

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hyde v. Witzke*,
2026 BCSC 214

Date: 20260209
Docket: M125558
Registry: Kelowna

Between:

Shannon Adam Hyde

Plaintiff

And

Brian Henry Witzke

Defendant

Before: The Honourable Justice Greenwood

Reasons for Judgment

Counsel for the Plaintiff:

J. Kennedy

Counsel for the Defendant:

M. Howard
M. Russmann

Place and Date of Trial:

Kelowna, B.C.
May 27-31, 2024
June 3-6, 2024
May 15-16, 2025
September 29, 2025
October 1-3, 6, and 8-9, 2025

Place and Date of Judgment:

Kelowna, B.C.
February 9, 2026

Overview

[1] The plaintiff claims damages arising from a motor vehicle accident that occurred in Kelowna on November 9, 2017. The defendant admits liability for the accident but denies causation, or alternatively, contests the severity of the ongoing injuries, and the quantum of damages.

[2] For the reasons that follow, I am satisfied that the plaintiff has established that he suffers from neck pain, and ongoing and persistent headaches that are attributable to the accident and have caused past and future losses.

[3] There are issues with the credibility of the plaintiff's evidence. He was dishonest about his employment plans when he initially testified. At times he understated his ability to function or exaggerated. He looked at his life through the prism of his worst headaches, and had a tendency focus on the severe headaches which he acknowledges are less frequent than the mild and moderate headaches he suffers from.

[4] Despite those credibility concerns, I am satisfied on a balance of probabilities that the plaintiff has suffered from intermittent but persistent, serious, and likely permanent headache pain that is attributable to the accident and has affected his quality of life. His symptoms are corroborated by lay witnesses, by the medical treatments he has consistently sought, and by his extensive use of medication to manage symptoms.

[5] In arriving at an award for damages, I have considered the extent to which the plaintiff has understated his abilities or exaggerated the frequency or severity of the pain he experiences.

[6] For the reasons that follow, I have determined that a fair and reasonable award that will fully compensate the plaintiff for his accident-related injuries is \$540,156.59.

Background

[7] The plaintiff is a 49-year-old arborist. He moved to Kelowna in 1999 and that is where he met his spouse, Ms. Politis. They have been in a long-standing common-law relationship. The plaintiff is a stepfather to two teenage girls and has an adult child of his own.

[8] In 2012, the plaintiff began working for the Okanagan Mental Health Services Society (“OMHSS”), a not-for-profit organization that provides skills training for people with mental illness, and provides horticulture, landscaping and yard maintenance services using the business name Yard by Yard. The plaintiff’s stepfather, Larry Vandergrift, is the CEO of OMHSS and was the plaintiff’s boss at Yard by Yard.

[9] After watching another arborist take down a large fir tree, the plaintiff was inspired to work as an arborist. He purchased climbing gear, read books and worked on an arbor crew.

[10] In 2015, he was working as an arborist for Yard by Yard. He took several courses with the International Society of Arboriculture and became a certified arborist in 2018. He worked in that capacity for several years and was earning \$32.50 per hour. Despite the seasonal nature of the work, he was able to achieve full time hours by working in a wood lot (until 2019), banking overtime and taking paid vacation in the winter months.

[11] Being an arborist was physically demanding. The plaintiff could climb 100-foot trees while carrying between 50-80 pounds of equipment.

Pre-Accident Health and Activities

[12] The plaintiff was in good physical health before the accident. He enjoyed skiing, boating, mountain biking, disc golf, camping and fishing among other activities. He enjoyed the outdoors and was very active on weekends with his family. By way of example, he completed the “tough mudder” – a 12-mile endurance race that requires overcoming a series of obstacles.

[13] Socially, the plaintiff enjoyed having friends over for meals and barbeques, playing yard games, and having friends over to light a fire, or have kids play on the trampoline.

[14] The plaintiff shared housework with his spouse prior to the accident. She would clean the bathrooms, they shared other duties such as dishes, dusting and cleaning. The plaintiff did most of the cooking, and did all the yard work, and any necessary repairs or maintenance around the house. In cross-examination, he said while there was limited time, he would spend half an hour or an hour on the yard.

[15] The plaintiff had no significant physical or mental health issues prior to the accident. Mr. Vandergrift testified that the plaintiff loved work prior to the accident, was a proud employee and could work 10-12 hours without difficulty. He was a very good arborist.

Circumstances of the Collision

[16] On November 9, 2017, the plaintiff and another employee were on their way to a wood lot to prepare cords of firewood for customers. The road was icy and there was a tow truck partially blocking the road. As the plaintiff drove around the tow truck, the defendant's truck came around a blind corner. There was a head on collision.

[17] The impact was hard. The frame of the plaintiff's truck was bent, and there was damage to quarter panel and four-wheel drive. The plaintiff felt his "whole body jarring". Feeling the effects of adrenaline, he forced the door open, drove back to Yard by Yard, then a medical clinic and home to rest.

Headache Symptoms and Post-Accident Employment

[18] The frequency, severity, progression and cause of the plaintiff's current headache pain is a live issue between the parties. The evidence on this point includes the plaintiff's description of his headache pain and its effects on his life and employment, his reported headaches over time, his reliance on medical advice, and his use of medication to treat his headache symptoms. In general terms, the plaintiff

testified to a consistent pattern of headache pain that has not gone away since the accident.

[19] The plaintiff's symptoms began to get worse on the day after the accident. He described the first two weeks as "awful" by virtue of the back pain, neck pain and headaches. He returned to work gradually on January 14, 2018, and was working full time by the middle of February. His back and elbow pain had resolved, but he continued to have neck pain and headaches.

[20] The plaintiff had an unrelated workplace accident on April 17, 2018, and was off for several months. He returned to full time duties as an arborist on August 29, 2018. He testified that he continued to suffer from headaches and that work aggravated his symptoms, particularly on long days, but he was hiding the symptoms.

[21] On October 24, 2018, the plaintiff saw Dr. Robinson, who is a headache specialist, and reported to him that he had continued to have headaches since the accident. There had been some improvement in the frequency and severity of his headaches, but he continued to have mild to moderate headache once or twice a week and severe headaches that made it difficult for him to function a couple of times a month.

[22] The plaintiff testified that while the frequency and severity of headaches had probably decreased a bit in the first months after the accident, they did not decrease over the rest of 2018. He was only managing with large amounts of ibuprofen. He was not being entirely truthful with Dr. Robinson and was underreporting his symptoms. He expected to get better and thought he should be "tough". He explained that if he knew he would be suffering for the rest of his life he would have been more forthcoming. He did not explain to Dr. Robinson that some of the headaches he reported lasted for multiple days.

[23] In 2019, the plaintiff went to emergency and was complaining of headaches two to three times a week, and migraines twice a month. He testified that typically he would go to the hospital if he had more than four to five days of a migraine.

[24] Full time work aggravated the plaintiff's headaches, especially when he was climbing, moving his head, or looking up and down as often had to do as an arborist. After four to six hours, he would become difficult to get along with. He hid his symptoms as he did not want his hours cut. He began to make excuses, break away early or call in sick. On occasions he would start vomiting at work. He seemed to be able to work a maximum of six hours, or his symptoms would become worse.

