IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pearson v. Osseiran,*
2025 BCSC 1729

Date: 20250905
Docket: M222444
Registry: New Westminster

Between:

Craig Michael Pearson

Plaintiff

And

Rima Osseiran and Jamil Khalil Wehbi

Defendants

Before: The Honourable Justice Morishita

Reasons for Judgment

Counsel for the Plaintiff:	C.M. Duplessis K.D. Cowan K. Troczynski
Counsel for the Defendants:	C.P. Collins R.K. Buchanan
Place and Dates of Trial:	New Westminster, B.C. March 24-28, 2025 March 31, 2025 – April 2, 2025 & April 4, 2025
Place and Date of Judgment:	New Westminster, B.C. September 5, 2025

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INTRODUCTION

[1] The plaintiff, Craig Pearson, was involved in a motor vehicle accident that occurred on October 15, 2018, at the intersection of Carnarvon Street and 6th Street, in New Westminster.

[2] The plaintiff was 28-years-old on the accident date and 35-years-old at the time of trial.

[3] The plaintiff grew up in Duncan, B.C. He was very physically active as a teen and into adulthood. He played sports and at age 16 started weightlifting regularly. His physical conditioning and physique grew to become a significant part of his identity.

[4] The plaintiff graduated from high school in 2008. From 2008 to 2010 he worked physical jobs, mainly involving delivering furniture or working in a warehouse. In 2010 the plaintiff moved to Vancouver, where he continued to work physically-demanding jobs. In February 2015, he got a job as a labourer with Glastech Glazing. The plaintiff immediately took to the work at Glastech. By summer 2015, the plaintiff passed his probation and the company registered him as a glazier apprentice with the Industry Training Authority.

[5] By the time of the accident, the plaintiff had become a valued employee at Glastech. He was passionate about his work, and had plans to either move up at the company or perhaps one day start his own glazier business.

[6] The plaintiff continued to be very physically fit and active right up to the accident. When the accident occurred, he was on his way to a boxing gym that he had recently joined.

[7] As a result of the accident, the plaintiff claims he sustained the following injuries: a mild traumatic brain injury, an injury to his left shoulder, soft tissue injuries to his neck and back, post-traumatic headaches, and various psychological injuries and symptoms.

[8] The plaintiff states that his most significant ongoing injuries are the injury to the left shoulder, which may require surgery, his neck injury, and his psychological symptoms.

[9] Following the accident, the plaintiff missed about two days of work. The plaintiff says that he has been unable to return to full duties, and is only able to continue employment at Glastech (which was subsequently bought out by Bothwell) in an accommodated role. The plaintiff submits that his injuries will not get better, and may in fact get worse, and that he will be forced to leave Bothwell in the near future.

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

Name	**Expertise**	**Report Date(s)**
Dr. William Regan	Orthopaedic Surgeon	January 5, 2022, October 28, 2024, January 14, 2025, January 21, 2025.
Dr. Donald Cameron	Neurologist	October 9, 2024, December 18, 2024, January 17, 2025, March 1, 2025
Dr. Shao-Hua Lu	Psychiatrist	November 10, 2024, December 24, 2024
Mr. Dominic Shew	Occupational Therapist	December 16, 2024
Mr. John Lawless	Vocational Expert	December 17, 2024
Mr. Mark Szekely	Economist	December 22, 2024

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

Name	**Relationship**
Mr. Ken Gillcash	Supervisor and friend
Ms. Greta Skjelstad	Plaintiff’s mother
Ms. Lory Balderama	Plaintiff’s girlfriend

[12] The plaintiff seeks the following award:

Non-pecuniary damages	$225,000.00
Past loss of income earning capacity	$68,000.00 (gross)
Future loss of income earning capacity	$1,000,000.00
Special damages (by agreement)	$9,564.35
Cost of future care	$71,000.00
Total	**$1,373,564.35**

[13] The defendants deny liability for the accident.

[14] The defendants deny that the plaintiff sustained a mild traumatic brain injury, but do not dispute that he suffered soft tissue injuries to his neck, back, and left shoulder. They also do not dispute that the plaintiff suffered emotional symptoms due to the accident. Nevertheless, they submit that the plaintiff has failed to mitigate his injuries, and is likely to experience improvement in his physical and psychological symptoms once he follows the medical advice he's received.

[15] While the defendants acknowledge that the plaintiff's injuries impact his ability to work, they say that his claims of impairment and disability are exaggerated. In support of their position, the defendants point to the minimal missed work, and the fact that the plaintiff has been able to work overtime, pass the Red Seal exam, and get promoted to temporary foreman. They submit that the plaintiff has not established that he is at risk of losing his job.

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

Name	**Expertise**	**Report Date**
Dr. William Craig	Physiatrist	November 22, 2024
Dr. Timothy McDowell	Neurologist	February 19, 2025

Dr. Colleen Quee-Newell	Vocational Expert	February 5, 2025

[17] The defendants called the following lay witnesses:

Name	**Relationship**
Ms. Rima Osseiran	Defendant driver
Dr. Anna Wolak	Treating physician

[18] The defendants submit that the following award is appropriate:

Non-pecuniary damages	$120,000.00 - $135,000.00 (less 20% for failure to mitigate)
Past loss of income earning capacity	Nil
Future loss of income earning capacity	$100,000.00 - $200,000.00 (less 20% for failure to mitigate or for contingencies)
Special damages (by agreement)	$9,564.35
Cost of future care	$13,440.00
Total	**$199,004.35 - $290,986.35**

[19] The main issues of contention between the parties are as follows: the credibility and reliability of the plaintiff, whether the plaintiff suffered a mild traumatic brain injury or not, the degree of improvement he is likely to experience, and most significantly, whether the plaintiff will be able to continue working as a glazier in an accommodated fashion.

[20] For the reasons that follow, I find the defendants fully liable for the accident. In addition, I find that the plaintiff has proved that the accident caused the following injuries: left shoulder injury, soft tissue injuries to the neck and back, post-traumatic headaches, and psychological injuries. I find that the plaintiff did not sustain a mild traumatic brain injury. I find that while the plaintiff is likely to experience improvement in his overall symptoms, he is unlikely to return to his pre-accident condition. I find that the defendant has not proven a failure to mitigate. Lastly, I find that the plaintiff has sustained a loss of future income earning capacity.

CREDIBILITY AND RELIABILITY

[21] The credibility and reliability of the plaintiff is a central issue in any personal injury trial.

[22] Credibility and reliability are not the same thing.

[23] Credibility is concerned with a witness's veracity. Reliability, on the other hand, is concerned with the accuracy of a witness's testimony; it 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

[24] The typical starting point in a credibility assessment is to presume truthfulness: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10.

[25] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarizes 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).
>
> [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.

[26] Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense, or if a witness is evasive, longwinded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at para. 92.

[27] A court may accept all, some or none of a witness's evidence: *R. v. R.E.M*., 2008 SCC 51 at para. 65.

[28] The defendants submit that the plaintiff is not credible. They say that some of the plaintiff's evidence went "beyond the human tendency to reconstruct and distort history in a manner that favours a desired outcome," and goes beyond being unreliable. In support of their position, the defendants helpfully provided a table setting out 12 instances where they say the plaintiff's evidence was problematic. These instances generally involve prior inconsistent statements, internal inconsistencies in the plaintiff's testimony, inconsistencies between the plaintiff's evidence and that of other witnesses, or exaggerations/overstatements.

[29] In my view, most of the 12 instances were fairly benign or could be explained when considered in the context of the plaintiff's evidence. For example, the defendants noted that in direct examination, the plaintiff said he could not perform

the heavier labour aspects of his job, but then proceeded to give evidence about instances where he was called upon to do heavy tasks and was able to. They also pointed out that the plaintiff complains of problems communicating, but also described a post-accident situation in which he was working on a complex project at the UBC Museum of Anthropology and served as the main point of communication between various workers. Another example that the defendants noted was the plaintiff stating that he can't read anymore, yet he was able to study for and pass the Red Seal exam.

[30] In my view, these examples do not quite achieve their intended purpose. I did not interpret the plaintiff's evidence, on the whole, as saying he can never complete heavier tasks or that he is incapable of engaging in complex communication on the job site. The plaintiff tended to overstate and to make broad statements that were imprecise; however, when asked for more detail he would provide further evidence that was more precise and less overstated.

[31] With respect to reading, the plaintiff made that statement in the context of recreational reading, which he did a lot of before the accident. In fact, after saying he can't read anymore, the plaintiff proceeded to testify that he attempts to read but can only read about ten pages or so. In context, it is clear that in saying he doesn't read anymore, the plaintiff meant that he has not been able to return to the level of reading he did before the accident.

[32] There were other similar examples of the plaintiff overstating or being imprecise with his language, but not necessarily misleading, when his statements are considered in the greater context or in conjunction with other parts of his evidence. In these instances, I did not have the impression that the plaintiff was deliberately trying to mislead. Rather, I think these issues are more likely explained by a combination of the plaintiff's way of speaking and, likely, some degree of irritability and frustration that are associated with his accident-caused psychological injuries and symptoms.

[33] While these overstatements and imprecision impact on my assessment of the plaintiff's reliability, they do not negatively impact his credibility.

[34] There were, however, two prior inconsistent statements that were potentially more significant.

[35] The first is the plaintiff's evidence on direct examination that he remembers "coming to" at the side of the road immediately after the impact. On cross-examination, the plaintiff was taken to ambulance records and records of Royal Columbian Hospital, where there were statements attributed to him to the effect that he did not lose consciousness. The plaintiff was asked about these statements. His evidence was that he did not recall the interactions with the paramedic and the hospital staff. The parties did not have a document agreement, nor was there agreement that the ambulance and hospital records were business records under the *Evidence Act*, R.S.B.C. 1996, c. 134 or the common law. The defendants did not call any witnesses to prove the elements necessary to admit these records as business records. Accordingly, the defendants did not prove that the plaintiff made these statements.

[36] However, as the defendants note, in his report Dr. Lu indicates that the plaintiff told him that he did not lose consciousness, but felt confused after the accident. I am satisfied that the plaintiff's made this statement to Dr. Lu and as such this constitutes a prior-inconsistent statement. I may also consider this statement as an admission and thus accept the content of the statement for its truth, which I do.

[37] When asked about this prior inconsistent statement, the plaintiff confirmed that he believes he had a loss of consciousness, and that he had said that consistently.

[38] This prior inconsistent statement and the plaintiff's response when presented with it are detracting factors in the assessment of the plaintiff's credibility.

[39] A second significant prior inconsistent statement related to the plaintiff's testimony that he had no problems with sleep before the accident.

[40] On September 12, 2017 and October 6, 2017, the plaintiff was seen by Dr. Anna Wolak for sleep complaints. The September 12, 2017 clinical record notes under “subjective” that the plaintiff “has been having some sleeping problems for quite a while” and that it “does not seem to matter how much sleep he gets, he is always exhausted.” The plaintiff also purportedly mentioned that there was sleep apnea in his family history. Dr. Wolak’s records were admitted into evidence as business records by agreement.

[41] I am satisfied that the plaintiff made these statements to Dr. Wolak and that they were true.

[42] When asked further questions about these prior inconsistent statements, the plaintiff said he did not remember, and then suggested he was having sleeping problems at the time due to drinking, and then finally conceded that perhaps he did have some sleeping issues at the time. These prior inconsistent statements, and the plaintiff’s explanation at trial were detracting factors in the assessment of the plaintiff’s credibility.

