IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Steffler v. Gillis,*
2025 BCSC 783

Date: 20250428
Docket: M202076
Registry: Victoria

Between:

Nicholas Steffler

Plaintiff

And

Nathan Gillis

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:	K.A. Schille B. Johnson
Counsel for the Defendant:	S. Missaghi
Counsel for the Third Party:	E.J. Wagner R. McLennan
Place and Date of Trial:	Victoria, B.C. October 15-18 and 21-23, 2024
Place and Date of Judgment:	Victoria, B.C. April 28, 2025

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I. Introduction

[1] On July 27, 2019, the plaintiff, Nicholas Steffler, was involved in a motor vehicle accident in which he was rear-ended by the vehicle driven by the defendant, Nathan Gillis. The third party, Insurance Corporation of British Columbia (ICBC), has defended the claim under s. 77 of the *Insurance (Vehicle) Act*, R.S.B.C., c. 231.

[2] There is no dispute that the accident was solely caused by the defendant's negligence.

[3] The issue to be determined at this trial is the quantum of damages to which Mr. Steffler may be entitled as a result of the accident.

II. Background

A. Pre-accident background

[4] At the time of the accident, Mr. Steffler was 37 years old. He was 42 years old at the time of the trial.

[5] Mr. Steffler is married to Jamie Emms, with whom he has two sons, now 6 and 10 years old. Just prior to the accident, he and Ms. Emms had purchased property in Sooke, B.C., on which they intended to build their family home. They managed to do so after the accident, however, with assistance from friends and family, and have lived on the property since August 2019. In addition to his immediate family, three of his four siblings also live on the Sooke property, rent-free.

[6] In the years leading up to the accident, Mr. Steffler worked at a number of physically demanding jobs, including as a roofer, harvesting, chopping, and selling firewood, and as a vinyl deck installer. He was self-employed in the roofing and firewood businesses. During that time, he required three knee surgeries, including a right knee ACL reconstruction in 2007 and bilateral knee surgery in 2013. He recovered from both surgeries sufficiently to allow him to continue with the physical demands of his work with no limitations.

[7] In 2018, he suffered injury to his left knee while working as a vinyl deck installer, where he was employed at the time of the accident. As a result of that incident, he underwent left knee surgery in April 2019. He was cleared to return to work, although with limitations, ten days before the accident.

[8] In his spare time, Mr. Steffler enjoyed varied recreational pursuits including quadding, camping, hiking, tubing, golfing, bowling, hockey, rollerblading, and cycling. In Mr. Steffler's words, he was not an "inside guy". After his sons were born, he spent his evenings outside with his children at a park or playing in the yard.

[9] Prior to the accident, Mr. Steffler was capable of managing all aspects of his life at work, at home, recreationally, and socially.

B. The accident and post-accident injuries

[10] On July 27, 2019, Mr. Steffler was slowing his vehicle to make a left-hand turn when he was hit from behind by the defendant's vehicle, who Mr. Steffler described as driving at excessive speed. His body was thrown forward and backwards on the impact, causing his head to hit the steering wheel or the headrest and his knee to collide with either the steering wheel or dashboard.

[11] He recalls seeing spots, feeling dizzy and confused, and suffering from immediate, severe pain in his neck, back, and knee. He was nonetheless able to make the short drive to his brother, Luke Steffler's home, where Mr. Luke had to assist him in getting out of the vehicle and into his vehicle to take him to the hospital.

[12] Once at the hospital, Mr. Steffler continued to experience confusion and dizziness and had to lie down on the hospital floor to stretch his back and knees. Ultimately, the loud sounds and bright lights proved unbearable, and Mr. Steffler returned home without seeing a physician.

[13] Mr. Steffler spent the following day bedridden and medicated with Tylenol 3's and an ice pack for his left knee, which was swollen and bruised. By the time of his assessment with a doctor the following day, Mr. Steffler continued to suffer from

dizziness as well as light and noise sensitivity. He also reported the inability to turn his neck, excruciating pain in his lower back while sitting, swelling, pain, and the return of clicking and grinding in his left knee, which he had not experienced since his left knee surgery three months prior. Ms. Emms testified about Mr. Steffler's cognitive state in the first month after the accident, reporting that he was irritable, confused, and forgetful.

[14] Mr. Steffler's mobility remained impaired over the weeks and months that followed, and he required crutches for approximately 5 to 6 months. During the initial few weeks following the accident, Mr. Steffler spent the majority of his time alone in a dark basement room, with Ms. Emms doing her best to keep their children out of the house, given Mr. Steffler's sensitivity to noise.

[15] Over the remainder of 2019, there were some minor improvements to Mr. Steffler's health. Mr. Steffler's light and noise sensitivity improved, as did the range of motion in his neck. The majority of his symptoms persisted, however – with ongoing pain and stiffness in his neck, severe pain in his lower back, and swelling, grinding, and locking in his left knee. He still required crutches to move across the uneven ground of his Sooke property.

[16] In early 2020, Mr. Steffler elected to undergo a left knee arthroscopy and partial lateral meniscectomy to address his ongoing difficulty with the left knee. The surgery was conducted on October 23, 2020.

[17] With the October surgery completed, Mr. Steffler was given clearance to engage in a more robust course of physical treatment, including physiotherapy and kinesiology, which he did until July 2021. At the conclusion of this kinesiology course, Mr. Steffler testified to only intermittent, occasional neck symptoms which occur when he "throws his neck out". This treatment regime also significantly increased Mr. Steffler's sitting capacity, improving from a 10 to 20-minute sitting tolerance to 60 to 90 minutes.

[18] Unfortunately, the vast majority of Mr. Steffler's symptoms have persisted despite both surgery and physical therapies. Although he testified that his knee range of motion has improved, Mr. Steffler continues to experience constant, ongoing pain and grinding in his left knee, as well as lower back pain, which becomes aggravated with any lifting or bending over.

[19] Mr. Steffler also testified that he continues to suffer from headaches and migraines. He explained that he experiences a debilitating headache approximately once every two weeks, which requires him to find a quiet spot to lie down with a cold cloth over his eyes. These headache and migraine symptoms tend to flare with the more work that he does, and he relies on regular Tylenol and Advil to mitigate their effects.

[20] Psychologically, Mr. Steffler testified about the difficulty of having to rely on so many of his friends and family to get by in the years following the accident. He explained his general reluctance to rely on others for help. He describes this change in his independence as demoralizing.

C. Post-accident events

[21] In December 2020, Mr. Steffler was involved in a single vehicle accident (the "December 2020 accident") when his vehicle left the road as a result of icy road conditions.

[22] After the accident, Mr. Steffler did not return to his work as a vinyl deck installer. However, in January 2022, he started a portable milling business. As of the date of trial, he remained self-employed in that business.

III. Credibility and Reliability

[23] In assessing credibility, I rely on the principles as set out in the often-cited passages of Justice O'Halloran in *Faryna v*. *Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and of Justice Dillon in *Bradshaw v*. *Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. Specifically, as noted at para. 186 of *Bradshaw*:

> 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… 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.

[24] Related to, but distinct from, credibility is reliability. Credibility concerns the veracity of a witness; reliability involves the accuracy of the witness's testimony. Accuracy engages consideration of the ability of the witness to observe, recall and recount what occurred: *R. v. Khan*, 2015 BCCA 320 at para. 44.

[25] In this case, while ICBC disputes the cause and the extent of the injuries that Mr. Steffler claims to have suffered as a result of the accident, it does not strenuously dispute that he did suffer the injuries. However, by his own admission, in the past, Mr. Steffler has underreported his primarily cash income on his tax returns, presumably to minimize tax payable. Given that admission, ICBC argues that his credibility is such that limited (if any) weight can be given to his evidence regarding the effects of the accident related injuries on his wage loss and his other various undocumented claims.

[26] I agree with that assessment of Mr. Steffler's diminished credibility.

[27] While self-employed in the firewood business from 2014 to 2017, Mr. Steffler was paid primarily, if not exclusively, with cash. He did not report a considerable portion of that income. In 2017, for example, he reported gross earnings of $18,550 and a net loss of $6,710. On cross-examination, he admitted that his gross income was closer to $125,000 and his net income was $80,000. The difference between the reported loss of $6,710 and his estimated actual net income of $80,000 is significant.