[25] Mr. Vandergrift testified that as time went by the plaintiff became sloppy, had less energy, and was relying on others to complete jobs. Whereas before the accident the plaintiff had no difficulty getting along with clients and other staff, he was now becoming argumentative and began to miss work. Mr. Vandergrift observed mood changes, stress, and a lack of follow through..

[26] By 2020, the plaintiff was feeling exhausted. He had been trying to ignore his headaches and had been hiding his symptoms from everyone around him but could "only fake it for so long."

[27] In September 2020, the plaintiff was struck on the head with what he described as a "stick" but was described as a "falling tree branch" in other reports. This incident increased his neck and headache pain but had no permanent effect. Based on all the evidence, I accept that the effects of the branch hitting his head were temporary and had resolved within seven days.

[28] In 2021, the plaintiff was receiving an hourly wage of \$32.50 for a 40-hour work week for 52 weeks a year, but he was struggling to get through the days. His ability to work was getting gradually worse and he was starting to wear down. He became moody, agitated and he was not easy to get along with.

[29] In 2021, the plaintiff also began seeing Dr. Chen for Botox injections and reported three to four headaches a week, but he acknowledged that in the six-week

period after receiving Botox, they went down to a handful a week. He testified that a handful was approximately two to three per week.

[30] According to the plaintiff, from 2020 to 2022 the situation was gradually getting worse, and his mood deteriorated. He was easily agitated and difficult to get along with.

[31] The plaintiff next saw Dr. Robinson on November 17, 2022. He was more honest with Dr. Robinson on this occasion. He told Dr. Robinson he experienced headache pain two to four days a week. He did not consider his statements inconsistent with near daily headaches, but he found averages confusing. He testified that he still felt like he was not being honest with himself in evaluating his symptoms.

[32] In 2023, the situation was even less tolerable from the plaintiff's perspective. He had been hopeful in 2018 but after years of medication that did not work, he felt burned out. The headaches and associated symptoms were unmanageable. He felt he was unbearable to those around him and was becoming unsafe in the workplace. He described himself as volatile on the best of days and irritable, which led to him being reprimanded at work.

[33] On June 7, 2023, after seeing his doctor and Dr. Poon (a psychologist), he reduced his work to six hours a day. Initially this was to be for a one-month period, but it was extended. In July 2023, he injured his wrist using a chainsaw. He spent some time on light duties, but then when there were no more light duties to perform, he was off work completely until February 2024. During that time, he received benefits from WorkSafe B.C.

[34] The plaintiff was cleared to return to work following his wrist injury on February 9, 2024. As things turned out he did not return. Around this time, he had received his second letter of reprimand at work. He was experiencing stress and anxiety and had come to hate working at Yard by Yard due to the working environment and his strained working relationship with his stepfather.

[35] The plaintiff reached out to Dr. Poon to relieve the stress and took medical leave as of February 19, 2024. The leave was intended to last eight weeks. Shortly thereafter, he developed a hernia that required surgery and would have prevented him from working anyway. He was cleared to return to work in late May 2024.

[36] In the meantime, sometime in April or May of 2024, the plaintiff decided not to return to Yard by Yard and to open his own business instead. To that end, he began taking steps to open the business. By May 22, 2024, he had lined up work and had committed to starting his own business using the name SISU tree care.

[37] On May 27, 2024, the plaintiff's trial commenced. During the trial, he did not disclose his intention to start his own business in examination in chief or in cross-examination about his future plans. He testified in essence that he planned to go back to work at Yard by Yard, that he felt stuck there, but that he could only work for six hours and did not know how long he would be able to do even that. Working for his stepfather was one of the only advantages he had.

[38] The plaintiff's trial was adjourned for continuation on June 9, 2024. When the trial resumed in October 2025, the plaintiff was recalled to provide additional evidence with respect to (1) his pursuit of SISU tree care in light of his evidence about returning to Yard by Yard during his initial trial dates, and (2) his use of simple analgesics. The evidence of use of simple analgesics was relevant to the defence expert's revised opinion that the plaintiff's severe symptoms were caused by "medication overuse headache" [MOH].

[39] The plaintiff testified that he was in a bad spot at the time of the initial trial dates, and he was not honest because he did not see a future for himself and was afraid that his stepfather would find out he was doing jobs through his own company. He acknowledged that it was a mistake to conceal the fact that he had already started his own business.

[40] Beginning in June 2024, the plaintiff performed various work for SISU tree care. He typically worked six or six and half hours a day and relied on

subcontractors and (later) employees to assist him. To follow his doctors' recommendations that he limit his work to 6 hours, he had other employees do some of the heavier work.

[41] The total income of SISU from June 7, 2024, to December 31, 2024, was approximately \$123,000 as outlined in the bookkeeper's statements. After deducting costs, the gross profit was approximately \$97,000 but payroll was \$31,681 and the net profit was listed as approximately \$24,000. As a sole proprietor, the plaintiff takes a draw from the company, by paying for things directly out of his company account.

[42] Between January 1, 2025, and September 9, 2025, the total income from SISU tree care was approximately \$265,000 for a gross profit of \$204,000. Expenses were listed at \$157,000 for a net profit of \$49,000. The plaintiff had missed a few weeks during this period for another Hernia operation, and approximately two months due to a broken wrist.

[43] The plaintiff intends to keep running SISU tree care for as long as he can. The business is growing and doing well. Starting his own business has had a positive impact on the plaintiff. He testified his mood has improved since leaving Yard by Yard, and that was observable in his testimony.

[44] The plaintiff testified that his headaches have never resolved since the accident. Some headaches last two to three days, such that he experiences headache symptoms four or five days out of the week, and one or two severe headaches a month. He has tried with doctors to alleviate the headaches, but it is a "roll of the dice" and he can't say when they will occur or how long they will last.

[45] His mental health has improved since changing jobs. He still suffers from anxiety that comes with his neck pain and headache and there is still some depression. The headaches are not going away or getting better, and they continue to affect his personal life. He described them as a "day to day thing".

Post Accident Health and Activities

[46] Since the accident, ongoing headache symptoms have affected the plaintiff's life and activities. He has not been able to ski, mountain bike, or go boating with the kids, and his social life has suffered. He has had to cancel on his friends, call off barbeques and family dinners, and he has missed Christmas dinner. He continues to camp and fish, but he has had to cut camping trips short due to headaches. He described sometimes simply lying in his trailer for two days while trying to camp without being able to do anything.

[47] The plaintiff's condition has affected his mood and his relationship with his spouse and kids. He is irritable, short tempered, and has had trouble interacting with family members normally.

Use of Simple Analgesics to Treat Headache Pain

[48] The plaintiff is currently using Advil or Tylenol to relieve his headache symptoms. He estimated that occurs on four or five days out of each week. He estimates that he suffers from two to three headaches a week, but some last longer than one day.