[43] The defendants outlined other instances of inconsistencies or overstatements. In two instances the defendants could not prove the inconsistent statement. Other instances were either very minor, in my view, or were somewhat cherry-picked and could be explained by examining other parts of the plaintiff’s evidence.

[44] Last, the defendants submit that the court should have regard for the plaintiff’s demeanour. Specifically, they note that the plaintiff often spoke over defence counsel in cross-examination or was argumentative, evasive, or non-responsive.

[45] I agree that the plaintiff’s demeanor on cross-examination was different at times than it was on direct examination. I also agree that he was argumentative at times and was occasionally curt or somewhat snarky in his tone. Further, there were some occasions where the plaintiff was evasive or non-responsive.

[46] In my view, the plaintiff's demeanour on cross examination was better explained by his underlying irritability than by an attempt to deceive. The plaintiff's underlying irritability was noted by Dr. Lu, along with the lay witnesses. Dr. Lu's opinion is that the plaintiff's irritability is a symptom of his depression and chronic pain, which the evidence establishes was caused by the accident.

[47] In personal injury cases plaintiffs often face a very difficult task. It is common for many years to pass between an accident date and trial. Moreover, the plaintiff's medical history in the years leading up to the accident is usually relevant. There can be hundreds of pages of records containing numerous prior statements that they can be asked about. Nevertheless, they are expected to give coherent and consistent evidence about their medical and personal history spanning several years. A plaintiff's task can be made more difficult by the symptoms of the injuries they sustain in the accident, which can include cognitive and memory deficits, along with personality changes. The lead up to trial can be extremely stressful and exhausting. By the time they step into the witness box, many plaintiffs have likely reached the limits of their capacity to deal with the strain of their injuries and of their case. Accordingly, the trier of fact should be careful to not hold personal injury plaintiffs to unreasonably high standards when it comes to how precise they are in their communication and how well they can regulate their demeanor when testifying.

[48] In sum, while there were a couple of areas of evidence that raised some potential concerns about the plaintiff's credibility, none of them individually were significant enough to cause the court to find the plaintiff not credible. Further, on the whole, the examples and instances raised by the defence did not collectively lead to a concern by the Court that the plaintiff was trying to be deceitful or dishonest. One does not need to be a perfect witness to be a credible witness.

[49] However, I do have some concerns about the plaintiff's reliability because of the plaintiff's tendency to overstate or overgeneralize his limitations. I also have concerns about the reliability of his evidence about the state of his consciousness immediately post-accident. As such, I will exercise caution when considering the

plaintiff's evidence, and in particular subjective complaints that are not corroborated by other reliable evidence.

[50] I found the plaintiff's three lay witnesses (Mr. Gillcash, Ms. Balderama, and Ms. Skjelstad) to be credible and reliable. In oral submissions, the defendants appeared to challenge both the credibility and reliability of Mr. Gillcash and Ms. Skjelstad; however, their arguments and points raised were fairly non-specific. While both witnesses, Ms. Skjelstad in particular, provided a fair amount of hearsay evidence, I did not perceive that either witness was trying to advocate or be insincere when providing such evidence. This was likely the first time that both witnesses testified in court. It can be difficult for lay witnesses to provide their evidence in a relatively natural manner while also avoiding hearsay. In considering their testimony, I have instructed myself not to place any weight on hearsay evidence unless it falls under an exception to the hearsay rule, in which case I will address that evidence specifically in these reasons.

LIABILITY

[51] The accident occurred on a sunny afternoon. The intersection of 6th and Carnarvon is controlled by traffic lights in all directions. Just prior to the accident, the plaintiff was traveling southbound on 6th Street.

[52] The plaintiff testified that his traffic light was green as he entered the intersection and that the walk sign for pedestrians was activated. He estimates that he was traveling at 47-48 kph. When he was in the middle of the intersection, he saw the other vehicle out of the corner of his eye to his left. He said his vehicle was struck before he had an opportunity to turn his head to the side. His next recollection was "coming to," with his vehicle stopped on the side of the road.

[53] The defendant Osseiran was traveling westbound on Carnarvon Street. She testified that while driving, she suddenly felt dizzy and then couldn't see, as the sun was in her eyes. She said she does not recall what happened after that. On cross-examination, the defendant denied that she could see the traffic lights. She said she could only see the sun.

[54] Constable Kyzen Loo, then of the New Westminster Police Department, was the investigating police officer. Constable Loo refreshed his memory by referring to the notes he took at the accident scene, along with the investigation report he drafted later that day.

[55] Constable Loo testified that the defendant Osseiran told him that she thought she had a yellow light, but the sun got in her eyes.

[56] When this statement was put to the defendant Osseiran on cross-examination, she said she could not see the traffic light and only saw the sun.

[57] Constable Loo struck me as a thorough and diligent investigator. His investigation notes are detailed. He presented as a careful and thoughtful witness. The defendant Osseiran's memory and recall of the accident were vague. I am satisfied that the defendant Osseiran made the statement to Constable Loo that she thought she had a yellow light but that the sun was in her eyes. Because she is a party, this statement is an admission, and I accept it for the truth of its contents.

[58] As set out above, I find the plaintiff to be a generally credible witness. I accept his evidence that he entered the intersection on a green light.

[59] I find that the defendant Osseiran was unable to see the colour of the traffic light due to a combination of her dizziness and the sun being in her eyes. It is not possible that both the plaintiff and the defendant Osseiran could have had a green light. Accordingly, I find that the defendant Osseiran entered the intersection on a red light, which was a breach of the standard of care. That breach caused the accident.

[60] The defendants allege that the plaintiff was contributorily negligent. The defendants have the onus of proving, on a balance of probabilities, that the plaintiff breached the standard of care. There was no evidence at trial to support such a finding. The plaintiff was not speeding, and he had no reasonable opportunity to avoid the accident.

[61] The defendants have admitted that the defendant Osseiran was driving the vehicle with the consent of the owner of the vehicle, the defendant Wehbi. As such, the defendant Wehbi is vicariously liable for the negligence of the defendant Osseiran.

[62] The defendants are 100% at fault for the accident, on a joint and several basis.

CAUSATION AND INJURIES SUSTAINED

Causation

[63] Madam Justice Stromberg-Stein recently provided a helpful summary of the applicable law in *Zenone v. Knight*, 2024 BCCA 200. She writes:

> [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.
>
> [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.
>
> [56] In *Clements*, Chief Justice McLachlin explained:
>
> > [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:

> 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).

Plaintiff's Pre-Accident Condition

[64] The plaintiff's pre-accident health is largely not at issue. With the exception of some sleep issues, the plaintiff's physical and mental health prior to the accident was excellent.

[65] Physical activity featured prominently in the plaintiff's life. For most of his life, the plaintiff was very committed to maintaining his physical fitness, and engaging in various physical activities, including hiking, playing sports, and working out at the gym. The evidence established that in the years leading up to the accident, the plaintiff worked out regularly and was in excellent physical shape.

[66] The plaintiff gravitated towards jobs that were physical. Even before he graduated, he got work in his hometown of Duncan delivering furniture. He moved to Vancouver in or around 2010, where he continued to work physical jobs.

[67] The plaintiff testified, and I accept, that much of his identity was tied to his physical strength, fitness, and physique.

[68] In 2015, the plaintiff started work as a glazier. Glazier work is very physically demanding. The plaintiff thrived in this work – partly due to his physical abilities.

[69] There was no evidence of the plaintiff having relevant injuries or physical issues prior to the accident. There was also no evidence that the plaintiff had any issues with headaches, driving, depression, or anxiety prior to the accident.

[70] As set out in the credibility section above, I find that the plaintiff did have an issue with sleep in the months before the accident.

[71] In sum, other than some sleep issues, the plaintiff had no relevant pre-existing health issues, injuries, or conditions.

Injuries

[72] The plaintiff claims the following injuries:

a) mild traumatic brain injury;

b) injury to his left shoulder;

c) soft tissue injuries to his neck and back;

d) post-traumatic headaches; and

e) psychological injuries.

[73] I will address each claimed injury below.

Mild Traumatic Brain Injury

[74] The medical experts are not in agreement about whether the plaintiff sustained a mild traumatic brain injury (“MTBI”). Dr. Cameron’s opinion is that the plaintiff suffered an MTBI, but that it is not clear if his ongoing symptoms are caused by the MTBI. Dr. Lu diagnoses the plaintiff with an MTBI. His opinion is that, while the plaintiff has experienced some recovery, he continues to experience MTBI-related symptoms. Dr. McDowell’s opinion is that the plaintiff may have suffered an MTBI. Whether he suffered one or not, in Dr. McDowell’s opinion, depends on whether the plaintiff’s report of a memory gap at the scene of the accident is accepted. Dr. McDowell casts doubt on that report based on what is documented

and not documented in the clinical records from the accident date. Dr. Craig's opinion is that the plaintiff may have suffered a brain injury, but if he did, he has likely fully recovered from it.

[75] Determining whether a plaintiff has sustained an MTBI is often a difficult task for the court, particularly when – as is the case here – the medical expert opinions vary. Further, the experts aren't always speaking the same "language," in that they are trained in different specialities and often use different diagnostic criteria.

[76] In this case, both Dr. McDowell and Dr. Lu used the American Congress of Rehabilitation Medicine diagnostic criteria. Dr. Cameron and Dr. Craig did not outline which criteria they used; however, on cross-examination, Dr. McDowell said that Dr. Cameron was using a dated diagnostic criteria.

[77] Dr. McDowell indicated that the American Congress's diagnostic criteria is modern (it was introduced in 2023) and was designed to build on past criteria that were felt to be too broad and non-specific, which resulted in almost anyone meeting the criteria for MTBI. In Dr. McDowell's view, the American Congress's diagnostic criteria is better suited for medical legal purposes because it emphasizes objective symptoms and examination findings.

[78] Dr. McDowell further noted that when diagnosing MTBI, one must consider whether there is an alternate process that better encapsulates or explains the symptoms.

[79] Although there are different diagnostic criteria for MTBI, one common criterion is the requirement that the person suffers an altered state of consciousness for some period of time, even if brief.

[80] Dr. McDowell's opinion illustrates the challenge the court often faces when assessing whether or not a plaintiff has sustained an MTBI. A common difficulty arises when a plaintiff's reports, made after the fact, aren't entirely consistent with the clinical records. Dr. McDowell notes that the plaintiff reported to him a brief gap in his memory and possible loss of consciousness at the time of the accident. He

states that if this is correct, the diagnostic criteria for MTBI are met. However, Dr. McDowell also notes that the records of the paramedics, emergency room triage nurse, and emergency room doctor report no loss of consciousness and do not report any amnesia. Further, in Dr. McDowell's view, the plaintiff's reports of disorientation were not medically significant.

[81] I agree with Dr. McDowell's opinion that the American Congress's emphasis on objective evidence and recorded examination findings may be helpful for medical legal purposes. That said, there can be many cases where subjective evidence, taken as a whole, meets the legal standard of proof for establishing that a person sustained a brain injury, even where it may not meet the medical standard of proof.

