IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Poonia v. Yazzie*,
2025 BCSC 1334

Date: 20250714
Docket: M177105
Registry: Vancouver

Between:

Sandeep Poonia

Plaintiff

And

Cordell Yazzie and Rozalie Yazzie

Defendants

Before: The Honourable Justice Morishita

Reasons for Judgment

Counsel for the Plaintiff:	R. Keith, K.C. A. Taggar
Counsel for the Defendants:	D.M. De Baie P. Pandher
Place and Dates of Trial:	Vancouver, B.C. December 2-6, and 9-13, 2024
Place and Date of Judgment:	Vancouver, B.C. July 14, 2025

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INTRODUCTION

[1] The plaintiff, Sandeep Poonia, claims damages for injuries he suffered in two motor vehicle accidents.

[2] The first accident ("MVA1") occurred on February 12, 2017, when the plaintiff was driving on Westminster Highway. The accident was a T-bone type of collision, and his vehicle sustained significant damage. The plaintiff has very little memory of the accident. The second accident ("MVA2") occurred on December 22, 2018, and was also a T-bone type of collision.

[3] Liability for both accidents has been admitted by the defendants. The parties advised that the Court need not address divisibility of injuries and apportionment as between MVA1 and MVA2.

[4] The plaintiff's position is that as a result of MVA1, he sustained a mild traumatic brain injury ("MTBI"), injuries to his neck and back, depression, post traumatic stress disorder ("PTSD"), and anxiety. These injuries, the plaintiff alleges, have caused him to experience headaches, tinnitus, dizziness, light and sound sensitivity, sleep disruption, cognitive and memory issues, and significant personality changes.

[5] The plaintiff says he suffered no new injuries or symptoms as a result of MVA2, but that MVA2 aggravated the injuries and symptoms he suffered from MVA1.

[6] The plaintiff was 42 years old when MVA1 occurred. He was 50 years old at the start of trial.

[7] The plaintiff is married. He has two sons who were teenagers at the time of MVA1 and are now young men.

[8] At the time of MVA1, the plaintiff was a businessperson who was involved in the construction and renovation of residential properties, as well as consulting.

[9] The plaintiff's position is that the accident impacted his work capacity in the following ways: a lucrative consulting contract was terminated; he lost out on opportunities to invest in and gain income from real estate development and other business ventures; and he had to hire others to do work that he can no longer complete due to his cognitive impairments and personality changes.

[10] The plaintiff seeks the following award:

Non-pecuniary damages	$250,000.00
Past loss of income earning capacity	$4,200,000.00 (gross)
Future loss of income earning capacity	$2,000,000.00
Special damages	$112,690.08
Cost of future care	$852,560.00
Total	**$7,415,250.08**

[11] Neither party raised any credibility concerns with any of the witnesses, including the plaintiff. In addition, the opinions of the plaintiff's medical experts and the defendants' medical experts were largely congruent. The parties agreed on several issues and conducted the trial in a very efficient manner. The Court is thankful to both parties for this approach.

[12] The main areas of disagreement between the parties are the diagnosis and prognosis of the plaintiff's injuries, the impact of the plaintiff's injuries on his ability to work and take advantage of business opportunities, the likelihood of those business opportunities materializing and being financially successful, and the plaintiff's future care needs.

[13] The defendants acknowledge that the plaintiff was injured in the accidents; however, their position is that the plaintiff did not sustain an MTBI. They further argue that the plaintiff has other health conditions that could impact his functional abilities and longevity. Their main argument, as it relates to injuries, is that the

plaintiff has not followed treatment recommendations, and he will experience significant improvement should he do so. Regarding income loss, the defendants submit that much of the claim for lost business opportunities is speculative, and that regardless of the accidents, the plaintiff would have needed to hire additional staff as his businesses grew.

[14] The defendants submit that the appropriate award is as follows:

Non-pecuniary damages	$180,000.00 - $200,000.00
Past loss of income earning capacity	$210,000.00 - $400,000.00 (gross)
Future loss of income earning capacity	Nil - $210,000.00
Special damages	$63,166.75
Cost of future care	$117,746.70
Total	**$570,913.45 - $990,913.45**

WITNESSES

[15] In addition to testifying himself, the plaintiff called the following lay witnesses as part of his case:

Name	**Relationship**
Ms. Sharanjit Poonia	Plaintiff's wife
Ms. Kuldeep Mann	Plaintiff's sister
Mr. Randeep Poonia	Plaintiff's brother
Ms. Rekha Phillip	Employee
Mr. Gary Aujla	Business associate and friend
Mr. Halibo (Herbert) Yu	Business associate and friend
Mr. Charles Lee	Business associate

Mr. Brett Sherwood	Business associate
Mr. Jaspreet Johal	Treating Kinesiologist and friend
Ms. Rebecca Rauscher	Treating Occupational Therapist
Mr. Stephen Epp	Treating Occupational Therapist

[16] The plaintiff tendered evidence from the following expert witnesses:

Name	**Expertise**	**Report Date(s)**
Dr. Hubert Anton	Physiatrist	May 1, 2018 & Jan. 13, 2022
Dr. Gordon Robinson	Neurologist	Jan. 18, 2019 & Nov. 30, 2021
Dr. Roy O'Shaughnessy	Psychiatrist	Jul. 16, 2018 & Dec. 3, 2021
Dr. Jason Barton	Neurologist and Neuro-Ophthalmologist	Jan. 30, 2018 & Nov. 22, 2021
Dr. Jaymi Dumper	Otolaryngologist	Nov. 30, 2018 & Nov. 23, 2021
Dr. Larissa Mead-Wescott	Neuropsychologist	Aug. 15, 2017
Ms. Nora Chambers	Occupational Therapist	Dec 12, 2022
Mr. Greg Williamson	Business Valuator	Jan. 9, 2023
Mr. Rob Wickson	Economist	May 21, 2024

[17] Dr. Robinson, Dr. O'Shaughnessy, Ms. Chambers, and Mr. Williamson gave oral evidence at trial.

[18] The defendants did not require the following plaintiff's experts to attend trial for cross examination: Dr. Anton, Dr. Barton, Dr. Dumper, Dr. Mead-Wescott, and Mr. Wickson.

[19] The defendants did not testify at trial and did not call any lay witnesses to testify.

[20] The defendants did, however, tender evidence from the following expert witnesses:

Name	Expertise	Report Date(s)
Dr. Todd Bentley	Physiatrist	Jan. 28, 2022
Dr. Derryck Smith	Psychiatrist	Oct. 28, 2021 & Jan. 20, 2022
Dr. Mark Nigro	Urologist	Jan. 24, 2022
Mr. Robert Mackay	Business Valuator	Apr. 15, 2024

[21] Dr. Smith and Mr. Mackay gave oral evidence at trial.

[22] The plaintiff did not require Dr. Bentley and Dr. Nigro to attend trial for cross examination.

[23] The plaintiff testified that he was also assessed by the following medical doctors at the request of the defendants: Dr. Medvedev, neurologist, and Dr. Sexton, neuro-ophthalmologist. Neither Dr. Medvedev nor Dr. Sexton provided evidence at trial. Plaintiff's counsel asked the court to draw an adverse inference against the defendants due to their failure to tender evidence from these two experts.

[24] Generally speaking, an adverse inference should only be drawn against the party who has the onus of proof: *Tan v. Mintzler*, 2016 BCSC 1183 at para. 42.

[25] The onus of proof rests on the plaintiff to prove their case, and more specifically, to prove the extent and consequences of their injuries. The plaintiff's case and the extent of his injuries are not proven or enhanced by the failure of the defendants to call their own expert evidence: *Reitsema v. Lammers*, 2017 BCSC 1374 at para. 121.

[26] I decline to draw an adverse inference against the defendants because of the absence of evidence from Dr. Medvedev and Dr. Sexton.

CREDIBILITY AND RELIABILITY

[27] Credibility and reliability are not the same thing. Credibility is concerned with a witness's veracity, while reliability is concerned with the accuracy of a witness's testimony.

[28] The typical starting point in a credibility assessment is to presume truthfulness: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10, citing *Halteren v. Wilhelm,* 2000 BCCA 2.

[29] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Madam Justice Dillon summarized the key elements of a credibility assessment:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] *v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).
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> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[30] Reliability, in contrast, involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[31] As referenced above, the defendants do not challenge the credibility of the plaintiff; however, they raise concerns about his reliability. The defendants point to

the plaintiff's statement on cross examination that "sometimes he just says things" due to his alleged cognitive issues, and the plaintiff's admission that he often struggles to articulate his thoughts and may unintentionally provide inaccurate information to treatment providers. The defendants also submit that there are inconsistencies in the plaintiff's statements. In light of these concerns, they argue that the plaintiff's evidence and his statements to practitioners should be approached with considerable caution.

[32] I agree with both parties that the plaintiff was a credible witness. He gave his evidence in a straightforward, matter-of-fact manner. He was generally not prone to overstatement or understatement. His tone and affect during cross examination were similar to that during direct examination. He testified over the course of three-and-a-half days (with a half-day interruption). During his testimony, he would periodically close his eyes, rub his neck or the side of his head, sigh, or squeeze a stress ball. I did not have the impression that this was performative. Instead, my impression was that these were strategies that the plaintiff has learned or developed over time to help manage his symptoms. This view is supported by my observation that these behaviours would increase towards the end of the day, when it was noticeable that the plaintiff was getting fatigued.

[33] The plaintiff did admit that due to his cognitive issues he may unintentionally provide inaccurate information to treatment providers. As I will set out further in these reasons, the plaintiff does suffer from cognitive and memory issues as a result of the injuries he sustained in the accident. I observed that, at times, the plaintiff had some difficulty understanding questions, both on direct examination and cross examination. This tended to increase in frequency the longer he was in the witness box. While this sometimes resulted in the plaintiff asking for the question to be repeated, taking longer to answer, or answering a slightly different question than the one that was asked, I did not observe him to intentionally provide inaccurate information in his testimony any more than a typical witness. Further, the defendants did not point to any specific examples in the evidence where the plaintiff provided inaccurate information.

[34] In a similar vein, while the defendants submit that inconsistencies in the plaintiff's statements undermine his reliability, they did not point to any specific examples of such inconsistent statements in their submissions.

[35] I did, however, note some inconsistencies in the plaintiff's testimony. As I indicate further in these reasons, the plaintiff downplayed his pre-accident history of back pain, hip pain, and shoulder pain to some extent in direct examination. Nevertheless, when confronted with conflicting evidence from clinical records on cross-examination, the plaintiff readily made concessions against interest.

[36] I am mindful of Justice N. Smith's comments in *Edmondson v. Payer*, 2011 BCSC 118 at para. 35, that inconsistencies are almost inevitable when plaintiffs are asked about a number of clinical records that were made over a long period of time.

[37] Given the nature of the plaintiff's accident-caused injuries (which I set out below), the passage of almost eight years since MVA1, and the numerous treatment providers the plaintiff saw post-accident, there were relatively few inconsistencies that came out at trial.

[38] I find the plaintiff to be credible and reliable, and unless specifically noted in these reasons, I generally accept his evidence.

[39] As indicated above, the defendants raised no credibility or reliability concerns about any of the other lay witnesses.

INJURIES SUSTAINED

[40] The plaintiff claims the following injuries:

a) mild traumatic brain injury;

b) neck, back, and shoulder injuries;

c) post-traumatic headaches;

d) otolaryngology injuries; and

e) psychological injuries.

[41] The defendants acknowledge that the plaintiff sustained the following injuries as a result of the accidents: PTSD, anxiety, depression, post-traumatic headaches, and soft tissue injuries. The defendants did not specify in their submissions which specific soft tissue injuries they concede that the plaintiff sustained. The defendants' position is that the plaintiff did not suffer an MTBI in the accidents. Further, they say that the plaintiff's PTSD has resolved and that his soft tissue injuries have largely resolved. Finally, they submit that the plaintiff's headaches have improved, and that his psychological issues should improve if he follows the recommended treatment.

Causation

[42] The accidents must be a necessary cause of the plaintiff's injuries. In *Zenone v. Knight*, 2024 BCCA 200, Madam Justice Stromberg-Stein recently provided a helpful summary of the applicable law with regards to causation that informs my analysis:

> [54] The test for showing causation is the "but for" test. It requires the plaintiff to demonstrate on a balance of probabilities that their injury would not have occurred "but for" the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; *Clements v. Clements*, 2012 SCC 32 at para. 8.
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> [55] The "but for" test is to be applied in a "pragmatic" and "robust common sense fashion" and does not require "scientific evidence of the precise contribution the defendant's negligence made to the injury": *Clements* at paras. 9, 11, 46. Nor does it require the plaintiff to establish that the defendant's tortious act was the sole cause of the injury: *Athey* at paras. 17–19; see also *Blackwater v. Plint,* 2005 SCC 58 at paras. 78–81. In every case, there may be a myriad of other non-tortious factors which were necessary preconditions to the injury occurring. What is required is a "substantial connection" between the injury and the defendant's tortious conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 327.
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> [56] In *Clements*, Chief Justice McLachlin explained:
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> > [10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell* and *Athey v. Leonati*, [1996] 3 S.C.R. 458. …

> [11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:
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> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).
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> [Emphasis in original.]

[57] The "crumbling skull" doctrine, as adverted to by the judge, is not a doctrine of causation. Rather, as Justice Major explained in *Athey*, the "crumbling skull" is a shorthand for the broader principles that apply in determining the effect of a plaintiff's pre-existing condition on their ability to recover damages:

> [34] … The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
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> [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage … Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award … This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis by underlining added; citations omitted.]

[58] In *Murphy v. Snippa*, 2024 BCCA 30, Justice MacKenzie further explained the implications of a plaintiff's pre-existing condition:

> [54] A pre-existing condition can have important legal implications, including the contingency analysis discussed in *Dornan v. Silva*, 2021 BCCA 228, at paras. 62–64.
>
> [55] A pre-existing condition may affect the plaintiff's entitlement to damages. The damages owed to the plaintiff consist of the difference between the plaintiff's "original position"—namely the position they would have been in had the accident never occurred—and their actual position after the negligently-caused injury (*Blackwater v. Plint*, 2005 SCC 58, at para. 78). A plaintiff who would have suffered some or all of the injuries resulting from the defendant's negligence, even absent that negligence, is sometimes referred to as a "crumbling skull" plaintiff. In such a case, the court determines what debilitating effects the plaintiff would have suffered in any event, and ensures the defendant is not held liable for those (*Athey*, at para. 35).
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> [56] In the case of a plaintiff who suffers from a pre-existing condition that may get progressively worse, the question is whether there is a "measurable risk" that the pre-existing condition would have affected the plaintiff in the future, regardless of the defendant's negligence (see *Dornan*, at para. 45; and *Athey*, at paras. 35–36). If such a measurable risk is demonstrated, the overall damage award can be adjusted accordingly.
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> [Emphasis in original.]
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> [59] Unlike the test for causation, which the plaintiff must establish on a balance of probabilities, the crumbling skull doctrine is predicated on hypothetical events; that is, the plaintiff would have experienced medical deterioration or injury absent the defendant's tortious act. Such hypothetical events will be taken into consideration as long as they are a real and substantial possibility, as opposed to mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; see also *Murphy* at para. 59; *Athey* at para. 27. Therefore, the prospect of a crumbling skull simply results from an accumulation of evidence, rather than an explicit onus that must be met in every case: see *Rezaei v. Piedade*, 2012 BCSC 1782 at para. 45. Practically speaking, however, the burden of establishing a real and substantial possibility falls on the party who seeks to rely on it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

Plaintiff's Pre-Accident Health

[43] The plaintiff describes his health pre-MVA1 as "really good."

[44] Around 20–30 years before MVA1, the plaintiff was involved in a number of motor vehicle accidents where he sustained a significant back injury which ultimately required surgery. The plaintiff says the surgery was very helpful, although he testified that he continued to have occasional back pain. In the late 1990s, the plaintiff had surgery to repair a meniscus tear in his left knee. In the years prior to

MVA1, the plaintiff also had left rotator cuff issues, for which he received arthroscopic surgery on November 10, 2015. The plaintiff testified on direct examination that by the time of MVA1, his left shoulder was “perfectly fine.”

[45] There was no evidence at trial indicating that the back, knee, or left shoulder were causing the plaintiff any functional limitations prior to MVA1.

[46] On cross-examination, the plaintiff admitted that he had a pre-accident history of issues with his right shoulder, and that it was a problem for him immediately before MVA1. In the spring of 2016, the plaintiff returned to an orthopedic surgeon to discuss problems with his right shoulder. The surgeon did not recommend surgery. The plaintiff sought a second opinion from another doctor.

[47] The plaintiff testified on cross examination that at present his right shoulder is “pretty good.” He said that he still experiences some weakness with it when he lifts overhead, but he does not have daily pain.

[48] In late 2016, the plaintiff started experiencing pain in his left flank. It was ultimately discovered that the pain was due to a cancerous tumour on his left kidney. The plaintiff underwent a left nephrectomy on December 31, 2016 to remove the kidney and tumour.

[49] Post-surgery, the plaintiff remained in the hospital for about two days, after which he was discharged. He testified that the recovery went quite well and that he felt almost back to normal within a couple of weeks. He said that receiving a cancer diagnosis was extremely difficult and scary. Fortunately, the plaintiff did not require any further treatment for the kidney cancer, other than an annual follow-up with a kidney specialist and a urologist.

[50] The plaintiff’s evidence is that prior to MVA1 he had never suffered from depression, post traumatic stress disorder, or panic attacks, nor had he experienced issues with cognition, vision, light tolerance, or noise tolerance.

[51] The plaintiff testified that he did experience stress when he was going through the diagnosis and treatment of kidney cancer.

[52] The plaintiff testified that prior to MVA1 he did not have any limitations in his ability to work, interact with his family in the way he wanted to, participate in recreational activities, or complete household duties.

[53] On cross-examination, the plaintiff acknowledged that prior to the accident he had some difficulty sleeping, for which he was prescribed sleeping medicine. He testified that the medication helped with his sleep. In addition, the plaintiff confirmed on cross-examination that before MVA1 he was having some issues with fatigue and low libido, for which he was prescribed testosterone. The plaintiff also conceded on cross-examination that in the year prior to MVA1, he was experiencing issues with his lower back, with pain radiating down his right leg, as well as right hip pain. The lower back issue was triggered by lifting weights at the gym. The plaintiff's family doctor requisitioned a CT scan, which was performed in June 2016.

[54] Jaspreet Johal is a long-time friend, mentee, and former personal trainer of the plaintiff. He trained the plaintiff both before and after the accidents. He testified that he first started training the plaintiff in 2013. They would train about three times per week. Mr. Johal said that prior to MVA1, he was aware that the plaintiff had a shoulder and back injury and had undergone back surgery. He said these issues did not significantly limit the workouts, and that the plaintiff was still squatting and deadlifting substantial weight. He further noted that despite having a shoulder issue, the plaintiff was able to do overhead presses with 80 pounds of weight. The inference I make from this evidence is that the plaintiff would not be able to complete such overhead presses if his shoulders were causing him significant problems.

[55] Sharanjit Poonia and the plaintiff have been married for 22 years. She works full-time as a Registered Nurse in an acute dementia unit at Vancouver General Hospital. She provided the following evidence about the plaintiff's health, abilities, and personality prior to MVA1:

- Since she worked full-time, the plaintiff was very involved with childcare. He would often drop off and pick up the kids from school and would take them to their after-school activities, such as martial arts. The plaintiff was also involved in helping the kids with their studies.

- The plaintiff was a very loving and compassionate man.

- She had a very good relationship with the plaintiff.

- The plaintiff had no issues with anger.

- The plaintiff would mow the lawn, garden, wash the cars (which he quite enjoyed), do the heavier cleaning such as washing the windows, and help with vacuuming.

- They spent a lot of time together, enjoying activities such as family picnics, going to the movies, and vacationing.

- The plaintiff was very sharp and had a good memory.

- The plaintiff was a very supportive son to his parents and regularly provided help to them.

- The plaintiff had very close relationships with his sister and brother.

- The plaintiff got up early in the morning and went to the gym.

- The plaintiff did not have any emotional problems, depression, or headaches, other than “a bit of an anxiety issue”.