[28] The underreporting of income extended to other years. While he did not (or was unable to) provide information regarding his actual income in 2014 and 2015, he testified that the $47,081 he reported as gross income in 2014 was closer to his net

income. He reported net income of $11,585. He agreed that he “probably” did not report all of his income for 2015.

[29] He testified that the inaccurate reports were due to either not reporting enough income or deducting too many expenses. The fact that he was not certain which was the case is some indication that he engaged in both practices.

[30] On cross-examination, Mr. Steffler conceded that his decision to underreport income was made consciously, despite knowing that it was important to be honest in those filings. Ms. Emms, too, seemed to be aware of Mr. Steffler’s failure to report income. She testified that it was only when a mortgage broker advised them that Mr. Steffler needed to “make money on paper” (as Ms. Emms referred to it) to qualify for conventional mortgage financing that he stepped away from his “cash business”.

[31] Simply put, both were content to report (or not report) Mr. Steffler’s income in a way that advantaged them financially.

[32] In *Padgham v*. *Ram*, 2024 BCSC 72 [*Padgham*], aff’d in part 2025 BCCA 100, this Court recently considered the effect of a plaintiff’s failure to report cash income earned as a tattoo artist on the assessment of her credibility. It noted:

> [15] Further, while it appears to be the industry norm for tattoo artists to receive the bulk of their remuneration in the form of cash, and to short-change the CRA, this economic dishonesty undermines the credibility of a party asking the court to order a significant damages award.

[33] The Court ultimately concluded that:

> [18] The plaintiff’s deliberate tax fraud combines with and compounds other difficulties with her credibility, and particularly undermines a claim such as the present where the plaintiff seeks a court order to compensate her for very significant amounts of purported lost income.

[34] Although noting that “some of the language used by the trial judge could have been more neutral,” the finding on credibility was upheld on appeal.

[35] The Court came to the same conclusion in *Kan v. McGill*, 2021 BCSC 843 [*Kan*], a decision that was referred to in *Padgham*. In *Kan,* the plaintiff's failure to report earnings on a "side hustle" lash therapy business undermined her credibility:

> [37] Amounts of undeclared income can be calculated into assessments of past or future loss of income (as I have done here with respect to past loss of income). However, I find that Ms. Kan's failure to report her lucrative Lash Therapy income has a bearing on her credibility. The failure to report this income shows Ms. Kan is willing to be malleable with her reporting of facts if it is in her financial interests to do so. Overall, I have accepted Ms. Kan's evidence about her injuries and the ongoing impact of the Accident where these assertions were corroborated by independent and objective evidence.

[36] In my view, the conclusions in those decisions are apposite the circumstances in this case. While Mr. Steffler did not expressly concede that the sole reason for underreporting income was to minimize, if not eliminate, tax payable, it is difficult to discern any other reason for his doing so.

[37] It is no credit to Mr. Steffler that he admits the failure to report income now that a larger past income will advantage him in this litigation. Notably, his significant claims of $175,000 and $1,050,000 for past and future wage loss are based on unreported 2018 income of $23,890 over a 3 ½ month period.

[38] Despite explaining that he intends to rectify what he referred to as his "bad decision" through CRA's voluntary disclosure program, he has yet to file any amended returns, some 11 years after the date he confirmed that he underreported his income. In my view, his failure to do so is some indication of his disingenuous contrition in an effort to bolster his claim in this action.

[39] As was the case in *Padgham* and *Kan*, I conclude that Mr. Steffler's conscious decision to underreport income undermines his credibility. It is a significant factor in my assessment of Mr. Steffler's claims for past and future wage loss.

[40] However, credibility and reliability are not all-or-nothing propositions. A trier of fact may believe all, part, or none of a witness's evidence, and may attach different weights to different parts of a witness's evidence: *R. v. R.(D.)*, [1996] 2 S.C.R. 291 at

para. 93. Further, it does not necessarily follow that because a plaintiff's evidence lacks credibility and reliability, their position is untenable: *Davie v*. *Hill*, 2022 BCSC 2074 at para. 76, citing *Rab v*. *Prescott*, 2021 BCCA 345 at para. 51. This is such a case.

[41] While I find that limited weight can be given to Mr. Steffler's evidence, particularly with respect to his reports of income, I do not discount his evidence altogether. That is particularly true where his assertions are corroborated by independent and objective witnesses, such as the medical experts and Margherita Bracken, an occupational therapist, all of whom assessed Mr. Steffler's claims. I have assessed his case on all of the evidence before me.

IV. Findings on Injuries

A. Physical injuries

[42] Mr. Steffler has alleged that as a result of the accident, he has sustained physical injuries to his neck, low back (radiating down to his tailbone), and to his left knee, and suffers from headaches and other "concussion-like" symptoms.

[43] Two experts, both physiatrists, prepared written expert reports in respect of those injuries. Dr. Jonathan Hawkeswood gave evidence on behalf of Mr. Steffler. Dr. Amarjit Arneja gave evidence on behalf of the defendants. Dr. Hawkeswood gave oral evidence at trial; Dr. Arneja did not.

1. Neck pain / back pain / concussion & concussion-like symptoms / headaches

[44] There is a fair degree of overlap between the doctors' opinions, who generally agree that Mr. Steffler suffered from myofascial neck, low back, coccygeal (tailbone) pain, concussion (mild traumatic brain injury), concussion-like symptoms, and headaches. Of those injuries:

a) Mr. Steffler testified that his neck pain has improved since the accident and, as of the trial date, were nearly gone, with some occasional flare-ups;

b) While Dr. Hawkeswood noted clinical signs of some upper back tensions pain (Dr. Arneja did not), Mr. Steffler did not report any ongoing symptoms in that area;

c) The lower back pain persists and, as of the trial date, Mr. Steffler testified that he continues to experience constant pain in that area;

d) The tailbone pain, which had prevented Mr. Steffler from sitting for more than 20 minutes, seems to have settled. After finishing with kinesiology, Mr. Steffler reported being able to sit for 1.5 to 2 hours. Ms. Bracken notes no limitations in his ability to sit, provided he can change positions;

e) The symptoms relating to concussion, including headaches, dizziness, impaired balance, and light and noise sensitivity, were relatively short-lived and seemed to resolve within approximately eight weeks of the accident; and

f) Mr. Steffler reports continuing to have debilitating headaches, which render him unable to work once every two weeks. Drs. Hawkeswood and Arneja agree that the headaches are cervicogenic in nature.

[45] Both doctors agree that those complaints are referable to the accident. Specifically, Dr. Hawkeswood opines that Mr. Steffler's headaches, neck pain, and low back pain, are "probably attributable" to the accident. Dr. Arneja does not dispute that conclusion, noting that it is "medically plausible" that the acceleration/deceleration forces transmitted to the neck, spine, and low back region would result in injuries to those areas.

[46] Despite those opinions (including that of Dr. Arneja), ICBC suggests that there is some evidence to suggest that neither the headaches nor the lower back/tailbone pain are related to the accident. I reject that suggestion.

[47] First, ICBC notes that both doctors opine that the headaches are cervicogenic, i.e., caused by the neck pain. (Dr. Hawkeswood also contemplates a

"probable tension component" and a possible "rebound component" relating to Mr. Steffler's analgesic use.) Noting that the accident-related neck pain has significantly diminished, ICBC suggests that the continuing headaches must be related to something other than the accident. However, with no medical evidence to support that theory, and in the face of Drs. Hawkeswood's and Arneja's clear opinions to the contrary, I reject the suggestion. I accept that Mr. Steffler's ongoing headaches are causally related to the accident.

[48] Second, ICBC notes: (a) spine imaging revealed a degenerative condition in the lower back related to aging, not the accident, and (b) Dr. Hawkeswood's view that, absent diagnostic blocks, it is "essentially impossible to know the exact source of Mr. Steffler's lumbar pain with certainty". It argues that with that evidence, it cannot be said that the accident, and not the degenerative condition, caused the back pain.