[82] I'm also alive to Dr. Cameron's evidence that often a person who has experienced a loss of consciousness or altered state of consciousness is not aware of it, and thus they may report suffering no loss of consciousness when in fact they did. Consequently, according to Dr. Cameron, it is very common for a patient to be subsequently diagnosed with an MTBI despite emergency room records indicating that the patient suffered no loss of consciousness.

[83] Lastly, I am reminded of Justice N. Smith's comments in *Edmondson v. Payer*, 2011 BCSC 118 [*Edmondson*] cautioning that the absence of a reference to a symptom in a clinical record cannot be the sole basis for an interference about the existence or non-existence of that symptom: para. 36.[1]

[84] To meet the diagnostic criteria for an MTBI, the plaintiff must prove – on a balance of probabilities – that he experienced an altered state of consciousness after the accident. I find that he has not met his burden of proof.

[85] The plaintiff testified that after the impact he recalls "coming to" at the side of the road. He says he does not recall the time period in between. The plaintiff also

[1] *Edmondson* was affirmed by the Court of Appeal: 2012 BCCA 114. I note, however, that the Court of Appeal stated, at para. 30, that Justice N. Smith's comments about the absence of a clinical record do not amount to legal principles applicable to every case, but instead reflect a common sense approach to arguments raised in that specific case.

testified that he had additional gaps in his memory at the scene of the accident, along with disorientation. He described going to the middle of the intersection and moving a bumper, which he thought was from his vehicle, to the side of the road. In addition, he testified to having patchy memory of being transported to Royal Columbian Hospital via ambulance. He recalls having difficulty reading a poster at the hospital.

[86] Although I found the plaintiff to be generally credible, I have concerns about his reliability on the issue of whether he lost consciousness or suffered an altered state of consciousness following the accident. Although Constable Loo's records did note a cut on the plaintiff's cheek, which was attributed to the air bags, as well as some agitation at the scene, they do not contain any evidence corroborating the plaintiff's report of altered consciousness or disorientation. In addition, there was no evidence from the paramedics who transported the plaintiff from the accident scene to the hospital, or from anyone who treated the plaintiff at the hospital. The ambulance records and the records from Royal Columbian Hospital were not admitted into evidence.

[87] The plaintiff testified that his former roommate, Danny, drove him home from the hospital. He believes he called his roommate for the ride, but he does not recall phoning him or the ride home itself. He testified that his next memory was being in bed. The plaintiff's former roommate was not called as a witness.

[88] The plaintiff's mother, Ms. Skjelstad, testified that the plaintiff phoned her "pretty much immediately" after the accident. She did not give any evidence indicating that the plaintiff was exhibiting signs of disorientation or confusion.

[89] In short, there was no evidence adduced by the plaintiff corroborating his subjective accounts of gaps in memory and disorientation following the accident. Such evidence was necessary because I have found the plaintiff to be unreliable on this issue. Accordingly, the plaintiff has not proven on a balance of probabilities that he suffered an altered state of consciousness and/or any disorientation of

significance immediately following the accident. As such, he has not proven that he meets the diagnostic criteria for having sustained an MTBI.

Left Shoulder

[90] The plaintiff testified that he recalled his left shoulder being raised up as a result of the impact. At the time of the accident, he had the driver's side window fully down and was resting his left arm on the window ledge of the door. He recalls having pain at the front of his shoulder at the accident scene. In the days following the accident, he recalls experiencing reduced range of motion and pain.

[91] The plaintiff said that since the accident, his left shoulder range of motion and pain has not improved much. In fact, he feels like the shoulder pain has become worse. At present, the plaintiff said that at rest his shoulder pain is in the form of a dull ache; however, as soon as he moves his shoulder above his head or across his body to the right he experiences pain in the medial area of his shoulder (i.e., the outer aspect). He also experiences pain when his left arm is extended out to the side. The plaintiff's shoulder pain impacts him at work – especially when doing overhead work. The pain can also be aggravated by lighter tasks, such as carrying a grocery bag.

[92] The plaintiff testified that while physiotherapy provided some relief, it was only temporary.

[93] The medical experts agree that the plaintiff sustained a left shoulder injury as a result of the accident.

[94] Dr. Regan is a well-known and well-regarded shoulder surgeon. He diagnoses the plaintiff with left biceps tendinopathy and subacromial bursitis. Dr. Regan recommended that the plaintiff get a series of three image-guided injections in order to definitively determine whether the biceps tendinopathy is the cause of the plaintiff's left shoulder symptoms. These injections could also result in lasting symptom improvement.

[95] The plaintiff has received the first of these injections. He told Dr. Regan that the injection provided about 20% relief, but that the relief was temporary. If the remaining two injections further confirm the diagnosis but do not provide lasting symptom relief, Dr. Regan recommends that the plaintiff undergo surgery, and specifically a biceps tenodesis. This procedure can be completed on an outpatient basis and would be associated with six weeks of sling immobilization (i.e., the left shoulder cannot be used), followed by six months of rehabilitation. In his report, Dr. Regan stated that surgery will more likely than not resolve the plaintiff's complaints. At trial, he qualified this statement and said that while he expects surgery would be successful, there is no guarantee, and even with a successful surgery, the plaintiff might not return to heavy lifting activities.

[96] Dr. Craig is an experienced physiatrist. He opined that the plaintiff's shoulder examination was suggestive of soft tissue pain and supraspinatus tendinopathy. Dr. Craig did not have the benefit of the plaintiff's left shoulder MRI or the results of the first diagnostic injection that the plaintiff underwent. Dr. Craig's opinion is that the plaintiff should experience some improvement in his shoulder with further treatment, but he did not opine on how much improvement the plaintiff would likely experience.

[97] There isn't much space between Dr. Regan and Dr. Craig's opinions. Both are of the view that the plaintiff has an objective injury to the left shoulder that was caused by the accident. Dr. Craig's opinion is that the primary issue is the supraspinatus, while Dr. Regan's opinion is that the primary issue is the biceps tendon. In the end, I prefer Dr. Regan's opinion. Dr. Regan is a shoulder surgeon. He also had the benefit of the MRI and the results of the plaintiff's first image-guided injection.

[98] In sum, I find that as a result of the accident, the plaintiff suffered a shoulder injury and has developed biceps tendinopathy and subacromial bursitis. I also find that there is a real and substantial possibility that the plaintiff is likely to experience further symptom improvement, either by way of the remaining two injections or, more likely, through shoulder surgery.

Soft Tissue Injuries to the Neck and Back

[99] The plaintiff testified that, as a result of the impact, his head snapped back and to the right. He recalls having neck pain when he was being assessed by a firefighter at the scene of the accident. In the days following the accident, he experienced reduced range of motion in his neck, along with pain in the upper, mid, and lower back.

[100] Since the accident, the plaintiff has experienced improvement in the range of motion in his neck; however, his neck pain has not really improved. His lower and mid back have improved, although he will occasionally experience flare-ups in those areas. His neck pain is aggravated by looking up and down, which is a problem given that many of his work tasks require him to look up or down.

[101] At trial, the plaintiff said he pretty much always has some amount of neck pain. He said the pain radiates from the upper back up to the sub-occipital area. The plaintiff said that treatments such as physiotherapy, chiropractic, registered massage therapy, dry needling, and trigger point injections all provided some temporary relief.

[102] Dr. Regan diagnoses the plaintiff with myofascial pain in the left neck and left upper back. In his first report, Dr. Regan's opinion is that these injuries were caused by the accident and were aggravated by a second motor vehicle accident that occurred on September 26, 2021. In his second report, Dr. Regan also diagnoses the plaintiff with mechanical back pain, and says that the combination of the October 15, 2018 accident and subsequent accidents that occurred on September 26, 2021 and in July 2024 have caused chronic pain in the neck and lower back.

[103] Dr. Regan's opinion on the prognosis of these soft tissue injuries is unclear. In his first report, he states his belief that these symptoms will continue to improve over time. In his second report, he states that the long-term prognosis for the plaintiff's neck and low back pain would be best gleaned from a review of the plaintiff's treating pain specialist's records and opinion. I note that there is no opinion before this Court from that specialist.

[104] Dr. Craig diagnoses the plaintiff with moderate soft tissue injuries to the left neck and left shoulder girdle. In addition, he opines that the plaintiff has a possible cervical facet joint injury. Last, in his view, the plaintiff likely has a moderate soft tissue injury to the lower back and a possible disc injury in the lower back. In terms of prognosis, Dr. Craig's opinion is that, given the plaintiff's symptoms have persisted for six years, it is likely he will have ongoing symptoms.

[105] Dr. Lu has considerable experience treating patients with chronic pain. Although he would defer to appropriate medical and surgical specialists on causation and prognosis, he states that chronic pain lasting more than two years is unlikely to remit.

[106] As with the left shoulder injury, the opinions of the medical experts on these injuries are fairly reconcilable.

[107] In their closing submissions, the defendants argue that the plaintiff's subsequent accidents (which occurred on September 26, 2021, and June 11, 2024) were intervening events that would have affected the plaintiff's original position, regardless of the 2018 accident. As such, they argue that the plaintiff's damages must be reduced.

[108] The evidence on which the defendants rely in support of this submission is limited.

[109] Defence counsel asked the plaintiff about the subsequent accidents on cross-examination. Regarding the September 26, 2021 accident, the plaintiff said that another driver turned right in front of him and he didn't have time to stop. The plaintiff testified that his vehicle sustained minimal damage and that, while his physical injuries were not aggravated, the accident did aggravate his psychological injuries, resulting in him increasing his alcohol intake.

[110] This evidence was, on its face, inconsistent with what Dr. Regan reported the plaintiff telling him, which was that this accident aggravated his existing injuries but did not cause any new injuries. This apparent prior inconsistent statement was not

put to the plaintiff, nor did defence counsel make any submissions on this in their closing.

[111] In regard to the June 11, 2024 accident, the plaintiff testified on cross-examination that he did seek medical attention at the emergency room and with his family doctor, and that the accident caused his collarbone to be tender for a few days and resulted in an aggravation of his driving-related anxiety.

[112] The defendant put the family doctor's record to the plaintiff. The plaintiff, however, did not adopt statements from that record, and the family doctor did not testify; nor were his records admitted into evidence as business records.

[113] The Court has very little evidence to assess the defendants' argument. The evidence about what injuries were aggravated and for how long is not clear. The defendants rely mainly on Dr. Regan's opinion that the combination of all three accidents produced chronic pain affecting the neck and lower back. Dr. Regan was not asked to clarify his opinion on cross-examination.

[114] The defendants have the burden of establishing an intervening event and/or that the plaintiff's damages should be reduced to reflect his original position. They have not met this burden. Their argument borders on speculation.

[115] I find that, as a result of the accident, the plaintiff sustained soft tissue injuries to his neck, upper back, and lower back. I find that the injuries to the neck, upper back, and lower back have mostly resolved. I find that the neck injury has not improved significantly and has largely plateaued. The plaintiff is still undergoing treatment for his neck pain. As will be discussed further below, I find that as the plaintiff is able to optimize treatment of other injuries, there is a real and substantial possibility that he will experience some improvement in his soft tissue injury symptoms.

Headaches

[116] The plaintiff experiences two types of headaches. The first is a “background” headache, which he says he experiences about three days a week. He takes Advil for these headaches. He describes these headaches as a pain in the back of the left side of his neck and a pressure from temple to temple. The second is a migraine-type headache, which he experiences once or twice a month. The migraine-type headaches generally last a day but can last up to two days. Advil does not help the migraine-type headaches.