- The plaintiff had a lower libido after his kidney surgery, and was taking testosterone mostly for anti-aging reasons.

[56] Ms. Poonia was a credible and compelling witness. She struck me as a very private and stoic person. Although she sometimes understandably got emotional during her testimony, she gave her evidence in a very balanced, matter-of-fact

manner. Her credibility, reliability, and evidence were not challenged or called into question in cross-examination. I accept her evidence about her observations of the plaintiff pre-MVA1.

[57] Kuldeep Mann is the plaintiff's younger sister. Prior to MVA1, Ms. Mann would see the plaintiff frequently, at least three to four times per week. She lived close by and would visit the plaintiff often, as the family is close-knit, and their parents live with the plaintiff. She provided the following evidence about the plaintiff's health, abilities, and personality prior to MVA1:

- The plaintiff was "fun to be around." She and the plaintiff would have regular conversations, as she would have with a friend.
- The plaintiff was loud and rambunctious, particularly with the kids. The plaintiff loved to spend time with his kids and hers.
- While she was aware that the plaintiff did have back pain, which she thought was due to the undiagnosed kidney issue, the plaintiff was energetic and active, particularly with the kids.
- The plaintiff was always interacting with others, having fun, and helping out with tasks like doing the dishes.
- She admired the plaintiff's charismatic personality and his ability to get along with people.
- She noted that in her culture, sisters rely a lot on their brothers, and she knew that if anything ever happened to their father, the plaintiff would always be there for her.
- The plaintiff was very caring and loving towards his parents, especially his mom, who has some health issues.

[58] Ms. Mann was a very credible witness. She gave her evidence in a measured and balanced way. Her credibility, reliability, and evidence were not challenged or

called into question in cross-examination. I accept her evidence about her observations of the plaintiff pre-MVA1.

[59] Randeep Poonia is the plaintiff's younger brother. Meaning no offence, I will refer to him by his first name, given that he shares a last name with the plaintiff. Prior to MVA1, Randeep lived in the family home with the plaintiff, their parents, and the plaintiff's wife and children. The plaintiff and Randeep also worked together prior to MVA1. Randeep provided the following evidence about the plaintiff's health, abilities, and personality prior to MVA1:

- The plaintiff was an early riser. He would get to the office at about 7:00 a.m.
- Randeep would see the plaintiff two to three times per week at work sites. Working with the plaintiff did not seem like work. The plaintiff interacted well with tradespeople. He would let them know what needed to be done and would seek their input. The plaintiff never got angry with him at work. If there were things they did not agree on workwise, they would discuss it calmly.
- The plaintiff was funny, outgoing, involved, and nice.
- The plaintiff had lots of friends.
- At family events, the plaintiff was social and would go out of his way to say hello to people.
- The plaintiff was very involved with his kids and their activities.
- The plaintiff was a supportive older brother.

[60] Randeep was a very credible witness. It was apparent that it was not easy for him to talk about his brother and the accidents. He had to pause on occasion to gather his emotions. He gave his evidence in a balanced manner. His credibility, reliability, and evidence were not challenged or called into question in cross-examination. I accept his evidence about his observations of the plaintiff pre-MVA1.

[61] Several other lay witnesses provided the following additional evidence about their observations of the plaintiff's health, abilities, and personality before MVA1:

a) Dale Bains described the plaintiff as very upbeat and high energy.

b) Harold Yu said he always had a good time with the plaintiff and that the plaintiff was a good communicator.

c) Jaspreet Johal testified that the plaintiff had lots of energy, was very humorous, a good story teller, and entertaining to be around.

d) Gary Aulja characterized the plaintiff as a "go getter", energetic, enthusiastic, pleasant, and nice to "hang out" with.

[62] All of these lay witnesses were credible and their observations about the plaintiff's health and personality were unchallenged on cross-examination. I accept their evidence outlined above.

Injuries

[63] I will address the evidence and give my findings on each of the claimed injuries.

Mild Traumatic Brain Injury

[64] The parties disagree on whether the plaintiff suffered an MTBI. I note that it may well be that the case does not significantly turn on whether the plaintiff suffered an MTBI, as many of the symptoms associated with the lingering effects of an MTBI are similar to those associated with chronic pain and/or psychological conditions. The parties seemed to agree that this is the case. Nevertheless, I will determine this issue.

[65] There was limited evidence at trial about the circumstances of MVA1. The plaintiff's evidence was that MVA1 occurred in the afternoon. Prior to the collision, the plaintiff was stopped at a red light at the intersection of No. 5 Road and Westminster Highway in Richmond. His vehicle was the first in line. The light turned

green and he proceeded to move his vehicle forward. The plaintiff next remembers a gold flash. He then remembers "waking up" and thinking his car was on fire. He thought he had died and felt like things were not "real."

[66] The plaintiff testified that he does not recall the impact of the collision. He said that he was wearing sunglasses at the time of the accident and that they were bent as a result of it. He described feeling foggy immediately after the accident. He had a sensation of watching himself from above as if he was watching another person. He described feeling like he was in a dream. He knew that he exited the vehicle, but there are gaps in his memory in the immediate aftermath. He did not remember if he spoke to the other driver. He recalls police, firefighters, and paramedics being at the scene, but he does not remember them arriving. He remembers being very confused and having some pain in his neck and back. The plaintiff does not remember any interactions with paramedics at the scene, nor does he recall much of being transported to the hospital, though he vaguely recalls arriving at the hospital. He thought he called his wife or his brother at the scene of the accident but subsequently learned he did not. The plaintiff's memory of his time at the hospital immediately following the accident is patchy, but he recalls getting blood work, x-rays, and feeling pain in his neck, left side, and left shoulder. He also recalls his mother and brother being at the hospital.

[67] Coincidentally, Randeep drove by the accident scene shortly after MVA1 occurred. The location of MVA1 was very close to the family home. Randeep testified that he was at the intersection and waiting to turn left when he saw what appeared to be his brother's car. He stopped his car and ran over. Randeep testified that the plaintiff appeared to be in shock. He said that the plaintiff was disoriented and was complaining about pain in his stomach area, head, and left side. Randeep sat with the plaintiff until the ambulance arrived.

[68] I pause to note that the plaintiff did not mention in his testimony that his brother was at the scene of the accident, despite being asked whom he spoke with. I find as a fact that Randeep was at the scene of the accident shortly after it occurred,

and I make an inference that the plaintiff did not recall his brother being there due to being disoriented.

[69] After the ambulance transporting the plaintiff departed the scene, Randeep went to the family home to inform their mother what had happened and then proceeded to the hospital. Randeep said that he did not spend much time with the plaintiff at the hospital, although he said the plaintiff appeared disoriented.

[70] Ms. Poonia was at work when MVA1 occurred. The plaintiff's family did not tell Ms. Poonia that her husband had been in an accident until she came home after her shift. When she found out about the accident she rushed to the hospital at around 7:30 p.m. Ms. Poonia said that when she arrived at the hospital she observed that the plaintiff was "really out of it" and a "bit confused." She said that they were at the emergency department for another three to four hours. The plaintiff was given pain medication and underwent blood work and x-rays. The next day the plaintiff was complaining about headaches and back pain. According to Ms. Poonia, the plaintiff did not remember who took him to the hospital and who was at the hospital, including Ms. Poonia.

[71] Based on the evidence above of the plaintiff, Randeep, and Ms. Poonia, all of which I accept as credible and reliable, I find that as result of MVA1, the plaintiff suffered from an altered state of consciousness that lasted at least a few hours after the impact.

[72] Five of the plaintiff's six medical experts provided an opinion on whether the plaintiff sustained an MTBI. Some of these experts diagnosed the plaintiff with an MTBI while others did not.

[73] Dr. Anton's opinion is that if the plaintiff's history of a brief period of amnesia after MVA1 is accurate, the plaintiff probably sustained an MTBI.

[74] Dr. Robinson's opinion is that the plaintiff likely sustained an MTBI, but it was not of a magnitude that would result in persisting cognitive symptoms.

[75] Dr. O'Shaughnessy's opinion is that it is possible that the plaintiff suffered an MTBI based on a report of memory loss, but it is more likely than not that the memory loss was due to the fright and trauma of MVA1 as opposed to any direct blow to the head.

[76] Dr. Barton's opinion is that the plaintiff sustained an MTBI and developed post concussion syndrome.

[77] Dr. Mead-Wescott's opinion is that the likelihood that the plaintiff sustained an MTBI is low, given that medical examinations by paramedics and hospital personnel consistently found him to be alert and orientated. In her opinion, the plaintiff's cognitive deficits are likely attributable in large part to his PTSD and sleep issues.

[78] Two of the defendants' three medical experts also weighed in on the issue.

[79] Dr. Bentley's opinion is that the plaintiff suffered a concussion and had persisting neurocognitive symptoms.

[80] Dr. Smith says that there is no objective evidence that the plaintiff sustained any type of concussion or brain injury from MVA1. In his view, it is much more likely that the plaintiff's cognitive difficulties are due to his long-standing depression rather than a brain injury.

[81] One possible explanation for the variance in opinions is that the experts are trained in different specialities and can approach their task from different lenses. Of the seven experts who provided an opinion, two are physiatrists, two are psychiatrists, one is a neurologist, another is a neurologist/neuro-ophthalmologist, and the last is a neuropsychologist.

[82] As explained in Dr. Barton's report, there is no one universally accepted diagnostic criteria for an MTBI. And while some of the experts in this case set out the diagnostic criteria they relied on, others did not.

[83] Some of the experts, Dr. Smith in particular, have set out in detail the diagnostic criteria and considerations that come into play when determining whether

or not someone suffered an MTBI. The issue typically turns on whether the patient suffered – in the time period immediately after the impact – a loss of consciousness, or alternatively, an altered state of consciousness. The latter refers to gaps in memory and/or disorientation. Dr. Smith's report noted that in order to avoid false positives, the emphasis should be on objective evidence that the patient suffered some type of altered state of consciousness. According to Dr. Smith's report, relying too heavily on subjective reports can result in anyone who says they were dazed for a few seconds meeting the criteria for an MTBI. Similarly, Dr. Smith also notes that doctors must consider differential diagnoses, i.e. could the reported symptoms be caused or better explained by other injuries or disorders, such as whiplash, injuries to the vestibular system, or psychological trauma.

[84] While the considerations raised by Dr. Smith are important, there can be many cases where subjective evidence, taken as a whole, meets the legal standard for establishing that a person sustained a brain injury, even where it may not meet the medical standard.

[85] I do not accept the opinions of Dr. Mead-Wescott and Dr. Smith that the plaintiff did not suffer an MTBI. Both opinions are based on the plaintiff not having suffered an altered state of consciousness immediately after the accident. As indicated, I have found as a fact that the plaintiff experienced an altered state of consciousness immediately after MVA1 that lasted at least a few hours.

[86] I accept the opinions of Dr. Anton, Dr. Robinson, Dr. Barton, and Dr. Bentley that the plaintiff sustained an MTBI in MVA1.

[87] As discussed in more detail below, I find that the plaintiff's headaches and visual symptoms are caused by the MTBI. It is not possible to determine with certainty whether the plaintiff's ongoing cognitive symptoms are attributable to the MTBI, as chronic pain and psychological conditions—or a combination of both—can produce symptoms that mimic those of an MTBI. Nevertheless, as I explain further in these reasons, while the MTBI is not the sole cause of the plaintiff's cognitive symptoms, it is a contributing factor.

Neck, Back, and Shoulder Injuries

[88] The plaintiff testified that he felt pain in his back and the left side of his neck at the scene of MVA1. At the hospital, the plaintiff said he continued to feel pain in his neck, entire left side, and his left shoulder. Over the next couple of weeks, his pain increased. He described constant pain in his back and "excruciating" pain in his neck.

[89] The plaintiff's evidence is that the MVA1 symptoms persisted at the time of MVA2 and that all these symptoms were made worse by MVA2.

[90] The plaintiff said his back pain has since resolved and that his shoulder pain is "pretty much resolved."

[91] The plaintiff testified that, since 2022, his neck pain is in the base of his skull on the right-hand side. He describes it as a dull ache. The pain is aggravated as the day goes on and he feels more tired or as his posture changes. It can be relieved by self-administered acupressure in the area.

[92] Dr. Anton diagnosed the plaintiff with injuries to the soft tissue structures in his neck, shoulder girdle, upper back, and lower back. Dr. Anton stated that these injuries were caused by MVA1. He opined that it is possible that the plaintiff sustained an additional injury to the facet joints in the neck in MVA1; however, he was unable to confirm this on examination. Dr. Anton was of the opinion that the plaintiff probably sustained additional injuries to the soft tissue structures in the neck and shoulder girdle in MVA2. Dr. Anton noted that the plaintiff reported the onset of new left shoulder pain after MVA2 in a location similar to where he had pain prior to his left shoulder surgery in 2015. Dr. Anton indicated that it was probable that MVA2 contributed to the subsequent development of shoulder pain from shoulder impingement syndrome.

[93] Dr. Bentley diagnosed the plaintiff with Whiplash Associated Disorder Type II, with cervicogenic headaches and impairment in neck range of motion.

[94] The defendants concede that the plaintiff suffered soft tissue injuries as a result of the accident. They did not specify which soft tissue injuries they admit he sustained.

[95] I am satisfied on the evidence that, as a result of MVA1, the plaintiff suffered tissue injuries to the neck, left shoulder, shoulder girdle, upper back, and lower back. I further accept that MVA2 aggravated all these injuries. However, I find that the injuries to the left shoulder, left shoulder girdle, upper back, and lower back have since resolved post-MVA2. I find that the neck pain has not resolved. I accept that the plaintiff has experienced some improvement in his neck pain, but he continues to suffer from some degree of neck pain due to the accidents.

Headaches

[96] The plaintiff testified that he started experiencing headaches within the first week after MVA1. He describes two types of headaches: one that comes from the neck/base of the skull and another that he feels at the front, top part of his head.

[97] The plaintiff's evidence is that the second type of headaches (i.e., at the front of the head) improved when he started Botox injections and then further improved significantly in 2022 or 2023 when he started taking a medication called Qulipta. More specifically, he said that the prior to starting Qulipta, the frontal headaches would get as high as a six or seven out of ten in terms of pain. Since starting Qulipta, these headaches max out at a two out of ten, but they are constant (albeit low grade).

[98] The plaintiff testified that he has not had much improvement in the first type of headaches (i.e., the ones that are at the base of his skull). These headaches are not constant. Generally, he does not wake up with this type of headache, however, they tend to appear when he gets tired or worked up.

[99] The plaintiff stated that his headaches can be aggravated by certain visual stimuli and certain lighting. They tend to get worse as the demands on him grow

during the day and he starts to get fatigued. Generally, after about three hours at work his headaches become “intolerable.”

[100] There is no dispute between the experts that the plaintiff suffers from headaches caused by the accidents. The defendants concede this point.

[101] Dr. Robinson, a headache specialist, diagnosed the plaintiff with persistent post-traumatic headaches related to the MTBI. Dr. Robinson noted that most patients’ post-traumatic headaches from motor vehicle accidents are a result of neck injury; however, the plaintiff’s neck complaints were relatively minor at the time he saw Dr. Robinson.

[102] Dr. Anton’s opinion is similar to Dr. Robinson’s. In his view, the plaintiff’s headaches are post-traumatic and are caused by the MTBI and/or the neck injury.

[103] Dr. Barton attributed the plaintiff’s headaches to post-concussion syndrome.

[104] Dr. Bentley diagnosed the plaintiff with post-traumatic headaches related to the MTBI.

[105] I find that the plaintiff suffers from post-traumatic headaches as a result of the accidents. These headaches are caused by the MTBI and neck injuries that the plaintiff sustained in MVA1. I accept that the plaintiff suffers from two types of headaches, one that emanates from the base of his neck and one that occurs at the front of his head. The headaches at the base of his neck are not constant and get triggered at the end of the day when the plaintiff’s fatigue and/or neck pain increases. He has not experienced much improvement with these headaches. The frontal headaches are more constant and problematic, but have improved over time with treatment, specifically Botox and, more significantly, Qulipta. The plaintiff’s headaches are generally aggravated by work, fatigue, certain visual stimuli, and certain lighting.

Otolaryngology Injuries

[106] The plaintiff's testified that he has experienced dizziness and tinnitus since MVA1. The plaintiff said that he initially experienced dizziness every day. These symptoms have improved with vestibular rehabilitation therapy; however, he finds that his symptoms worsen if he pauses the rehabilitation for more than a couple of weeks. The plaintiff also notices that his dizziness is aggravated when he is fatigued.

[107] The plaintiff described the tinnitus as a constant tone. He stated that the tinnitus has not improved; however, he has found ways to manage it, including using a sound generator and noise-cancelling headphones.

[108] Dr. Dumper diagnosed the plaintiff with the following conditions caused by the accidents:

a) Persistent Postural-Perceptual Dizziness;

b) Tinnitus; and

c) Central Auditory Processing Disorder.

[109] Persistent Postural Perceptual Dizziness is an umbrella term which includes a condition called visual vestibular mismatch. Dr. Dumper explained that a person's balance system incorporates three different systems that allow a person to be balanced. In general, people rely on their vestibular system as their baseline balance system. In Dr. Dumper's opinion, the plaintiff's vestibular system was injured in the accident and his brain switched to using his visual system as his baseline balance system. Dr. Dumper explained that the visual system is not as good at managing day to day stimuli and gets overwhelmed, causing the symptoms that the plaintiff describes.

[110] Central Auditory Processing Disorder is a disorder which causes a patient to have difficulty hearing or understanding auditory cues, despite having normal hearing. It is not a disorder of the hearing system, but rather of the brain. In Dr.

Dumper's opinion, the plaintiff's Central Auditory Processing Disorder is related to his brain injury.

[111] Dr. Dumper was not cross-examined. I accept his opinion as well as the plaintiff's evidence on this issue. I find that as a result of MVA1, the plaintiff suffers from Persistent Postural Perceptual Dizziness, which has improved significantly; tinnitus, which has not improved but is well-managed; and Central Auditory Processing Disorder.

Visual Symptoms

[112] The plaintiff describes issues with vision, including double vision and difficulty reading, along with light sensitivity.

[113] The plaintiff says that his light sensitivity has improved but has not gone away completely. To manage his light sensitivity, the plaintiff keeps interior lighting quite dim. He modified his office by removing florescent lighting and installing dimmable pot lights. He also wears tinted glasses at times.

[114] To help with double vision, the plaintiff has been prescribed special prism lens glasses.

[115] Dr. Barton is the only neuro-ophthalmologist that provided an opinion. In his view, the plaintiff's light sensitivity and convergence insufficiency (i.e. blurry and double vision) are caused by the MTBI that the plaintiff sustained in MVA1.

[116] I accept the plaintiff's evidence about his vision-related symptoms, as well as Dr. Barton's opinion that these symptoms are caused by MVA1.

Psychological Injuries

[117] The plaintiff presented significant evidence regarding the psychological and personality changes he has experienced since MVA1.

[118] The plaintiff testified that shortly after MVA1 he started experiencing panic attacks and symptoms of anxiety (including driving anxiety) and depression.

[119] The plaintiff said that following MVA1 he was having panic attacks about once or twice a week. The panic attacks worsened after MVA2. The plaintiff testified that he felt like he was in a constant panic attack for about two days after MVA2. The panic attacks improved significantly around 2022. The plaintiff feels that the precursors to the panic attacks are still present; however, he has developed a number of strategies to recognize and stave off a panic attack. These include breathing techniques, redirecting his attention, and flicking his knee with his finger.

[120] The plaintiff's evidence is that he started feeling anxiety after MVA1. He describes it as a worry that comes over him. His anxiety worsened after MVA2 and caused him to excessively and unreasonably worry that something would happen to his family. He also worries about driving and his investments. He has experienced improvement with his anxiety, but he still gets anxious about twice a week.

[121] The plaintiff also experienced driving-related anxiety for a period of time after MVA1. For a while, he had difficultly driving through the intersection where MVA1 happened, which was located close to his home. The driving-related anxiety ultimately went away.