[49] The plaintiff discussed taking simple analgesics such as Advil and Tylenol with his doctor and Dr. Robinson in 2018. He was advised of possible risks to his liver and kidneys, but he was never advised of a risk of "medication overuse headache".

[50] The plaintiff acknowledged underreporting his use of simple analgesics when he filled out a headache calendar for Dr. Robinson that showed usage of three pills a day, but testified that was part of his actively hiding the scope of the problem.

[51] Following the 2018 assessment with Dr. Robinson, the plaintiff began using Tylenol and Ibuprofen on a near daily basis. By late 2021 and into 2022, he was taking an average of eight pills a day. He explained that reports of nine pills of ibuprofen or Tylenol per day might be for four to five times per week, or seven days a week if he had a headache each day.

[52] The plaintiff tried antidepressants and other drugs, but they were either not effective or had bad side effects. Apart from simple analgesics, only the Botox injections offered some relief. Botox did not get rid of the headaches but made them more manageable. In August 2022, the Botox injections were increased from one every three months to one every two months.

[53] The plaintiff testified that there was a gradual increase in his headaches between 2022 and November of 2023, despite the use of Botox. From 2022 to June 2024, he continued to use simple analgesics an average of five days a week

[54] On the five days he experiences headaches, the plaintiff estimated he takes eight to 12 tablets of Tylenol, Advil, or a combination of both. The lowest number of pills he would take would be two to four tablets and the highest number would be 24 tablets in a day. He understood the limit for a dose was eight tablets per day and testified he would only take up to 24 tablets if it was the third day of a headache and he was exhausted. He estimated taking 24 tablets a day about once a week from July 2022 to June 2024.

[55] The plaintiff agreed that did not explore whether his headaches and mood were deteriorating due to MOH, because, as he put it, “I didn’t even know it was a thing.” The plaintiff first became aware of MOH when he became aware of the defence expert report of Dr. Desai shortly before his trial commenced.

[56] The plaintiff testified that after becoming aware of the MOH diagnosis, he stopped taking simple analgesics on February 14, 2025. Apart from some naproxen and tramadol for his hernia surgery in March 2025, he did not take any simple analgesics between March 12, 2025, and August 4, 2025.

[57] The plaintiff testified that when he stopped using simple analgesics, the frequency of his headaches did not change, but his headaches were more intense. There were fewer mild headaches and more moderate headaches, and the intensity of his moderate headaches increased leading to increased irritability and more nausea. Severe headaches were less manageable. The plaintiff estimated that he

had to leave work earlier than he otherwise would have approximately 20% of the time.

[58] On August 4, 2025, the plaintiff resumed taking analgesics after breaking his wrist and continued to use them as they made his headaches more manageable. He testified that with the analgesics the situation returned to how it had been before he stopped analgesics on February 14, 2025.

[59] The plaintiff testified that his caffeine intake has decreased in the last year or so, but he still consumes 2-3 cups of coffee a day, and a can of coke zero once a week.

Credibility and Reliability

[60] The well-known passage from *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, provides guidance on how to assess credibility:

[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), 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. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[61] There is a need for care in cases where the reports of injury are subjective, and where associated expert evidence is dependent on the plaintiff's self-reporting, particularly where there is limited or no "objective evidence": *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47-50.

[62] The defendant urges me to entirely reject the plaintiff's evidence about the frequency and severity of his current headache symptoms based on concerns about his credibility.

[63] The most serious concern about the plaintiff's evidence arises from the fact that he was dishonest about his future plans and employment. At a time when he had clearly decided to pursue his own business, he testified that he was stuck at Yard by Yard. Initially he attempted to minimize his commitment to pursuing the business, describing it as a "wing and a prayer," but he had taken several concrete steps before trial that demonstrated his intentions clearly. He had obtained commercial insurance, secured the name, organized a logo and obtained tools and branded clothing. Ultimately, the plaintiff acknowledged lying to the court and knowing that it was wrong.

[64] The plaintiff claimed that he did not tell the truth because he did not know whether his business would work out, and he did not want his stepfather to find out. However, that claim does not withstand scrutiny. He had already crossed the Rubicon in terms of deciding to open the business at the time of his testimony, and it was inevitable his stepfather would find out, as his first customers were existing Yard by Yard clients. The more logical explanation is that the plaintiff was not thinking clearly and did not want to disclose his business because he did not know how it might affect his claim for damages.

[65] It is always serious when a witness intentionally misleads the court, particularly in a case where much of the evidence of injury is based on the plaintiff's self-reporting. It may lead to rejection of the claim, and at the very least it requires a court to approach all of the plaintiff's evidence with a high level of caution.

[66] Another serious credibility issue arises from the fact that the plaintiff instructed his doctor to issue a medical certificate that he was "incapable" of work for the purposes of employment insurance, even though he was performing work at SISU tree care. The plaintiff testified that he was told he could start his own business

while on EI, which may be true, but the instruction to his doctor was clearly dishonest, and is again a reminder to treat all of his evidence with caution.

[67] There was an inconsistency between the plaintiff's description of the severity of his headache symptoms from the beginning and some of the statements that the plaintiff made to Dr. Robinson in 2018. However, I am satisfied that those are partly explained by the difficulty of recounting such matters with exactitude, and because the plaintiff was not fully acknowledging his symptoms to himself or to those around him in an effort to be tough rather than dependent on others. It took the plaintiff a while to become aware of the reality of his situation and the permanence of his symptoms.

[68] There were other less serious, but still germane credibility issues. For example, there was a subtle shift in the plaintiff's evidence about why he took leave from work in the spring of 2024. Initially he testified it was the result of worsening headaches, but under cross-examination he acknowledged that he had come to hate working at Yard by Yard because of his stepfather, and the stress of a toxic work environment.

[69] At times during cross-examination, the plaintiff generalized to avoid being pinned down, fell back on the fact that he was having a bad day to explain inconsistencies, or stated he was not good with averages or dates, even though in some instances he had provided the same kind of information to his own counsel, and in others, he was not being asked for a specific average or date.

[70] As outlined then, there are significant credibility issues to consider. Most obviously, the plaintiff's evidence demonstrates an ability and willingness to lie, such that robust caution is required before accepting his evidence.

[71] Despite all these difficulties, and after much deliberation, I have concluded that I accept his core evidence that he suffered from and continues to suffer from serious and sometimes severe headaches that have not resolved since the accident. and have had a profound effect on his life.

[72] The plaintiff's account of his symptoms is significantly corroborated by lay witnesses who described his symptoms, and the effects of headaches on his family life, and his employment. These witnesses include his spouse, his co-worker, and his boss, a person who he does not get along with. The picture they paint is of a person who had no real difficulties before the accident, and significant difficulties and associated mood disorders, as well as physical symptoms related to headaches after the accident.

[73] Ms. Politis testified to the plaintiff's condition after the accident, his headaches, his sensitivity to light, nausea, vomiting and the deterioration of his mood as well as physical restrictions and fewer activities. She was a credible witness and described continuous headaches that never seemed to go away. In general, she described headaches and symptoms that started with the accident and continued to the present day.