[49] However, that argument ignores Dr. Hawkeswood's evidence that degenerative changes do not necessarily correlate with actual symptoms or pain. With no apparent reference to previous back pain, I am satisfied that was the case in this instance.

[50] It is also significant that both doctors reviewed the spinal imaging and both noted the degenerative condition. Having done so, both nonetheless attribute the lower back pain to the accident. I accept that is the case.

[51] I find that Mr. Steffler's lower back pain is causally related to the accident.

[52] Finally, regarding prognosis, Drs. Hawkeswood and Arneja agree that, given the duration of his continuing symptoms, full recovery from the accident is not a probable outcome. As Dr. Arneja opines:

> …there is a low possibility that he will recover to 100% and he will be left with some of the subjective pains and functional issues with potential to impair both his higher level of functionality and his overall quality of life.

[53] However, with treatment, both experts expect some improvement, although to varying degrees. Specifically, Dr. Hawkeswood opines that, with treatment, the likelihood of significant improvement seems "relatively low", but would offer a "small but meaningful improvement in Mr. Steffler's collective pain condition, particularly in relation to his low back pain whereby modest improvements can be made (e.g. 25 – 40% reduction in pain in the short term)." Overall, he assessed the prognosis as "fair".

[54] Dr. Arneja's prognosis is more encouraging. He opines that with his recommended treatment, the chance of further recovery is "more likely than not" and that Mr. Steffler should be able to return to most of his "pre-index" accident activities. He notes, however, that Mr. Steffler "may occasionally develop an exacerbation or recurrence of his musculoskeletal symptoms and may require a few sessions of treatment modalities of physiotherapy, massage therapy, and analgesics (painkillers)". Dr. Arneja does not quantify the degree of likely improvement.

[55] Based on the above, I find that, while not completely dire, Mr. Steffler has suffered a permanent disability as a result of the accident.

2. Knee pain

[56] There is no dispute that after the accident, Mr. Steffler experienced what Dr. Hawkeswood describes as "post-traumatic and post-surgical mechanical left knee pain", which required surgery in October 2020. It is also undisputed that, despite some improvement, Mr. Steffler continues to experience left knee pain, which limits his function.

[57] What is in dispute is the causal role of the accident on Mr. Steffler's left knee symptoms. In brief, Dr. Arneja does not include those symptoms as being causally connected to the accident. Dr. Hawkeswood does.

[58] Both doctors canvassed Mr. Steffler's history of knee issues, including his three knee surgeries, the most recent of which was in April 2019, three months prior to the accident.

[59] Dr. Hawkeswood notes that the clinical records indicate that Mr. Steffler had "indeed nearly or fully recovered from his knee surgery" in April 2019 and mentioned that he was able to start a return to full work duties by July 17, 2019 (ten days before the accident). He agreed that Mr. Steffler had to be "a bit careful" with more extreme movements six months post-operatively. He suggested that full recovery from the surgery would have taken roughly 12 months. However, even acknowledging the post-operation limitations, Dr. Hawkeswood writes:

> In view of the information contained in the clinical records, the subject accident likely reactivated premorbid but latent left knee pain. I note that during the subject accident his left knee hit the dashboard and that there was bruising and swelling, which indicates that a new physical injury was sustained. I recognize that with his complex left knee history, Mr. Steffler was vulnerable to subsequent knee injuries in the setting of trauma; however, it is my opinion that Mr. Steffler has substantially more left knee pain at the current time than would be expected absent the subject accident. He unfortunately need to go on to have another surgery after the subject accident, which probably could have been avoided without this trauma. In summary, absent the accident, I expect that Mr. Steffler would have been more comfortable and functional with respect to the left knee -although this is difficult to quantify with absolute certainty, based on the complex premorbid surgical history.

[60] Dr. Hawkeswood explained the need for the October 2020 surgery on cross-examination. In his view, the accident likely caused the sutures that were put in place in the April 2019 surgery to anchor the meniscus to disrupt, essentially depriving Mr. Steffler's knee of the opportunity to fully heal, and resulting in a large hole in his lateral meniscus. That, in turn, required Mr. Steffler to undergo the October 2020 surgery, in which part of the meniscus was cut out – rather than being left to heal - and his knee debrided.

[61] As noted, Dr. Arneja did not provide any oral evidence at trial. His opinion regarding the cause of Mr. Steffler's ongoing knee pain is confined to his written report. In the report, Dr. Arneja expressly includes the left knee injury as pre-existing or unrelated to the accident. However, he provides no analysis to support that opinion, nor does he address the October 2020 surgery.

[62] Significantly, despite noting that a pre-accident medical examination revealed that the "left knee was very stable and had full range of motion" and that there was "no medial/lateral joint tenderness and McMurray's test was negative", Dr. Arneja does not provide any analysis to explain the post-accident decline in that condition. In my view, his failure to do so, especially in light of the fulsome reference to the knee issue in his letter of instruction, is notable. Without any analysis or explanation of the post-accident decline in the knee condition, I am able to give any significant weight to Dr. Arneja's opinion in this regard.

[63] I find, as Dr. Hawkeswood opines, that while Mr. Steffler had a pre-existing knee condition, the accident has caused him substantially more left knee pain at the current time than would be expected had the accident not occurred. That contribution, even if not the sole cause of Mr. Steffler's ongoing left knee injury, is sufficient to establish causation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[64] Regarding prognosis, Dr. Hawkeswood opines that given the accident-related injuries, Mr. Steffler "is probably going to have more pain and more relative disability than would be expected absent the subject accident" and that his "premorbid knee injuries and accident-related injury have increased the likelihood (i.e. 25% chance) that he will require another knee surgery".

[65] However, he concedes that, absent the accident, Mr. Steffler's prior knee injuries likely would have resulted in a recurrence of some degree of left knee stiffness and pain in his lifetime, "although of debatable severity and related functional implications compared to his current health status". He is of the view that such symptoms would have onset at some point 10 to 15 years in the future had the accident not occurred.

[66] I accept Dr. Hawkewood's opinion regarding Mr. Steffler's prognosis.

B. Psychological injuries

[67] Dr. Zohar Waisman was the only psychiatrist to give opinion evidence with respect to Mr. Steffler's psychological injuries. He did so on behalf of Mr. Steffler. Dr. Waisman's report is based, in part, on an assessment he conducted virtually on March 13, 2022.

[68] Based on that assessment, the history provided by Mr. Steffler, and his review of medical records, Dr. Waisman noted that, as of the date of his assessment, Mr. Steffler suffered from depressed mood most of the day, nearly every day, as well as a diminished interest and pleasure in all activities. Other noted symptoms included weight changes, insomnia and psychomotor agitation, fatigue, feelings of worthlessness, and diminished ability to concentrate.

[69] Together, those symptoms were sufficient to meet the criteria for, and Dr. Waisman's diagnosis, of major depressive disorder, moderate and non-psychotic.

[70] While Dr. Hawkeswood deferred to a psychiatric professional with respect to diagnosis, his testing in June 2024 also revealed depression, which he subjectively rated as "mild", and moderate anxiety. Given those observations, I am satisfied that Mr. Steffler continues to suffer from the depressive disorder diagnosed in March 2022.

[71] Drs. Waisman and Hawkeswood noted the interplay between Mr. Steffler's depressed mood and his chronic pain. As Dr. Waisman reports, "Mr. Steffler is caught in a cycle of chronic pain and depression that leads to frustration and lack of motivation to deal with daily stressors." Dr. Hawkeswood added that Mr. Steffler's non-restorative sleep complicated his mental health issues.

[72] It is Dr. Waisman's view that the accident, and not other factors, was the primary cause of the depression. As ICBC notes, the doctor was not aware of all aspects of the plaintiff's life, including certain aspects of his upbringing, his relationship with, and the death of, his mother, and the 2020 single motor vehicle

accident. However, to the extent that those aspects of his life were factors, they made him more vulnerable.