[122] The plaintiff has also experienced depression since MVA1. He describes his depression as feeling sad and unloved, being highly emotional, and feeling like he is out of place or an imposter. The plaintiff said that his depression has improved since MVA1, but that he still experiences it from time to time.

[123] The plaintiff experienced nightmares about MVA1 for about 1.5 to 2 years post-accident.

[124] The plaintiff testified to experiencing significant personality changes since MVA1. He says that he is agitated, quick to anger, mean, difficult, frustrated, impatient, unreasonable, and argumentative. He says that he changed from someone who was very social and great with people, had lots of friends, and was close with his family, to someone who is anti-social, gets into fights with those around him, and is contemptible. This, he says, has caused him to have a falling-out

with many of his friends, business partners, and most significantly, his family – including his brother. He feels that because of his personality changes, he is a poor father, husband, brother, and son. While the plaintiff has experienced improvement in most of his psychological conditions, he feels that his personality changes have not improved.

[125] Almost all the plaintiff's friends and family who testified described profound changes in his personality since MVA1. I will not summarize all of the evidence from all of the witnesses. Rather, I will summarize the most significant evidence from the witnesses who were best placed to observe changes in the plaintiff's mood and personality.

[126] Ms. Poonia, the plaintiff's wife, testified that since the accidents the plaintiff is mostly angry all the time. She said that he is generally better in the morning, but in the afternoon, she has to think carefully about what she says to him to avoid angering him. Ms. Poonia feels like she is stuck in a situation where she cannot talk to him because of his angry outbursts. She testified that his level of anger and the triggers for his anger are not normal. She said she usually tries to be quiet and not say anything, out of concern for her husband's angry outbursts. Ms. Poonia testified that the plaintiff's relationship with his kids has changed – he is no longer involved with any of their activities and shows no interest in talking to them about their schooling. Ms. Poonia observed that the plaintiff gets angry and upset with the kids, so they have stopped talking to him about their problems. Ms. Poonia feels like she has lost her husband and that their kids have lost their father.

[127] Ms. Poonia said that since the accidents, the family has been unable to participate in many of the activities they used to do together, as the plaintiff has a hard time tolerating crowded places and longer activities. She described a family vacation to an all-inclusive resort in Mexico in 2022, which had to be cut short by several days because of the plaintiff's headaches.

[128] Although Ms. Poonia has observed some improvement in his function and his symptoms such as headaches, his anger has not improved.

[129] The plaintiff's sister said her relationship with the plaintiff has completely changed due to his personality. Ms. Mann characterized him as mean and angry all the time. She testified that she cannot talk to him about anything that could potentially lead to a disagreement. Ms. Mann described an incident that occurred a few years ago, in which she referred to the plaintiff's home as belonging to their father, which caused the plaintiff to become enraged and scream at Ms. Mann at the top of his lungs. Ms. Mann was afraid that he was going to hit her. Ms. Mann said that after the incident, she no longer talks to him unless required.

[130] Ms. Mann said that prior to the accident she and the plaintiff were very close. Their relationship today is nearly non-existent. Nonetheless, based on her observations, she has seen some improvement in his personality changes.

[131] The plaintiff's brother testified that after the accident his relationship with the plaintiff changed significantly. At the time of MVA1, Randeep lived in the plaintiff's house and worked fairly closely with him. After the accidents, Randeep stopped working with the plaintiff and moved out of the house due to the plaintiff's personality changes.

[132] Randeep testified that he does not want to be around his brother anymore and does not have much to do with him. He says his brother has become really angry and has nothing good to say. Randeep explained that the plaintiff belittles him and other members of his own family. He yells and screams at family members for no good reason. When asked why he stopped working for the plaintiff, Randeep said that no amount of money was worth having to deal with how the plaintiff makes him feel. He loved working with the plaintiff before MVA1, but he could no longer do it after the accidents. Similarly, Randeep testified that he moved out of the family home because he could not tolerate how the plaintiff speaks to him and the rest of the family. Randeep testified that he has not seen much improvement in the plaintiff's symptoms.

[133] The plaintiff's long-time friends Mr. Johal and Mr. Yu also described the plaintiff's significant personality changes after the accidents. Mr. Johal testified that

he and the plaintiff had an incident where they got into a heated text message argument. He said that the plaintiff was quite belittling, hurtful, and demeaning. They stopped talking for a period of time but eventually reconciled. Mr. Johal said that the plaintiff continues to have a short fuse. Mr. Yu testified that he feels like the plaintiff is a completely different person. He will message the plaintiff and there will be a significant delay in getting a reply, which is very different than the plaintiff's conduct before MVA1. He said that the plaintiff is quick to anger and gets in arguments with people for no apparent reason.

[134] With the exception of Brett Sherwood and Mr. Yu, the witnesses who were business associates or colleagues of the plaintiff did not describe dramatic personality changes, although they did testify to changes in the plaintiff's cognition and business acumen (as set out below). However, Mr. Sherwood, the plaintiff's business associate, testified that after the accidents he felt like he was in an abusive relationship with the plaintiff.

[135] Dr. O'Shaughnessy assessed the plaintiff on July 11, 2018 (prior to MVA2) and on December 3, 2021. In his 2018 report, Dr. O'Shaughnessy diagnosed the plaintiff with post-traumatic stress disorder (PTSD) and major depressive disorder. In his opinion, both these disorders were caused by MVA1. In his 2021 report, Dr. O'Shaughnessy noted that the plaintiff's reported increase in anxiety following MVA2 was entirely expected given his PTSD following MVA1. Dr. O'Shaughnessy observed that at the time of the 2021 assessment, the plaintiff continued to experience significant levels of anxiety, but that his symptoms of PTSD had improved. Dr. O'Shaughnessy further noted that the plaintiff's symptoms of depression had improved but had not completely gone away.

[136] Dr. Smith assessed the plaintiff on September 21, 2021. He diagnosed the plaintiff with PTSD, insomnia disorder, and persistent depressive disorder with a current episode of major depressive disorder. He noted that at the time of the assessment, the plaintiff was continuing to experience severe symptoms of anxiety and PTSD, and moderately severe symptoms of depression. Dr. Smith's opinion in

his first report was that the plaintiff had a pre-existing susceptibility to developing anxiety and depression following trauma and that his PTSD and insomnia were likely not caused by the accidents but rather were ‘reactivated’. He reached this opinion due to reports that the plaintiff experienced mixed symptoms of anxiety and depression after three previous motor vehicle accidents in 1993 and 1999. Dr. Smith did not note any change to his opinion on causation in his second report.

[137] I find that as a result of the accidents, the plaintiff suffers from the following psychiatric disorders:

a) Depression;

b) PTSD; and

c) Insomnia Disorder.

[138] Although Dr. Smith referenced records noting that the plaintiff experienced symptoms of anxiety and depression following previous accidents in 1993 and 1999, those records were not in evidence nor was the plaintiff asked about this at trial. As such, the defendants have not proven these facts.

[139] I do, however, find as a fact that in the months leading up to MVA1, the plaintiff was experiencing some symptoms of anxiety, insomnia, and reduced energy. Nevertheless, there was no indication that these symptoms were of a severity or persistence that would result in a diagnosis of any psychiatric disorder. While the plaintiff was taking some medication to help him sleep and was taking testosterone to help with his energy levels, he was receiving no other treatment for these issues. The plaintiff indicated that his diagnosis and treatment for kidney cancer caused him anxiety. In my view, these symptoms were likely situational and temporary. There was no evidence, lay or opinion, which established that but for the accidents the plaintiff would have ongoing symptoms of anxiety or would experience significant symptoms of insomnia or fatigue.

[140] As such, I find that the accidents caused the plaintiff's psychiatric disorders, and that the defendants have not established that any reduction in damages is warranted.

[141] In addition, based on the evidence of Dr. O'Shaughnessy, the plaintiff, and the plaintiff's family, friends, and business colleagues, I find that the plaintiff's psychiatric disorders, headaches, and pain from the accidents caused the plaintiff's personality changes.

Cognitive Symptoms

[142] The plaintiff testified to experiencing a number of cognitive issues since MVA1. More specifically, he says that he has problems with memory, reading, and retaining information. He is generally sharper in the morning; however, as the day progresses his cognition deteriorates. The plaintiff testified that he gets confused and has difficulty remembering names and conversations.

[143] Ms. Poonia testified that since MVA1 the plaintiff is forgetful. She notes that she often must repeat things several times for the plaintiff.

[144] Rebecca Rauscher was the plaintiff's initial treating occupational therapist. She started working with him in February 2017, soon after MVA1. When she first started treating the plaintiff she observed him to have cognitive issues, such as difficulties with word-finding, tangential speaking, and forgetfulness. He also exhibited signs of anxiety as he expressed thoughts of doom for himself and his family. In addition, shortly after MVA1 she observed the plaintiff to have difficulties with self-care and making simple meals. Ms. Rauscher worked with the plaintiff for about 18 months. During that time, she said the plaintiff was very engaged in his rehabilitation. They worked on strategies to manage his forgetfulness, such as using a weekly planner, the alarm function on his phone, and to-do lists. They also did some cognitive behavioral therapy and other relaxation and mindfulness strategies to help with his depression and anxiety symptoms. She noticed improvements in all his symptoms during those 18 months.

[145] Stephen Epp is an occupational therapist who worked with the plaintiff from early 2019 until the fall of 2022. During the 2.5 years he treated the plaintiff, Mr. Epp observed the plaintiff's primary deficit to be difficulty with processing information and decision-making. Mr. Epp noticed the plaintiff to have difficulty coming up with solutions to what he would consider to be everyday problems. He testified that he found the plaintiff to be very cognitively impaired, in that he would get easily overwhelmed with tasks. Mr. Epp said that on occasion the plaintiff would leave voicemails for him in the evening saying he did not know how to handle certain issues. Mr. Epp would sometimes call him back and walk him through strategies to deal with the issue. Mr. Epp noted that the plaintiff would require him to repeat simple concepts and to express things in a very basic manner. He said they could talk about various simple concepts for an hour and the plaintiff might only remember one thing from the conversation.

[146] Mr. Epp testified that the plaintiff's main problem from a functional perspective is that his psychological and personality issues, coupled with his headaches and pain, cause him to be an inconsistent and unreliable worker. Mr. Epp observed that the plaintiff would get more fatigued in the afternoon and would become angry, irritated, and difficult to deal with. This caused him to get into more conflict with family members, colleagues, and workers. Mr. Epp developed strategies for the plaintiff to address these issues, which included moving work-related and relationship-related activities to the mornings, assigning more work to support staff, working with other rehabilitation and health care professionals, adding vacations, and prioritizing family time.

[147] Mr. Epp said that the plaintiff was very engaged in his rehabilitation. He stated that his main goal was to increase the plaintiff's work hours. The plaintiff's work hours generally ranged from four to six hours a week and were as low as zero to two hours a week at some points. Working with Mr. Epp, the plaintiff was able to get his hours up to about five to ten hours a week. Their goal was to have the plaintiff get up to about 10 to15 hours a week, which they were not able to achieve.

[148] All the medical experts that opined on this issue agree that the plaintiff's cognitive complaints are caused by the accidents; however, they disagree on what specific injuries or conditions are the cause.

[149] Dr. Barton's opinion is that the plaintiff's cognitive problems, including problems with attention and short-term memory, are caused by post-concussion syndrome.

[150] Dr. Robinson's opinion is that the plaintiff's difficulties with concentration and memory are directly related to his anxiety. He does not believe that the plaintiff suffered an MTBI of a magnitude that would result in persisting cognitive symptoms.

[151] Dr. Bentley's opinion is that the plaintiff has persisting neurocognitive sequelae (i.e., aftereffects) from his concussion.

[152] Dr. Smith's opinion is that any cognitive problems that the plaintiff is experiencing are not due to an MTBI but are probably due to major depression, ongoing pain, and PTSD.

[153] In my view, the cause of the plaintiff's cognitive problems is best explained by Dr. Anton. In his first report, Dr. Anton noted the complicated relationship between chronic pain and psychological conditions. Specifically, chronic pain may exacerbate or cause psychological symptoms, and psychological conditions may in turn amplify chronic pain. In addition, Dr. Anton notes the complicated relationship between cognitive and emotional symptoms caused by MTBI and psychological conditions. MTBI symptoms may be exacerbated and perpetuated by psychological conditions. Moreover, chronic pain can also contribute to cognitive symptoms after MTBI. In his second report, Dr. Anton says that while he cannot completely rule out the possibility that residual effects of the MTBI are contributing to cognitive symptoms, his opinion is that the plaintiff's current cognitive complaints probably arise from multiple factors which include pain and headaches affecting his attention, and psychological disruption of cognitive function caused by anxiety, depression, and fatigue.

Nevertheless, whatever its cause, Dr. Anton's opinion is that the plaintiff's cognitive complaints can be attributed to the effects of the accidents.

[154] In sum, I find that the plaintiff's cognitive complaints, including difficulties with memory, word-finding, absorbing and retaining information, making decisions, and problem-solving are caused by the injuries he sustained in the accidents. Specifically, I find that his cognitive symptoms are caused by a combination of his headaches (which are partially caused by his MTBI), chronic pain, psychological symptoms, and fatigue.

Summary of Findings on the Plaintiff's Injuries

[155] To summarize, I find that the plaintiff sustained the following injuries, disorders, and conditions due to the accidents:

a) MTBI;

b) Soft tissue injuries to the neck, back, and left shoulder;

c) Posttraumatic headaches;

d) Persistent Postural Perceptual Dizziness;

e) Tinnitus;

f) Central Auditory Processing Disorder;

g) Depression;

h) PTSD; and

i) Insomnia Disorder.

[156] These injuries cause the plaintiff to experience the following symptoms:

a) Chronic pain;

b) Light sensitivity;

c) Double vision and reading difficulty;

d) Noise sensitivity;

e) Dizziness;

f) Mood disruption;

g) Anxiety;

h) Cognitive issues;

i) Personality changes; and

j) Fatigue.

[157] I find that the plaintiff's back, left shoulder, and left shoulder girdle injuries have resolved. The plaintiff continues to suffer from his neck injury, although with improved symptoms. At present, his neck pain is in the form of a dull ache and tends to develop as the day goes on and he gets more tired.

[158] I find that the plaintiff's headaches, visual symptoms, and (to a lesser degree) cognitive symptoms, are the only ongoing residual effects of his MTBI.

[159] I find that the plaintiff continues to suffer from two types of headaches: one that originates from the base of the skull and another that is at the front, top part of his head. The plaintiff has not had much improvement in the first type of headaches; however, these headaches are not constant. Although he generally does not wake up with this headache, he does usually experience it at some point every day.

[160] The plaintiff has had significant improvement with the second type of headaches, first with the introduction of Botox treatments and then significantly with Qulipta medication, which he started taking in 2022 or 2023. Nevertheless, at present he continues to experience the second type of headache on a constant, but low-grade basis which he rates as a two out of ten level of pain. Prior to taking Qulipta, that headache could get as high as a six out of ten.

[161] I find that the plaintiff's light sensitivity and double vision symptoms have not resolved, but are managed by the plaintiff being mindful of lighting and using prism glasses.

[162] I find that the plaintiff's vestibular symptoms have improved and can be managed provided that he engages in vestibular rehabilitation. His tinnitus is ongoing, but is managed with sound generators and headphones.

[163] I find that the plaintiff's psychological symptoms continue, albeit with improvement. His panic attacks have stopped, largely because he employs strategies to recognize and stave them off. He continues to experience symptoms of depression and anxiety and continues to have difficulty with sleep. He continues to deal with personality changes and issues with anger, emotional deregulation, agitation, and irritability; however, some witnesses described some improvement. Any improvement in these symptoms are due to treatments, headache improvement, and employing strategies he has learned from his treatment professionals.

[164] I find that the plaintiff continues to experience cognitive symptoms, including difficulties with memory, word-finding, absorbing and retaining information, decision making, and problem-solving. I find that he has experienced improvement with these symptoms by employing strategies he learned from Ms. Rauscher and Mr. Epp, and as his headache symptoms improved with new medication.

Prognosis

[165] In terms of prognosis, Dr. Anton's opinion is that the plaintiff could still improve with a positive response to further treatment, especially treatment focused on his psychological symptoms. Nevertheless, given the chronic nature of the plaintiff's symptoms, the limited response to treatment thus far (as of January 2022), and the complicated role of psychological factors, in his opinion, the plaintiff will be left with permanent symptoms, activity limitations, and disability.

[166] With respect to the prognosis for the plaintiff's headaches, Dr. Robinson noted in his November 2021 report that the plaintiff will probably suffer from

posttraumatic headaches indefinitely. He observed that the plaintiff had experienced substantial improvement in his “excruciating headaches” with Botox, but that the addition of a medication called Aimovig did not add any additional improvement. Dr. Robinson said that it was possible, but not likely that he would experience further improvement if he replaced Aimovig with a different medication of the same class. Dr. Robinson’s opinion was that the plaintiff could experience improvement if his anxiety was more successfully managed.

[167] Dr. Dumper noted that the plaintiff’s dizziness had significantly improved. He expects that it will continue to improve. He suspects that the plaintiff will continue to experience tinnitus and Central Auditory Processing Disorder. Dr. Dumper was hopeful that the plaintiff could better manage the impacts of tinnitus with further retraining therapy. He was unable to provide a prognosis for the Central Auditory Processing Disorder.

[168] In his 2021 report, Dr. Barton was optimistic that the plaintiff could further improve his headaches with Botox, given that the plaintiff had experienced significant improvement with Botox thus far. He noted that while the plaintiff had experienced improvement in his panic attacks and anxiety, those conditions remained amongst his main challenges. Nevertheless, Dr. Barton indicated that with further improvements to his headaches, anxiety, and pain, the plaintiff can expect further improvement in cognitive function. Dr. Barton noted that the plaintiff’s light sensitivity had improved more than his noise sensitivity. His opinion was that these symptoms would persist indefinitely. In addition, he believed that the plaintiff’s double vision had not improved and is likely permanent.

[169] Dr. Bentley’s opinion is that the plaintiff has reached “maximum medical recovery.”

[170] With respect to psychiatric injuries, Dr. O’Shaughnessy’s opinion is that the plaintiff’s mental state could be slightly improved through a combination of switching medications and more direct psychological interventions (i.e. more structured cognitive behavioral therapy). Dr. O’Shaughnessy had initially made these

recommendations in 2018; however, they were not pursued by the plaintiff. Dr. O'Shaughnessy's opinion is that it is unlikely that the plaintiff will ever return to his pre-accident level of functioning. Nonetheless, he believed it was possible for the plaintiff to improve his work function if his energy and motivation were improved with medication or if his neck pain and headaches diminished. Dr. O'Shaughnessy agreed with Dr. Anton's opinion about the complexity of the interactions between anxiety, depression, and chronic pain and noted that it is possible that the plaintiff will experience some improvement with his chronic pain with more aggressive management of his anxiety and mood. However, Dr. O'Shaughnessy stated that he fully expects the plaintiff will experience ongoing difficulties with chronic pain, as well as some degree of anxiety and depression for the foreseeable future.

[171] Dr. Smith's opinion is that the plaintiff has not received effective psychiatric management of his psychiatric conditions. He is confident that the plaintiff will experience considerable improvement if he changes his antidepressant medication, vigorously exercises, and can better treat his insomnia. If he does not respond to different anti-depressant medication, Dr. Smith says the plaintiff could consider other interventions such as repetitive transcranial magnetic stimulation, ketamine, or electroconvulsive therapy. Dr. Smith also recommends that the plaintiff be under the regular care of a psychiatrist and be assessed by a psychologist. Despite his positive outlook, Dr. Smith cautions that a prognosis is a prediction and, like all predictions, is far from certain.

[172] Determining the plaintiff's prognosis is challenging for several reasons. First, as Dr. Anton notes, there is an interplay between the plaintiff's chronic pain, psychological, and cognitive symptoms. These symptoms can be mutually exacerbating and perpetuating. Therefore, in order to get overall improvement, each individual injury and symptom will likely need to be addressed and improved.