[74] Mr. Goselin, who worked with the plaintiff in the aftermath of the accident, testified to his struggles at work, including headache, vomiting, and leaving early. His evidence was that the symptoms continued while the plaintiff worked at Yard by Yard. Mr. Vandergrift, who had a strained relationship with the plaintiff, testified to a notable difference before and after the accident in the plaintiff's ability handle the work environment.

[75] I am also satisfied from the plaintiff's evidence, as well as the expert evidence that there is a basic continuity to the symptoms he has experienced, sometimes severe, which he has suffered since the accident. This is corroborated in part by the plaintiff's seeking of medical attention, including hospital attendances for severe headaches, as well as severe symptoms he described that were corroborated by lay witnesses.

[76] The sometime severity of the plaintiff's symptoms is perhaps epitomized by what happened at his friend's wedding. They had been friends for over 30 years, and the plaintiff was to be the best man, but he contemplated cancelling as he was in a room with a severe headache all day. He made it to the ceremony but left early

by 6 p.m. and did not participate in any of the celebrations. He left other events early as well, including his stepdaughter's graduation. Lay witnesses confirmed these occurrences.

[77] Nor am I satisfied that the plaintiff's prior statements to medical professionals are a basis upon which to reject his testimony with respect to headache symptoms. While the plaintiff was pressed to explain various reports, the context of whatever discussions took place was often missing. It is perhaps not surprising given the passage of time that the plaintiff is unable to recount in forensic detail the details of every conversation he may have had with medical professionals. Overall, apart from his statements to Dr. Robinson describing his symptoms in 2018, I did not find the statements to be inconsistent with his testimony as a whole.

[78] I have approached the plaintiff's evidence with caution. I find at times he has exaggerated his symptoms and understated his ability to perform various tasks. However, I do accept the main thrust of his evidence, which is that since the accident on a near continuous basis he has suffered from headache pain that is at times debilitating. The full scope and reality of the plaintiff's headache pain only became evident over time as the headaches did not go away, and his condition worsened.

[79] Despite the defendant's urging, I do not find that the plaintiff's symptoms have been or are only mild symptoms in accordance with the least severe descriptions he provided to Dr. Robinson in 2018. I conclude from the evidence that the headache symptoms were present from the beginning, were sometimes severe, and their full effect only became apparent over time when they did not resolve, and in fact became worse. I draw that conclusion from all the evidence and despite the credibility concerns that arise with respect to the plaintiff's evidence.

Are the Plaintiff's Present Symptoms the Result of MOH?

[80] The defendant argues that if I accept the plaintiff's evidence that he has suffered from frequent and severe headaches, they are the result of MOH. The defendant's position is that the plaintiff's evidence that he continues to suffer from

more severe headaches, and that they did not improve when he stopped taking simple analgesics, is not credible and should not be accepted.

[81] As a preliminary matter, I am not satisfied that the plaintiff's ongoing symptoms are or were the result of MOH.

[82] Both experts, Dr. Robinson for the plaintiff and Dr. Desai for the defendant, initially opined that the plaintiff's headaches were post traumatic headaches attributable to the accident.

[83] On April 26, 2024, shortly before trial commenced, counsel for the defendant wrote to Dr. Desai and asked him to reconsider his opinion based on certain assumed facts, including the amount of medication taken by the plaintiff in the form of simple analgesics like Tylenol and ibuprofen. Dr. Desai's revised opinion was that the plaintiff's worsening headaches were "more likely than not solely on the basis of MOH given the weight of the currently available information."

[84] Both Dr. Robinson and Dr. Desai gave expert evidence, but they disagreed about MOH based solely on the use of simple analgesics. While I am satisfied that both were credible witnesses, I prefer the evidence of Dr. Robinson.

[85] There was no real dispute between the experts that the diagnostic criteria for MOH in ICHD-3 published by the international headache society includes the use of simple analgesics for 15 or more days per month, which the plaintiff exceeded. Where Dr. Robinson and Dr. Desai differed, was on the reliability of a finding of MOH as it relates to the use of simple analgesics, as opposed to opioids or other more serious drugs.

[86] Dr. Desai relied on the "established criteria" for MOH, which includes simple analgesics, opioids and other drugs. In his view, it was necessary to explore why headaches would increase after an initial improvement in 2018, and MOH was the likely explanation. He relied on studies, including recent studies, that focused on the use of new medications that do not cause MOH. These studies treated simple

analgesics, opioids and other drugs together as a group, since they all met the diagnostic criteria. In Dr. Desai's opinion that was appropriate.

[87] Dr. Robinson testified that the vast majority of studies that led to the diagnostic criteria in ICHD-3 focused on those who have migraine headaches and take more acute medication. The clinical evidence in support of MOH based only on the use of simple analgesics is surprisingly weak, and evidence that simple analgesics alone can cause MOH is "almost nil". In Dr. Robinson's view, if MOH from use of only simple analgesics exists, it is extraordinarily rare and not something he has encountered in his clinical practice. Since 2012, his opinion has evolved, and he has become more critical about the inclusion of simple analgesics in the diagnostic criteria.

[88] Both Dr. Robinson and Dr. Desai addressed the fact that the plaintiff stopped taking simple analgesics. Dr. Robinson testified that if the plaintiff stopped for five months and MOH was present, his headaches should have improved substantially. Dr. Desai testified that the fact that the plaintiff's symptoms did not improve when he stopped taking simple analgesics did not prevent a diagnosis of MOH, since that is not required under the diagnostic criteria. He testified that the condition usually resolves after overuse stops, but not invariably.

[89] On balance, I would place more weight on the evidence of Dr. Robinson. Dr. Robinson has extensive clinical experience in headaches, as well as strong academic qualifications, and I accept his evidence that the support for MOH caused by overuse of simple analgesics appears to be weak. In particular, I find persuasive the lack of clinical studies focused on the use of simple analgesics alone, as opposed to studies that group simple analgesics with other medications.

[90] Dr. Desai's opinion relied on the diagnostic criteria that is set out in the ICHD-3, which he was not inclined to question. While that is understandable, it does not directly address the weakness in the clinical evidence. The recent studies that Dr. Desai pointed to, as I understand his evidence, did not isolate simple analgesics like

Tylenol or Ibuprofen but grouped them together with other drugs that are known to cause medication overuse headache.

[91] In short, the expert opinion evidence leaves considerable doubt as to whether MOH could likely have been caused in this case by the overuse of simple analgesics. In my view, it is telling that the plaintiff has consistently consulted medical professionals and often reported the usage of high amounts of simple analgesics that either approached or exceeded the diagnostic criteria for MOH, but he was never once advised of any risk in that regard.

[92] Apart from the medical evidence, there are two important aspects of the plaintiff's evidence which suggest that MOH was not the cause of his ongoing symptoms over time. First, he has experienced consistent symptoms from the time of the accident to the present without significant interruption. Second, his evidence, which I accept, is that when he stopped using simple analgesics, he did not experience a reduction in his symptoms.