[73] Regarding the prognosis, as of the date of Dr. Waisman's examination, Mr. Steffler had not received "optimal psychiatric treatment". Accordingly, Dr. Waisman was unable to comment on the permanence of the psychiatric condition. He recommended psychotherapy and possibly an anti-depressant medication, both of which he opines can address both the chronic pain and depression. On cross-examination, he testified that Mr. Steffler required treatment to get better and agreed that a lack of treatment would be a reason for not getting better.

[74] Mr. Steffler has candidly conceded that he is unlikely to engage in either of Dr. Waisman's recommended treatment options.

[75] On the basis of the above, I find that Mr. Steffler suffered from depression that manifests itself as described by Dr. Waisman and that the depression was caused by the accident. However, I also find that Mr. Steffler's failure or refusal to engage in treatment is and will be a factor in his ability to recover from the depression and, as a result, his chronic pain. I address the impact of that failure next.

V. Mitigation

[76] ICBC argues that Mr. Steffler's failure to comply with Dr. Waisman's treatment recommendations amounts to a failure to mitigate. Given the interrelated nature of the psychological condition and the pain symptoms, it argues that failure impacts both his depression and pain.

[77] In *Chiu v. Chiu*, 2002 BCCA 618, the Court of Appeal confirmed at para. 57 that the onus is on a defendant to prove that a plaintiff could have avoided all or a portion of their loss. When a defendant alleges that a plaintiff has not pursued a recommended course of treatment, the following elements must be proved:

a) that the plaintiff acted unreasonably in eschewing the recommended treatment; and

b) the extent, if any, to which the plaintiff's damages would have been reduced had they undergone the recommended treatment.

[78] The first question is subjectively assessed; the second is assessed objectively: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[79] In this case, despite Dr. Waisman's clear treatment recommendations, Mr. Steffler testified that he is not someone who wants to talk about his issues and has "no interest" in pursuing counselling. While his response was not completely unequivocal, in the two years since the date of Dr. Waisman's report, he has not pursued that form of treatment. With no other stated reason, I am satisfied that his failure to do so is unreasonable.

[80] However, to prove that Mr. Steffler did not properly mitigate his damages, ICBC must also prove the second branch of the *Chiu* test. As the Court explained in *Haug v. Funk*, 2023 BCCA 110 at para. 61, that branch:

> …require[s] the defendant to prove on a balance of probabilities that the plaintiff's injuries *would have* been reduced to some degree had they acted reasonably. Only once this is established does the Court go on to assess the reduction to the damages award based on *the extent* to which the injuries would have been avoided, which is the true hypothetical.

[81] In this case, Dr. Waisman's evidence was unequivocal: lack of treatment is a reason for not getting better. There was no opinion to the contrary. I am satisfied that ICBC has proven on a balance of probabilities that Mr. Steffler's current condition would have been improved if he had not eschewed counselling as recommended. Given the interrelatedness of the depression and physical pain, that treatment would have resulted in improvements in both spheres.

[82] In my view, a reduction of 10% from damages that Mr. Steffler would otherwise receive for non-pecuniary damages is a fair measure of the results of his failure to reasonably mitigate his damages.

VI. Damages

A. Non-pecuniary damages

[83] As outlined in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal ref'd [2006] S.C.C.A. No. 100, in assessing non-pecuniary damages, courts must consider the effect of the injuries on the plaintiff's particular circumstances, using factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle.

[84] In this case, I have found that, as a result of the accident, Mr. Steffler has sustained both physical and psychological injuries, including left knee pain, soft tissue, whiplash-associated-disorder symptoms in his neck and lower back, which radiate down into his tailbone, headaches, and concussion and associated dizziness, nausea, and light and sound sensitivity.

[85] The symptoms related to the concussion resolved within a number of months, and while his neck continues to have occasional flare-ups, that pain is nearly gone. However, he is left with severe headaches and migraines, which render him unable to work approximately once every two weeks. Over five and a half years after the accident, he continues to suffer from constant pain in his lower back and left knee.

[86] Fortunately for Mr. Steffler, there is some possibility for "small but meaningful improvement" in his pain symptoms. However, given the duration of his continuing symptoms, full recovery from the accident is not probable. As Dr. Hawkeswood opines, "he will be left with some of the subjective pains and functional issues with potential to impair both his higher level of functionality and his overall quality of life".

[87] Psychologically, he struggles with major depressive disorder. The symptoms of that disorder, including a diminished interest and pleasure in all activities (anhedonia), have persisted for five and a half years after the accident. Together, the chronic physical and psychological symptoms create a cycle of frustration and a lack of motivation to deal with daily stressors.

[88] Despite his injuries, Mr. Steffler has been able to continue to work, although in a diminished capacity. However, he has been precluded from returning to work as a vinyl decker and, presumably, from his former vocation of a roofer. While I have assessed the pecuniary losses as a result of this impairment below, I have also considered the non-pecuniary losses flowing from his inability to continue to pursue the line of work of his first choosing and to support his family to his full potential.

[89] I also accept that the accident-related injuries have affected him socially, recreationally, and at home. Prior to the accident, Mr. Steffler was a healthy, active person, who enjoyed a wide range of sports and outdoor pursuits and, by all accounts, he was an active father to his two young sons and enjoyed spending his non-working time playing with them in the yard. As he put it, he liked to think he did his fair share of chores around the home.

[90] Since the accident, he had to give up virtually all of his recreational pursuits and had limited ability to assist his wife around the home. A notable impact of the accident-related injuries is the impact it has had on the nature of his relationship with his son, with whom he is no longer able to participate in the outdoor play they once enjoyed. His sons' young ages serve to exacerbate the extent of the impact on this area of his life.

[91] While the impact of the accident-related injuries may be ameliorated as his pain symptoms improve, as noted, he will never fully recover to the condition he was in on the day the accident occurred.

[92] Mr. Steffler refers to five decisions in which the Court awarded non-pecuniary damages ranging from approximately $140,000 to $180,000 (adjusted to 2024 dollars). They are: *Cook v*. *Symons*, 2014 BCSC 1781; *Gauthier v. Dubois*, 2018 BCSC 229; *Ferguson v*. *Watt*, 2018 BCSC 1587; *Mason v*. *Narvaez*, 2023 BCSC 709; and *Mesbah v*. *Piche*, 2021 BCSC 1310.

[93] All of those cases involved relatively young plaintiffs whose physical and psychological injuries and, more significantly, the impact of the injuries, were quite

similar to the ones sustained by Mr. Steffler. Notably, the injuries sustained by all of the plaintiffs in those cases affected their ability to perform their pre-accident employment. In two of the cases, *Cook* and *Ferguson*, the plaintiffs were unable to return to their pre-accident employment but were able to find alternative employment.

[94] For its part, ICBC relies on three decisions in which the plaintiffs' pre-existing health was a factor in their post-accident condition: *Dhingra v*. *Hayer*, 2024 BCSC 160; *Blyschak v*. *Topolewski*, 2024 BCSC 739; and *Dahlke v*. *Davidson*, 2023 BCSC 1884. The plaintiffs in those cases were awarded non-pecuniary damages of $95,000, $100,000, and $110,000, respectively. ICBC distinguishes the cases on which Mr Steffler relies on the basis that pre-existing health was not a factor. Moreover, it argues that credibility was not an issue for any of those plaintiffs.

[95] In my view, neither basis serves to diminish the applicability of the cases relied on by Mr. Steffler.

[96] ICBC's first position regarding pre-existing injuries conflates the issue of causation with the assessment of damages. As Chief Justice McLachlin (as she then was) stated in *Blackwater v*. *Plint*, 2005 SCC 58 at para. 78 [*Blackwater*]:

> Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.
>
> [Added emphasis.]

[97] In this case, having concluded that Mr. Steffler's physical and psychological injuries were caused by the accident, the defendant is fully liable for the damages, including non-pecuniary damages, related to those injuries. As I discuss below, while the pre-existing injuries will factor in the final assessment of damages, there is no basis to reduce damages at this stage of the analysis.

[98] I also reject Mr. Steffler's credibility issues as a basis to reduce non-pecuniary damages. As noted in the above analysis, Mr. Steffler's reports of his symptoms are supported by the independent assessments of the medical experts. While those reports were based, in part, on Mr. Steffler's subjective complaints, all of the medical experts also relied on their own reviews of the records and assessments of his injuries. As I discuss below, the objective evidence of Ms. Bracken, an occupational therapist, confirms that those injuries have caused functional limitations.