[173] Second, although the plaintiff has engaged in considerable treatments at significant cost, he has not followed up on two key treatment recommendations made by Dr. O'Shaughnessy, whom he first saw in July 2018 at the request of his

own counsel. Dr. O'Shaughnessy recommended that the plaintiff be referred to a treating psychiatrist and noted that the plaintiff would likely require more complicated pharmacological intervention given that he had limited response to the antidepressant that he was taking. Dr. O'Shaughnessy recommended that in the interim, the plaintiff be switched from his current antidepressant, Paxil, to an SNRI such as Cymbalta or Effexor. He recommended the switch because SNRIs are effective not only for the management of PTSD, anxiety and depression, but also may assist in the management of neck pain and headaches. On cross-examination, Dr. O'Shaughnessy noted that while the plaintiff may get some improvement by altering his antidepressant medication, it is uncertain whether the improvement will be significant, and that at this point the focus is more about managing flareups. However, he reiterated that there is good evidence that SNRIs can assist with chronic pain.

[174] Dr. O'Shaughnessy also recommended that the plaintiff engage in more formal cognitive behavioural therapy.

[175] Thus, while all the experts except Dr. Smith do not believe the plaintiff is likely to experience significant improvement in his symptoms, there are still treatments that the plaintiff has not undertaken which could result in some amount of improvement.

[176] Third, all the medical legal reports admitted into evidence are somewhat dated; the most recent reports are all dated late 2021 to early 2022. Importantly, the plaintiff did not start taking Qulipta until after all the updated reports were drafted. None of the reports account for Qulipta's significant improvement to the plaintiff's headaches – his most problematic physical injury.

[177] In my view, given that the plaintiff has improved since the reports were drafted, his prognosis is more positive than what the experts have indicated. That said, I do not accept Dr. Smith's fairly positive prognosis, which is an outlier amongst all the medical experts. I do note that Dr. Smith acknowledges that his prognosis is merely a prediction and lacks certainty.

[178] I find that if the plaintiff follows the recommendations of Dr. O'Shaughnessy and engages in structured cognitive behavioural therapy,[1] and switches from his current antidepressant medication to an SNRI, there is a real and substantial possibility that he will experience improvement in his psychological and emotional symptoms.

[179] Given the interplay between chronic pain, psychological symptoms, and cognitive symptoms, I find that an improvement in the plaintiff's psychological symptoms will also lead to an improvement in the plaintiff's chronic pain (including headaches), as well as his cognitive symptoms. Although I find a real and substantial possibility of improvement in the plaintiff's overall symptoms, there is no expert evidence to support an argument that any of the plaintiff's ongoing symptoms will completely go away.

[180] I will address the implications of these conclusions on the plaintiff's prognosis under the relevant heads of damages.

NON-PECUNIARY DAMAGES

[181] In *Langford (City) v. Matthews*, 2024 BCCA 214, Madam Justice Horsman (for the Court), helpfully summarizes the applicable law as follows:

> [44] Non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, including the loss of amenities and enjoyment of life: *McCliggot* at para. 43. The amount of an award for non-pecuniary damages is determined by a functional approach that does not depend solely on the gravity of the injury, but also on the circumstances of the particular plaintiff: *McCliggot* at para. 44. While an assessment of comparator awards is important, damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26. In British Columbia, the assessment of non-pecuniary damages is generally guided by the non-exhaustive list of factors set out by this Court in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include the plaintiff's age, the nature of the injury, the severity and duration of pain, level of disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of physical and mental abilities, and loss of lifestyle.

[1] I note that the plaintiff did engage in some cognitive behavioural therapy with Ms. Rauscher. Dr. O'Shaughnessy's opinion is that the plaintiff requires a more structured form of cognitive behavioural therapy.

[182] The plaintiff claims $250,000.00 in non-pecuniary damages. In support of this claim, he relies on the following cases:

a) *Cheng v. Mangal,* 2021 BCSC 954 ($225,000.00);

b) *Ponych v. Klose*, 2023 BCSC 1504 ($250,000.00);

c) *Timms v. Lucaben*, 2023 BCSC 1119 ($235,000.00); and

d) *Wallman v. John Doe*, 2014 BCSC 79 ($262,547.00 adjusted for inflation).

[183] The defendants submit that the appropriate range for non-pecuniary damages is $180,000.00 to $200,000.00. In support of their position they rely on the following cases:

a) *Conarroe v. Tallack*, 2020 BCSC 626 ($180,000.00);

b) *Meckic v. Chan*, 2022 BCSC 182 ($190,000.00);

c) *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 ($180,000.00); and

d) *Redmile v. Beaulieu*, 2019 BCSC 1571 ($180,000.00).

[184] Both parties were helpful in providing cases where the plaintiffs had largely similar injuries and circumstances to Mr. Poonia. Of the cases provided by the plaintiff, I found *Cheng* and *Timms* to be fairly analogous to the circumstances of this case. In contrast, the plaintiff in *Ponych* suffered more significant injuries than Mr. Poonia and *Wallman* is dated. With the exception of *Pololos v. Cinnamon-Lopez*, which was too dated, I found all of the defendants' cases to be fairly analogous.

[185] I am reminded that while comparable cases can be helpful in assessing non-pecuniary damages, they serve only as a rough guide; each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189; *Hau v. Patterson*, 2020 BCSC 1069 at para. 75.

[186] Prior to MVA1, the plaintiff was largely in good health. He had undergone a previous surgery on his left shoulder, and in the weeks leading up to MVA1 was recovering from kidney cancer and a kidney removal surgery. In the months leading up to MVA1, the plaintiff was dealing with some anxiety related to the cancer diagnosis, as well as some difficulty sleeping and fatigue. The plaintiff recovered well from the surgery and is cancer free. His anxiety was situational and related to his cancer diagnosis. His left shoulder was not causing him any significant problems, nor were his sleep issues and fatigue. Most significantly, the plaintiff had no functional or cognitive limitations. His businesses were growing, he was fostering important business relationships, and he was leveraging his success to be a mentor for others. At home, the plaintiff enjoyed a very close-knit and rich family life. He and his wife had a happy marriage. The plaintiff was an active and loving father and uncle. He was very close with his parents and siblings.

[187] The accidents have had a profoundly negative impact on the plaintiff's life. Physically, he experiences chronic headaches, which are often debilitating. He continues to experience light and noise sensitivity. He is depressed and anxious. Additionally, he continues to have cognitive issues, including impaired memory, word finding and problem-solving abilities. Perhaps most significantly, his personality has completely changed. Prior to the accidents, the plaintiff was extroverted and easily connected with others. He described that as his "superpower". Since the accident, the plaintiff has become angry, irritable, and socially withdrawn. He has difficulty regulating his emotions. Those closest to him avoid him if they can and walk on eggshells if they cannot. He is unable to work full-time, and no longer enjoys his work, which had been a source of passion and pride for him prior to MVA1. He has had fallings-out with his brother and sister. His relationship with his wife and kids has been especially damaged, possibly irreparably. In sum, the impact of the plaintiff's injuries on his family, both immediate and extended, has been devasting. Although some witnesses report that the plaintiff's accident-caused personality problems have improved to some degree, they continue to significantly impact almost all of his relationships. Fortunately, the plaintiff has some self-awareness of the impact of his personality changes, which may help him work on improving them. However, it was

apparent from his testimony that the plaintiff also has shame and guilt over the pain that his personality changes have brought to his family.

[188] In my view, after considering the cases provided (and factoring in inflation on the awards in those case), as well as the plaintiff's pre-accident health, his injuries, the impact of his injuries on his life, and his prognosis, an award of $220,000.00 is appropriate. This reflects an award of $275,000.00 minus a 20% contingency to reflect the real and substantial possibility that the plaintiff's overall symptoms will improve with additional recommended treatment.

[189] I pause to note that Dr. Nigro provided an opinion on the likelihood of the plaintiff's kidney cancer returning and the likelihood of death if it reoccurs. Dr. Nigro's opinion is that the plaintiff has an 11% chance of developing metastatic kidney cancer in the next 5 to 10 years and a 16.6% chance in the next 15 years. Dr. Nigro stated that if the plaintiff developed kidney cancer again, he would almost certainly pass away within 10 years. Dr. Nigro's evidence could provide a basis for a negative contingency for damages. Nevertheless, I did not receive any submissions on what use I should make of Dr. Nigro's opinion. Thus, I decline to apply any contingencies based on Dr. Nigro's opinion.

PAST LOSS OF INCOME EARNING CAPACITY

[190] The plaintiff claims $4,200,000.00 (gross) in past loss of income earning capacity.

[191] At the time of MVA1, the plaintiff was a businessperson with three primary income streams. First, he pursued real estate development opportunities through Three Lion Investments and Centurion Property Group. Second, he engaged in custom and "spec" home building and renovation through Sachin Capital Corporation. Third, he was retained as a consultant with Green Mountain Jade, a mining and exploration company.

[192] The plaintiff submits that as a result of the accidents, his ability to work was significantly impaired and he consequently suffered a loss of income and income earning opportunities in all three of his income streams.

[193] The defendants concede that the plaintiff's ability to earn income prior to trial was impaired by the accidents; however, they submit that much of the plaintiff's claim for lost income and loss of opportunities is speculative. They submit that an appropriate award under this head of damage is $210,000.00.

[194] In *Lamarque v. Rouse*, 2023 BCCA 392, Madam Justice Horsman (for the Court), helpfully summarizes the applicable law as follows:

> [29] An award of damages for loss of past earning capacity compensates the claimant for the loss of the value of the work they would have, not could have, performed, but were unable to perform due to the accident-related injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The standard of proof for past hypothetical events is: whether there is a "real and substantial possibility" that the events would occur: *Grewal v. Naumann*, 2017 BCCA 158, at para. 48; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. If the claimant establishes a real and substantial possibility, the court must then determine the measure of damages by assessing the likelihood of the event: *Grewal* at para. 48.
>
> [30] In many cases, a claimant's actual lost income will be the most reliable measure of a loss of earning capacity. However, there is no hard and fast rule that only loss of actual income is compensable. It must be remembered that it is not the actual lost income that is compensable, but the loss of capacity: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. An award of damages for past loss of earning capacity compensates a claimant for any pecuniary loss resulting in an inability to work, and evidence supporting such loss can take different forms. In *Ibbitson*, for example, the plaintiff, who worked in the forest industry, maintained his pre-accident level of income by working longer hours. Thus, he was found to have suffered a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20–21.

[195] I find that the plaintiff's ability to earn income prior to trial was impaired by his accident-caused injuries.

[196] The Court heard considerable evidence, both lay and expert, which established that the plaintiff's injuries significantly impacted his functioning and ability to work.

[197] The plaintiff testified that since MVA1 he has only been able to work part-time hours. His tolerance for work is currently limited to about three hours per day. After that, his symptoms worsen to the point where he is no longer productive. Specifically, he states that his neck pain, headaches, tinnitus, dizziness, and anxiety increase as the day progresses. As his symptoms increase, he becomes tired, agitated, angry, short-tempered, and frustrated. By the end of the morning, the plaintiff is no longer able to productively complete tasks, other than going through emails. He testified that he goes home by the afternoon.

[198] The plaintiff testified that his emotional issues and personality changes cause him to be unreasonable and argumentative, which has led to several fallings-out with business partners, clients, and colleagues.

[199] Ms. Rauscher started occupational therapy with the plaintiff shortly after MVA1. She testified that the plaintiff was working a very minimal amount at that time. She would visit him at his office for their sessions. She observed that his lights were kept low. Ms. Rauscher noticed that the plaintiff had difficulty responding to his work emails, which she said were complex in nature. She noted that he had a hard time understanding what people were asking of him in emails. In addition, she observed problems with word-finding, memory, and managing agitation and frustration. Over the course of the 18 months that they worked together, Ms. Rauscher did observe him to show improvement.

[200] As noted above, Mr. Epp was the plaintiff's occupational therapist for about 2.5 years from February/March 2019 until the fall of 2022. When Mr. Epp started working with the plaintiff, the plaintiff was initially able to increase his working hours to around 4–6 hours per week. The plaintiff then had a setback and reduced his hours to about 0–2 hours a week but was ultimately able to maintain about 5-10 hours of work per week. Mr. Epp's goal was to increase the plaintiff's work hours to 2–3 hours a day (or 10–15 hours a week). They were not able to achieve this goal. Mr. Epp observed that the plaintiff would get tired in the afternoon and become

angry, irritable, and difficult to deal with. Because of this, they moved his work hours into the morning. He also worked with the plaintiff to delegate more work to his staff.

[201] The plaintiff testified that since he finished working with Mr. Epp, he has been able to further increase his hours to about 2.5 to 3.0 hours a day. This is due to symptom improvement since starting Qulipta, as well as increased delegation of work to his employee, Rekha Phillip.

[202] The plaintiff relies heavily on Ms. Phillip. Ms. Phillip is an accountant who has become the plaintiff's right-hand person. Ms. Philip started working for one of the plaintiff's companies in the summer of 2018. After a maternity leave, Ms. Philip started working more directly with the plaintiff at his office in November 2020. While she has many duties, one of her most significant is serving as a buffer between the plaintiff and almost everyone else. In order to maintain business relationships, Ms. Phillip essentially deals with everyone on the plaintiff's behalf. Ms. Philip testified that she communicates and coordinates with the accountants, lawyers, consultants, tradespeople, and contractors because the plaintiff can get very agitated during conversations. She explained that aside from some initial meetings or discussions on critical matters, the plaintiff does not deal with consultants, as he gets very short tempered if there are any problems.

[203] Ms. Philip testified that since she started working more closely with plaintiff he typically works between 2.0–2.5 hours per day. Ms. Philip said that she generally starts her workday at 9:00 a.m. and the plaintiff arrives at the office around 10:00 to 10:30 a.m. Ms. Phillip meets with the plaintiff every morning for about an hour to brief him and provide him with materials. The plaintiff then makes business decisions and gives Ms. Phillip instructions to carry out.

[204] Ms. Philip testified that it is difficult to predict the plaintiff's mood and capacity. Some days he arrives upset or will leave after 1.5 hours if he is not feeling comfortable. She knows that she generally has a two-hour window in which she can get work done with him. Ms. Philip explained that if the plaintiff is feeling discomfort or is agitated, she will reschedule or move matters to the next day.

[205] Ms. Philip observed the plaintiff to have pain and difficulty focusing at work. After about one or two hours of work, she has seen him exhibiting signs of physical discomfort in his neck and shoulder. She testified that, at times, the plaintiff has difficulty focusing and will request that they revisit something the next day.

[206] As set out above, both Randeep and Mr. Sherwood worked closely with the plaintiff both before and after the accidents. Both had fallings-out with the plaintiff and no longer work with him due to what they describe as the plaintiff's abusive personality.

[207] The medical expert opinions are largely congruent with the lay evidence.

[208] Dr. Mead-Wescott's neuropsychological testing, which took place within a few months of MVA1, showed that the plaintiff had mild to moderate cognitive impairments affecting the following: learning and memory; ability to maintain attention and retain visual information; word-finding ability, visuospatial skills; and, to some extent, executive functioning (particularly relating to emotional and behavioral control, complex decision making, and organization). Dr. Mead-Wescott also noted that the plaintiff exhibited signs of depression, anxiety, and post-traumatic stress.

[209] Dr. Mead-Wescott described several ways in which the plaintiff's cognitive impairments affect his work. She noted that the nature of the plaintiff's work is highly cognitively demanding and involves high stakes. His business success requires others to have confidence in him and this confidence may wane if his struggles become obvious to associates and clients. She indicates that his difficulties with memory, visual attention, and verbal communication can all be expected to impact his ability to remember information and to communicate in a precise way. The difficulties that the plaintiff reported with decision making can be traced to a breakdown in many areas, including remembering important details, keeping track of the various options, and being able to organize thoughts and facts in a coherent way. These issues, Dr. Mead-Wescott notes, will be exacerbated under conditions of high stress or fatigue. In addition, depression and anxiety can negatively impact the

decision-making process. Finally, a lack of emotional regulation also has the potential to be highly detrimental in the business context.

[210] Dr. Mead-Wescott noted that the plaintiff's best option was to scale back on planned projects, find trusted partners to assist with or take over some of the more complex projects, maintain a more limited schedule, and continue to prioritize his own recovery with the assumption that he will improve over time. She recommended a reassessment in a year.

[211] Dr. Anton noted that the plaintiff has only been able to work part time and relies on others to keep his businesses running. His opinion is that the plaintiff has a permanent disability for work activities.

[212] Dr. Barton declined to give an opinion on the plaintiff's work ability. In his view, the major factors impacting the plaintiff's ability to work are headaches, neck pain, and anxiety, which are all problems outside his speciality.

[213] Dr. Robinson noted that the nature of the plaintiff's symptoms and headaches are subjective. There is no objective way to measure or document the presence, absence, or magnitude of these complaints. Thus, the impact of the headaches on the patient's life can only be determined by self-report.

[214] Dr. O'Shaughnessy noted that the plaintiff was not working full-time hours. His opinion was that it is unlikely that the plaintiff will ever be able to return to full-time employment, although it is possible he could increase his hours if his energy and drive are improved with medication or if his neck pain and headaches diminish.

[215] Dr. Dumper noted that the plaintiff's decreased cognitive ability is the impairment that has the most impact on the plaintiff's work.

[216] Dr. Smith noted that it was difficult for him to assess whether the plaintiff is disabled from work, as he needed to review additional records; however, he did indicate that an individual with untreated major depressive disorder would experience difficulty with complex cognitive tasks. After reviewing additional records,

Dr. Smith still did not provide an opinion on disability, other than stating that if the plaintiff followed his recommendations, he would experience considerable improvement in his functioning.

[217] Dr. Bentley's opinion on disability is very narrow. He stated that "from a musculoskeletal perspective," the plaintiff is "not substantially disabled" from his pre-accident employment as a direct result of the accidents. He indicated that "it is anticipated" that the plaintiff "likely meets and exceeds the strength demands of his position with no compromised future productivity in employment."

[218] Dr. Smith and Dr. Bentley's opinions provide little insight into the plaintiff's work capacity.

[219] The plaintiff's experts were largely unchallenged in their opinions on capacity. In my view, Dr. Mead-Wescott, Dr. Anton, and Dr. O'Shaughnessy's opinions are the most helpful to the Court. However, I am again mindful that these reports were drafted prior to the plaintiff taking Qulipta and thus prior to the plaintiff experiencing meaningful improvement in his headache symptoms.

[220] I found the lay evidence (including the plaintiff's evidence) about the plaintiff's work impairments to be generally consistent and credible.

[221] After considering all of the evidence, I find that the plaintiff has suffered a significant impairment of his ability to work as a result of the accidents. I find that the plaintiff's headaches, neck pain, tinnitus, dizziness, fatigue, depression, and anxiety, along with his various cognitive, mood, and personality difficulties negatively impact his ability to accomplish key aspects of his job. These symptoms are aggravated by work and work-related stress and generally get worse as the day progresses. I find that the plaintiff's work hours are impacted by his accident-caused symptoms. Following each accident, the plaintiff was only able to work minimal hours. By working with Mr. Epp, he was able to increase his hours to about 5 to 10 hours a week. The plaintiff has been able to further increase his hours to about 12.5 to 15 hours a week (or 2.5 to 3.0 hours a day).

[222] The plaintiff breaks down his $4,200,000.00 claim for past loss of income earning capacity into three categories of loss:

a) $700,000.00 for the inability to complete a consulting contract with Green Mountain Jade;

b) $2,000,000.00 for the inability to participate in a development called the LC; and

c) $1,400,000.00 for a general impairment of earning capacity.

[223] I will address each category below.

Green Mountain Jade

[224] At the time of MVA1, the plaintiff had a consulting contract with a group of companies which I will collectively refer to as Green Mountain Jade. Green Mountain Jade is a business owned by the Li family, who are based in China. Patrick Li lived in Vancouver and served as principal of the family's Canadian businesses. The consulting contract was signed in November 2016.

[225] Prior to signing the contract in 2016, the plaintiff provided consulting services to Mr. Li on an informal, but paid basis, for over a decade. The plaintiff first met Mr. Li in 2004 through a mutual acquaintance. At the time, Mr. Li was young and inexperienced and was looking for help dealing with some properties that the business held in Richmond. The plaintiff assisted Mr. Li with various development projects in Richmond, including setting him up with consultants and guiding him through the rezoning, permitting, building, and selling processes.