[93] On all the evidence, I am not satisfied that the frequency and severity of the plaintiff's headaches are the result of MOH, or that his symptoms were reduced when he stopped taking simple analgesics. Rather, the plaintiff's symptoms continued but without the modest relief provided by simple analgesics.

Causation

[94] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The general test for causation is the "but for" test: "but for" the accident would the plaintiff have suffered the injury in question? A plaintiff need not establish that the defendant's negligence was the sole cause of injury. If there are other non-tortious causes, the defendant will still be found liable if the plaintiff can prove the accident caused or materially contributed to the injury beyond the *de minimus* range (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 and *Farrant v. Laktin*, 2011 BCCA 336 at para. 9).

[95] It is important to distinguish between causation as the source of the loss and the rule of damage assessment in tort. As McLachlin, C.J.C. explained in *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 at para. 78:

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

[96] In the present case, I am satisfied that causation has been established, and that "but for" the accidents the plaintiff would not have suffered the injuries that were outlined in the evidence.

[97] The defendant's first submission is that the plaintiff's claim should be dismissed for a lack of causation based on multiple concerns about the plaintiff's credibility, the subjective nature of the claim, and the plaintiff's willingness to lie to for his own personal benefit. In the defendant's submission, the circumstances in this case are analogous to those in *McGlue* where the Court of Appeal overturned an award of damages based on a failure to prove causation.

[98] I am unable to accept that submission. Despite credibility concerns about various aspects of the plaintiff's evidence, there is sufficient evidence to satisfy me that the plaintiff suffered from, and continues to suffer from, serious headaches that he would not have suffered from "but for" the accident.

[99] In *McGlue*, the trial judge rejected the plaintiff's evidence in its entirety, and there was no corroborative evidence that would have allowed her to find that causation had been proven. By contrast, I do not reject the plaintiff's evidence in its entirety. I accept critical aspects of his testimony.

[100] Both Dr. Desai and Dr. Robinson agreed in their initial reports on a diagnosis of persistent posttraumatic headache attributable to soft tissue injury and trauma to the neck sustained in the car accident. I accept those opinions. In my view, they are

consistent not only with the plaintiff's evidence, but also with the treatment he sought over time.

[101] I see it as highly unlikely that the plaintiff has fabricated his symptoms. His attendance at hospitals, the number of medical appointments and treatments he has pursued and the volume of over the counter medication he has used in an attempt to control his symptoms, suggest to me that his symptoms are real, have continued unabated since 2017, and were caused by the accident.

[102] Dr. Desai's revised opinion that the plaintiff's headache intensity and frequency was more likely than not due to MOH, does not affect my finding of causation. Even if I had accepted his opinion, he testified that a diagnosis of MOH would be "superimposed over the initial headaches attributed to the whiplash injury." This is consistent with Dr. Robinson's evidence that no studies of MOH look at whether a headache can be created by the overuse of medication – they simply focus on the worsening of an underlying headache.

[103] The defendant's negligence need not be the sole cause of injury. Even if MOH could be considered a contributing factor, the defendant remains fully liable to the plaintiff for the injuries he caused.

Non-Pecuniary Damages

[104] The principles relating to non-pecuniary damages were summarized in *Langford (city) v. Matthews*, 2024 BCCA 214 at para. 44:

[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 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.

[105] The plaintiff submits that an award in the range of \$190,000 to \$200,000 for non-pecuniary damages would be appropriate. The plaintiff relies on *Danks v. Middelveen*, 2024 BCSC 174, *Federico v. Viveros*, 2024 BCSC 1689, and *Nguyen v. Elberg*, 2025 BCSC 144.

[106] The plaintiff emphasizes the chronic and likely permanent nature of the headaches, cognitive impairment, sleep disturbance and associated anxiety, depression and fatigue. He says that the award should reflect the fact that the plaintiff is being worn down by the constant effort to manage his headaches and symptoms, and the profound effect they have had on his life.

[107] The defendant's first argument is that if the court accepts that the plaintiff has headache symptoms, his current symptoms are more likely than not consistent with the much milder symptoms he originally reported to Dr. Robinson, and he is now exaggerating his symptoms. The defendant says an award of \$25,000 to \$40,000 would be appropriate and relies on *Lumley v. Balilo*, 2013 BCSC 1052, *Chapman v. Zilm*, 2020 BCSC 695, *Mak v. Eichel*, 2008 BCSC 1102, and *Sidhu v. Johal*, 2012 BCSC 587.

[108] I am not satisfied that this first group of cases put forward by the defence are comparable or reflect the true severity of the symptoms suffered by the plaintiff, or the actual effect of the injuries on his personal life. As I have indicated, I do not accept the premise of the defendant's argument that the plaintiff's symptoms are mild and fully encapsulated by statements he made to Dr. Robinson in 2018. I am satisfied the symptoms are more severe and enduring than that.

[109] In *Lumley*, *Chapman* and *Sidhu*, headache pain was mild, had resolved, or did not exist. In this case, by contrast, the headache pain is persistent, serious and likely permanent.

[110] Alternatively, the defendant says if the court accepts the headaches as described in the plaintiff's testimony, a non-pecuniary award between \$70,000 and \$100,000 would be appropriate, relying on *Murphy v. O'Brien*, 2013 BCSC 339, *Michael v. Bayfield*, 2014 BCSC 1602, *Thorson v. Vandop*, 2016 BCSC 221, and *Khademolhosseini v. Ji*, 2019 BCSC 854.

[111] Some guidance can be taken from the second group of cases put forward by the defence and the plaintiff's cases. Collectively, they suggest a range between \$100,000 and \$200,000 although prior cases are only a guide. Each case depends on its own facts.

[112] *Murphy*, *Michael*, and *Khademolhosseini* included ongoing headache pain, but in my view the effects of persistent and severe headaches on the plaintiff's enjoyment of life suggest a larger award than those cases.

[113] Of the plaintiff's cases, I find *Danks* the most analogous. The plaintiff in that case suffered whiplash and associated headaches that did not resolve, which led to significant anxiety and depression and affected her enjoyment of life, ability to function, and her social and family relationships. However, in *Danks*, the effects of the injuries were more severe than the case at bar, because sports and athletics were a core part of the plaintiff's identity and the loss of that "core part of her being" was a major contributing factor to her anxiety and depression.

[114] In *Federico* and *Nguyen* the plaintiffs were diagnosed with post traumatic stress disorder, and the awards were based on continuing mental health challenges and psychiatric injuries that are not present in this case to the same extent.

[115] What then is an appropriate award in this case? The plaintiff had no pre-existing health conditions at the time of the accident. He was physically active, sociable, and enjoyed his employment as an arborist. Most of his soft tissue injuries have resolved, apart from neck pain, but persistent and ongoing headaches have had a profound and permanent effect on his life and happiness.

[116] Since the accident, the plaintiff has curtailed his recreational activities, has struggled with employment and inter-personal relationships, and has had to contend with debilitating physical effects of persistent headache, particularly when the headaches become severe. The headaches have also worn down the plaintiff over time.