[99] Given the objective third-party evidence that supports Mr. Steffler's complaints of injuries and limitations, his credibility is not a significant factor on this analysis.

[100] In that light, given the similar injuries and impact, I find that the cases relied on by Mr. Steffler are most instructive. Based on my findings and review of the case law referred to by both parties, in my view, an award of $160,000 for non-pecuniary damages is appropriate.

[101] However, as alluded to above, that does not end the analysis. As Dr. Hawkeswood opines, given his pre-existing knee injuries, Mr. Steffler was already at risk for some degree of left knee stiffness and pain regardless of the accident. Non-pecuniary damages should be reduced to account for the damages that he would have suffered anyway: *Dornan v*. *Silva*, 2021 BCCA 228 at para. 39 [*Dornan*], citing *Blackwater* at para. 78.

[102] In my view, it is appropriate to reduce non-pecuniary damages by 10% to account for Mr. Steffler's "original condition". Making that reduction results in a non-pecuniary award of $144,000 ($160,000 x 90%).

[103] In addition, as discussed above, that amount is to be reduced by a further 10% for his failure to reasonably mitigate. That further reduction results in a net award for non-pecuniary damages of $129,600 ($144,000 x 90%), rounded to $130,000.

[104] Before leaving this assessment, I will address ICBC's submission that a further reduction should be made to account for the possibility that the December 2020 accident aggravated the pre-existing and the accident-related injuries.

[105] I decline to do so.

[106] First, despite making the argument at trial, no such claim was made in the pleadings. On that basis alone, the claim cannot succeed. However, I come to the same conclusion on the merits.

[107] In support of its position, ICBC relies on the decision *Chevez-Babcock v. Peerens*, 2020 BCSC 863 [*Chevez-Babcock*]. In that case, Mr. Chevez-Babcock was involved in two accidents. The defendant, Ms. Peerens, was solely at fault for the first accident, being the "largest contributor" to his ongoing injuries. Mr. Chevez-Babcock was at fault for the second accident, which aggravated his injuries "but only to a limited extent". Even without expert evidence about the pain after the second accident, the court considered it "appropriate to conclude that it was not *de minimus*" and apportioned 10% of the plaintiff's damages to the second accident.

[108] Notably, the apportionment of damages was premised on the finding that Mr. Chevez-Babcock was at fault for the second accident. On its analysis in *Chevez-Babcock*, the court noted:

> [153] In *Demidas v. Poinen*, 2012 BCSC 416 at para. 56, and *Blenkarn v. Mills,* 2016 BCSC 1976 at paras. 23-30, this court has addressed the approach to take where multiple accidents cause indivisible injuries and the plaintiff is at fault for one or more and not at fault for one or more. The goal is to apportion the damages so that the tortfeasor only pays for the portion of the harm he or she caused: *Blackwater* at para. 70; *Blenkarn* at para. 23. The approach is to assess the overall damages, then estimate the damage caused by the at-fault accident, and deduct it from the award…
>
> [Added emphasis.]

[109] In this case, Mr. Steffler denied driving too fast for the conditions, stating that he was driving 5 to 10 kph when the truck started to slide in the December 2020 accident. That evidence went unchallenged. There is nothing in the evidence on which to base a finding that Mr. Steffler was at fault for the December 2020 accident.

There is no basis on which to apportion any of Mr. Steffler's damages to the December 2020 accident.

[110] I award non-pecuniary damages of $130,000.

B. Past loss of earning capacity

1. Relevant Facts and Evidence

Employment Background

[111] Prior to the accident, Mr. Steffler worked in physically demanding jobs, including as a roofer and in the firewood business, at least 40 hours a week. In 2007 and 2013, that work was interrupted by knee surgery, but he fully recovered and was able to return to work after each surgery.

[112] In 2014, Mr. Steffler turned to the firewood business, in which he contracted with the Malahat First Nation for the right to 'harvest' wood from logged areas on the Nation's land, which he would then chop and sell as firewood. Despite his 2013 double knee surgery, Mr. Steffler had no difficulty completing that work, which largely consisted of moving heavy logs, swinging an axe, and stacking firewood. He continued doing that work for four years.

[113] Issues with respect to Mr. Steffler's reports of income for income tax purposes are set out in the "Credibility and Reliability" section above.

[114] After he lost the firewood contract and then needed "paper income" to qualify for a mortgage, in September 2018, Mr. Steffler began work installing vinyl decking for Deck Solutions, a company owned or operated by Rob Fisher. Mr. Steffler testified that his experience in roofing allowed him to learn vinyl decking quickly, and he was soon tasked with installing the decking for new condominium construction on his own. He also testified, and Ms. Emms confirmed, that he loved the vinyl decking work, which reminded him of roofing, but on a flat surface with less physical demands.

[115] However, after working for only 3 ½ months, Mr. Steffler tripped on construction equipment while on the job, which resulted in injury to his left knee. He ultimately underwent left knee surgery on April 16, 2019. He was cleared to return to "modified duties" on July 17, 2019.

[116] The accident occurred on July 27, 2019. He did not return to the vinyl deck installation work.

[117] In 2021, Mr. Steffler purchased a portable mill saw, which he intended to use "recreationally" on the Sooke property. By the end of 2021, he had started a portable milling business. He continues to be self-employed in that business.

Expert evidence

[118] On May 14, 2024, Ms. Bracken performed a functional capacity evaluation of Mr. Steffler and prepared a report dated July 5, 2024. Based on her evaluation, Ms. Bracken sets out Mr. Steffler's work capacity and limitations, both generally and with respect to his pre- and post-accident work.

[119] With respect to work as a vinyl decking installer, Ms. Bracken opines:

> Mr. Steffler has limitations for essential functions of work as a Vinyl Decker Installer. Specifically, he does not meet the demands for work in low-level body positions (i.e., kneeling, crouching, crawling, and bending) required in this position. He further is unable to meet the demands for lifting and carrying, and also does not meet the demands for climbing, particularly when required to concurrently carry weight.
>
> In the setting of his limitations, Mr. Steffler retains no employability as a Vinyl Deck Installer.

[120] Ms. Bracken also noted limitations for essential functions of his work as a portable mill operator, including "standing, negotiating uneven terrain, and lifting in the absence of equipment modification". She opines that:

> In the context of symptom aggravation from essential functions of his work as a portable mill operator, Mr. Steffler does not fully meet the demands for durable full-time work. The number of hours he is ultimately able to work will depend on the location of the work, the access to accommodations, the ability to take breaks, and the terrain in which he is working (i.e., uneven, muddy, slippery, etc.)

> Generally speaking, Mr. Steffler has reduced competitive employability in his role as a self-employed portable mil operator. He will be unable to work that same number of hours that he would in the absence of his limitations and may also be limited in the scope of work that he is able to perform.

2. Legal Framework

[121] A claim for what is often described as past wage loss is really a claim for past loss of earning capacity. Compensation for past loss of earning capacity is determined based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v*. *Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v*. *British Columbia*, [2003] 2 S.C.R. 477, at para. 49.

[122] The burden of proof of actual past events is a balance of probabilities. However, an assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. They will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27 [*Athey*]; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

[123] Where the contingency or risk is a real and substantial possibility, the process becomes one of assessing its relative likelihood: *Dornan* at paras. 63 – 64, 93, citing *Athey* at para. 27.

3. Discussion and Analysis

Without accident earnings

[124] After the accident, Mr. Steffler did not return to work as a vinyl decking installer as planned on August 5, 2019, nor has he worked in that capacity at all since the accident. The first question is whether his inability to do so was due to the accident.

[125] I conclude that it was.

[126] As noted, Mr. Steffler was cleared to return to work 10 days prior to the accident, albeit with limitations. Although Dr. Hawkeswood noted that it would have been sensible to be a “bit careful” with “extreme movement” for up to 12 months post-operatively, he agreed with that assessment. After the accident, Dr. Hawkeswood opines that the time Mr. Steffler missed from work was “reasonable and medically appropriate”.