[226] In addition to development work, Green Mountain Jade had some jade mining operations in northern B.C. The company mined and processed the jade for sale, primarily to China. Prior to MVA1, Mr. Li was looking to take the jade company public. The plaintiff had experience with taking companies public and Mr. Li wanted the plaintiff's assistance with the process. The plaintiff agreed to assist and they decided to formalize the relationship with a contract.

[227] The contract was for a three-year term, starting on November 1, 2016. The plaintiff and Green Mountain Jade each had the option to terminate early. There was also an ability to extend the contract for a further time period. Green Mountain Jade agreed to pay a consulting fee of $300,000.00 a year, to be paid once annually on the anniversary date of the contract. In addition, the plaintiff was provided with the full and exclusive use of a 2015 Mercedes Benz S63 coupe.

[228] Mr. Li did not testify at trial. The plaintiff was not able to locate him. Charles Lee, the operations manager of Green Mountain Jade, did testify. Mr. Lee was essentially Mr. Li's second in command at Green Mountain Jade. Mr. Lee testified that Mr. Li became less involved in Green Mountain Jade after he was the victim of a home invasion in 2016. Mr. Lee stated that by 2019, Mr. Li essentially disappeared, and Mr. Lee has not had contact with him since then. Mr. Lee believes that Mr. Li is somewhere in China. Mr. Lee continued running the business after Mr. Li's disappearance, but ultimately left the company in 2021.

[229] Mr. Lee testified that the plaintiff was already working with Mr. Li when Mr. Lee joined Green Mountain Jade. He stated that the plaintiff was a consultant on a lot of Mr. Li's businesses and was very involved in Green Mountain Jade's real estate projects. The plaintiff would connect them with consultants, assist with putting the plans together, help them find financing, and be their liaison with the city for the development approval process. With respect to taking the mining companies public, Mr. Lee confirmed that the plaintiff was heavily involved.

[230] Mr. Lee's evidence was that the plaintiff's work with Green Mountain Jade grew in 2015 and 2016. He estimated that during that time period the plaintiff was working between 15–20 hours per week for Green Mountain Jade. Due to business picking up, in large part from taking the mining companies public, Green Mountain Jade was heavily engaging with the plaintiff and needed to formalize the relationship. Mr. Lee testified that although he did not draft the consulting contract, he worked with Mr. Li to ensure it made sense.

[231] Mr. Lee indicated that the value of the contract was not necessarily based on the hours the plaintiff worked. He stated that they looked at the contract from a value perspective – more specifically the value that the plaintiff brought in helping connect them to the right people and assisting with problem-solving.

[232] Mr. Lee testified that there was no specific reason that the contract provided for a three-year term. He said there was no expectation that the plaintiff would stop consulting for Green Mountain Jade after the three-year term expired.

[233] Mr. Lee recalls the plaintiff undergoing cancer treatment shortly after the contract was signed. He did not recall any changes to the plaintiff's availability. To his recollection, the plaintiff was available during that time.

[234] The plaintiff testified that his kidney cancer did impact his ability to perform services under the contract; however, he discussed this with Mr. Li who was very understanding.

[235] The plaintiff's consulting contract with Green Mountain Jade was ultimately terminated on June 30, 2017, eight months into the three-year term.

[236] Mr. Lee testified that after MVA1 the plaintiff acted a lot less like himself. His availability greatly decreased and it was difficult to reach him. Mr. Lee stated that initially they wanted to give the plaintiff some time to recover from the accident. However, after giving him time, the plaintiff was still not providing the value of the contract. Mr. Lee stated that from a business perspective, the contract no longer made sense. Mr. Lee testified that he and Mr. Li discussed this and they decided to terminate the contract.

[237] The plaintiff's termination is set out in a letter dated June 30, 2017 and signed by Mr. Li. The letter was hand-delivered to the plaintiff by an employee of Green Mountain Jade. The plaintiff testified that he knew the termination was coming, as he and Mr. Li discussed it.

[238] The plaintiff confirmed that he was paid for $200,000.00 for the 8 months he worked, along with a $50,000.00 bonus. The plaintiff testified that his understanding was that the bonus was for services he rendered prior to formalizing the contract. Green Mountain Jade also agreed to continue to provide the plaintiff with a vehicle or reimburse him for the cost of leasing a vehicle for the remainder of the contract term.

[239] Mr. Lee testified that he helped contribute to the June 30, 2017 termination letter and was involved in the decision to terminate the plaintiff.

[240] The termination letter indicates that the contract was being terminated as a result of the plaintiff being unable to provide the agreed upon services due to the effects of the motor vehicle accident. The defendants say that the letter is hearsay and inadmissible. They also submit that the elements of the business records exception were not proven, and thus the letter is not admissible under s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124 [*Evidence Act*].

[241] It is not necessary for me to determine if the letter is admissible for the truth of its contents. Based on Mr. Lee's testimony, I find as a fact that Mr. Lee was the operations manager of Green Mountain Jade and Mr. Li's right-hand person. I further find that Mr. Lee was involved in the decision to terminate the plaintiff and in drafting the termination letter. Finally, I accept Mr. Lee's oral evidence that the plaintiff's contract with Green Mountain Jade was terminated due to the impacts of MVA1.

[242] I note that the defendants argued it was equally likely that Mr. Li terminated the contract because of his personal circumstances and his ultimate decision to move back to China. They also suggest that the plaintiff's reduced availability during his cancer treatment may have contributed to the termination. However, accepting these arguments would require me to find that Mr. Lee's evidence on this issue was not credible. These propositions were not put to Mr. Lee on cross examination. Trial fairness and the principle in *Browne v. Dunn* (1893), 6 R. 67 (U.K.H.L.), 1893 CanLII 65 require such a challenge to credibility to be put to a witness in order to make such a submission in closing submissions: *R. v. Podolski,* 2018 BCCA 96 at para. 162.

[243] Mr. Lee testified that the $50,000.00 bonus was paid in recognition that the plaintiff had helped them over the years. He noted that Mr. Li was very generous and always gave fair compensation to people that helped the company. Mr. Lee stated that the bonus was a gesture of goodwill – they did not wish to cancel the contract unless they had to – and the bonus was meant to leave things on good terms.

[244] Green Mountain Jade did not replace the plaintiff. Mr. Lee noted that the plaintiff's value was that he was well-rounded and could assist with connections in both real estate development and in mining operations. Mr. Lee testified that the plaintiff had a unique set of skills which is not typically replaceable by one specific person.

[245] Mr. Lee testified that, had the plaintiff not been in the accident, Green Mountain Jade would have continued working with the plaintiff, even despite Mr. Li stepping back and ultimately disappearing. Mr. Lee continued working on the business and reiterated that the plaintiff brought a lot of value to the company as a mentor, advisor, and problem solver. Although Green Mountain Jade sold the main development property in 2018, he stated that it would not necessarily mean they would have had less need for the plaintiff. He indicated that they might not have sold the property if the plaintiff was available; however, he acknowledged that the Covid-19 pandemic may have also changed the development landscape.

[246] I am satisfied based on the evidence, that as a result of the accident, Green Mountain Jade terminated the plaintiff's consulting contract. I find that, had the accident not occurred, the plaintiff would have completed the three-year contract and earned an additional $700,000.00 in income.

[247] The plaintiff did not argue that the contract would have continued beyond the three-year term.

[248] In terms of contingencies, I find that there was a real and substantial possibility that the contract would have been terminated early due to Mr. Li stepping away from the company. However, the evidence was that Mr. Li did not step away

completely until sometime in 2019 – when at least two thirds of the three-year contract term would have passed. Further, Mr. Lee testified that he continued working with Green Mountain Jade until 2022. There is also a real and substantial possibility that Green Mountain Jade would not have required the same amount of consulting services from the plaintiff after selling its development property in 2018. Opposingly, there is also a real and substantial possibility that with Mr. Li's disappearance, Mr. Lee and the Li family would have required more of the plaintiff's time to assist with running the business and that the three-year contract would have been extended but for the accidents. Further, there is also a real and substantial possibility that the development property would not have been sold if the plaintiff was not injured or that if it was, Green Mountain Jade would have acquired another property.

[249] In my view, these positive and negative contingencies offset each other.

[250] I find that the $50,000.00 bonus was given as a gesture of goodwill, given that the contract was terminated prematurely. I find that the plaintiff would not have received this bonus if he had not been injured.

[251] Accordingly, I award the plaintiff $650,000.00, gross, for this loss.

The LC

Background

[252] The plaintiff claims $2,000,000.00 for the loss of the ability to participate in a development project called the LC due to his accident-caused injuries.

[253] The LC is an 80-unit rental property located in Langley. The development was spearheaded by Gary Aujla, a longtime business associate and partner of the plaintiff. Mr. Aujla and the plaintiff first started working on projects together in the 2000s.

[254] In 2010, Mr. Aujla purchased the property that would ultimately become the LC. He started the development process, but then put the project on hold while he

finished another development. When he restarted work on the project, he approached the plaintiff about him potentially becoming involved. In 2015–2016, the plaintiff introduced Mr. Aujla to a new builder, CF Projects, who revised the entire concept drawings for the development, which Mr. Aujla said saved him millions of dollars. Mr. Aujla worked with CF Projects and an architect and submitted an application to the city to start the development permit process.

[255] Mr. Aujla testified that he encountered problems obtaining financing for the development project. Mr. Aujla had a group of investors, but the group did not have a strong enough net worth to work with a tier one bank. Mr. Aujla stated that this was one of the reasons he asked the plaintiff to join the project; the plaintiff's involvement would assist with the financing application. Mr. Aujla also wanted the plaintiff involved to benefit from his skills and expertise in real estate development. He testified that the plaintiff had developed a shopping centre in the past and had worked with CF Projects before. The expectation was that the plaintiff would also be the project manager. This would involve reviewing quotes, supervising the team that Mr. Aujla had put together, and reviewing the project and budget as it moved through the different construction phases.

[256] Mr. Aujla was looking for a $500,000.00 capital investment from the plaintiff, and in turn would give him a 25% share in the project. The plan was that Mr. Aujla would retain a 50% share of the project while his sister would have the remaining 25%. Mr. Aujla testified that his sister invested $400,000.00 and, based on the status of the project, he felt that $500,000.00 was an appropriate contribution from the plaintiff.

[257] The plaintiff agreed to join the project. On September 15, 2016, the plaintiff's company, Three Lion, signed a contract with the LC's ownership company to invest $500,000.00 in capital in exchange for a 25% share of the project. The contract stated that the plaintiff would pay $500,000.00 either on May 31, 2017, or upon the issuance of the building permit for the development by the city, whichever came later. The contract also required the plaintiff to infuse additional capital as and when

required into the project in proportion to his shareholding. Further, the plaintiff agreed to a number of roles and responsibilities for the project, including assisting in finalizing the project, sourcing materials, reviewing and finalizing contractors, overseeing the work undertaken by the construction management company, and providing assistance for construction funding.

Factual and legal causation

[258] Mr. Aujla testified that the deadline for the plaintiff to make the investment came around June or July of 2017. The plaintiff never made the investment. Mr. Aujla stated that the plaintiff was in "rough shape" in 2017 and they decided that his personal health was more important than him going through with a project of that size. On cross-examination, Mr. Aujla said it was clear that the plaintiff was not going to be able to be involved in the project on a daily basis. Mr. Aujla also stated that he recalled the plaintiff saying that he was not comfortable investing in the project because he was not sure to what extent, if at all, he could work in the future. Mr. Aujla indicated that both he and the plaintiff were no longer comfortable with the plaintiff investing in the project.

[259] The plaintiff testified that he did not proceed with the investment in the LC because of the difficulties he was having with his injuries. He indicated that at the time he was barely functioning, and did not know what the future would hold for him. He said he was not in a position mentally to take $500,000.00 out of his family's savings when his capacity to be involved in the project was uncertain. The plaintiff said it was a scary time for him because he did not know if or when he was going to get better. The plaintiff also felt that he was not in a position to act as the project manager.

[260] The defendants submit that this aspect of the plaintiff's claim is speculative and not reasonably attributable to the accidents. The defendants argue that the plaintiff's decision to not invest in the LC was not imposed on him or made on the basis of any medical recommendations. They state that the evidence clearly demonstrates that the decision resulted from the plaintiff's financial and personal

priorities unrelated to his injuries. In support of this argument, they submit the following:

a) the plaintiff and his wife did not have enough in cash and investments to make the $500,000.00 investment in the LC or alternatively, making the investment would create considerable cash flow issues for the plaintiff's other companies;

b) the plaintiff and his family were actively looking for a property to purchase to build a new family home and they would have needed their savings and investments for that purchase;

c) the plaintiff had just started a business venture with Mr. Sherwood and was in the process of starting another business and would have needed the funds to support those businesses;

d) the plaintiff would not receive any compensation from Green Mountain Jade until late 2017, while the payment for the LC was due in the spring 2017; and

e) the plaintiff would have been responsible for his share of the construction mortgage payments until the LC earned rental income.

[261] In the alternative, the defendants argue that even if the plaintiff's reason was his injuries, the plaintiff could have made the investment, but not taken on the project management role. They note Mr. Aujla's evidence that he likely would have permitted the plaintiff to still invest in the project without doing any project management.

[262] In my view, the plaintiff has established that but for the accident, he would have proceeded with investing in the LC project and taking on the project management role. I reach this conclusion for the following reasons.

[263] First, I do not accept the defendants' argument that the plaintiff was not in a financial position to make the investment. The plaintiff was adamant in his testimony

that he and his wife had adequate funds to make the investment. The plaintiff was taken through a number of financial and investment statements. He and his wife had significant savings and investments, both personally and through their companies. Further, he noted that his wife made between $110,000.00 and $120,000.00 annually as a Registered Nurse, that his parents have money and had lent him money in the past to invest in deals, and that he had a $550,000.00 home equity line of credit that he could have used. The plaintiff was taken through bank and investment statements both in direct examination and cross-examination. As indicated, I have found the plaintiff to be credible and reliable. The evidence established that the plaintiff had sufficient funds or access to sufficient funds to make the $500,000.00 investment without putting himself or his companies in a financially precarious situation. A number of the witnesses testified to the plaintiff's business and financial acumen. I do not believe that he would have agreed to make the investment without ensuring that he had the financial means to do it.

[264] Second, the plaintiff had a contract with Mr. Aujla. The plaintiff and Mr. Aujla had a long-standing friendship and working relationship. The plaintiff was known for his ability to make connections and maintain them. If the accidents had not occurred, I do not believe that the plaintiff would have breached the contract for no reason, risking his relationship with Mr. Aujla, and jeopardizing his well-earned reputation.

[265] Third, I accept the plaintiff's evidence that, given the severity of his symptoms at the time and his uncertainty about returning to work, he was unwilling to invest his family's savings in the project for fear of tying up capital.

[266] I also conclude that the plaintiff's loss of investment income is not too remote and was a reasonably foreseeable consequence of the accidents: *Mustapha v. Culligan,* 2008 SCC 27 at para. 13. The relevant inquiry is whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha* at paras. 11–12. In my view, it is reasonably foreseeable that a significant car accident could deprive an individual of the ability to act as a shareholder/project manager for a major investment project.

[267] I note that some of the plaintiff's stated reasons for abandoning the project focused on his personal investment preferences, such as his desire to be an active investor and to take part in decision-making. These precise preferences may not have been reasonably foreseeable to the defendants. Nevertheless, foreseeability is established if one can generally foresee the class or character of the damage: *Hussack v. Chilliwack School District No. 33,* 2011 BCCA 258 at para. 71. The precise series of events by which the damage came about need not be foreseeable: *Helgason v. Rondeau*, 2023 BCCA 339 at para. 61; *Tellini v. Bell Alliance,* 2022 BCCA 106 at paras. 45–48. It was reasonably foreseeable that the type of damage – loss of the ability to participate in a development project – would result from the accidents.

Quantification of loss from the LC

[268] The next issue is what damages flow from the plaintiff's decision not to invest in the LC.

[269] The LC project proceeded without the plaintiff's participation. Nevertheless, the plaintiff's decision had consequences for the project. Mr. Aujla stated that without the plaintiff's participation, tier 1 lenders like CIBC and TD would not finance the project and Mr. Aujla had to look at different financing options. Mr. Aujla ultimately had to turn to private lending, which had much higher interest rates.

[270] Mr. Aujla testified that had the plaintiff participated in the project, he would have been completing the duties of a project manager and would have been paid as such. Specifically, he indicated that the plaintiff would have been paid between $8,000.00-10,000.00 per month for the duration of the construction, which was 18 months. Instead, Mr. Aujla hired CP Projects to do the project management work as well.

[271] Despite the additional difficulties, the project was successfully completed in 2019, at a cost of about $24,000,000, which was covered by the construction mortgage. By the end of 2019, the LC was fully rented out. Since then, it has

typically remained close to full occupancy, with only one or two vacancies per month.

[272] Mr. Aujla testified that neither he nor his sister had to infuse any additional capital into the project from 2016 through to its completion.

[273] Mr. Aujla testified that his sister's initial $400,000.00 investment has been paid back, and she retains a 25% share in the development. Mr. Aujla indicated that had the plaintiff invested in the LC, some of the capital he invested would have been paid back, but likely not as much as Mr. Aujla's sister. Mr. Aujla has received about $800,000.00 to $900,000.00 of his capital back. Mr. Aujla's plan is to pay out the balance of the investor funds in the project in 2028, when the mortgage is refinanced.

[274] Mr. Aujla testified that he receives about $30,000.00 per month in net income from the LC. Of that amount, he pays his sister about $2,500.00 for her share and the remaining balance is paid to him as an equity re-payment. Mr. Aujla indicated that they will likely continue to draw $30,000.00 from the property every month until the mortgage is refinanced. Had the plaintiff invested, Mr. Aujla said he would get paid a similar amount as his sister.

[275] Mr. Aujla testified that the mortgage on the property is at about $20,000,000.00. He indicated that if mortgage rates are higher when he refinances and he can no longer afford the development, he would look to sell the property. He stated that he has received some offers for the property, but he is not interested in selling right now because he has a good interest rate.

[276] Mr. Aujla testified that the offers he has received have all been verbal offers in the range of $35,000,000 to $40,000,000.00.

[277] The plaintiff also put into evidence the 2024 BC Assessment for the property, which assessed the value at $39,855,000.00.

[278] The plaintiff concedes that assessing this claimed loss of opportunity is difficult, as it is unknown when, if, and at what price the LC will be sold.

[279] Nevertheless, the plaintiff relies on Mr. Williamson's opinion on the value of the plaintiff's lost opportunity to invest in the LC project. Mr. Williamson looked at the balance sheet of the LC and noted its book value (the completed construction cost) was $23.6 million and its appraised value on October 19, 2022 was $34.0 million. To estimate the plaintiff's loss, Mr. Williamson adjusted the LC's book value of $23.6 million to its market value of $34.0 million, then took into account the LC's other current assets, liabilities, and long-term debt, which ultimately resulted in a shareholders' equity of $9,748,798 before income taxes. Mr. Williamson then adjusted for tax implications and calculated the shareholders' equity to be in the range of $8,455,000 to $9,160,000. To estimate the loss to the plaintiff, Mr. Williamson calculated a 25% interest in that amount and deducted the plaintiff's $500,000 initial investment to arrive at a loss of $1,613,800 to $1,790,000.

[280] The plaintiff submits that Mr. Williamson's estimate is likely conservative, as it does not account for the value of the building increasing since 2021 and for the decrease in the liabilities related to the building.

[281] The plaintiff also claims the compensation he would have received for fulfilling the role of project manager during construction.

[282] In my view, Mr. Williamson's opinion is based on facts that are either unproven or inadmissible and thus I cannot place any weight on it. More specifically, his valuation of the plaintiff's loss is based on a calculation of the increase in the shareholders' equity in the project. He determined the shareholders' equity by relying on an October 19, 2021 appraisal of the property completed by Colliers International. The opinion evidence of Colliers International was not before the Court and I decline to give any weight to this aspect of Mr. Williamson's opinion. The Court has no information as to Colliers International's methodology or any caveats to their appraisal. Further, Mr. Williamson relies on an appraisal opinion that was drafted

over four years prior to trial. The appraised value of the property could be much different at present.