[117] The plaintiff said that when he has headaches, his mood, focus, and concentration are negatively affected. His headaches, and the impact they have on his focus, concentration, and attention, are one of the reasons why he does little crane work.

[118] Dr. Cameron diagnoses the plaintiff with post-traumatic headaches following the accident. In his opinion, these headaches are in the form of post-traumatic musculoskeletal or cervicogenic headaches, intermixed with post-traumatic migraine headaches. Dr. Cameron does not provide a prognosis specific to the headaches; however, his general prognosis suggests that he would not expect improvement after two years post-accident. He states that any treatment recommended beyond the two-year post-accident period may or may not result in mild improvement but will not resolve the ongoing symptoms. Dr. Cameron notes that the plaintiff’s complaint of twice-weekly headaches is borderline with respect to meeting the requirements of specific prophylactic headache medication. Thus, he recommends the plaintiff continue with over-the-counter medication.

[119] Dr. McDowell’s opinion is that the plaintiff developed post-traumatic headaches due to whiplash as a result of the accident. In his report, he notes that the plaintiff suffers from two types of headaches: tension-type headaches, which are mild, and migraine-type headaches, which are more severe. Dr. McDowell is also of the view that the plaintiff’s headaches are not frequent enough to warrant prophylactic headache medication; however, he does recommend that the plaintiff

be prescribed and use specific migraine medication and to follow headache hygiene, which includes adequate exercise, water intake, sleep, and stress reduction. Following these recommendations, Dr. McDowell notes, should significantly reduce the partial disability the plaintiff reports due to headaches. Nevertheless, Dr. McDowell's opinion is that the plaintiff will likely have some degree of ongoing partial disability (albeit not to the extent of missing work) due to headaches.

[120] Dr. Craig attributes the plaintiff's headaches to myofascial pain in the neck and shoulder girdle and/or possible cervical facet arthropathy. In other words, in Dr. Craig's opinion, the plaintiff's headaches are caused by soft-tissue injuries to the neck and shoulder girdle and/or mechanical neck pain. Dr. Craig recommends that the plaintiff be referred for cervical medial branch blocks, which involve blocking the nerve supply to the facet joints. If those injections provide relief, then ultimately, he would recommend that the plaintiff undergo radiofrequency ablation to ablate/cauterize the nerve supply in that area. Dr. Craig also recommended various prescription medications. Dr. Craig provided no opinion on prognosis for the plaintiff's headaches.

[121] I find that, as a result of the accident, the plaintiff has a headache disorder that is caused by the whiplash injury he suffered to the neck and upper back. This disorder presents in the form of two types of headaches – a mild tension-type headache, which he experiences about three days a week, and a more severe migraine-type headache, which he experiences once or twice a month. I find that the plaintiff's headaches have not been adequately treated and that if he follows the treatment recommendations of Dr. Cameron, Dr. McDowell, and, Dr. Craig there is a real and substantial possibility that he will experience improvement, but not full resolution, of his headache symptoms.

Psychological Injuries and Symptoms

[122] The plaintiff testified that he didn't become aware of his mood issues until about 2019.

[123] Prior to that, he was aware of driving anxiety, which manifested shortly after the accident. The plaintiff's vehicle was written off due to the accident. He didn't purchase a replacement vehicle for approximately 1.5 years due to his driving anxiety. In the meantime, he largely relied on public transit. Since then, the plaintiff continues to experience anxiety while driving, particularly in high-traffic areas. He typically gets a ride to worksites from Mr. Gillcash, his supervisor.

[124] Returning to mood issues, the plaintiff realized he was experiencing mood issues when Mr. Gillcash approached him and said the plaintiff had become aggressive and moody.

[125] The plaintiff testified that his mood has changed since the accident. He said he is "100 times" more irritable and lacks confidence. He said he experiences very little enjoyment in his life. The plaintiff testified that since the accident he is much less social and now only tends to go out when Ms. Balderama pressures him. He feels like he is lacking empathy for others and is too focused on his own problems. Prior to the accident, he used to talk to his mother on the phone regularly, but since the accident, he doesn't really talk to her much, even though she is going through some difficulties. The plaintiff feels like he has lost much of what formed his identity prior to the accident, such as being healthy and exercising.

[126] Ms. Skjelstad testified that she and her son were extremely close prior to the accident. Although they lived in different cities, she said they spoke with each other on the phone every day and that the plaintiff always told her everything that was going on with him.

[127] Ms. Skjelstad said that the plaintiff was very happy-go-lucky growing up. He was always very active and had many friends. She said that the plaintiff loved books from a young age and that his love of reading continued right up to the accident.

[128] Prior to the accident, Ms. Skjelstad would see the plaintiff in person about ten times a year. When visiting each other, they would typically do outdoor activities.

[129] Ms. Skjelstad noted the following personality changes in the plaintiff since the accident:

a) She barely hears from him. She will call and he won't answer and won't phone back, which is not something that occurred pre-accident. When they do speak, he will often give short answers or will end the call early because he isn't having a good day or because he has a headache;

b) When they visit they do limited physical activities;

c) When he visits he no longer brings books with him and they don't talk anymore about what he is reading.

d) He doesn't have much tolerance for social gatherings. Since the accident he seems withdrawn and aggravated.

e) Her impression is that he's lost his confidence.

f) Prior to the accident he always seemed excited when talking about work. He no longer seems prideful when talking, and instead is very monotone in his tone.

g) He tends to repeat himself or she will tell him something and he will forget it.

h) He no longer tells her much about what is going on in his life.

[130] Ms. Skjelstad said that she feels like she's lost her son.

[131] Dr. Lu diagnoses the plaintiff with the following psychiatric disorders or conditions:

a) Major depression;

b) Somatic symptom disorder; and

c) Elements of posttraumatic stress disorder (PTSD) (although he does not meet the diagnostic criteria).

[132] Dr. Lu's opinion is that the plaintiff's major depression developed due to the multiple impacts of his chronic pain - particularly its effect on his working capacity and his ability to balance his personal demands. In reaching this diagnosis, Dr. Lu notes the plaintiff's reports of persistent sadness, feelings of helplessness, loss of joy and interest, emotional withdrawal and social anxiety, internal irritability and isolation, and loss of libido. There are also features of anxiety associated with the depression, including worries about the future and his capacity to have a family.

[133] Dr. Lu states that a somatic symptom disorder captures the interaction between physical and psychiatric symptoms and function. He notes the following as evidence of and manifestations of the plaintiff's somatic symptom disorder:

a) Self-reinforcing cycle of anxiety, pain, and isolation;

b) Health anxiety, persistent frustration, and feelings of demoralization;

c) Pre-occupation with pain-related symptoms and limitations;

d) Perceiving all facets of his daily life from the perspective of his negative expectation of pain.

[134] Dr. Lu indicates that the plaintiff's somatic symptom disorder reinforces his fear and avoidance and that the disorder is self-perpetuating.

[135] Dr. Lu's opinion is that, as a result of the PTSD symptoms, the plaintiff has driving anxiety and a recurrent fear of being injured.

[136] As noted above, Dr. Lu is experienced in treating patients with chronic pain from a psychiatric perspective. He noted that chronic pain can cause fatigue, reduced stamina, and non-specific symptoms such as mental fatigue, reduced concentration, irritability, mood changes, and anxiety. He noted that, common to

many patients with chronic pain, the plaintiff has some degree of mental exhaustion and requires increased mental energy to maintain his attention and concentration.

[137] In terms of prognosis, Dr. Lu's opinion is that the plaintiff's long-term psychiatric risk is guarded. In his view, the plaintiff's chronic pain is unlikely to resolve. Dr. Lu says that based on the plaintiff's current clinical course, as long as he has chronic pain, he will have some fluctuating psychiatric symptoms. He notes that the plaintiff's mood and psychological symptoms will wax and wane with the severity of his pain and physical symptoms. Dr. Lu states that even with optimal treatment, the plaintiff is likely to have some elements of depression due to his chronic pain.

[138] Dr. Lu recommends that the plaintiff engage in long-term counselling with a specific focus on his depression and chronic pain. On cross-examination, he also noted that cognitive behavioural therapy is the gold standard for treating PTSD. Dr. Lu further recommends that the plaintiff continue with the current antidepressant he is taking for at least five years.

[139] If the plaintiff responds well to treatment and his depression achieves remission, Dr. Lu estimates he would have at least a 30% chance of relapse within five years.

[140] The defendants submit that Dr. Lu's opinion should not be given much weight. Some of their main arguments include the following:

a) Dr. Lu is not a physical medicine doctor but he nonetheless emphasized the plaintiff's chronic pain as central to his opinion;

b) Dr. Lu's opinion is "immediately troubling" because it comes on the eve of trial as a "litigation IME" after the plaintiff went through more than six years without treatment;

c) Dr. Lu ignores examples of the plaintiff's function that suggest the characterization of the plaintiff's complaints are excessive. In this regard, the defendants note that Dr. Lu makes no mention of various activities the

plaintiff engaged in, including vacations, going to the movies and to restaurants with his girlfriend, and the fact that the plaintiff and his girlfriend have a stable relationship; and

d) Not putting sufficient weight to the plaintiff's worry about family planning.

[141] I do not find the defendants' criticism of Dr. Lu's opinion persuasive. Dr. Lu has considerable experience treating and/or assessing patients who are experiencing psychiatric symptoms secondary to physical injuries. Somatic Symptom Disorder is a psychiatric disorder involving the interplay between pain and psychological symptoms. Dr. Lu has spent the past 20 years treating patients in hospital who are experiencing physical injuries and psychiatric issues related to those physical injuries. In many ways, his expertise is best suited to explain the plaintiff's overall situation.

[142] I am not troubled by the fact that Dr. Lu's opinion was obtained approximately six years after the accident. There can be many explanations for this. First and foremost is that Dr. Lu is a medical legal expert, not a treating expert. Moreover, the *Disbursement and Expert Evidence Regulation*, BC Reg. 210/2010, limits both the number of experts and reports that a party can serve, along with capping the amount of disbursements a successful party can claim, absent consent from the defendant or a court order. I was advised by counsel during submissions that the parties were in Chambers prior to trial to hear the plaintiff's contested application for leave to serve additional expert reports and to exclude certain disbursements from the regulated cap. The defendants seem to be arguing that the plaintiff either should have obtained an earlier report from Dr. Lu and/or should have seen a treating psychiatrist earlier. If the plaintiff had seen Dr. Lu earlier in the proceeding, his counsel would likely have needed to have him reassessed closer to trial in order to ensure that the opinion wasn't dated. This would have resulted in an additional report and additional disbursements, which the defendants have shown they wouldn't have consented to. In effect, the defendants want to have their cake and eat it too.

[143] Further, I have difficulty understanding how the plaintiff's alleged delay in seeking treatment for mental health issues makes Dr. Lu's opinion "immediately troubling."

[144] The remainder of the defendants' argument is essentially that I should place little or less weight on Dr. Lu's opinion because the basis for that opinion is built on a shaky factual foundation.

[145] I do not accept that argument.