[117] I accept the evidence of Dr. Vallentyne and Dr. Robinson that it is likely after so many years have passed that the plaintiff's persistent headaches will present indefinitely, which is an important factor.

[118] I am also satisfied that the plaintiff continues to suffer from some psychological effects that are attributable to the accident and the persistence of his symptoms. Dr. Anderson's opinion was that the plaintiff will likely continue to experience anxiety and depressive symptoms as long as his headache pain continues. Dr. Robinson explained that frequent headaches are strongly associated with mood disorders. It can become a "viscous cycle" as headaches lead to psychological distress, which in turn can aggravate the headaches.

[119] While I am satisfied there are psychological effects from the accident, I would not overstate them. Common sense suggests that significant and persistent headaches would cause a person to feel worn down over time or develop other mental health challenges. By the same token, however, it is apparent that some of the difficulties the plaintiff has experienced were not caused by the accident but were the result of a toxic relationship between the plaintiff and his boss and stepfather while he was employed at Yard by Yard. His mood has lightened and his mental health challenges have dissipated since he left his employment and started his own business.

[120] I have accepted the plaintiff's core evidence that he suffers from persistent and serious headaches that have had substantial effects on his quality of life. Based on my concerns about his credibility, however, I find that his overall ability to function and to derive enjoyment from his life is not quite as impaired as he has described.

[121] The plaintiff's ability to do housekeeping chores, yard work, and minor repairs and has been affected. However, given the kind of work he is currently performing for SISU tree care, it is clear to me that he can perform both household and yard work, but not without additional difficulty, frustration, and delay. There may certainly be days on which his headaches prevent him from doing that work, but there will be other days where the headache pain is mild, or his work hours have been less taxing. Yard work is not something that needs to be done everyday.

[122] Rather than a separate pecuniary award for loss of housekeeping capacity or to fund ongoing yard work and household repair, I will include this loss on the part of the plaintiff in arriving at a total for non-pecuniary damages: *McKee v. Hicks*, 2023 BCCA 109 at para. 112.

[123] I conclude that \$160,000 is an appropriate award for non-pecuniary damages. In my view, that amount accurately reflects the impact of persistent headaches on the plaintiff's health, life, well-being and emotional state.

Past Wage Loss and Past Loss of Income Earning Capacity

[124] The plaintiff's claim for loss of past income and income earning capacity is based on being only able to work six hours per day rather than eight hours. He contends that he should be awarded damages to compensate for lost income in four distinct periods:

- a) \$4,694 for the period from November 9, 2017, to February 14, 2018;
- b) \$3,168 for the period from June 7, 2023, to September 4, 2023;
- c) \$5,115 for the period from June to December 31, 2024; and
- d) \$12,562 for the period from January 1, 2025, to September 9, 2025.

[125] The defendant argues that if there are lost wages attributable to the effects of the accident, they relate to the period between the accident and the time when the plaintiff was medically cleared to work on May 13, 2024. The defendant has

presented two alternative assessments, amounting to either \$3,000 or an award between \$6500 and \$7,000.

[126] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 and *M.B. v. British Columbia*, 2003 SCC 53, [2003] 2 S.C.R. 477). The goal of the exercise is to put the plaintiff in the position he or she would have been in had the tort not occurred - not to put him or her in a better position. (*Blackwater* at para. 74 and *Athey* at para. 32).

[127] For the first period from the date of the accident to February 14, 2018, the evidence is relatively straightforward. The plaintiff was off work until January 14 and then returned but worked reduced hours for the next month. I would adopt the figure of lost wages from the report prepared by the defence expert, Mr. Timbol, who based his calculations on the available time sheets. For this first period therefore, I would award \$4,694 as all the missed work was a result of the accident. In my view, the evidence establishes that full time hours would have been available to the plaintiff in this time period as a result of snow removal and the wood lot.

[128] For the second period (June 7, 2023, to September 4, 2023), I would adopt the defendant's proposed calculation of a net loss of \$1560. I am satisfied that it was medically necessary for the plaintiff to reduce his hours because of his continuing headache pain. He tried to "tough it out" but it was not sustainable and he reduced his hours from eight to six hours per day on medical advice. However, I find that the plaintiff has not established lost income for the entire 13-week period, because the plaintiff suffered an unrelated wrist injury on July 17, 2023. He continued to work doing light duties, but there is no evidence that there would have been enough light duty work to fill up an eight-hour workday, as soon became apparent when light duties dried up and the plaintiff was off work altogether.

[129] The plaintiff's wage at this time was \$32.50 an hour. Missing two hours a day, five days a week for approximately six weeks comes out to a gross income loss of \$1950. It is from that figure that the net loss of \$1560 is derived.

[130] The plaintiff's next claim for lost wages is one full week of wage loss from February 11-20, 2024. I am not satisfied that this relatively short period of lost wages was attributable to the accident. At this stage, the plaintiff had been cleared to return to work. He was able to work but it was his stress and anxiety in the face of a second reprimand, and the fact that he had come to hate the working environment and his strained relationship with his stepfather that caused him to take medical leave. Shortly thereafter he developed a hernia and could not work anyway.

[131] The next periods for which past losses are claimed are May 2024 to the end of December 2024 and the first nine months of 2025 when the plaintiff operated SISU tree care. He contends that because of his inability to work more than six hours per day, he made less profit than he otherwise would have.

[132] Assessing these alleged losses is more difficult as it involves a hypothetical, namely how the business would have proceeded were it not for the accident. Hypothetical events will be considered if they are a real and substantial possibility and not speculation. If a real and substantial possibility is established, the court will determine damages by assessing the likelihood of the event. (*Grewal v. Naumann*, 2017 BCCA 158 at para. 48 and *Athey* at para. 27).

[133] I am satisfied the plaintiff has established a real and substantial possibility of economic loss arising from the fact that he was only able to work for six hours per day at his business.

[134] The plaintiff's current condition generally prevents him from working for longer than six hours a day without seriously exacerbating his symptoms. This is a step he has taken with medical advice. I accept that debilitating headaches from the accident are a reality in his life and working eight hours a day was not realistic for him in 2024 or 2025.

[135] The task is therefore to compare how the plaintiff's business would have unfolded if the accident had not occurred to assess the appropriate compensation for lost earning capacity. A useful starting point is to examine how his business

functioned in 2024 and 2025, and then to gaze into the crystal ball and attempt to determine what he would have earned in the business but for the accident.

[136] Mathematical calculations are a starting point. The ultimate award must be fair and reasonable, and will depend on the evidence, hypothetical events, and positive and negative contingencies (*Reilly v. Lynn*, 2003 BCCA 49 at para. 101, *Jurczak v. Mauro*, 2013 BCCA 507 at para. 35-37, and *Siu v. Regehr*, 2022 BCSC 1876 at para. 171).

[137] The challenge is increased by the fact that financial details are not the plaintiff's strong suit. He has hired a bookkeeper, but there were gaps in the information he provided. For that reason, I would adopt Mr. Timbol's report as a useful starting point.