[127] In light of that evidence, I find that had it not been for the accident, subject to the contingencies I discuss below, Mr. Steffler would have returned to his employment as a vinyl deck installer for Deck Solutions in August 2019.

[128] Also subject to the same contingencies, there is a real and substantial possibility that he would have continued to work as a vinyl decker until the date of trial. As he and Ms. Emms testified, he enjoyed the work and it provided him with an opportunity for consistent employment and “paper income” that was required to obtain traditional mortgage financing they required to construct their home on the Sooke property. I accept that, had it not been for the accident, there is a real and substantial possibility that Mr. Steffler would have continued to work as a vinyl decker.

[129] In the circumstances, the second question is, had it not been for the accident, what income would Mr. Steffler have earned as a vinyl decker to the date of trial?

[130] As a starting point, in the 3 ½ months that Mr. Steffler worked for Deck Solutions (September 5, 2018 to December 12, 2018), he claims to have earned $23,890.50. Based on those earnings, Mr. Steffler calculates that he would have had annual earnings of $88,736. To assess his past without accident earnings, he proposes further adjustments as follows: (a) a 10% reduction to reflect possible negative contingencies; (b) an upward annual adjustment for 2% inflation; and (c) a reduction of 50% of earnings for the period August 2019 to August 2020, the period in which he intended to work on the construction of his home.

[131] With those adjustments, Mr. Steffler argues that his past without accident earnings would have been $351,045.

[132] In my view, that assessment of past without accident earnings is too high.

[133] First, while Mr. Steffler did provide evidence of e-transfers from Deck Solutions for the period of September to December 2018, it is not evident on their face what those transfers were for, be it for income, materials or otherwise. Notably, nothing on the face of the e-transfer confirmations indicates that the transfers were for employment income, nor does it appear that Deck Solutions issued a T4 in respect of Mr. Steffler's work (none was produced at trial). In fact, Mr. Steffler reported no employment income in 2018. His reported gross business income of $16,691 is less than the $23,890.50 he claims to have earned in 3 ½ months with Deck Solutions.

[134] While Mr. Fisher could have clarified Mr. Steffler's employment and income status, Mr. Steffler did not call him or anyone else from Deck Solutions to give evidence at trial.

[135] Based on the evidence of the e-transfers, I accept that Mr. Steffler received $23,890 from Deck Solutions between September and December 2018. However, Mr. Steffler's continued failure to report income, even while he and Ms. Emms testified that one of the reasons for taking the job was to have "paper income", remains problematic and adds to my concern regarding the weight that I can give to his evidence regarding income. While I accept that Mr. Steffler was paid some amount, given the inconclusive documentary evidence and the lack of independent objective evidence of income (including, for example, a T4 or Mr. Fisher's evidence), I am unable to definitively conclude that the $23,890 transferred to Mr. Steffler represented employment or other income.

[136] Second, even if I were to accept that Mr. Steffler earned roughly $24,000, his extrapolated annual income of roughly $89,000 assumes that the same amount of work would be available to him on a consistent basis for the entire year. The

evidence indicates otherwise. In fact, text communications between Mr. Steffler and Mr. Fisher indicate there were times between August 2018 and September 2019 when no work was available, either for Mr. Steffler or at all.

[137] For example, on May 15, 2019, Mr. Steffler texted Mr. Fisher, stating:

> Hey Rob, I start physio today. can I maybe pick up a deck or twos week and see how my knee feels [sic]

[138] Mr. Fisher responded the same day, stating:

> I'm good for guys right now but if I need somebody down the road here I will call you thanks for the update [sic]

[139] In a September 2019 text exchange, Mr. Fisher asked Mr. Steffler if he was still looking for work. Mr. Steffler replied that he was. Having received no further response, Mr. Steffler followed up two days later, asking, "So did you have any [work?] ", to which Mr. Fisher replied, "Sorry nothing at the moment". Mr. Fisher explained that "I had some quotes out there and a building but I never got the building sorry about that" [sic].

[140] Notably, those texts were exchanged in spring and early fall, seasons in which one would expect construction work to be at its peak. There is no evidence that the same amount of construction work would be available in the winter months, including over the winter holiday break. Without that evidence, which could have been available to Mr. Steffler (through Mr. Fisher or otherwise), I am unable to conclude that the $24,000 Mr. Steffler purports to have earned is a sufficient basis on which to ground his annual without accident income. Simply put, extrapolating one year's earnings from 3 ½ months' earnings is too speculative.

[141] Taking into account all of the above, in my view, it is appropriate to discount the $89,000 Mr. Steffler calculated to be his annualized earnings by 45%, to take into the likelihood that: (a) given my assessment of his credibility and the lack of corroborating independent objective evidence, his 3½ month earnings may have been overstated; and (b) he would not have had the same amount of work that was available to him in September to December 2018 for the rest of the year. That 45%

discount results in an assessment of without accident annual earnings of $48,950 ($89,000 x 55%), rounded to $50,000.

[142] Other discounts are appropriate. While perhaps more reliable than using 3 ½ months' earnings to base annual earnings, I cannot conclude that the annualized without accident earnings, as assessed, represent what he would have earned in each of the five years between the accident and trial.

[143] First, the medical clearance for him to return to work in July 2019 was not unequivocal. Rather, it endorsed his return to "modified duties" and contemplated that "[h]e should be able to return to his full duties at work by six months postop". As noted, Dr. Hawkeswood agreed that Mr. Steffler would have to be a "bit careful" with more extreme movements six months post-operatively. On cross-examination, he noted that recovery from the meniscus surgery would have taken roughly 12 months.

[144] While I accept that Mr. Steffler would have been available for work in August 2019, in light of that evidence, a discount must be made for the possibility that he would not have worked full time for at least the first six months and further than "modified duties" may not have been available to him. There is no evidence that it would have. A 50% discount is appropriate to account for the likelihood that he would not have worked on a full-time basis in the first year after his return to work.

[145] Second, as Mr. Steffler concedes, he intended to only work part-time – he says 50% - in 2019 while he dedicated the other 50% of his time to the construction of his home. Together, the above two contingencies dictate that a 75% discount is made for his possible year one without accident earnings.

[146] Third, from 2020 and into 2021, many industries were impacted by the COVID-19 pandemic. With no evidence to the contrary (which could have easily been adduced through Mr. Fisher), Mr. Steffler failed to establish that the construction industry was wholly spared from that impact. In my view, it is appropriate to reduce the potential earnings for each of those years by 30%.

[147] For the reasons set out above, it is appropriate to reduce the amount that Mr. Steffler would have earned to reflect the likelihood that he would not have earned $50,000 in each of the five years following the accident. Doing so results in the following assessment:

Year **(August – August)**		**Income**
2019	$50,000 x 25%	$ 12,500
2020	$50,000 x 70%	$ 35,000
2021	$50,000 x 70%	$ 35,000
2022	$50,000	$ 50,000
2023	$50,000	$ 50,000
2024 (Sept. – Oct.)	$50,000 x 2/12	$ 8,333
Total		**$190,833**

[148] However, that assessment does not end the analysis. The likelihood of other contingencies, both positive and negative, also must be taken into account.

[149] First, as Mr. Steffler concedes, his relationship with Mr. Fisher was not free from conflict. In December 2018, Mr. Steffler advised Mr. Fisher that he could make more money elsewhere, to which Mr. Fisher replied, in part:

> …I don't know who you have been talking to but I charge this amount to stay busy! [Y]ou're a fast worker and it's been great having you around but I'm not interested in negotiating…Anyways I can't run a business with guys that think they can pick and choose what jobs they want to do and what type of vinyl they feel like working with? [sic] [I]t's not the way I run my business.

[150] Although Mr. Steffler described the issue as "nothing major", based on that exchange, it is not clear that he intended to stay with Deck Solutions. In my view, a deduction must be applied to take the likelihood of that possibility into account. In

assessing that likelihood, I have considered that Mr. Steffler would have been unlikely to leave Deck Solutions without alternate employment in place. However, some discount must also be made for the likelihood that Mr. Steffler may have lost the job altogether due to layoffs or other general market factors.