[146] Dr. Lu did not document the various vacations that the plaintiff has taken in the past six years. When asked on cross-examination whether he spoke to the plaintiff about vacations, Dr. Lu said no. He was not asked whether knowing about those vacations would change his opinion. Regardless, I am not persuaded by this argument. The plaintiff missed two days of work immediately after the accident. Since then, he may have taken the occasional day off due to symptoms, but has overwhelmingly continued to work, albeit in an accommodated fashion. I would imagine that, in such a situation, an expert in Dr. Lu's position would consider a handful of beach-type and/or family vacations taken over the course of six years largely inconsequential to their opinion.

[147] I remain similarly unpersuaded by the defendants' argument that the plaintiff's excessive worry about future family planning is a cause of the plaintiff's psychological problems and not a symptom of the psychological problems caused by the accident. There was no evidence that the plaintiff had any anxiety or excessive worry about relationships or family life prior to the accident. In my view, this type of excessive worry is related to the plaintiff's depression and somatic symptom disorder.

[148] The defendants also argue that regardless of the accident, the plaintiff would have suffered from psychological symptoms as a result of September 26, 2021, and June 11, 2024 motor vehicle accidents. The plaintiff's evidence is that the 2021 accident did aggravate his psychological symptoms. There was no evidence that the

2024 accident caused or aggravated the plaintiff's psychological symptoms. The defendants have not pointed to any expert opinion supporting their argument that the plaintiff would have experienced psychological symptoms regardless of the 2017 accident. The defendants' argument on this issue amounts to speculation.

[149] I find that, as a result of the accident, the plaintiff developed major depression, a somatic symptom disorder, and features of PTSD. These accident-caused psychiatric disorders and issues cause the plaintiff to experience a number of symptoms, including the following:

a) Mood changes, including anxiety, persistent sadness, feelings of helplessness, loss of joy and interest, irritability, and emotional and social withdrawal;

b) Physical fatigue and reduced stamina;

c) Mental fatigue, reduced concentration, and reduced attention;

d) Driving anxiety; and

e) Fear of being reinjured.

[150] I find that the plaintiff has not received adequate treatment. The plaintiff did start a course of counselling with Dr. Sheppard, a registered psychologist. He would like to continue counselling with Dr. Sheppard, as he had a good rapport with him and found him quite helpful. I find that if Dr. Lu's recommendation of ongoing counselling and continued medication are followed, and if he experiences the expected improvement from further shoulder and headache treatments, there is a real and substantial possibility that the plaintiff will experience improvement, but not full resolution, of his psychiatric symptoms.

Conclusion re: Injuries and Prognosis

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

a) Left shoulder injury – specifically biceps tendinopathy and subacromial bursitis;

b) Soft tissue injuries to the neck, upper back, shoulder girdle and lower back;

c) Post-traumatic headaches; and

d) Major depression, somatic symptom disorder, and PTSD symptoms (including driving anxiety)

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

a) Chronic pain;

b) Mood disruption;

c) Anxiety;

d) Irritability;

e) Fatigue and reduced physical stamina;

f) Fear of reinjury;

g) Reduced focus, concentration, and attention; and

h) Mental fatigue.

[153] While the plaintiff has experienced significant improvement in the injuries to his upper back, shoulder girdle, and lower back, and some improvement in his neck pain, his shoulder has not improved nor have his headaches. I find that the plaintiff's injuries and symptoms have reached a plateau. Nevertheless, I find that the plaintiff has treatment options available to him, and that should these treatments be pursued, there is a real and substantial possibility that he will experience improvement in all his symptoms. I make this finding based on the following:

a) I find as a fact that the cause of the plaintiff's left shoulder issues is what Dr. Regan has diagnosed him with. Dr. Regan has recommended a series of three image-guided injections. If the injections reduce the plaintiff's pain, that will further confirm Dr. Regan's diagnosis. If they reduce the pain permanently, then the plaintiff will not need surgery. If they reduce the pain, but the effect is temporary then biceps tenodesis surgery is indicated. Dr. Regan's evidence is that biceps tenodesis surgery has an extremely high success rate. In his report, he said that more likely than not surgery will resolve the plaintiff's shoulder complaint. I note that at trial Dr. Regan did qualify his opinion and noted that success is not guaranteed and that while it will likely significantly improve the plaintiff's shoulder issues, he still may not return to his pre-accident shoulder function. I find that there is a real and substantial possibility that the plaintiff will require surgery, and that the surgery will significantly improve the plaintiff's left shoulder symptoms.

b) I find that if the plaintiff continues with seeing his pain specialist and follows the treatment recommendations of Dr. Craig, there is a real and substantial possibility that he will experience improvement, but not full resolution, of his neck symptoms.

c) I find that if the plaintiff follows the headache-related treatment recommendations of Dr. Cameron, Dr. McDowell, and, Dr. Craig, there is a real and substantial possibility that he will experience improvement, but not full resolution, of his headache symptoms.

d) I find that if the plaintiff follows the psychiatric treatment recommendations of Dr. Lu, namely significant counselling and continues with antidepressant medication, there is a real and substantial possibility of improvement of his psychiatric symptoms.

[154] In making these findings, I am mindful of Dr. Lu's comment about the challenges caused by the complexity of the treating someone with chronic pain. The

plaintiff's physical pain is a perpetuating factor for his psychiatric symptoms and vice versa. Nevertheless, Dr. Regan is optimistic that the plaintiff's shoulder condition can be improved significantly if his recommendations are followed. If the plaintiff's shoulder pain (and related function) and can be improved significantly, and his neck symptoms and headaches improve, his psychiatric symptoms should also improve. Moreover, if the plaintiff follows Dr. Lu's recommendation to pursue long term counselling, it should improve his psychiatric condition, which will in turn improve his chronic pain.

FAILURE TO MITIGATE

[155] The defendants submit that the plaintiff failed to mitigate his injuries. In support of this submission, they argue the following:

a) The plaintiff inexplicably stopped counselling and did not provide a reasonable excuse for this. Had he continued he would likely have recovered or substantially reduced his psychological complaints;

b) More than three years ago, Dr. Regan recommended three diagnostic injections to assess his candidacy for surgery. While he has undergone one of these injections, the plaintiff has offered no explanation why he has not completed the remaining two. He has unreasonably failed to follow recommendations that would likely significantly resolve his shoulder issues, which are a significant contributor to the development of his psychological issues.

[156] As set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, in a case where the plaintiff has not pursued a medical treatment recommended by doctors, the defendant must prove two things to establish a failure to mitigate:

a) The plaintiff acted unreasonably in eschewing the treatment recommendation; and

b) The extent, if any, to which the plaintiff's damages would have been reduced had the plaintiff acted reasonably.

[157] The defendant must establish that the plaintiff acted unreasonably on a balance of probabilities.

[158] To establish the second branch of the *Chiu* test, the defendant must prove, on a balance of probabilities, that the plaintiff's injuries *would* have been reduced to *some* degree had they acted reasonably. Only once this is established does the court go on to assess the reduction to the damages award based on *the extent* to which the injuries would have been avoided, which is a true hypothetical: *Haug v. Funk*, 2023 BCCA 110, at para. 61.

[159] To date, the plaintiff has attended four counselling sessions with Dr. Michael Sheppard, Registered Psychologist. These sessions occurred between July 26, 2024 and October 23, 2024. The plaintiff testified that he believed he was referred to Dr. Sheppard by his family doctor. He said he stopped the counselling sessions due to cost and because Dr. Sheppard moved to Europe, albeit temporarily. The plaintiff did acknowledge that his treatment sessions were online and he might have been able to obtain online treatment with Dr. Sheppard when he was in Europe. The plaintiff testified that he had a good rapport with Dr. Sheppard and that he felt he made progress with him.

[160] In my view, the defendants have not proven that the plaintiff acted unreasonably in not following a treatment recommendation. First, there was no evidence before the court about when the plaintiff received the recommendation to seek counselling. As such, there is no evidence of any delay in seeking treatment. Second, the plaintiff did not eschew or deliberately avoid or refuse the treatment. The plaintiff attended treatment but did not continue due to cost concerns and because his treatment provider was away for an extended period of time. At no time did the plaintiff refuse to follow the treatment recommendations.

[161] The defendants note that the plaintiff earns roughly $100,000.00 and argue that the plaintiff's costs concerns are unreasonable. They further suggest that if the plaintiff could not afford counselling, he could have asked his mother for financial help. I do not accede to this argument. The cost of each counselling session was $250.00. While an annual income of $100,000.00 is a good income, I take judicial notice of the fact that the cost of living in the Lower Mainland is high, and has been made more difficult by high rates of inflation. As such, paying $250.00 per counseling is a significant cost even for someone who earns what the plaintiff was earning.

[162] If I am wrong, I find that even if the plaintiff continued counselling from the fall of 2024 to trial, the defendants have not proven on a balance of probabilities that that short period of counselling would have improved the plaintiff's condition such that his damages would be reduced or avoided.

[163] I also reject the defendants' argument regarding the delay in diagnostic injections and surgery.

[164] While Dr. Regan did recommend the injections in his January 5, 2022 report, Dr. Regan is not one of the plaintiff's treating physicians.

[165] In the context of a failure to mitigate argument, as a general proposition, there is a meaningful distinction to be made between recommendations made by a physician preparing a medical-legal report and a treating physician; however, the court is not precluded from considering findings or recommendations by medical experts other than a treating physician: *Padgham v. Ram*, 2025 BCCA 100 at para. 19.

[166] In this case, the distinction between a medical-legal physician and a treating physician is important. When asked on cross-examination about the plaintiff's delay in getting the recommended injections, Dr. Regan noted that he is not the plaintiff's treating doctor. He added that the plaintiff's family doctor referred the plaintiff to Dr. Patrick Chin, a well-regarded orthopedic surgeon. Dr. Regan indicated that the first

image-guided injection was performed under the direction of Dr. Chin and that he leaves it to Dr. Chin, as the plaintiff's treating doctor, to advise the plaintiff on the next steps, including whether he should proceed with surgery.

[167] The defendants essentially argue that once a medical legal doctor makes a recommendation, the plaintiff should quickly implement that recommendation, and if they don't they are acting unreasonably. While that could be the case for a recommendation that is uncomplicated and more easily implemented, such as going to physiotherapy, it is not the case for something more complicated, such as injections or surgery.

[168] Dr. Regan was clear that as a non-treating doctor he could not implement the recommendations he made. That required the plaintiff to have his treating family doctor make a referral to a treating orthopedic surgeon.

[169] The records admitted into evidence show that the plaintiff obtained an MRI of his shoulder on July 7, 2024, with Dr. Chin as the referring physician. The evidence also indicated that the plaintiff received the first ultrasound-guided injection on August 21, 2024. There was no evidence adduced by the defendants demonstrating unreasonable delay in the plaintiff obtaining the second and third injections. It's possible that some time must elapse between injections, or that the plaintiff is waiting for a follow up appointment with Dr. Chin. This is all speculation. The point is that the defendants must prove that there has been delay and that the delay is caused by the unreasonable conduct by the plaintiff. They have not done so.

[170] In sum, the defendants have not met their burden in proving a failure to mitigate.

NON-PECUNIARY DAMAGES

[171] In *Langford (City) v. Matthews*, 2024 BCCA 214, 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.