[283] The plaintiff relies on the 2024 BC Assessment of the property in support of his submission that the property has increased in value since 2021. However, the case law is clear that property assessments are not reliable evidence of property value and cannot be used as indicators of market values: *Dosanjh v. Liang*, 2015 BCCA 18 at para. 67.

[284] I find that the plaintiff has not established that he would have benefitted from any increase in his equity had he invested in the LC.

[285] Nevertheless, the evidence establishes that, had the plaintiff invested in the LC and become a 25% shareholder in the project, he would have received payments of $2,500.00 per month, similar to what Mr. Aujla's sister receives. Mr. Aujla's evidence was he returned his sister's equity to her in 2019, thus these monthly payments were not equity repayments but income from the LC's net earnings.

[286] Accordingly, I find that the plaintiff has established he would have received $30,000.00 a year (or a 6% return) in income from the LC from 2019 to trial (a period of six years), which amounts to $180,000.00.

[287] However, the analysis does not end there. I have found as a fact that the plaintiff had sufficient family savings and investments to make the $500,000.00 investment in the LC. There was no evidence about what the plaintiff did with the money that wasn't invested in the LC. We do not know, for example, whether the amount was kept in savings or an investment account, or whether it was used to fund other business opportunities, or to pay for living expenses. Nevertheless, the plaintiff testified that he makes money from his money. In other words, he invests money that he has to bring in returns. The loss of investment income from the LC investment must be offset by any investment income the plaintiff likely earned on that $500,000.00 amount regardless of the accident.

[288] I note that the defendants point to Mr. Aujla's testimony that he would have allowed the plaintiff to act as a passive investor without taking on the project manager role. As I understand their argument, they submit that the plaintiff could have mitigated the loss attributed to the investment had he taken reasonable steps to discuss with Mr. Aujla the possibility of being a passive investor in the LC.

[289] I do not accept the defendants' argument that it was unreasonable for the plaintiff not to explore the option of passively investing in the LC. Although the plaintiff's evidence is that he preferred to be an active investor, I find that the main reason he did not participate in the LC was his reluctance to tie up capital when his ability to return to work was uncertain.

[290] That said, the evidence establishes that by 2020, the plaintiff's businesses had become more active, necessitating additional capital investment. I find that by this time, the plaintiff perceived less uncertainty about his future and began investing his capital more substantially. In other words, by that point, the plaintiff had likely begun investing the funds he otherwise would have put into the LC.

[291] Accordingly, I find that the plaintiff has only established one year (i.e. 2019 to 2020) of lost rental income due to not investing in the LC, which amounts to $30,000.00.

[292] In addition, the evidence establishes that but for the accidents, the plaintiff would have served as the project manager for the LC during the 18 months of construction, earning between $8,000.00 and $10,000.00 per month. I award him the midpoint of that range, which amounts to $162,000.00.

[293] The total amount award for past loss of income earning capacity from the LC is $192,000.00 gross.

General Impairment of Income Earning Capacity

[294] The plaintiff submits that his accident-caused impairments have resulted in other past losses, which should be assessed globally as a capital asset loss. The

plaintiff submits that the court should quantify this loss by using the approach to value a future loss that is set out in *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (B.C.C.A.). More specifically, the plaintiff claims two years of his current earnings, which amounts to $1,400,000.00.

[295] The plaintiff's claim for general past loss of income earning capacity is based on three areas of loss:

a) Lost opportunities and earnings from Three Lion;

b) Lost opportunities from Sachin Capital Corporation; and

c) The increased expense associated with Ms. Philip's employment.

Three Lion

[296] Three Lion was incorporated in 2015. Its main business activities include consultation services and investments in residential rental properties and property development projects.

[297] In 2016 and 2017, Three Lion had three renovation projects ongoing. These three projects sold in 2016 and early 2017. The plaintiff submits that his plan was for Three Lion to continue with additional renovation projects, but due to MVA1 he was unable to pursue these activities until February 2021, when he started a renovation project in Richmond.

[298] In the two years prior to MVA1, Three Lion earned $99,548 and $294,186 respectively in net income. In the three years after MVA1 (i.e. 2018, 2019, and 2020), Three Lion earned -$22,823, $624, and $6,574 respectively. Mr. Williamson's opinion is that Three Lion's past loss (from 2018 to 2020) is in the range of $158,200.00 to $324,300.00. To arrive at this amount, Mr. Williamson assumed that but for MVA1, Three Lion would have earned similar amounts in 2018-2020 as it did in 2016-2017.

Sachin Capital Corp.

[299] Sachin Capital Corp. was incorporated in 2009. Its business centers around constructing and renovating custom homes.

[300] The plaintiff submits that given the nature of this business, a project-by-project analysis is not possible; however, the plaintiff did give evidence about project offers he received prior to the accident that he never followed up on after the accident. In 2019, the plaintiff had Mr. Sherwood manage a project instead of himself because of his accident injuries. This resulted in increased expenses.

[301] Mr. Williamson estimated the loss to Sachin Capital Corp. to be approximately $376,600.00. He based this opinion on the fact that the company's earnings were on an upward trend prior to MVA1 and declined significantly in 2018 and 2019, before increasing significantly again in 2020.

[302] Mr. Williamson assumed that but for MVA1, Sachin Capital Corp's earnings would have continued on a similar upward trend/trajectory for 2018 and 2019. Mr. Williamson also adjusted for the added incremental management fees paid to Mr. Sherwood for work that the plaintiff said he was unable to complete due to his injuries.

Rekha Philip

[303] Ms. Philip is an accountant. She received a Chartered Accountant designation in India prior to moving to Canada in 2018. Her Indian CA designation is not recognized in Canada, but she plans on taking the Chartered Professional Accountant (CPA) exam in Canada in the future.

[304] Ms. Philip started working for the plaintiff in August 2018. She initially worked solely for Centurion Hardwood, a business that the plaintiff owned with Mr. Sherwood. She was hired to help set up the accounting processes and operations for Centurion Hardwood and then move on to more significant roles once the business hired other employees. Ms. Philip was also part of the operations team for Cambridge Building Supplies, where she handled accounting and bookkeeping.

[305] Ms. Philip went on maternity leave in 2019 and returned in November 2020. On her return, her role within the plaintiff's businesses changed. Although she continued to do some work for Centurion Hardwood (about three hours a week), she took on more roles at Centurion Property Group and Sachin Capital Corp.

[306] For Sachin Capital Corp., Ms. Philip's responsibilities are dealing with budgeting and providing the required financing documents to financial institutions. She is also involved with the scheduling of projects and, as previously described, she is the primary contact point for lawyers, tradespeople, and other contractors and partners.

[307] For Centurion Property Group, Ms. Philip helps the plaintiff decide the corporate ownership structure of projects, works with lawyers to get the structure in place, deals with consultants for project drawings, coordinates and directs municipal planners and management, engages with stakeholders on financing and fund management, and handles budgeting matters.

[308] More generally, Ms. Philip oversees accounting and the keeping of accounting records.

[309] As set out above, Ms. Philip works very closely with the plaintiff. She meets with him every day to brief him and get instructions from him. She serves as the primary buffer between the plaintiff and most of the people he deals with in the course of his business operations.

[310] Ms. Philip testified that she currently earns a salary of $2,200.00 a month from Centurion Hardwood, $1,500.00 a month from Centurion Property Group, and $500.00 a month from Sachin Capital Corp. In addition, she earns bonuses when projects are finished and is given an opportunity to purchase shares in some of the projects.

[311] The plaintiff submits that for the past four years, Ms. Philip has been completing work that the plaintiff would have carried out if not for the accidents, apart from the work she completes for Centurion Hardwood. In addition, the plaintiff

submits that Ms. Philip is a necessary right-hand person and that he is only able to continue his business activities and projects due to her handling his communications. The plaintiff says prior to MVA1, he would handle all his own communications and relationships. Therefore, the plaintiff claims a portion of Ms. Philip's salary as a loss to his businesses and, therefore, to his income.

[312] The plaintiff submits that the amount paid to Ms. Philips that is attributable to the accidents is $54,400.00. This amount is broken down as follows:

a) $32,400.00 in salary from Centurion Property Group. Ms. Philip earned $1,200.00 per month from December 2020 to December 2022 and $1,500.00 per month from January 2023 to trial. This amounts to $64,800.00; however, because Centurion Property Group is a 50/50 partnership with Mr. Aujla, the loss to the plaintiff is 50% of this amount, or $32,400.00;

b) $12,000.00 in salary from Sachin Property Corp. Ms. Philip earned $500.00 per month from Sachin Property Corp. since January 2022; and

c) $10,000.00 in bonuses related to construction projects in Richmond and Whistler.

Positions

[313] The plaintiff submits that he has sustained the following general loss of earning capacity:

a) Three Lion: $158,200.00 to $324,300.00;

b) Sachin Capital Corp: $376,600.00; and

c) Payment of Ms. Philip: $54,400.00.

[314] The sum of these amounts is $589,200.00–$754,700.00.

[315] Despite setting out the above valuation, the plaintiff argues that this assessment undervalues his loss and submits that the Court should instead adopt the capital asset approach set out in *Pallos*.

[316] The plaintiff submits that this valuation fails to account for the fact that he has been working only a few hours per day since MVA1. In addition, the plaintiff argues that these amounts fail to adequately consider the impact that the plaintiff's anger and irritability have had on his relationships with previous business partners and on new business opportunities. The plaintiff submits that, following *Pallos,* a reasonable and appropriate assessment of the plaintiff's loss is two or more years of the plaintiff's current annual earnings, which is approximately $1,400,000.00.

[317] The defendants submit that the plaintiff has not proven any loss from Three Lion and Sachin Capital Corp. The defendants state that it was unrealistic for the plaintiff to have continued to operate all his companies, work with Green Mountain Jade, and continue to pursue other projects through Three Lion.

[318] The defendants argue that, regardless of the accidents, Three Lion would have experienced a significant revenue loss during this period, given that Three Lion did not hold any properties in 2017–2018 from which to earn revenue. The defendants further submit that the plaintiff has not identified any specific projects or opportunities that Three Lion turned down due to the accidents. Last, they submit that Mr. Williamson's opinion on Three Lion's losses is based on assumptions that were not proven at trial.

[319] The defendants raise similar arguments in relation to the losses advanced for Sachin Capital Corp. They submit that there was no evidence that the plaintiff turned down any projects due to the accidents. They submit that the nature of the plaintiff's business is one where revenue could be expected to fluctuate based on market conditions. In their view, there is no evidence that the drop in Sachin Capital Corp.'s revenue is attributable to the accidents. Lastly, the defendants dispute that the amounts paid to Mr. Sherwood were due to the accidents. They submit that Mr. Sherwood's job involved site visits, which the plaintiff did not generally do.

[320] Finally, with respect to Ms. Philip, the defendants submit that regardless of the accidents, the plaintiff would have needed to hire Ms. Philip due to the growth of his companies.

[321] The defendants advanced an alternative argument that the plaintiff's total past loss of income-earning capacity from all business and income streams should be assessed using the approach set out in *Pallos.* However, they submit that if the capital asset approach is followed, the plaintiff should be awarded two years of his average pre-accident annual salary, which amounts to $210,000.00.

Discussion

[322] There are two principal ways of calculating a loss of income earning capacity: the "earnings approach" and the "capital asset approach". The former is more useful when a loss is more easily measurable – for example where a plaintiff's income is not expected to fluctuate up or down over time: *Reid v. Robinson,* 2020 BCSC 574 at para. 94. The latter involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset and is more appropriate where the loss is less easily measurable: *Pallos; Park v. Targonski,* 2017 BCCA 134 at para. 123. In appropriate circumstances, the capital asset approach may be applicable to past income loss as well as to future income loss: *Gamesaee v. Priest,* 2020 BCSC 1763 at para. 45. Nevertheless, I do not find the capital asset approach is appropriate here.

[323] The capital asset approach may be appropriate in circumstances where a loss is not easily quantified; however, the approach is not a cure-all for situations where something could have been proven or supported with evidence, but was not: *Gao v. Dietrich*, 2018 BCCA 372 at para. 62.

[324] Here, there is insufficient evidence to establish a loss of income from Sachin Capital Corp. or Three Lion. I find, rather, that the plaintiff's losses he did establish – the expenses associated with Mr. Sherwood and Ms. Philip – are quantifiable.

[325] While the evidence establishes that Three Lion earned no income or operated at a loss in 2018–2019 and that Sachin Capital Corp. earned significantly less income in 2018 and 2019 than it did pre-MVA1, I find that the plaintiff has not established that those losses were due to the accidents.

[326] As set out above, the plaintiff was significantly impaired in his ability to work day-to-day. Nevertheless, the plaintiff's claim is mostly based on a claim of lost opportunities to pursue development projects, home construction projects, and renovation projects.

[327] Other than the evidence about the LC, there was little evidence about the opportunities that the plaintiff turned down or did not pursue. The plaintiff testified that there were projects he was approached about prior to MVA1 that he never followed up on after MVA1. However, there was no evidence about what these projects were or about the likelihood that he would have taken them on but for the accidents. Further, there was insufficient evidence to establish a routine project schedule or an annual number of projects typically undertaken by the plaintiff pre-accident. Without such evidence, I am unable to find that there was a real and substantial possibility that the plaintiff would have taken on additional projects in 2018–2020, absent the accidents.

[328] I agree with the defendants that Mr. Williamson's approach to assessing the losses of Three Lion and Sachin Capital Corp. are overly simplistic and based on the assumption that any loss to the companies during this period was due to the accidents, which was not established in the evidence. Accordingly, I do not accept his opinion on the losses sustained by these two corporations.

[329] However, I accept that as a result of the accidents, the plaintiff has incurred expenses associated with Mr. Sherwood and Ms. Philip.

[330] Both the plaintiff and Mr. Sherwood testified that Mr. Sherwood assisted the plaintiff with project management for the construction/renovation of homes in Richmond, Coquitlam, and Vancouver. The plaintiff and Mr. Sherwood described Mr.

Sherwood's role as scheduling, coordinating with tradespeople, handling purchasing, and making site visits. I accept the plaintiff's evidence that the tasks undertaken by Mr. Sherwood were tasks that the plaintiff would do himself prior to MVA1.

[331] Mr. Sherwood did not give evidence about the amount he was paid in 2019 for the project management tasks. The plaintiff gave evidence that Mr. Sherwood was paid $32,340.00 in 2017 to complete project management tasks that he could not complete due to MVA1. Randeep gave evidence about Mr. Sherwood managing a project in 2019. I find that the plaintiff was mistaken, and that Mr. Sherwood's project management work was in 2019. In his report, Mr. Williamson indicated that Mr. Sherwood was paid $82,000.00 in management fees in 2019 from Sachin Capital Corp. to manage projects that the plaintiff could no longer manage. I find that the plaintiff suffered a loss of $82,000.00 in the form of management fees paid to Mr. Sherwood to complete project management tasks in 2019. I accept that these were tasks that the plaintiff was unable to complete due to the accidents.

[332] I find that a considerable amount, but not all, of Ms. Philip's time is spent completing tasks that the plaintiff cannot complete due to his injuries or serving as a buffer between the plaintiff and others due to the plaintiff's personality changes. However, I find that some of Ms. Philip's time is spent doing accounting work and other tasks that the plaintiff would not be completing regardless of the accidents. Ms. Philip did not give evidence about how much of her day is spent doing specific tasks. However, she described significantly more tasks related to the plaintiff's work and to managing the plaintiff's relationships than tasks related to accounting. Doing the best I can with the evidence I have, I find that 75% of her time is spent on tasks necessitated by the accidents. Accordingly, I find the past loss attributed to Ms. Philip's remuneration to be $40,800.00.

[333] In sum, I award $122,800.00 for the plaintiff's claim for the cost of replacement workers.

Summary

[334] In sum, I award $964,800.00 (gross) for past loss of income earning capacity, broken down as follows:

	Amount Awarded
Green Mountain Jade	$650,000.00
The LC	$192,000.00
Replacement workers	$122,800.00
Total	**$964,800.00**

[335] The loss of $964,800.00 must be adjusted by deducting the income tax payable on this amount: see s. 98 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231. I leave it to the parties to attempt to do so.

FUTURE LOSS OF INCOME EARNING CAPACITY

[336] In *Lamarque*, Madam Justice Horsman again provides a helpful summary of the applicable law with regard to future loss of income earning capacity. She writes (for the Court):

> [37] The central task for the court in assessing a claim for loss of future earning capacity is to compare the claimant's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156–157. As with past hypothetical events, future hypothetical events need not be proven on a balance of probabilities. A hypothetical future possibility will be accounted for as long as it is a real and substantial possibility. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event: *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., dissenting on other grounds, in *Grewal* at para. 48.
>
> [38] A diminishment in earning capacity does not justify an award of damages for future loss of earning capacity in the absence of evidence that the impairment will result in a pecuniary loss. A claimant must always prove there is a real and substantial possibility of a future event leading to an income loss. If the claimant discharges that burden, then the loss must be quantified based on either an earnings approach or a capital asset approach. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 4 and 32.
>
> [39] In *Rab*, this Court set 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 will cause a loss of capacity; and (3) what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?: *Rab* at para. 47.
>
> [40] The process of quantifying damages for loss of capacity at the third step of the *Rab* test is often challenging. Courts have adopted various approaches to assigning a dollar figure to the loss of capacity to earn income, including, where appropriate, awarding a claimant's entire income for one or more years: *Pallos v. Insurance Corporation of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 at para. 43. Any approach that is adopted must be supported by the evidence: *Rab* at para. 75.

[337] As a final step, the court must determine whether the damage award is fair and reasonable: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

Steps one and two of the *Rab* Analysis

[338] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court of Appeal elaborated on the first and second steps of the *Rab* analysis. The Court writes:

> [11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[339] The defendants concede that the plaintiff has satisfied step one of the *Rab* analysis. They accept that the evidence discloses that the plaintiff suffers from injuries which may cause a loss of capacity.

[340] Step two of the *Rab* analysis asks whether there is a real and substantial possibility that the potential future event giving rise to a loss of capacity identified in step one will cause a pecuniary loss to the plaintiff. The standard of proof is "a lower threshold than a balance of probabilities but a higher threshold than that of

something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Ploskon-Ciesla* at para. 15.

[341] The defendants submit that the plaintiff has failed to show a real and substantial possibility that his impairments will cause a pecuniary loss. They submit that, despite his alleged impairments, the plaintiff's businesses are thriving, as reflected in the income he has earned in recent years.

[342] The plaintiff submits that the evidence demonstrates there is a real and substantial possibility that his demonstrated impairments in income-earning capacity will cause a pecuniary loss. In support of this position, they note the following:

a) The plaintiff requires assistance to maintain his business activities, which he is currently obtaining from Ms. Philip. He will require this assistance, and its associated cost, in the long term.

b) The plaintiff's ability to work a maximum of three hours a day will translate into a decreased ability to take advantage of the business opportunities that were previously available to him.

c) The plaintiff's demonstrated personality issues have resulted in compromised business relationships and will continue to do so in the future, which will also impact the business opportunities available to him.

[343] The defendants submit that the plaintiff's case is "less clear-cut" and falls into the second category of cases identified in *Ploskon-Ciesla*.

[344] I agree that the plaintiff's case is less clear-cut given that he is earning more income now than he was earning prior to MVA1. However, I conclude that the plaintiff has established a real and substantial possibility of his impairments leading to a loss of income. Notwithstanding that the plaintiff is earning more income, the plaintiff's chronic injuries will likely have an effect on his capacity to earn income.

[345] While the nature of the plaintiff's business is such that his earnings are not directly correlated to his hours, working three hours per day, only in the morning, will

significantly impair his ability to take advantage of business opportunities. Simply put, the plaintiff is not going to build as many business relationships, find as many business opportunities, make as many sales, or get as much work done if he works three hours per day instead of eight.

[346] The plaintiff is a much different person now than he was prior to MVA1. Whereas he had an exceptional ability to build connections and relationships before MVA1, he is now someone whom others find difficult to be around. Prior to MVA1, the plaintiff leveraged his relationships and abilities to find and implement business and development opportunities.