[151] Second, Mr. Steffler argues he would have received pay increases to match the 2% rate of inflation. I accept that his pay may have increased over the 5½ year past wage loss period. However, with no evidence to support the amount of a possible increase (which could have been obtained through Mr. Fisher, or someone else on behalf of Deck Solutions), I will simply include a positive adjustment to take into account he possibility that he would have had some increase in pay.

[152] In my view, a further net reduction of 5% is appropriate to take into account the additional possibilities set out above.

[153] I assess past gross without accident earnings at $181,291 ($190,833 x 95%), rounded to $180,000.

With accident earnings

[154] As the next step in assessing past wage loss, consideration must be given to the income Mr. Steffler did earn in the period between the date of the accident and trial. His recoverable past wage loss will be the difference between his assessed without accident earnings and that amount.

[155] Included in those earnings are earnings from the portable milling operations he started in early 2022. For those years, Mr. Steffler's tax returns reflect gross income of $30,000 (2022) and $29,980 (2023). Excluding capital cost allowance (CCA), he reports net business incomes of $23,121.11(2022) and $28,900 (2023).

[156] Based on gross earnings of $24,201 for January to July 2024 and his estimate of expenses, he estimates that his gross income for 2024 will be $40,000 to $45,000, with expenses of $7,000 to $10,000, for an estimated net income of $30,000 to 38,000.

[157] Notably, there is no objective third-party documents to support either the income or expense claims. Even the most basic documents, such as bank account statements, utility bills, gas receipts, and other receipts for expenses, were not before the Court. Much like the firewood business, the only evidence supporting Mr. Steffler's milling income are documents he and Ms. Emms prepared, including a handwritten record of hours, undetailed invoices for labour and materials, and lists of receipts and expenses.

[158] Despite the evidence on which Mr. Steffler has based his milling income, ICBC agrees that it is reasonable to consider that the information reported in the 2022 and 2023 tax returns is accurate.[1] Despite my concerns with Mr. Steffler's credibility, given that concession, I accept that is the case. (Mr. Steffler testified that he purchased the mill for $20,000 in 2021 for recreational use. As he would have purchased the mill regardless of the accident-related injuries, the $23,121.11 I have attributed to him for 2022 net income does not include that capital expense.)

[159] Based on Mr. Steffler's recorded gross income for the first 8 months of 2024, ICBC suggests that gross income for that year will be $48,000, just in excess of the $40,000 to $45,000 that Mr. Steffler suggests he will gross. I accept ICBC's calculation.[2] Mr. Steffler testified that he expected his 2024 expenses to be "up a little" from the $3,442 reported as expenses for 2023, and noted that he had employed his nephew at $25 an hour during school breaks. He estimated that his expenses for that work was approximately $7,000 to $10,000.

[160] However, with no evidence of expenses other than Mr. Steffler's unsupported oral evidence, I assess his likely 2024 expenses at $4,000[3], being the average of his 2022 and 2023 non-CCA expenses. Accordingly, his annual 2024 net income will be $44,000 ($48,000 - $4,000).

[1] Written submissions of ICBC, p. 22.
[2] $24,401 (invoices for January to August) + $700 (2024 invoice erroneously dated 2018) + $6,500 (late 2023 invoice) = $31,601 ÷ 8 months x 12 = $47,405, rounded to $48,000.
[3] ($6,878.89 + $1,080) ÷ 2 = $3,979.45, rounded to $4,000

[161] Based on the foregoing, I accept that Mr. Steffler received net income from all sources as follows:

Year	**Income**
2019	$ 1,204
2020	$ 11,068
2021	$ 570
2022	$ 23,121
2023	$ 28,900
2024 (Jan. to Oct.)	$36,667[4]
Total	**$ 101,530**

[162] Subtracting gross with accident earnings ($101,530) from his assessed without accident earnings ($180,000) results in a gross past wage loss of $78,470, rounded to $80,000 for the period July 27, 2019 to October 30, 2024.

[163] However, an award for that past wage loss is limited to the person's net income loss: *Insurance (Vehicle) Act,* s. 98. Deducting 25% for taxes and employment insurance premiums results in a net past wage loss of $60,000 ($80,000 x 75%). I award that amount for past wage loss.

C. Future loss of earning capacity

1. Legal Framework

[164] It has long been established that to prove entitlement for a loss of earning capacity, a plaintiff must demonstrate both (a) an impairment to their earning capacity, and (b) that there is a "real and substantial possibility", and not "mere

[4] $44,000 x 10/12 = $36,667

speculation", that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 11, 31–32 [*Perren*].

[165] In the trilogy of *Dornan*, *Rab v*. *Prescott*, 2021 BCCA 345 [*Rab*], and *Lo v. Vos*, 2021 BCCA 421 [*Lo*], the Court of Appeal re-stated the approach to assessing claims for loss of future earning capacity by setting out a three-step analysis. In *Rattan v. Li*, 2022 BCSC 648 at para. 148, Justice Horsman, then of this Court, summarized that analysis as follows:

> (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?

[166] As the final step of the analysis, the court must consider whether the award of damages is "reasonable and fair": *Lo* at para. 117.

2. Discussion and Analysis

[167] As set out above, based on her assessment, Ms. Bracken's undisputed conclusion is that Mr. Steffler retains no employability as a vinyl deck installer and has "reduced competitive employability" as a self-employed portable mill operator. His inability to work as a vinyl deck installer alone has created a pecuniary loss. Dr. Hawkeswood's prognosis of a "relatively low" likelihood of significant improvement creates a real and substantial possibility that future loss of earning capacity will continue.

[168] I am satisfied that the first two *Rab* factors have been met. The only remaining issue is the value of that future loss.

[169] There are two possible approaches to assessing loss of future earning capacity: the "earnings approach" and the "capital asset approach": *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133, citing *Brown* and *Perren* at paras. 11–12.

[170] The earnings approach will generally be more useful when the loss is easily measurable, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate the plaintiff's future earning capacity: *Perren* at para. 32. By contrast, where the loss is not measurable in a pecuniary way, the "capital asset" approach is more appropriate: *Perren* at para. 32.

[171] In this case, given Mr. Steffler's historic underreporting of income, it is difficult to ascertain his earnings history with certainty. However, based on the available evidence, as set out above, I am satisfied that it is possible to reasonably estimate his earning capacity. Having assessed the income that Mr. Steffler would have earned had it not been for the accident, and with Mr. Steffler's estimated 2024 income, the loss is measurable. In my view, the earnings approach is appropriate.

[172] I have concluded that at the time of the accident in 2019, Mr. Steffler would earn approximately $50,000 annually. Accepting, as counsel argues, that income would have increased by the date of trial (2024), had it not been for the accident, I assess that his earnings in 2024 would have been approximately $53,000.[5] I have concluded that Mr. Steffler's actual income for 2024 is $44,000, resulting in an annual loss of $9,000.

[173] In assessing the duration of that loss, I have considered Dr. Hawkeswood's view that Mr. Steffler's history of knee surgeries would likely have resulted in a "recurrence of knee stiffness and pain…within 10 - 15 years" and that Mr. Steffler would have "probably noticed symptoms with some degree of consistency while in his 50s". Although Dr. Hawkeswood is unable to quantify the degree of severity and related functional impairment of those symptoms, given the physical nature of Mr. Steffler's employment, there is no real and substantial possibility that Mr. Steffler would have worked until 75 years old, as he suggests.

[174] I find that, had it not been for the accident, and in any event, he would have worked until he turned 67 years old in 2050.

[5] Annual increases of 1% results in 2024 income of $53,076, rounded to $53,000.

[175] The present value of a $9,000 annual loss to 2050 (26 years) is $192,587.40.[6]

[176] However, since the course of future events is unknown, 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* at para. 29.

[177] In this case, general contingencies apply to both Mr. Steffler's pre-accident employment (vinyl decking) and post-accident employment (milling), such that those contingencies are largely nullified. For example, while Mr. Steffler may have earned wage increases as a vinyl decker, it is equally possible that he may be able to increase the efficiencies of his milling operations by, for example, hiring employees as he did in his previous roofing business.