[138] Mr. Timbol found the plaintiff's adjusted earnings from pursuit of SISU tree care to be \$27,280 for 2024 and \$51,407 for the first nine months of 2025. He arrived at those figures by taking reported earnings and adjusting them to account for certain expenses that were not business related or provided a personal benefit for the plaintiff.

[139] The plaintiff suggests that because the plaintiff is only able to work six hours a day instead of eight that a fair and reasonable award for each of these periods can be arrived at by assuming that the plaintiff would have earned 25% more had it not been for the accident. For 2024, this would amount to a gross loss of \$6,820 and a net loss of \$5,115. For 2025, this would amount to a gross loss of \$16,750 and a net loss of \$12,562.50

[140] I am not satisfied that there is necessarily a straight line between the time spent by the plaintiff and the earnings achieved. There are other contingencies and probabilities that would likely have affected the plaintiff's earnings from pursuit of his own business even in a non-accident scenario. SISU tree care was a brand-new business in its infancy in 2024 with little or no marketing beyond word of mouth, and a need to build up business. There is no evidence that work was passed up due to

the inability of the plaintiff to work eight hours, or that there would have been sufficient business to drive revenue beyond what it was. While the plaintiff had to hire an associate for particularly heavy jobs, that also increased the overall efficiency of the jobs performed.

[141] In 2025, the business had grown, but there remains a lot of uncertainty with respect to what additional revenue could be generated through additional hours alone. Running his own business gave the plaintiff an opportunity to earn revenue by working smarter, not necessarily by simply working longer hours.

[142] I am prepared to accept that the plaintiff would have increased revenue in a non-accident scenario, but given the contingencies involved, and the likelihood of early challenges associated with a new business, which he would have been pursuing absent the accident anyway, I consider a fair and reasonable assessment to be a net loss of \$2500 for 2024 and a net loss of \$9,000 for 2025.

Loss of Future Earning Capacity

[143] To determine a claim for loss of future income earning capacity, the court must consider two questions. First, has the plaintiff's earning capacity been impaired by their injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. Second, if so, what compensation should be awarded for the resulting financial harm that will accrue over time? (*Tyler v. Sowinski*, 2022 BCSC 878, citing *Hoy v. Williams*, 2014 BCSC 234 at para. 153).

[144] An award for future loss of earning capacity represents compensation for pecuniary loss. Again, it is not a mathematical calculation, but it does involve a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened (*Dornan v. Silva*, 2021 BCCA 228 at para. 156, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32).

[145] The ultimate award must be fair and reasonable, and will depend on the evidence, hypothetical events, and positive and negative contingencies (*Reilly* at para. 101, *Jurczak* at paras. 35-37, and *Siu* at para. 171).

[146] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Grauer J.A. set out the three-step process for assessing claims for loss of future earning capacity:

.... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring. The first step is whether the evidence discloses a potential future event that could lead to loss of capacity. The second step is whether on the evidence there is a “real and substantial possibility” that the future event in question will cause a pecuniary loss. The third and final step is to assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring....

[147] Applying the three-part test, I am satisfied that the evidence supports chronic headaches that could lead to a loss of capacity. I accept that the plaintiff has experienced continuing headache pain of sufficient frequency to affect his capacity to work and concentrate. Dr. Robinson’s opinion that the plaintiff’s headaches will likely “present indefinitely” is, I find, reasonable given it has been over seven years since the accident, and despite efforts at treatment, the headaches continue.

[148] I am also satisfied there is a real and substantial possibility that the plaintiff’s continuing injuries will cause a pecuniary loss. The plaintiff had a strong work history prior to the accident but has not been able to apply the same energy to his work since. He has difficulty concentrating at times and has had to limit his hours to control his condition. It is reasonable to assume those problems will continue considering the medical evidence.

[149] The plaintiff plans to continue doing physical labour to support himself, but he will also have to attend to other tasks associated with running his own business. His inability at times to do the heavier work, to concentrate on computer work for more

than an hour at a time, or to work the same number of hours himself, will almost surely affect the bottom line to some extent. That is particularly true since the plaintiff himself, and his labours, are the main driving force behind the business.

[150] I find the real challenge on these facts is valuing the loss. In my view, it is virtually certain that continuing headache pain will occur and cause loss, but valuation of that loss is extremely challenging, because this is a new business, there are business efficiencies that may make up for the reduction in the amount of time spent on the business, and strong growth has already been demonstrated despite the plaintiff's challenges such that it is difficult to say how much stronger the growth would have been in a non-accident scenario.

[151] Once a loss has been proven, the plaintiff may prove the quantification of loss based on an earnings approach or a capital asset approach. The earnings approach may be most appropriate where there is an "identifiable loss of income at the time of trial," or "a demonstrated work history with a clear trajectory". The capital asset approach may be appropriate where there is no "settled career path" or "no clearly identifiable earnings history to be used as a yardstick for future earning capacity": *Lewis v. Gibeau*, 2025 BCCA 127 at para. 48.

[152] The plaintiff has proposed a range of awards based on each of the approaches and using earnings of \$40 per hour as a mathematical anchor.

[153] In my view, quantification of the loss should be based on an earnings approach in this case to the extent possible. The loss of income at the time of trial is difficult to identify given that the plaintiff is no longer an employee and is pursuing his own business. This makes his trajectory less clear. However, he does have a settled career path as an arborist, and there is sufficient earnings history to reasonably estimate his earnings in the post accident scenario and use the likely reduction of that income in percentage terms to ground a fair and reasonable award.

[154] A useful starting point is to assume that absent the accident the plaintiff's earnings as an arborist through SISU tree care would be equivalent to working full

time at \$40 an hour. This accounts for the fact that he was being paid \$32.50 an hour when he last worked for Yard by Yard, for the evidence of a range of salaries associated with arborists, and for the fact that his earnings may increase through his business. \$40 an hour over a forty-hour work week comes out to annual earnings of \$83,200, and that is a reasonable figure to use as a basis for his yearly earnings until his retirement.

[155] The plaintiff submits that there has been a 20% reduction in his ability to earn income, but I conclude that a 15% reduction is somewhat closer to the mark and provides a useful basis for comparison. This accounts for positive and negative contingencies, some exaggeration on the plaintiff's part related to his diminished capacity, the possibility of some improvement in the management of the plaintiff's headache symptoms, increased productivity due to his improved mood, and efficiencies that may arise from business practices that overcome the reduced hours the plaintiff will be able to devote to the business.

[156] Adopting a 15% loss in gross earnings would amount to \$12,480 a year. Using the multiplier supplied by the plaintiff's expert, Mr. Turnbull, allows for calculation of the present value of such a loss until the plaintiff retires. Subtracting 2024 and 2025 which are no longer relevant to future loss, the multiplier is 12.98. The present value of the plaintiff's yearly loss until his retirement at 65 would come out to \$161,990.40.

[157] However, the authorities are clear that the process of arriving at an award is an assessment of lost capacity, and not simply a mathematical calculation. I have considered the plaintiff's submission of a 20% reduction in earnings, which would amount to \$215,987.20, in addition to the 15% figure of \$161,990.40 and consider an award in between those two amounts to be fair and reasonable.