[347] To his credit, post-accidents the plaintiff has worked extremely hard and incurred significant expense to improve his symptoms and functioning. He implemented strategies to help manage his symptoms as much as he can, including delegating work to Ms. Philip. Nevertheless, I conclude that the plaintiff's personality and behavioural changes result in a real and substantial possibility of future income loss, due to the impact on his business connections and relationships. The loss of one of the plaintiff's greatest business strengths – his interpersonal skills – will likely have a pecuniary impact, given the plaintiff's line of work.

[348] Moreover, the plaintiff is no longer capable of running his businesses without someone like Ms. Philip working closely with him to help with operational tasks and, perhaps more importantly, to serve as a buffer between the plaintiff and the many people he must deal with as part of his business. Ms. Philip has been critical in helping the plaintiff mitigate the effects of his personality changes. The plaintiff is extremely fortunate to have found and retained her. At present, Ms. Philip earns approximately $55,000.00 per year. As a further incentive, the plaintiff pays her bonuses and gives her an opportunity to invest in projects they are overseeing. Given the critical importance of her role, her salary is likely a bargain. There is no guarantee that Ms. Philip will continue to work with the plaintiff. Although there was no evidence that she planned to leave, she did testify that she plans on taking the CPA exam. Given Ms. Philip's qualifications, experience, and skill set, she is

someone who will be much sought after by other businesses, particularly if she has a CPA designation. If Ms. Philip were to leave her position and the plaintiff were unable to find a suitable replacement, the impact on the plaintiff and his business would be considerable.

[349] For these reasons, I find that the plaintiff has satisfied step two of the *Rab* analysis.

Step three of the *Rab* Analysis

[350] Step three in the *Rab* analysis involves assessing the value of the potential future loss, which includes assessing the relative likelihood of the possibility occurring. Again, there are two approaches to valuing the potential future loss – the earnings approach and the capital asset approach.

[351] The Court of Appeal in *Ploskon-Ciesla* elaborates on these approaches as follows:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[352] The plaintiff and the defendants agree that if step two of *Rab* is established, the plaintiff's loss should be valued using the capital asset approach.

[353] In *Pallos,* the Court of Appeal identified three potential methods of valuing a potential future loss of capacity using the capital asset approach. At para. 43, the Court explains:

> The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income.

[354] The plaintiff submits that, given his level of impairment and the length of time remaining in his working career, an assessment equal to approximately three years of current earnings is appropriate. The evidence establishes that the plaintiff's average annual earnings in the two years prior to trial were about $700,000.00. Accordingly, the plaintiff submits that an award of $2,000,000.00 under this head of damage is appropriate. The plaintiff did not make any submissions about applicable contingencies.

[355] The defendants submit that if step two of the *Rab* test is established, an appropriate award is two years of the plaintiff's average annual earnings in the three years prior to MVA1. That amount is $105,000.00 per year. As such, the defendants' alternate argument is that the plaintiff's loss of future earning capacity award should be $210,000.00. The defendants also did not make any submissions about appropriate contingencies.

[356] I agree with the plaintiff that an award equal to three years' current earnings is appropriate, which amounts to $2,100,000.00. I arrive at this number after considering the plaintiff's age (and likely work years ahead of him), the nature and severity of his injuries and the level of impairment they cause, and the nature of the plaintiff's work. More specifically, I note that the plaintiff is still relatively young and is unlikely to retire early, and that his injuries have had a profound impact on both the hours he can work and the type of tasks he can consistently and successfully complete.

[357] I agree with the plaintiff that his award should be based on his current earnings as opposed to his earnings pre-MVA. The plaintiff's earnings in the three years leading up to MVA1 were not an accurate reflection of his earning capacity:

see e.g. *Aylen v. Mellin,* 2022 BCSC 223 at paras. 153–156; *Aujla v. Nijjar,* 2022 BCSC 1262 at para. 223.. In those years he was growing the businesses. As such, an award of $315,000.00 would significantly undercompensate the plaintiff.

[358] In terms of specific contingencies, as set out above, I have found that there is a real and substantial possibility that the plaintiff's overall symptoms will improve with additional treatment. The plaintiff's non-pecuniary damages were reduced by 20% to reflect this finding. In my view, a similar reduction to this head of damage is warranted.

[359] There was no evidence led about general contingencies such as labour market non-participation.

[360] There is a line of authority indicating that a negative contingency of 20% is appropriate where there is no specific evidence regarding general contingencies: see *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (B.C.S.C.), *Dunn v. Heise,* 2021 BCSC 754 at para. 202, and *Hann v. Lun*, 2022 BCSC 1839 at paras. 111–113. Nevertheless, as stated by Justice Gomery, it is doubtful that a 20% adjustment for general labour market contingencies could now be justified as a general rule, given the repeated recent assertions by the Court of Appeal that an adjustment to reflect general contingencies should be modest: *Johansen v. Lee*, 2024 BCSC 1310 at para. 130.

[361] General labour market contingencies account for the statistical likelihood of a person not participating in the labour force, experiencing unemployment, or choosing to work part time or seasonally.

[362] In my view, given the plaintiff's demonstrated work ethic and the fact that he has always been effectively self-employed, he likely has a much greater attachment to the workforce than the average person. I also consider the fact that the plaintiff is 50 years old and is well-settled into his working career. Thus, the risks of future disability, part-time work, or early retirement do not loom as large. In these

circumstances, applying a 20% general contingency is not justified. In my view, a 10% general contingency is appropriate.

[363] Finally, as a last step, the Court must determine whether the damage award is fair and reasonable on the whole.

[364] In my view, this amount is fair and reasonable to both the plaintiff and the defendants. Accordingly, I award the plaintiff $1,470,000.00 for loss of future income earning capacity.

Special Damages

[365] The plaintiff incurred considerable special damages. The table below sets out the special damages claimed by the plaintiff as well as the defendants' position on each (italicized items are the damages in dispute).

Item	**Plaintiff's Position**	**Defendants' Position**
BC Emergency	$80.00	$80.00
Catalyst Kinetics BC Ltd.	*$13,486.78*	*$1,835.00*
Physiotherapy/Kinesiology/Active Rehab	$6,661.55	$6,661.55
Massage Therapy	*$28,743.92*	*$11,313.57*
Psychological Services	*$7,315.00*	*$4,440.00*
Chiropractic	$1,380.00	$1,380.00
Discover Vision Therapy	$7,771.00	$7,771.00
Ironwood Optometry Clinic	$350.00	$350.00
Parker Optical/Eyewear	$2,790.00	$2,790.00
Prescriptions/Supplements	*$10,341.18*	*$5,627.61*
Botox	$5,878.79	$5,878.79
Gym Fees/Pool	$1,707.00	$1,707.00
No. 1 Collision Inc. Car Repairs	$895.59	$895.59
JSH Landscaping Ltd.	*$5,040.00*	*$2,000.00*
N&M Electric Ltd.	*$1,312.50*	*$0*

Miscellaneous	*$1,312.50*	*$936.64*
Parking	*$1,716.54*	*$1,000.00*
Mileage	*$13,455.00*	*$8,500.00*
Total:	**$112,690.08**	**$63,166.75**

[366] Claims for special damages are subject to the standard of reasonableness: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[367] Evidence of medical justification is a factor in determining whether an expense aimed at promoting the plaintiff's physical or mental wellbeing is reasonable: *Redl* at para. 55.

[368] Subjective factors can also be considered in determining whether an expense is reasonable, including whether the plaintiff believes an expense was reasonably necessary: *Redl* at para. 55; *MacIntosh v. Davison*, 2013 BCSC 2264 at para. 128.

[369] It may be possible for a plaintiff to establish, in the context of special damages, that reasonable care equates with a very high standard of care; however, plaintiffs are not given a blank cheque to undertake any and all therapies that they believe will make them feel good: *Redl* at para. 55.

[370] Nevertheless, in assessing special damages, the court must be mindful of the fundamental governing principle that an injured person is to be restored to the position they would have been in had the accident not occurred: *Milina* at 78. The court must remain cognizant that it can be easier to determine the appropriate treatments or aid in hindsight. Sustaining injuries that cause ongoing pain and impair the ability to work and perform daily activities can cause a person to experience fear about whether their injuries will ever resolve. This can lead to a willingness, desperation even, to try any treatment that could potentially resolve the injuries, or at the very least provide temporary relief. That said, the court must also be mindful that an award for special damages must be reasonable to the defendant as well as the plaintiff.

[371] I will address each disputed special damage below.

Catalyst Kinetics BC Ltd.

[372] The plaintiff attended at Catalyst Kinetics from February 16, 2017 to December 15, 2020 for 29 chiropractic and 58 naturopathic treatments. The plaintiff testified that the treatments were related to the accidents. He said he found the adjustments helpful, but the improvements were short-lived. The plaintiff testified on cross-examination that his chiropractor recommended that he seek treatment from the naturopath. He eventually stopped attending treatments at Catalyst because they were not a long-term solution to his symptoms.

[373] The defendants say that there was no medical justification for the expenses related to the naturopathic treatment, as no treating medical practitioner or expert recommended naturopathy. The plaintiff, they say, decided to take part in this treatment on his own.

[374] In my view, the case law does not require that a specific treatment be recommended by a medical practitioner or expert in order for the plaintiff to be awarded that cost as a special damage. While such a recommendation would likely constitute medical justification, it is not a prerequisite for the treatment to be considered reasonable.

[375] Naturopaths are regulated healthcare professionals. Similar to chiropractors, one does not need a prescription from a medical doctor or nurse practitioner to see one. As such, it was reasonable for the plaintiff to seek treatment from a naturopath, particularly since the treatment was recommended by another regulated healthcare professional, specifically a chiropractor. The plaintiff decided to stop treatment at Catalyst when he realized that he was getting no long-term benefit from those treatments.

[376] I award the plaintiff the amount claimed for these treatments, which is $13,486.78.

Massage Therapy

[377] The plaintiff has engaged in a considerable amount of registered massage therapy (RMT) treatments. At times, he was going two to three times per week. The plaintiff testified that he would seek treatments specific to his neck, but he also found that RMT was very helpful for his anxiety and panic attacks. When asked on cross-examination who recommended that he continue to seek RMT and who recommended he attend RMT sessions at that frequency, the plaintiff said that his treating psychologist, Dr. Wade and family doctor, Dr. Collette both told him to continue with massage therapy. Dr. Anton also recommended 12 sessions per year of whichever passive therapy the plaintiff finds helpful.

[378] On re-direct examination, the plaintiff was asked why he continues to exceed the 12 RMT sessions a year recommended by Dr. Anton. The plaintiff said because they help him a great deal and that he finds it helps him calm down before spending time with his family.

[379] The defendants' position is that the plaintiff's reliance on RMT is excessive and that the medical opinion is that such passive treatments will only temporarily improve his pain.

[380] In my view, while the plaintiff's claim for RMT treatments is quite significant, it was reasonable for him to continue obtaining RMT treatments at a frequency that is greater than what Dr. Anton recommended. Although there was no expert opinion from the plaintiff's treating psychologist or family doctor, the plaintiff gave evidence that they recommended he continue with RMT treatments at a high frequency if they were helpful. This evidence is hearsay and I do not admit that evidence for the truth of its contents, but rather for the purpose of assessing the plaintiff's subjective belief that the RMT treatments were reasonably necessary.

[381] I am also mindful that the $28,743.92 claim for RMT treatments covers a period of eight years and therefore works out to approximately $3,500.00 per year.

[382] Last, in my view, Dr. Anton's cautions against additional RMT were focused more on the absence of lasting physical benefits from the treatments. The plaintiff's evidence, which I accept, is that the RMT is very helpful for his psychological symptoms. While the effects of the treatment may not result in long-lasting improvement, I find that the treatments are helpful in managing the plaintiff's psychological symptoms and preventing them from declining further.

[383] I award the $28,743.92 in special damages for RMT treatments.

Psychological Services

[384] The defendants take issue with some of the amounts the plaintiff spent on psychology/counselling sessions. Specifically, they argue that there was no medical justification for the treatment the plaintiff obtained at the PTSD clinic.

[385] The plaintiff testified that he attended counselling at the PTSD clinic to address psychological symptoms from the accidents.

[386] Given the psychological symptoms that the plaintiff was suffering from, including driving anxiety, nightmares, and flashbacks, it was reasonable for the plaintiff to receive counselling at that clinic. I am also satisfied that the amount spent was reasonable. Counselling and psychology sessions are expensive. Given the severity of the plaintiff's psychological symptoms, the amount spent to date on counselling/psychology was not unreasonable.

[387] I award the $7,315.00 in special damages for psychological services.

Prescriptions/Supplements

[388] The defendants accept the expenses that the plaintiff incurred for prescription medication. However, they submit that the plaintiff should not be awarded any damages for the cost of supplements he purchased from Finlanda Natural Pharmacy. They note that the supplements were not recommended by any medical experts.

[389] The plaintiff testified that he took various supplements based on recommendations from a naturopath who worked at Finlanda, or based on his own research and discussions with other people.

[390] I accept the plaintiff's evidence that he purchased and took many different supplements based on the recommendations of a naturopath at Finlanda and on research that he did on his own. While there is no indication that a medical doctor recommended these various supplements, I find that the plaintiff subjectively believed that these supplements could improve his symptoms. Based on the evidence, I find that the plaintiff's subjective belief was reasonable in the circumstances. The plaintiff struck me as someone who was, and still is, desperate to find a treatment or medication that can help his symptoms. The evidence from his treating occupational therapists was that he was a very engaged patient who was motivated to try and get better.

[391] In my view, the plaintiff has established in the circumstances that reasonable care equates with a very high standard of care. That said, I am careful not to award any and all therapies simply because the plaintiff has stated a belief that they will make him "feel good". In this case, the plaintiff was not incurring these expenses simply to "feel good." He conducted research, spoke to a naturopath, and determined that the supplements could potentially alleviate his symptoms. He was fortunately able to incur the costs associated with the supplements without a guarantee that he would get it reimbursed.

[392] I find that the damages incurred for supplements were reasonable in the circumstances and award the plaintiff $10,341.18 for medication and supplements.

JSH Landscaping Ltd.

[393] The defendants submit that some of the landscaping costs claimed for 2022 and 2023 are unreasonable, as the plaintiff's evidence is that his only limitation regarding landscaping work is a difficulty working on flower beds. They submit that the plaintiff should only be awarded $1,000.00 for each of 2022 and 2023, for a total of $2,000.00.

[394] The plaintiff explained that he needs to hire a landscaper because the landscaping work at his home is too difficult for him to complete without suffering from an increase in his symptoms.

[395] The evidence does not establish that the plaintiff's physical symptoms are severe enough that he needs assistance with landscaping. The plaintiff's evidence is that most of his musculoskeletal symptoms have improved, except for his neck pain. This is not a reasonable expense, and notwithstanding the defendants' reasonable intermediate position, I decline to award any damages for the cost of landscaping.

N&M Electric Ltd.

[396] The amount claimed by the plaintiff under this category reflects the cost to install dimmable pot lights in the plaintiff's office.

[397] The defendants submit that this expense was not reasonably related to the plaintiff's injuries.

[398] The plaintiff testified that due to his light sensitivity, he replaced the overhead florescent lighting in his office with dimmable pot lights. I have found that the plaintiff experiences light sensitivity due to his accident-caused injuries. As such, it was reasonable for the plaintiff to incur a very modest cost to modify his office to make the lighting more tolerable.

[399] I award the plaintiff $1,312.50 for this item.

Miscellaneous

[400] The defendants submit that the costs for supplements purchased at Fit Nation were not recommended by any medical professional and are thus not reasonable.

[401] The plaintiff testified that the supplements purchased at Fit Nation, which total $403.12, were recommended by a nutritionist at Fit Nation. I am satisfied that the plaintiff purchased these supplements on the recommendation of a nutritionist, and subjectively believed these supplements could help his symptoms. The costs incurred were reasonable and as such I award the disputed amount.

Parking

[402] The defendants dispute the parking costs incurred by the plaintiff for some of his massage therapy and naturopathy treatments and submit that these amounts should be deducted. As I have found those treatments to be reasonable, a deduction is not warranted. These costs form part of the plaintiff's loss. I award the plaintiff $1,716.54 for parking.

Mileage

[403] The defendants also dispute costs for mileage claimed by the plaintiff for some of his massage therapy and naturopathy treatments and submit that these amounts should be deducted. As I have found those treatments to be reasonable, a deduction is not warranted. I award the plaintiff $13,455.00 for mileage.

Summary of Special Damages Awarded

[404] I award the plaintiff special damages of $105,197.35, which is broken down as follows:

Item	**Amount Awarded**
BC Emergency	$80.00
Catalyst Kinetics BC Ltd.	$13,486.78
Physiotherapy/Kinesiology/Active Rehab	$6,661.55
Massage Therapy	$28,743.92
Psychological Services	$7,315.00
Chiropractic	$1,380.00
Discover Vision Therapy	$7,771.00
Ironwood Optometry Clinic	$350.00
Parker Optical/Eyewear	$2,790.00
Prescriptions/Supplements	$10,341.18
Botox	$5,878.79
Gym Fees/Pool	$1,707.00

No. 1 Collision Inc. Car Repairs	$895.59
JSH Landscaping Ltd.	$0
N&M Electric Ltd.	$1,312.50
Miscellaneous	$1,312.50
Parking	$1,716.54
Mileage	$13,455.00
Total:	**$105,197.35**

Cost of Future Care

[405] The plaintiff claims $1,065,000.00 in cost of future care.

[406] In *Pang v. Nowakowski*, 2021 BCCA 478, Mr. Justice Voith (for the Court), helpfully summarizes the applicable law as follows:

> [56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:
>
> > [43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
> >
> > [44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.
>
> [57] Several additional principles are relevant:
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> > i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.
> >
> > ii) The court must be satisfied that 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: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
> >
> > iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015

> BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.
>
> [58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

[407] The plaintiff served a cost of future care report written by Nora Chambers, Occupational Therapist. Ms. Chambers conducted an occupational therapy assessment and reviewed the reports of the plaintiff's physician experts. Her report provides cost of future care recommendations based on the advice of the physician experts and her own expertise.

[408] Assessing the plaintiff's cost of future care is challenging due to the dated nature of Ms. Chambers' report. The report is dated December 12, 2022. The medical legal reports she relies are on similarly dated. At the time of trial, the plaintiff was not necessarily taking the same medication or engaging in the same rehabilitation that he was at the time Ms. Chambers assessed him. Further, the plaintiff's headache symptoms have significantly improved since then, after he started taking Qulipta.

[409] Mr. Wickson, economist, supplied a report which provides multipliers to calculate the present value of a cost of future care award.

[410] I will assess each category of cost of future care claimed by the plaintiff.

Medications

[411] The plaintiff claims the following items and amounts for future prescription medication:

Item	**Amount (quarterly)**
Trazodone	$12.70
Duloxetine	$150.40
Gabapentin	$39.51
Modafinil	$102.48
Buspirone	$35.85
Botox	$785.00 – 885.00
Botox Physician's Fee	$250.00
Syringes and saline	$7.00
Lorazepam	$21.20
Lidocaine spray	$66.90
Effexor	$63.22
Qulipta	$3,617.97
Annual cost	$20,608.92 – 21,008.92
Present value cost to age 80	**$409,313.76 – 417.258.16**

[412] The plaintiff claims the cost of the following medications until age 80: Trazodone, Duloxetine, Gabapentin, Modafinil, Buspirone, Botox (plus physicians' fees, syringes, and saline), Lorazepam, Lidocaine spray, Effexor, and Qulipta.

[413] Ms. Chambers included a medication called Emgality in her cost of future care recommendations. The cost of this is $620.00 per month. However, the plaintiff did not claim this medication in his closing submissions.

[414] The defendants submit that the plaintiff should only be awarded damages for trazodone (at $50.80 per year), Botox (at $2,284.00 per year including syringe fee), and Effexor (at $252.88 per year, instead of Paxil, which the plaintiff is currently taking). They submit that the plaintiff should only be entitled to 50% of the Botox amount claimed, as he gave evidence that his Botox prescription has been reduced by half since he started taking Qulipta. The defendants further state that the plaintiff is not taking several of the recommended medications he claims as future care

costs. According to the defendants, these include the following: Duloxetine, Gabapentin, Modafinil, and Lorazepam. The defendants also note that Buspirone, Lidocaine spray, and Qulipta have not been recommended in the medical reports.