[172] The plaintiff claims non-pecuniary damages of $225,000.00. It was not clear from the plaintiff's written or oral submissions what analogous cases he relied on to support this award. The plaintiff referenced some cases in his written submissions, but the excerpts of those cases all relate to loss of income earning capacity. These cases are as follows:

a) *Fox v. Danis*, 2005 BCSC 102;

b) *Shapiro v. Dailey*, 2010 BCSC 770;

c) *Johal v. Meyede*, 2013 BCSC 2381

d) *Soligo v. Turner*, 2001 BCSC 205; and

e) *Arletto v. Kin*, 2016 BCSC 77.

[173] In the cases referenced by the plaintiff, the court awarded non-pecuniary damages ranging from $113,710.00 to $252,037.00, when adjusted for inflation.

[174] The only case where the non-pecuniary award is in the range of what the plaintiff is seeking is *Soligo v. Turner*, a dated case where the court awarded $150,000.00 ($252,037.00 when adjusted for inflation).

[175] The defendants argue that non-pecuniary damages of $120,000.00 to $140,000.00 should be awarded. In support of their position, they cite the following cases:

a) *Erdem v. O'Brien*, 2023 BCSC 1233 (award: $120,000.00);

b) *Clough-Smith v. Piton*, 2022 BCSC 953 (award: $120,000.00); and

c) *Pruett v. Robert*, 2023 BCSC 49 (award: $142,500.00).

[176] In my view, the plaintiffs in the cases relied on by the defendants sustained less significant injuries than the plaintiff in this case. *Pruett v. Robert* is fairly analogous; however, in that case, the court did not accept that the plaintiff had a somatic symptom disorder in addition to major depression.

[177] I am reminded that while comparable cases can be helpful in assessing non-pecuniary damages, they only serve 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 106 at para. 75.

[178] The accident has had a significantly negative impact on the plaintiff. It has affected all aspects of his life. I have found that he will very likely require surgery. That surgery will involve a prolonged period of recovery. Further, the plaintiff has lost a lot of his self-identity. His mother described significant personality changes – she feels like she's lost her son. Prior to the accident, the plaintiff was thriving at his job, and his passion for his work was clearly evident at trial. Although the somatic symptom disorder impacts his perception of pain and causes him to be preoccupied with pain, the plaintiff has shown considerable stoicism by not missing much work. Nevertheless, he experiences pain while at work, and it was apparent to me that going to work each day and being reminded of what he can no longer do takes a toll on him emotionally.

[179] Nevertheless, as set out above, I have found that there is a real and substantial possibility that the plaintiff will require surgery. I assess the likelihood of surgery being required as near certain. I further assess the likelihood of significant left shoulder improvement due to the surgery at 75%. I have also found that there is a real and substantial possibility of the plaintiff experiencing improvement in his neck pain, headaches, and psychological symptoms.

[180] Considering the evidence as a whole, I am satisfied that a contingency deduction of 30% for non-pecuniary damages is fair, reasonable, and warranted. I am mindful that there is a risk of complications from the surgery (albeit very low) and a risk that the surgery may not be successful. I am also mindful that the psychiatric treatment recommendations are not guaranteed to be successful; however, the plaintiff was eager to continue sessions with Dr. Sheppard, whom he found helpful.

[181] In my view, after considering the contingency deduction, non-pecuniary damages in the amount of $185,000.00 are appropriate.

PAST LOSS OF INCOME EARNING CAPACITY

[182] In *Lamarque v. Rouse*, 2023 BCCA 392, 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.

[183] As stated, immediately following the accident the plaintiff missed two days of work, after which he returned. Since then, he has not missed any work due to his accident-related injuries, other than possibly an occasional day taken as sick leave.

[184] Nevertheless, the plaintiff says that he is entitled to an award under this head of damage for the following reasons.

[185] First, he states that since returning to work shortly after the accident he has been unable to work full duties. He argues that he is significantly accommodated by a sympathetic foreman. He says that he is unable to perform much of the physical requirements of the job.

[186] Second, he says that but for the accident, he would have progressed to an "A" foreman by 2020.

[187] The plaintiff claims the difference between the earnings of an "A" foreman and what he actually earned from the period 2020 to present, which he says amounts to $68,000.00 net.

[188] The defendants submit that the plaintiff's past loss of income-earning capacity should be limited to the two days of work he missed immediately after the accident. They note that the plaintiff's tax returns show no evidence of reduced income, and, in fact, show a steady increase. They argue that the plaintiff has not provided any direct evidence that he was offered a foreman position and turned it down due to the accident. They say that, on a balance of probabilities, the plaintiff has not proven he sustained a past income loss that is causally related to the accident

[189] I largely agree with the defendants' position.

[190] As I will discuss further in these reasons, the plaintiff has established, on a balance of probabilities, that his accident-related injuries have impaired his ability to perform all the duties required of a glazier and a foreman. However, apart from the two days he missed immediately after the accident, there is no clear evidence that the plaintiff took any additional time off of work due to his injuries, and if so, how much time he took.

[191] The plaintiff testified that his plan was to move up in the company and to become an "A" foreman by 2020. He said that the company planned for him to be an

"A" foreman. More specifically, the plaintiff's evidence was that his "A" foreman at the time, Glen Lang, said he was grooming him to be an "A" foreman.

[192] Mr. Gillcash testified that it was also his understanding that the company was grooming the plaintiff to be an "A" foreman. When asked how he knew this, Mr. Gillcash said that he spoke directly with the superintendents and the vice president of the company. He also said that the plaintiff's name came up in discussions that he and other foremen had with the superintendents about which workers had good prospects for promotion.

[193] Mr. Lang is still with the company and is currently a superintendent. Mr. Gillcash testified that Mr. Lang is his boss.

[194] While I accept that as an "A" foreman and supervisor, Mr. Gillcash, likely plays a role in identifying and being tasked with grooming prospective foremen; however, there was no evidence that he or other foremen ultimately decide who becomes a foreman and when.

[195] The evidence relied on by the plaintiff in support of his position was largely hearsay evidence. The plaintiff was placed under Mr. Gillcash's supervision in 2019, as a result of Mr. Lang having difficulty dealing with the plaintiff. There was no evidence that Mr. Gillcash was ever involved in, or tasked with, grooming the plaintiff to become a foreman. The evidence was that Mr. Gillcash was involved in conversations where the plaintiff's prospects were discussed. In my view, while Mr. Gillcash could provide lay opinion evidence about the plaintiff's suitability and prospects in general of becoming a foreman, I am limited in the weight I can place on his hearsay evidence about if and when the plaintiff was going to be promoted to a foreman position at Glastech.

[196] It would have been helpful to hear evidence from Mr. Lang, whom the plaintiff said told him the company was grooming him to be a foreman. Mr. Lang is now a superintendent and is likely in a position to provide evidence about the plaintiff's specific prospects for promotion at Glastech.

[197] In sum, there is insufficient evidence for me to find that there was a real and substantial possibility of the plaintiff being promoted to an "A" foreman position between 2020 and the time of trial, but for the accident.

[198] The plaintiff is awarded damages for past income loss for the two days of work he missed immediately after the accident. Unfortunately, there was no evidence before the court about what precisely the loss of these two days amounted to. The plaintiff gave evidence that he was earning approximately $25.00 per hour in 2017. Mr. Lawless's report indicates that in September 2017, the plaintiff was earning $24.95 per hour as an apprentice glazier. Based on two missed eight-hour shifts at a wage of $24.95 an hour, I assess the plaintiff's past loss of income earning capacity at $399.20.

FUTURE LOSS OF INCOME EARNING CAPACITY

[199] In *Lamarque*, Justice Horsman again provides a helpful summary of the applicable law. 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.
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> [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.

[200] 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

[201] The plaintiff's position is that but for the accident, he would have been promoted to an "A" foreman; however, because of the accident he will carry on in his accommodated position at Glastech until August 31, 2026, when he will quit and retrain to work as a medical radiation technologist or a physiotherapy assistant. He claims a loss of future income capacity award based on the difference between the career earnings of an "A" foreman and these other jobs – which he says ranges between approximately $450,000.00 and $1,000,000.00. The plaintiff claims the upper amount of that range.

Steps 1 and 2 of the *Rab* Analysis

[202] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 [*Ploskon-Ciesla*], the Court of Appeal elaborates 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.

[203] For situations in which there has been no clear loss of income at the time of trial, the "*Brown* factors", as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*], come into play: *Ploskon-Ciesla*, at para. 12.

[204] The *Brown* factors comprise a means of assessing whether there has been an impairment or diminishment of income-earning capacity. The factors are as follows:

a) Is the plaintiff less capable overall of engaging in all types of employment?

b) Is the plaintiff less marketable or attractive as an employee?

c) Has the plaintiff lost the opportunity to take advantage of all job opportunities had they not been injured; and

d) Is the plaintiff less valuable to themselves as a person capable of earning money in a competitive labour market?

[205] I note that even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of income-earning capacity, it does not mean that they have established a real and substantial possibility that this impaired or diminished earning capacity would lead to an income loss: *Ploskon-Ciesla*, at para. 12.

[206] I find that step one of the *Rab* test has been established. In other words, I find that the plaintiff has suffered an impairment or diminishment to his income earning capacity.

[207] The evidence establishes that the plaintiff is impaired in his ability to complete all aspects of the job of a glazier and as a temporary foreman, the position he currently holds.

[208] There was a significant amount of evidence from the plaintiff and Mr. Gillcash about the nature of glazier work. I do not propose summarizing all that evidence. Nevertheless, I am satisfied that glazier work is very physically demanding. Glaziers are required to transport and lift heavy pieces of glass. These pieces are often large

and often have to be transported by hand over longer distances, up stairs, or over uneven terrain. Assistive equipment, such as booms, lifts, and cranes, are frequently used; nevertheless, there is still physical labour involved even with the help of such equipment.

[209] In addition to transporting glass on the work site, glaziers' main duty is to install glass. Glastech focuses on large commercial, institutional, or residential projects. Installing glass in these buildings typically requires the glazier to drill holes into concrete or steel. The drills used are large and heavy. Drilling one hole can require the glazier to hold a drill up for prolonged periods while also exerting significant directional force. Installing a glass panel can also require the glazier to remain in a static position for prolonged periods while exerting force to hold the panel in place.

[210] The plaintiff described having significant problems with drilling and installing glass. The nature of his left shoulder injury makes it very difficult to hold his left arm overhead, extended out to the side, or to put his left arm across his chest. He testified that many of the glazier tasks require prolonged work overhead or with arms extended outwards. These positions aggravate his pain. In addition, a lot of the plaintiff's work – as a glazier and especially as a crane operator – require him to look up or down – which aggravates his neck pain. I accept the plaintiff's evidence that he has difficulty with such tasks.

[211] The plaintiff's reported difficulties with glazier work is largely congruent with the expert medical opinion.

[212] In his first report, Dr. Regan says that the plaintiff's combined neck and left shoulder complaints cause him to be "somewhat compromised" in his job as a glazier, and that the plaintiff has been cautioned to protect his left shoulder while working and doing recreational activities that require left shoulder lifting. In his second report, Dr. Regan's opinion is that the plaintiff is still able to work as a glazier, but with limitations. He states that the plaintiff's neck issues may represent a "permanent partial disability," and opined that if the plaintiff's current supervisory

role, or some type of lighter duty role were not available to him he would be "somewhat compromised" to stay in his line of work.

[213] Dr. Cameron's opinion is that the plaintiff has been rendered partially disabled due to the residual adverse effects of the physical injuries he sustained in the accident.