[178] Likewise, negative contingencies are also neutral. While I cannot discount the possibility of unemployment as a vinyl decker, it is also difficult to ignore the difficulty of running one's own business regardless of injuries. Moreover, any downturn in the construction business would affect both his pre- and post-accident work to a similar degree.

[179] The same is true for contingencies that are specific to Mr. Steffler. Most notably, given the physical nature of both his pre-accident and post-accident work, the impact of a future decline in pre-existing knee condition would affect both in roughly the same way: a less severe impact would allow him to continue working longer; a more severe impact may limit his ability to work longer the future. Those impacts would have been the same regardless of the accident.

[180] Notwithstanding the largely neutral impact of the various general contingencies, in my view, one specific contingency favours an increase in the future wage loss assessment. Specifically, Dr. Hawkeswood opines that given the accident-related injuries, Mr. Steffler "is probably going to have more pain and more

[6] I have used the prescribed discount rate of 1.5% *pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253* and the present value tables in CIVJI ($9,000 x 21.3986 = $192,587.40).

relative disability than would be expected absent the subject accident" and that his "premorbid knee injuries and accident-related injury have increased the likelihood (i.e. 25% chance) that he will require another knee surgery".

[181] Given that evidence, there is a possibility that, over time, Mr. Steffler's post-accident capacity to work as a mill operator may not match his pre-accident capacity to work as a vinyl deck installer, creating an increased differential in earnings. The accident-related injury has also increased the risk that he may be forced to miss some months of post-accident work for a possible surgery. However, based on the fact that he was cleared to return to modified duties three months after his April 2019 surgery, it would not seem that any such time off work would be significant.

[182] Weighing the above contingencies, in my view, the future wage loss should be increased by 10%, resulting in a possible future loss of capacity of $211,846 ($192,587 + $19,259), rounded to $210,000.

[183] Despite Mr. Steffler's longstanding failure to accurately report income, I have relied on the evidence that was before me in the form of the e-transfers from Deck Solutions as the basis for the assessment of his without accident earnings. Given the evidence that was available, and having considered both positive and negative contingencies, in my view, the outcome is reasonable and fair.

[184] I award future loss of earning capacity of $210,000.

D. Special damages

[185] An injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 (S.C.) at 78.

[186] In this case, Mr. Steffler has claimed the following as special damages:

a) $11,356.92 for medical and related treatments including physiotherapy, kinesiology, occupational therapy, and vocational rehabilitation;

b) $12,810 for payments made or to be paid to various friends and family for their assistance in the construction of the home on the Sooke property;

c) $6,926 for payments made to Willowleaf Contracting in relation to the construction of the home on the Sooke property.

[187] Of those amounts, ICBC agrees that the $11,356.92 incurred for medical and other treatments (inclusive of amounts that have been paid to the date of trial) are compensable special expenses. It disputes the amounts claimed for the construction of the home on the Sooke property.

[188] As noted, prior to the accident, Mr. Steffler and Ms. Emms purchased the property in Sooke, with the intention of building a home. Given his experience in construction, Mr. Steffler intended to act as the general contractor, as well as to provide the labour required, for much of the construction. However, given the accident-related injuries, he was unable to do much, if any, labour and had to rely on family and friends. In addition, he had to hire a third-party contractor (Willowleaf) for the framing and truss work.

[189] Mr. Steffler testified that had it not been for the accident-related injuries, he and Ms. Emms would have done all of that work themselves.

[190] I do not accept that is the case.

[191] First, it is notable that the additional labour was provided by family and friends with whom Mr. Steffler has close relationships. His brother, Dan, for whom Mr. Steffler has claimed $6,310 for unpaid labour, lives rent-free on the property. As Ms. Emms described, they are a “tight-knit” family and help each other out, not out of obligation, but because they want to.

[192] Given the nature of the relationships, I am unable to conclude that his family and friends would not have assisted him without pay, regardless of the accident. On

cross-examination, Mr. Steffler conceded as much, although he said they did more work than they otherwise would have. Even accepting that some additional assistance was required due to his injuries, there is no evidence to support the $35 an hour Mr. Steffler has claimed for that assistance.

[193] Second, despite being a “very handy guy” (as Ms. Emms described him), Mr. Steffler had never built a house on his own. He had only framed one house and had never been in charge of such a significant endeavour. Moreover, as noted, even without the accident, Mr. Steffler had not recovered 100% after his April 2019 knee surgery. Dr. Hawkeswood noted that it would have been sensible to be a “bit careful” with “extreme movement” for up to 12 months post-operatively. On those bases, I am unable to conclude that he would not have had to retain third-party assistance, be it friends, family, or third-party contractors, to complete at least some aspects of the construction, regardless of the accident.

[194] However, I accept that the accident-related injuries did impair Mr. Steffler’s ability to complete the construction work. I also accept that impairment may have required additional work that he otherwise would not have paid for. To ensure that he is compensated for reasonable out-of-pocket expenses that he would have incurred but for the accident, I award $5,000 for additional construction costs.

[195] To summarize, in addition to the $11,356.92 that ICBC has agreed to pay for medical and other treatments, I also award special damages of $5,000 for the costs relating to the construction of Mr. Steffler’s home. The total special damages award is $16,357 ($11,356.92 + $5,000), less any amounts that may have already been paid and for other appropriate statutory deductions.

E. Cost of future care

[196] To be entitled to an award for the cost of future care: (1) there must be a medical justification for the claims for cost of future care; and (2) the claims must be reasonable: *Milina* (*S.C.*) at 84.

[197] However, it is not necessary for a physician to testify to the medical necessity of each individual item of care claimed: *Quigley v*. *Cymbalisty*, 2021 BCCA 33 at para. 44. As set out in *Pang v*. *Nowakowski,* 2021 BCCA 478 at para. 57, the court must also be satisfied that: (a) the plaintiff would, in fact, make use of the particular care item; (b) the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and (c) there is no significant overlap in the various care items being sought.

[198] In this case, Dr. Hawkeswood made numerous recommendations for future care, only three of which are claimed by Mr. Steffler for future care costs. They are:

a) Foam rollers/myofascial release equipment to facilitate the recommended exercise program to address Mr. Steffler's musculoskeletal pain symptoms, at an estimated one-time cost of $300;

b) Ten kinesiology sessions to help implement and progress the active rehabilitation program recommended by Dr. Hawkeswood. Based on an estimated cost of $1,070[7;] and

c) Fifteen sessions of allied health treatment (IMS, massage therapy, acupuncture, or chiropractic) at Mr. Steffler's discretion, also to support his rehabilitation process, at an estimated cost of $1,780[8].

[199] I am satisfied that, given Dr. Hawkeswood's recommendations, all of those items are medically justified. While Mr. Steffler has not engaged in any of the specific treatment in the past two years, as Dr. Hawkeswood notes, for the most part, Mr. Steffler has done "many of the right things to address his pain condition". I am satisfied that, given Mr. Steffler's commitment to address his physical pain issues, he will engage in the more specific recommendations to do so.

[7] Agreed Statement of Facts, Appendix 2: $100.80/session in 2021, inflated at 2% per year to 2024 dollars ($106.97 each).
[8] Agreed Statement of Facts, Appendix 2: $112.35/session in 2019, inflated at 2% per year to 2024 dollars ($118.68 each).

[200] Given the short-term nature of the recommended treatments, I am satisfied that a modest deduction is required to ensure that the amount awarded represents the present value of this future claim. I award a total of $3,100 [($300 + $1,070 + $1,780) - $50].

VII. Summary of Damages

[201] To summarize, I award damages as follows:

Non-pecuniary damages:	$130,000
Past loss of earning capacity:	$60,000
Future loss of earning capacity:	$210,000
Special damages:	$16,357
Cost of future care:	$3,100

[202] This damages award is subject to deductions for amounts that have already been paid and for post-trial deductions subject to s. 83 of the *Insurance (Vehicle) Act*.

VIII. Costs

[203] If the parties wish to make submissions on costs, they may do so in writing within 30 days of these reasons.

[204] If I receive no submissions on costs, I award costs to Mr. Steffler at Scale B.

"Ahmad J."