[415] The plaintiff's evidence is that he continues to take the following medication: Paxil/paroxetine, Buspirone, Qulipta, Botox, Ubrelvy, Modafinil, Trazodone, and Lidocaine spray.

[416] Both Dr. O'Shaughnessy and Dr. Smith recommend that the plaintiff switch from Paxil/paroxetine to an SNRI. Dr. O'Shaughnessy recommends Duloxetine or Effexor. Dr. Smith recommends Effexor. The plaintiff was not asked whether he would switch from Paxil to an SNRI. Nevertheless, the evidence establishes that the plaintiff is committed to his rehabilitation. I am satisfied that the plaintiff will switch from Paxil to either Duloxetine or Effexor. There is a significant price difference between the two. Duloxetine costs $601.60 per year, whereas Effexor costs $252.88. I award the midpoint between the two, which is $428.24 per year.

[417] A number of doctors recommended Botox. I agree with the defendants that the plaintiff's current Botox cost is half the amount that is listed in Ms. Chambers' report. I am satisfied that Botox is medically justified and reasonable. Ms. Chambers costed Botox at $785.00 – $885.00 every 10 to12 weeks. It's not clear from her report whether the range listed reflects variance in the cost of Botox or the injection interval. Dr. Robinson's opinion is that Botox injections should be completed every 12 weeks. Dr. Robinson is a headache specialist, and I accept his opinion in this regard. The most recent Botox prescription claimed in the plaintiff's special damages amounted to $404.00. When Ms. Chambers' amounts for physician's fee ($250.00) and syringes ($7.00) are added to the cost of the Botox, the total quarterly cost of the injections is $661.00, which amounts to $2,644.00 per year.

[418] The plaintiff is no longer taking Gabapentin and Lorazepam, and neither are recommended by any experts. As such, I decline to award amounts for these medications.

[419] The plaintiff continues to take Buspirone, Ubrelvy, and Lidocaine spray. Nevertheless, none of the experts who provided evidence at trial recommended these drugs. As such, I decline to award amounts for these medications.

[420] Contrary to the defendants' submissions, the plaintiff's evidence was that he continues to take Modafinil. This medication is recommended by Dr. Barton. Accordingly, I find that this medication is medically justified and reasonable and award a cost of $409.92 per year.

[421] The defendants concede that the plaintiff should be awarded cost of future care damages for Trazodone at $50.80 per year. I award that amount.

[422] The plaintiff continues to take Qulipta, which he testified has provided him with significant headache improvement. None of the expert reports recommend Qulipta; however, as Dr. Robinson noted in his trial testimony, the drug is part of a newer class of drugs and was approved for treatment of migraines in Canada about two years ago. He testified that this class of drugs have become important drugs for the management of migraines. Dr. Robinson further noted that Qulipta had only been approved by BC Pharmacare the week before trial.

[423] Dr. Robinson was not able to give opinion evidence at trial about whether he would recommend the plaintiff use Qulipta, as no notice was provided of that opinion evidence. However, he did testify that medications for the treatment of migraines and post-traumatic headaches are safe and can be used long-term as long as they continue to work and for as long as the disorder remains active.

[424] It is unfortunate that there was no opinion evidence specifically addressing Qulipta; nevertheless, it is inherent to the nature of trials that the court may be required to decide an issue without the benefit of all the ideal evidence.

[425] When asked about the dated nature of the medical-legal reports, plaintiff's counsel noted that the first scheduled trial was adjourned due to the plaintiff's then-counsel being appointed to the bench. The second scheduled trial was then unfortunately bumped. I am also mindful of the limits on disbursements imposed by

the *Disbursements and Expert Evidence Regulation*, B.C. Reg. 210/2020. Given the uncertainty about whether trials will actually proceed, and the potential prejudice caused by the *Regulation*, it is understandable that counsel may not wish to repeatedly obtain updated medical legal reports.

[426] With the above context in mind, I am satisfied that the plaintiff has established medical justification for Qulipta. In his reports, Dr. Robinson mentions a number of different medications that the plaintiff could try to help manage his post-traumatic headaches. Given his trial testimony about Qulipta, I am satisfied that had Qulipta been approved at the time of this last report, Dr. Robinson would have included it (as well as any other drugs in that class) among the list of drugs that the plaintiff could consider trying. I also note that the official prescription receipt is in evidence. It shows that Qulipta has been prescribed by the plaintiff's treating neurologist, Dr. Bing Wang.

[427] I am also satisfied that this cost of future care item is reasonable. Although the medication is expensive, it has provided the plaintiff with significant headache relief. This has improved his overall function and, in the end, has resulted in a significant reduction in his damages. Simply put, the reduction in the plaintiff's damages due to the positive impact of Qulipta far exceeds the cost of Qulipta.

[428] The plaintiff testified that he takes Qulipta every day. The prescription in evidence indicated that he was prescribed 60 pills for a 30-day period. The cost of the prescription was $1,205.97. This would correspond to an annual cost of $14,468.00. I award that amount to the plaintiff.

[429] The plaintiff claims the costs of medication to the age of 80. The defendants say he should be awarded medication until age 60. In support of this position, the defendants note that Dr. O'Shaughnessy has recommended that the plaintiff should begin a gradual withdrawal of the various medications he is taking. They further submit that if the plaintiff follows the recommendations for treatment of his psychological conditions, his headaches should lessen, which would reduce his need for many of the recommended medications.

[430] With respect, in my view, the defendants have misunderstood Dr. O'Shaughnessy's opinion. Dr. O'Shaughnessy expressed concern that the plaintiff was taking multiple medications that have an impact on central nervous system functioning, such that it made it difficult to get a clear understanding of the precise effect of each specific medication. As such, he recommended that the plaintiff gradually withdraw *some* of his medications *once symptoms have become more stable.* Further, Dr. O'Shaughnessy did not identify which medications the plaintiff should cease taking or how a withdrawal of medications should be sequenced.

[431] In my view, the defendants' position that the plaintiff should only be awarded the cost of medication until the age of 60 is not grounded in the evidence. None of the medical experts gave an end date for when the plaintiff should stop taking the recommended medication. Dr. Anton and Dr. Robinson both recommended that the plaintiff take headache medication as long as it continues to benefit him. While there was no expert opinion on how long the plaintiff would need to be on Trazodone, Duloxetine/Effexor, and Modafinil, given my findings that the plaintiff's symptoms are unlikely to completely resolve, I find that he will likely require these medications on an ongoing basis for the remainder of his life.

[432] In sum, I award damages for cost of future care for the following medications:

Item	**Annual Cost**
Trazodone	$50.80
Duloxetine/Effexor	$428.24
Modafinil	$409.92
Botox (including fees and equipment)	$2,644.00
Qulipta	$14,468.00
Annual cost of Prescriptions	**$18,000.96**

[433] Mr. Wickson's multiplier for the cost of future care from the trial date to age 80 is 19.861. Accordingly, I award the plaintiff $357,517.07 for future medications.

Therapies and Rehabilitation

[434] The plaintiff claims the following items and amounts for future therapies and rehabilitation:

Item	Interval / Frequency	One Time Cost	Annual Cost	Present Value
Physiotherapy	2 assessments at $95/assessment + 20 sessions at $95–$105/session	$2,090.00 – $2,290.00		$2,090.00 – $2,290.00
Kinesiology	4 sessions/week (50 weeks a year) at $100/session to age 65		$20,000.00	$414,880.00
Pool pass	$535/year to age 80.6		$535.00	$11,098.04
Occupational Therapy	5 hours/year at $121–$140/hour to age 80.6		$605.00 – $700.00	$12,550.12 – $14,520.80
Massage therapy	36 sessions/year at $125/session to age 80.6		$4,500.00	$93,348.00
Psychology	24 sessions at $225/session	$5,400.00		$5,400.00
Vision Therapy	2 sessions at $1,200 and 12–14 sessions at $120/session	$2,640.00 – $4,080.00		$2,640.00 – $4,080.00
Audiology Therapy	2 treatments at $700	$1,400.00		$1,400.00
Neuropsychological Reassessment	1 reassessment at $3,000 – $5,000	$3,000.00 – $5,000.00		$3,000.00 – $5,000.00
Total:				**$546,406.16– $554,016.84**

[435] The defendants' position is that no amount should be awarded for physiotherapy; however, they do not provide a clear basis for this argument. In my view, the evidence establishes medical justification. Dr. Anton recommends 12 sessions per year of whichever passive therapy the plaintiff finds helpful. Dr. Dumper recommends additional vestibular physiotherapy. The plaintiff's claim for two physiotherapy assessments, plus 20 physiotherapy sessions is reasonable. I award the midpoint of the amount claimed, which is $2,190.00.

[436] The defendants submit that the plaintiff's claim for kinesiology is unreasonable. I agree. Dr. Anton noted that the plaintiff reported difficulty participating in independent exercise due to poor motivation but was able to successfully participate in supervised exercise with a kinesiologist. He recommended that the plaintiff continue with supervised exercise in the short term. Dr. Anton's opinion is that the plaintiff may be able to exercise more independently in the long term if the plaintiff's motivation improves with successful treatment of depression. Absent improvement, his view is that the plaintiff would probably require at least two supervised exercise sessions with a kinesiologist per week. Based on Dr. Anton's opinion, Ms. Chambers recommended two to three kinesiology sessions per week. The plaintiff has claimed four sessions per week until the age of 65, with a present value of $414,880.00. Given my findings that there is a real and substantial possibility that the plaintiff's mood symptoms will improve, ongoing kinesiology until age 65 is neither medically justified nor reasonable. The defendants submit that two sessions per week for six months is reasonable. That amounts to $5,200.00. In my view, there is medical justification for providing the plaintiff with two sessions per week for one year. That should give the plaintiff time to implement Dr. O'Shaughnessy's recommendations, which should improve his psychological symptoms and thus his motivation to exercise independently. I award the plaintiff $10,400.00 for future kinesiology.

[437] The defendants dispute an award for a pool pass, on the basis that a pool pass has not been recommended by any of the medical experts. This is not correct. The pool pass is recommended by Ms. Chambers. The plaintiff testified that he attends a pool regularly at a local community aquatic centre to use the hot tub and cold plunge pool. This helps with his management of his psychological symptoms. I find that this cost is medically justified and reasonable, and I award the plaintiff the amount claimed, which is $11,098.04.

[438] The defendants concede that occupational therapy is recommended by a number of experts, including their own. Ms. Chambers recommends 23 hour-long sessions (at $195 per session, including travel), which amounts to $4,485.00.

Nevertheless, the plaintiff claims five hours per year for the rest of his life, based on Dr. Anton's recommendation of up to six hours per year. Dr. Anton did not indicate for how long the plaintiff would need occupational therapy. In my view, the evidence establishes that occupational therapy was very helpful in providing the plaintiff with strategies to manage his symptoms and increase his functionality at work. Given my findings that the plaintiff is likely to have ongoing symptoms that will impact his ability to work, there is medical justification for him to receive ongoing occupational therapy while he is continuing to work. Four sessions per year (at $195 per session) until age 70 is a reasonable amount. The multiplier provided by Mr. Wickson for a cost to age 70 is 15.912. Accordingly, I award $12,411.36 for future occupational therapy.

[439] The defendants submit that no amount should be awarded for RMT. While they note that Dr. Anton has recommended 12 sessions per year of whichever passive treatments the plaintiff finds helpful, they argue that the plaintiff was already attending RMT 12 times per year prior to MVA1. I disagree with the defendants' position. While the plaintiff did seek RMT prior to MVA1 for relaxation, there is medical justification for him receiving massage therapy over and above his pre-accident baseline. It is reasonable for the plaintiff to receive ongoing massage therapy at a rate of one session per month. I accept that the treatments help him manage his psychological injuries and symptoms and more specifically, help keep them from worsening. I award the plaintiff 12 RMT sessions per year at a cost of $125 per session (or $1,500.00 per year). The multiplier provided by Mr. Wickson for a cost to age 80 is 19.861. Accordingly, I award $29,791.50 for future RMT.

[440] The plaintiff claims 24 sessions of psychology at a cost of $5,400.00. The defendants do not dispute this amount and, in fact, they note that Ms. Chambers recommends 48 sessions spread out over four years, which amounts to $10,800.00. Given my findings that the plaintiff's psychological symptoms will improve with a change of medication and further structured cognitive behavioural therapy, an award of $10,800.00 to cover the cost of this therapy is reasonable.

[441] Dr. Dumper recommended that the plaintiff continue with vision therapy. According to Dr. Barton, the evidence that vision therapy helps with the conditions the plaintiff has is poor. He states that the plaintiff would not benefit from more vision therapy. Dr. Barton is a neuro-ophthalmologist. In my view, he has greater expertise in this area than Dr. Dumper, an otolaryngologist. Accordingly, I decline to award future vision therapy.

[442] Dr. Dumper recommends audiology therapy to assist with the plaintiff's tinnitus and Central Auditory Processing Disorder. Ms. Chambers has calculated the cost of the therapy as $700.00 for Central Auditory Processing Disorder and $700.00 for eight hours of tinnitus therapy. These amounts are medically justified and reasonable. I award $1,400.00 as a one-time cost for auditory services.

[443] The plaintiff claims $3,000.00 to $5,000.00 for a neuropsychology reassessment. Ms. Chambers' report indicates that Dr. Mead-Wescott recommended this reassessment. On my review of Dr. Mead-Wescott's report, it does not appear that she made this recommendation. As such, I decline to award this cost of care item.

[444] In sum, I award damages for the cost of future therapies and rehabilitation as follows:

Item	**Present Value**
Physiotherapy	$2,190.00
Kinesiology	$10,400.00
Pool pass	$11,098.04
Occupational Therapy	$12,411.36
Registered Massage Therapy	$29,791.50
Psychology	$10,800.00
Audiology services	$1,400.00
Total	**$78,090.90**

Landscaping

[445] The plaintiff claims the following items and amounts for landscaping:

Item	Interval / Frequency	Annual Cost	Present Value
Annual lawn and garden home maintenance	Various services to age 65.	$2,500.00	$31,177.50
General gardening assistance	$360 per month for four months of the year to age 70	$1,440.00	$22,409.28

[446] None of the physician experts opined that the plaintiff requires ongoing lawn and garden assistance. Ms. Chambers recommends home maintenance and lawn/garden assistance, but her report does not set out what specifically is causing the need for such assistance. I am not satisfied that home and garden assistance is medically justified. As such, I decline to award these items.

Miscellaneous Aides and Assistive Devices

[447] The plaintiff claims the following items and amounts for miscellaneous aides and assistive devices:

Item	Interval / Frequency	Present Value
Tinnitus maskers	$5,000 cost, replaced every five years starting in 2026 to age 80.6	$23,180.00
Out of warranty repair on current tinnitus maskers	$600 (one time cost)	$600.00
Out of warranty repairs on future maskers	$300 every four years to age 80.6	$1,659.00
Oasis Bluetooth Sound Therapy	$201.60 per unit, replaced every 10 years	$568.92
Waterproof headphones	$25 per unit, replaced every three months to age 80.6	$2,074.40
Bose noise cancelling earphones	$350 replaced every 10 years to age 80.6	$937.65
Apple Watch	$700 replaced every 10 years to	$1,875.30

	age 80.6	
Prism glasses	Two sets at $500 each, replaced every five years to age 80.6	$4,639.00
Zero gravity chair	$3,000.00 replaced every 15 years to age 80.6	$6,030.00
Full adjustable desk chair	$603.39 – $1,634, replaced every 10 years to age 80.6	$1,616.48 – 4,377.48
Ergo deskette	$139 replaced every 5 years to age 80.6	$651.35
Adjustable lap top stand	$75 replaced every 5 years to age 80.6	$201.75
Adjustable foot stool	$115 replaced every 10 –15 years to age 80.6	$231.15 – 308.08
Orthopaedic Pillow	$140 replaced every 10 years to age 80.6	$375.06
Theragun and foam roller	$258.85 replaced every 10 years to age 80.6	$693.46
Massage chair	$1,500 – $4000 replaced once	$3,000.00 – $8,000.00
Total:		**$48,333.52 – $56,171.45**

[448] The defendants submit that these items are not justified because they have not been recommended by any of the experts or have been recommended but have already been purchased by the plaintiff.

[449] The defendants are correct that a number of these items have already been purchased by the plaintiff; however, many of them do require replacement from time to time.

[450] Dr. Dumper references tinnitus maskers and sound therapy devices in his second report. Under the section addressing recommendations for future treatment, care, or therapies, he notes that the plaintiff currently has tinnitus maskers as well as sound generators and that he would also benefit from tinnitus training. This suggests that Dr. Dumper is endorsing those items. Ms. Chambers took those recommendations and provided evidence about the replacement interval and cost of those devices. The plaintiff has established medical justification and reasonableness

for these costs of care items. Therefore, I award those items and amounts as claimed, which is $26,007.92.

[451] I decline to award amounts for waterproof headphones, Bose Noise Cancelling Headphones, and an Apple watch. The plaintiff submits that he uses these items for white noise while at the pool. None of these items were recommended by Ms. Chambers, although I note she did recommend Bluetooth earbuds to allow for handsfree calling.

[452] I award the amount claimed for prism glasses, which is $4,639.00. These are recommended by Dr. Barton. It is reasonable that the plaintiff would need two pairs of glasses so that he can have one pair at home and one pair at the office. It is also reasonable that they would need to be replaced every five years.

[453] I am not satisfied that the zero-gravity chair is medically justified, and thus I decline to make an award for that item. Ms. Chambers indicates that the chair will help offload and provide elevation to the plaintiff's left lower extremity. There is no evidence that the plaintiff injured his left lower extremity in the accidents. Presumably, the chair also assists with the user's back. The plaintiff's evidence is that his back injury has resolved.

[454] For the same reason, the foot stool is not medically justified, as Ms. Chambers indicates it would assist with swelling and pain in the plaintiff's lower extremity.

[455] The claim for the adjustable desk chair is not warranted. The plaintiff would need a desk chair regardless of the accidents.

[456] The claims for the ergo deskette (document holder), adjustable laptop stand, and orthopedic pillow are medically justified as they will assist with neck pain. Further, the amounts claimed are reasonable. I award $1,228.16 for those items.

[457] Last, I am not satisfied that there is medical justification for the Theragun, foam roller, and massage chair. Ms. Chambers indicates that these items are for

muscle and joint pain. The only remaining musculoskeletal issue that the plaintiff has is some neck pain. In my view, the evidence does not establish that these items could assist with the plaintiff's neck complaints. Accordingly, I decline to award damages for these items.

[458] In sum, I award cost of future care damages for the following aides and assistive devices:

Item	**Amount**
Tinnitus maskers and sound therapy devices	$26,007.92
Prism glasses	$4,639.00
Ergo deskette, adjustable laptop stand, and orthopedic pillow	$1,228.16
Total	**$31,875.08**

Summary of Cost of Future Care Award

[459] I award the plaintiff $467,483.05 in cost of future care, which is broken down as follows:

Item	**Amount Awarded**
Medications	$357,517.07
Therapies and Rehabilitation	$78,090.90
Aides and Assistive Devices	$31,875.08
Total	**$467,483.05**

Disposition

[460] The plaintiff is awarded the following damages against the defendants, jointly and severally:

a) Non-pecuniary damages	$220,000.00

b) Past loss of income earning capacity	$964,800.00
c) Future loss of income earning capacity	$1,470,000.00
d) Special damages	$105,197.35
e) Cost of future care	$467,483.05
Total	**$3,227,480.40**

[461] Total damages are awarded in the amount of $3,227,480.40, less any statutory deductions.

[462] If the parties cannot agree to costs, they may schedule a 45-minute 9:00 am hearing, to be set no later than 45 days from the release of these reasons. The parties must file written submissions and briefs of authorities no later than seven days before the hearing. The written submissions must not exceed 2,500 words and the brief of authorities must not exceed five authorities. If a costs hearing is not set within 45 days of the release of these reasons, unless the Court otherwise directs, the plaintiff shall have his costs at Scale B.

"Morishita J."