[214] Dr. Lu does not provide a clear opinion on the impact of the plaintiff's injuries on his work capacity. In his opinion section, Dr. Lu repeats what the plaintiff reported to him about work difficulties; however, Dr. Lu does not set out a medical opinion on whether those complaints and limitations are reasonable and congruent with his medical diagnoses.

[215] Dr. Craig's opinion is that the plaintiff's initial time off work and return on lighter duties were appropriate. In addition, he states that "ongoing work at lighter duties would be appropriate," and that the plaintiff could have difficulty operating a crane for long hours due to the repetitive neck extension required.

[216] Dr. McDowell's opinion is that the plaintiff is likely to have some degree of partial disability because of his headaches. He qualifies this statement by indicating that the plaintiff won't miss work but will have to do alternative tasks.

[217] Mr. Shew completed a functional and cognitive capacity evaluation of the plaintiff in November 2024. As part of the evaluation, he tested the plaintiff for physical effort and cognitive effort. Mr. Shew was satisfied that the plaintiff fully participated in the testing, and that the results of the testing were an accurate and reliable representation of the plaintiff's physical and cognitive function.

[218] Mr. Shew tested and compared the plaintiff's functional ability in relation to the job duties and demands of a glazier, machine operator (i.e., crane operator), and supervisor. More specifically, he used data on the demands of those occupations provided by the National Occupational Classification and the *Dictionary of Occupational Titles*, and then had the plaintiff undergo standardized functional and cognitive tests that he thought best represented the demands of those occupations.

[219] Mr. Shew's physical testing showed the following:

a) The plaintiff demonstrated the ability to perform activities requiring light to medium strength through the full body range.

b) The plaintiff demonstrated the ability to handle heavier loads as long as the items were handled to his waist or knuckle height.

c) The plaintiff did not demonstrate any significant limitations with tasks requiring hand dexterity, weight-bearing, squatting, and crouching.

d) The plaintiff demonstrated moderate limitations with tasks involving his head, neck, and upper back with activities requiring sustained head/neck positioning (i.e., looking up or down for extended periods), repetitive and prolonged vertical reaching, repetitive and prolonged horizontal reaching, and prolonged sitting.

e) The plaintiff demonstrated moderate limitations with tasks involving his left shoulder with activities requiring repetitive and prolonged vertical reaching, and repetitive and prolonged horizontal reaching.

f) The plaintiff demonstrated mild to moderate limitations with tasks involving his lower back/hips with activities requiring repetitive bending, prolonged stooping, and prolonged crouching.

[220] Mr. Shew's testing showed that the plaintiff did not demonstrate the safe ability and durability to meet the full and upper-strength physical requirements of the plaintiff's pre-accident position. While the plaintiff showed the ability to perform the basic body positional demands of his pre-accident position, he demonstrated limitations in his tolerance of these demands over time. Overall, because of the plaintiff's decline over the course of testing, Mr. Shew's opinion is that the plaintiff does not show the ability to perform and sustain the complete physical demands of his pre-occupation position at a competitive level on a sustainable part-time or full-time basis.

[221] Mr. Shew's cognitive testing showed that the plaintiff demonstrated the ability to likely perform the cognitive demands of his pre-accident position.

[222] With respect to the plaintiff's accommodated position, Mr. Shew's opinion is that the plaintiff demonstrates the ability to perform the basic strength requirements, along with the fundamental body positional demands. However, he notes that there were measured declines in the plaintiff's speed and productivity with certain tasks and body positioning, which indicates that he is unable to sustain such demands over time due to symptom aggravation. Thus, according to Mr. Shew, the plaintiff will be able to continue with his current position but will require continued accommodations, including the following:

- the ability to take breaks to rest, stretch and change positions;
- the ability to request assistance when his symptoms are aggravated;
- an understanding of a reduced level of productivity when his symptoms are aggravated; and
- the ability to perform light demands.

[223] From a cognitive perspective, Mr. Shew's testing showed that the plaintiff meets aspects of the cognitive demands of his current position, but with increased cognitive demands there will likely be a reduction in the plaintiff's cognitive capacity, particularly with tasks requiring delayed recall, higher-level/complex problem-solving, and attention/concentration. Mr. Shew's opinion is that the plaintiff will continue to require accommodations for his cognitive limitations.

[224] Lastly, Mr. Shew's opinion is that the plaintiff is capable of working at his current position, but due to his physical and cognitive limitations he is less competitively employable compared to his cohorts who do not require the same level of accommodation.

[225] Overall, the key aspects of the capacity opinions of Dr. Regan, Dr. Craig, Dr. McDowell, and Mr. Shew are largely consistent with each other.

[226] None of these experts' opinions on capacity were undermined during cross-examination. I accept the excerpts of their opinions on this issue summarized above.

[227] In my view, the medical evidence clearly shows the plaintiff's accident-caused injuries impair his income-earning capacity. More specifically, the evidence shows, and I accept, that in his current state, the plaintiff is significantly impaired in his ability to complete the tasks and duties required of his pre-accident occupation as a glazier. I also accept that the plaintiff is currently impaired in his ability to complete the tasks of a temporary foreman *without accommodation*.

[228] I further find that there is a potential future event that gives rise to the considerations articulated in the *Brown* factors. In fact, these considerations have largely already manifested.

[229] The defendants concede that the plaintiff is less capable overall of engaging in all types of employment.

[230] The plaintiff is less marketable or attractive as an employee. At present, he is not able to meet the physical requirements of the job as a regular glazier. He is able to meet the requirements of his current hybrid position as glazier/crane operator/supervisor, but only because it's an accommodated position. As Mr. Shew notes, this makes the plaintiff less competitive when compared to his cohort that doesn't require accommodation.

[231] For similar reasons, the plaintiff has also lost the opportunity to take advantage of all job opportunities and is less valuable to himself as a person capable of earning money in a competitive labour market. The plaintiff is currently dependent on a sympathetic employer who is willing to accommodate him. Should that change, he will have reduced opportunities and will be less valuable to himself.

[232] In sum, I conclude that the evidence establishes an accident-caused impairment that is chronic and could give rise to a loss of capacity.

[233] Step 2 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 1 will cause a pecuniary loss to the plaintiff.

[234] The defendants say that the plaintiff has not proven, beyond speculation, that a future event will actually lead to a pecuniary income loss in his particular circumstances. They say that the plaintiff's claim amounts to nothing more than a "worry" about his future. In support of their argument, the defendants note that the plaintiff has remained durably employed since the accident, has been promoted, and has obtained his Red Seal.

[235] In my view, the evidence establishes a real and substantial possibility that the future event in question will cause the plaintiff a pecuniary loss. I make this finding for the following reasons:

a) The plaintiff is not able to meet the physical demands of work as a glazier;

b) The plaintiff is not able to meet the physical and cognitive demands of his current role as a temporary foreman without accommodations.

c) I accept the plaintiff's and Mr. Gillcash's evidence that the plaintiff makes mistakes at work as a result of the cognitive and attention/focus issues he has due to the accident. I also accept their evidence that Mr. Gillcash has to double-check aspects of the plaintiff's work.

d) I find that prior the accident the plaintiff was passionate about his work as a glazier. I also find that prior to the accident, the plaintiff was in excellent physical shape and had no issues with any of the physical aspects of the job. I also accept Mr. Gillcash's evidence that prior to the accident the plaintiff was an excellent worker, showed great initiative, was eager to learn, was well-liked by colleagues, and was viewed as someone who was

very strong. I also accept as lay opinion evidence that Mr. Gillcash viewed the plaintiff pre-accident as someone who could be a suitable foreman.

e) I accept the plaintiff's evidence that he wanted to move up in the company and become an "A" foreman.

f) I find as a fact that after the accident, the plaintiff's personality has changed, and that those changes have resulted in him becoming more difficult to work with, and has required Mr. Gillcash to intervene as a buffer.

g) I find that the plaintiff is being accommodated through the intervention of Mr. Gillcash and that the plaintiff holds the title of temporary foreman because Mr. Gillcash is willing to accommodate him and supervise the plaintiff. I find that Mr. Gillcash is continuing to accommodate the plaintiff due to his personal sympathy for the plaintiff and the plaintiff's situation. While there is no indication that this will necessarily end, there is also no certainty as to whether this will continue, particularly given there is no evidence that the company has approved of this accommodation or is even aware of it.

h) I find that without the accident, there was a real and substantial possibility that the plaintiff would be promoted to an "A" foreman at some point in the future, but now because of the accident and absent any significant improvement, that is unlikely to occur.

i) As set out above, given my findings on Dr. Regan's diagnosis, I have found that there is a real and substantial possibility that the plaintiff will need to undergo biceps tenodesis surgery. This will require six weeks in a sling, followed by six months of rehabilitation. The plaintiff will require time off work during these periods.

j) Both Dr. Regan and Dr. Craig have indicated that because of his accident injuries, the plaintiff is at risk for aggravation or more prolonged recovery if

he experiences another accident (whether workplace, recreational, or motor vehicle). In other words, the plaintiff's accident injuries have rendered him more vulnerable to subsequent injury. Although the plaintiff is in an accommodated role, there are still times when he must complete physical tasks. He has a much greater risk of reinjury in his current work than if he worked a sedentary position in an office setting.

k) The plaintiff is 35 years old, with many more years of working life ahead of him. He is dependent on Mr. Gillcash and Glastech to continue to be willing to accommodate him. If that circumstance changes and/or if the plaintiff wishes to leave Glastech, his opportunities would be significantly reduced.

Step 3 of the *Rab* Analysis

[236] Step 3 in the *Rab* analysis involves assessing the value of the potential future loss, which includes assessing the relative likelihood of the possibility occurring. There are two approaches to valuing the potential future loss: the earnings approach and the capital asset approach.

[237] 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.

[238] The earnings approach typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence, as well as the plaintiff's past earnings history: *Rattan v. Li*, 2022 BCSC 648 at para. 150.

[239] In *Pallos v. Insurance Co. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) [*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, they write:

> 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.

[240] The plaintiff did not clearly indicate which valuation approach should be taken; however, his analysis suggests the earnings approach.

[241] The plaintiff's submissions rely heavily on Mr. Lawless's opinion. Mr. Lawless's opinion is that the plaintiff's accommodated work situation "will not last long-term". He recommends that the plaintiff retrain for suitable lighter work. Based on his vocational testing, Mr. Lawless found that the plaintiff would be suited to work as a medical radiation technologist or in some other occupation in supportive health services, such as a physiotherapy assistant. Both occupations, and physiotherapy assistant in particular, pay less than what the plaintiff is currently earning.

[242] The plaintiff's submission assumes that within 1.44 years, the plaintiff will be forced to quit his job as a temporary foreman and retrain for one of the careers identified by Mr. Lawless.

[243] The plaintiff submits that the loss should be assessed based on the present value of the plaintiff's without-accident career earnings to age 70 (as an "A" foreman), minus the present value of the plaintiff's presumed with-accident career

earnings to age 70 (as a medical radiation technologist or physiotherapy assistant). The earnings difference ranges from about $450,000.00 to about $1,000,000.00. The plaintiff claims the upper limit of this range.

[244] The defendants submit that if the court finds that Step 1 and Step 2 of the *Rab* analysis are met, the Court should assess the loss using the capital asset approach. They argue that the loss should be valued at one to two years of the plaintiff's current salary, which amounts to damages of $100,000.00 to $200,000.00.

[245] In my view, the capital asset approach is appropriate. The plaintiff has lost minimal income since the accident. His income has, in fact, increased; however, this is due to the plaintiff getting into the accident early on in his glazier apprenticeship. As he advanced through the various apprenticeship levels, his income has increased.

[246] In 2024, his income was just under $100,000.00.

[247] In my view, assessing the loss based on one or more years of salary is more appropriate than the approach advocated by the plaintiff.

[248] I did not find Mr. Lawless's report particularly helpful, given the evidence at trial and my factual findings.

[249] While the plaintiff testified to having difficulties in his accommodated position, he did not indicate at trial that he planned to quit. In addition, there was no evidence from the plaintiff about whether he would be interested in retraining and then becoming a physiotherapy assistant or a medical rehabilitation assistant.

[250] In short, plaintiff counsel's argument that the plaintiff would quit his job in 1.44 years, following which he will spend two years retraining and then engage in a career that is vastly different than his current one, is speculative.

[251] I am somewhat persuaded by aspects of Dr. Quee-Newell's criticism of Mr. Lawless's approach. Specifically, she states that from a vocational perspective, retraining is closer to a last resort and that it would be preferable for the plaintiff to

remain in an accommodated position, and if that does not last, to work in a different role with the same employer, failing which working in a different job in the same industry would be the next best option. Examples of such jobs would be an estimator/project coordinator or a project manager. According to Dr. Quee-Newell, the median earnings of an estimator/project coordinator is $40.24 per hour, and for a project manager $48.08 per hour. The plaintiff currently earns $41.50 an hour. By comparison, an “A” foreman earns about $47.00 per hour.

[252] Nevertheless, it’s important to acknowledge the limits of Dr. Quee-Newell’s opinion. Dr. Quee-Newell was very clear that her opinion is narrow. She did not meet with or assess the plaintiff. Her opinion is primarily a critique of the methodology and approach taken by Mr. Lawless. Her opinion does not state that the plaintiff is capable of working as an estimator, project coordinator, or project manager. Rather, she criticizes Mr. Lawless for not identifying retraining options that would allow the plaintiff to access less physically demanding work within his trade. In addition, Dr. Quee-Newell sets out the educational requirements for those jobs and the availability of work. Significantly, she does not compare the available work for those positions to that of a glazier. Had she done so, I suspect the data would show that there are many more opportunities for work as a glazier than there are for estimators, project coordinators, or project managers. Further, although they had Dr. Quee-Newell’s opinion, the defendants did not ask Mr. Shew or Mr. Lawless on cross-examination whether, in their view, the plaintiff would be capable of working as an estimator, project coordinator, or project manager. In my view, the argument that the plaintiff could work in those roles is based on speculation. Regardless, even if those positions are less physical than the plaintiff’s current accommodated position, his issues with headaches, mood, cognition, and difficulties getting along with co-workers would still impair his work capacity in those roles.

[253] Returning to valuing the plaintiff’s loss, in my view, an appropriate starting point for assessing the plaintiff’s future loss of income earning capacity is five years’ salary, or $500,000.00. I arrive at this number for the following reasons:

a) The plaintiff's age.

b) The nature of his injuries.

c) The level of impairment.

d) The nature of his job.

e) The fact that I have found that it is a near certainty that he will require surgery, which will impact his ability to work to some degree for approximately seven to eight months.

[254] Specifically, the plaintiff is young and is currently experiencing significant injuries that have resulted in considerable impairment in his very physical vocation. He is only able to continue at his work due to a high level of accommodation. These considerations warrant an award representing a greater number of years' salary as a starting point, before adjusting for contingencies.

[255] In his report, Mr. Szekely allowed for a general negative contingency (to age 70) of 23%. This accounts for labour market contingencies such as labour force participation, unemployment, and choosing to work part-time or seasonally. In my view, given the plaintiff's work ethic and history, he likely had a greater attachment to the workforce than the average person. In addition, the nature of his work is not part-time or seasonal. Thus, using a general negative contingency of 23% would result in under-compensation. Accordingly, I will apply a 15% general negative contingency.

[256] The defendants submit that a specific contingency of 20% should be applied to account for the likelihood that the plaintiff will experience improvement with future treatment options.

[257] In my view, this specific contingency deduction is appropriate. As set out earlier in these reasons, it almost certain that the plaintiff will need to undergo surgery, and it is likely that surgery will improve his shoulder symptoms. In addition, the plaintiff is still undergoing treatment for his neck and testified that there are still some potential future treatment options, including radiofrequency ablation. If his

neck pain improves and he follows other treatment recommendations, he may experience some improvement in his headaches. Finally, the plaintiff has not had optimal treatment for his psychiatric injuries and symptoms. As I have indicated above, if he pursues counselling and continues with his antidepressant medication, there is a real and substantial possibility that he will experience symptom improvement. Nevertheless, it is unlikely that he will experience a full resolution of all his symptoms and there is considerable risk that his work capacity and functionality may not improve significantly despite symptom improvement.

[258] The plaintiff argued that there is a 50% likelihood that Ms. Balderama will leave him, which would have a considerable negative effect on his symptoms and disability. This argument is based on speculation. There was no evidence from either the plaintiff or Ms. Balderama that the relationship is at risk. It appeared to me to be a loving and healthy relationship.

[259] There is a risk that the plaintiff will not improve. However, there is also some likelihood that if the plaintiff experiences symptom improvement he could get promoted into an “A” foreman position. In my view, the respective likelihood of these contingencies is about equal and offset each other.

[260] Applying a 15% general contingency followed by a further 20% specific contingency deduction reduces the $500,000.00 pre-contingency award to $340,000.00.

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

[262] In my view, this amount is fair and reasonable to both the plaintiff and the defendants. Accordingly, I award the plaintiff $340,000.00 for loss of future income earning capacity.

SPECIAL DAMAGES

[263] Evidence was led about special damages during trial; however, the parties advised the Court during submissions that they had reached an agreement on special damages. The parties may include the agreed to amount for special damages in the trial order

COST OF FUTURE CARE

[264] The plaintiff claims the following cost of future care items:

Treatment	**Amount claimed**
Physical therapies including chiropractic, physiotherapy, and massage therapy	$2,070 (annually)
Psychological counselling (twice a month for 15 years)	$67,500 (total)
Vocational counselling (12 sessions at $150/session)	$1,800 (total)

[265] In addition, the plaintiff claims $21,000.00 for the cost of the plaintiff to retrain as a medical radiological technician.

[266] The defendants argue that the plaintiff would have required psychological counselling regardless of the accident, due to the September 26, 2021, and June 11, 2024 motor vehicle accidents.

[267] The defendants further argue that there was no evidence from the plaintiff about whether he intends to undertake any of the recommended physical treatments.

[268] The defendants' alternative argument is that if the court accepts that the plaintiff has a permanent disability, then he should be awarded 48 sessions of counselling, at a cost of $235.00 per session, plus an allowance for 24 sessions of physiotherapy at a cost of $90.00 per session, for a grand total of $13,440 in cost of future care.

[269] I pause to note that there are references in some of the medical evidence to additional treatments and medications. Dr. Lu recommended that the plaintiff continue on his current antidepressant medication. Dr. Regan indicated that the plaintiff would require six weeks in a sling and immobilization after surgery, followed by six months of rehabilitation. Presumably, the plaintiff would likely require some household assistance if his left arm is immobilized for six weeks. Dr. Craig recommended kinesiology, as well as consideration of headache medication and antidepressants. Dr. McDowell recommended various headache medications. Because these items have not been claimed by the plaintiff, I am not making an award for them in this action.

[270] 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:
>
> > 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.

Physical Therapies

[271] None of the plaintiff's physician experts have specifically recommended ongoing physiotherapy, chiropractic care, or massage therapy, although Dr. Regan indicated that the plaintiff would require six months of rehabilitation following surgery. In my view, the term "rehabilitation" implies that there would be some type of physical therapy required.

[272] I have found that the plaintiff will almost certainly require surgery. He will require six months of rehabilitation after surgery, and I find that as part of this rehabilitation he will require physiotherapy. I find that during this period he will likely require 48 sessions of physiotherapy (two sessions per week for six months) at a cost of $95.00 per session (the midpoint of the cost outlined by Mr. Shew) for a total of $4,560.00.

[273] The defendants argue that there is no evidence that the plaintiff would undertake this treatment. While the plaintiff was not asked whether he would undertake additional physiotherapy treatments, I am satisfied that he would. The plaintiff seems motivated to get better and seems willing to try treatments that are recommended to him.

Counselling

[274] Dr. Lu recommends long-term counselling. However, he does not indicate what he means by long-term.

[275] I am satisfied that this care item is medically justified and reasonable.

[276] The defendants argue that the plaintiff would have needed counselling regardless of the accident due to the 2021 and 2024 accidents. I have already rejected the defendants' argument that the plaintiff would have suffered psychological injury from the 2021 and 2024 accidents absent the 2017 accident. It follows that I also reject the argument that he would have needed counselling regardless of the 2017 accident.

[277] Given that Dr. Lu recommends that the plaintiff take antidepressants for a further five years, I think it is medically justified and reasonable for the plaintiff to be awarded counselling with a registered psychologist for five years. I am satisfied that the plaintiff will make use of this care item, as he testified that he would like to resume counselling.

[278] Mr. Shew recommends an interval of one session every two weeks. Mr. Shew indicates that the cost of a one-hour session with a registered psychologist is $235.00 per hour.

[279] The annual cost of one counselling session every two weeks is $6,110.00.

[280] Mr. Szekely's cost of future care multipliers are based on the plaintiff's birth date, so the court cannot easily use his calculations to determine the multiplier for a five-year cost of future care item from the date of trial. The CIVJI multiplier for five years (at the statutory discount rate of 2.0%) is 4.64. Accordingly, the present value of five years of counselling is $28,350.40, which I award.

Vocational Counselling

[281] Mr. Lawless recommends 12 sessions of vocational counselling at a cost of $140.00 to $155.00 per session.

[282] Given my findings on loss of future income earning capacity, I find that this cost of care item is justified and reasonable. The plaintiff is not able to do his job without accommodations. It is justifiable, reasonable and in fact prudent for him to seek professional advice on what other vocational options might be available to him. I am also satisfied that the plaintiff will make use of this item for the same reason I am satisfied he will engage in the other recommendations.

[283] I award 12 vocational counselling sessions at a cost of $150.00 per session, for a total of $1,800.00.

Retraining

[284] The plaintiff claims $21,000.00 for the cost to retrain. Given my loss of future income earning capacity findings, I find that it is speculative whether the plaintiff would incur such a cost in the future.

[285] Accordingly, I decline to make an award for the cost of retraining.

Conclusion on Cost of Future Care

[286] I award the plaintiff $34,710.40 in cost of future care.

CONCLUSION

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

a) Non-pecuniary damages	$185,000.00
b) Past loss of income earning capacity	$399.20
c) Future loss of income earning capacity	$340,000.00
d) Special damages	As agreed
e) Cost of future care	$34,710.40
Total	**$560,109.60**

[288] Total damages are awarded in the amount of $560,109.60, plus special damages, less any statutory deductions.

[289] If the parties cannot agree to costs, they may schedule a one-hour 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, and no attempts are made by the parties to schedule a hearing in that time, the plaintiff shall have his costs at Scale B.

"Morishita J."