[158] Considering all the evidence, the uncertainty inherent in predicting the future, and balancing concerns I have over the exaggeration of the plaintiff's symptoms with the unique challenges posed by persistent headaches and their effect on mood, I

consider a fair and reasonable assessment of damages for loss of future earning capacity to be \$185,000.

Future Cost of Care

[159] The plaintiff claims a total of \$216,888 for the costs of future care. The plaintiff's figures are adjusted to reflect the present value of the total cost on an item-by-item basis based on a cost of future care report prepared by Ms. Bos and tendered into evidence.

[160] The plaintiff's claim is based on the following four categories of care that are said to be required: (1) health and occupational assessments, (2) medication, (3) equipment or adaptive aids, and (4) Home Support services.

[161] An award for the cost of future care is based on the principle of restitution and may include what is reasonably necessary on medical evidence to promote the mental and physical health of the claimant (*Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-69 and *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at paras. 21-22). Whether the costs will actually be incurred by the plaintiff, and whether he or she is willing to accept the recommended treatment are both relevant considerations. An award under this heading must reflect what may reasonably be expected to be required (*O'Connell v. Yung*, 2012 BCCA 57 at paras. 68-70).

[162] The defendant argues that there should be no award for future care as, at most, the plaintiff's condition is unchanged from 2018 shortly after the accident when he reported improvement to Dr. Robinson, and that the plaintiff's claim for future care, as is the case with his claim for future wage loss, is based on unreliable and incredible evidence which I should not accept. As I have already indicated, I do not agree with that characterization of the facts.

[163] As I have indicated, I am satisfied that despite the credibility issues that arise from the plaintiff's evidence, there are serious, persistent and ongoing headaches,

attributable to the accident, and of sufficient severity as to require care. Accordingly, the plaintiff is entitled to an award for reasonably necessary medical treatments.

Health and Occupational Assessments

[164] I am satisfied that seeing a kinesiologist is reasonably necessary on the evidence. Both Dr. Vallentyne (a physiatrist) and Melanie Bos (an occupational therapist) recommended that the plaintiff see a kinesiologist to review his home exercise program for prolonged instruction on gentle stretching of his neck muscles. The evidence is that the plaintiff's headache symptoms bear some relation to the soft tissue injury to his neck, and his symptoms worsen when his neck flares up.

[165] The plaintiff testified he has already seen a kinesiologist and had some guidance. Given the focus is on instruction, I am not convinced that six sessions are required. In my view three sessions are sufficient. Based on the cost for such appointments in Ms. Bos' report, I would award \$260 for kinesiology appointments.

[166] I am also satisfied an ergonomic assessment and work analysis is reasonably necessary as recommended by Ms. Bos. and Ms. Gallagher, who was qualified as a vocational rehabilitation expert. Both testified about the benefits of ergonomic equipment and ergonomic adjustments for the plaintiff when he is engaging in sedentary work to support his business. The combined cost of the assessment and subsequent analysis is \$1,190.

[167] I am not satisfied that a vocational assessment is required. This was originally recommended by Dr. Anderson, a psychiatrist, but on the basis that "Mr. Hyde is uncertain how much longer he will be able to continue working at his present job," such that a vocational assessment would assist in assessing the plaintiff's long-term prognosis. That was in 2022, but things have changed. The plaintiff has clearly decided to run his own business, he loves being an arborist, and the business is growing and successful. The plaintiff argues that half the amount recommended be awarded in case the business is unsuccessful, but I am not satisfied that is reasonably necessary on the evidence.

Medication

[168] I have no hesitation in concluding that Botox is reasonably necessary on the medical evidence. The plaintiff testified, and I accept, that Botox is one of the only things that gave him relief. Dr. Robinson testified about the use of Botox. He would not recommend discontinuing use if an individual with headache pain was receiving Botox and there was some improvement. I would award the amount sought by the plaintiff for indefinite Botox treatments of \$135,319 (based on a cost of \$937.50 for bimonthly Botox injections including both the procedure and Botulinum toxin).

[169] I would not award travel costs to receive injections as those are no longer necessary. The Plaintiff gets injections in Kelowna at the Bill Nelmes Pain and Research Centre. In my view, the travel costs sought by the plaintiff are speculative as there is no evidence that travel is likely to be required in the future.

[170] I would grant the plaintiff's claim for one half the costs of Tylenol, Toradol and Cambia (Diclofenac). I am satisfied that these medications are reasonably necessary to take the edge off the plaintiff's headaches and allow him to function, but the effect of taking too much of these drugs is not good for the plaintiff's liver or overall health. I consider the plaintiff's claim for roughly half the cost of these drugs indefinitely to be reasonable and would award \$5,000 to reflect the cost of future use of these or similar drugs.

[171] I am not satisfied that the plaintiff should be awarded an amount for a six month trial of Ubrelvy and Qulipta. I am not satisfied that the medical necessity of those drugs is clear on the evidence, or that the cost of those medications will actually be incurred by the plaintiff.

[172] Dr. Robinson opined that it was reasonable for the plaintiff to try Ubrelvy or Qulipta, but his expectations for those drugs improving the plaintiff's headaches were low. The plaintiff testified that he had tried several other medications without success and that Botox was the only treatment that seemed to help. The plaintiff has opted to pursue regular Botox treatments and over the counter drugs to control his

symptoms and has taken no steps to try Ubrelvy or Qulipta since the active ingredients in those drugs were first mentioned by Dr. Robinson in 2022.

Equipment and Adaptive Aids

[173] In my view, the claim for \$3,200 for equipment and adaptive aids, consisting of a heating pad, cervical pillow, high-back office chair and large monitor is reasonable. These items will relieve pain and prevent exacerbation of neck pain caused by the accident, as recommended by Ms. Bos.

Home Support Services

[174] The plaintiff makes a pecuniary claim for \$39,000 for the cost of home support services, under which he includes yard work, drywall repair, baseboard repair, and general repairs that the plaintiff used to perform but has not since the accident. Ms. Bos recommended 24 hours a year of yard work. I would classify these claims as relatively routine domestic and household tasks that are related to a loss of housekeeping capacity.

[175] As noted, I accept that the plaintiff's ability to perform these chores has been negatively affected but have declined to treat a loss of housekeeping capacity as a pecuniary claim. The plaintiff is capable of yard work and small household repairs, albeit with greater difficulty. He is a practicing arborist and does work that exceeds the requirements of yard work already. He testified that yard work was a struggle, but he does it when he can, and that it is his personal choice not to let other members of the family use the lawnmower. With respect to household repairs, he testified that there is only a little difference since the accident, such as jobs he can't get to.

[176] When the plaintiff's headache symptoms are severe, it is not reasonable to expect that he will be able to do yard work or minor repairs to his house, but his symptoms are not always present and are sometimes mild. His psychological state has greatly improved since leaving Yard by Yard, and he has greater flexibility over his schedule as the owner of his own business. I do not accept that he is unable to

do yard work or small household repairs and find that he can perform those duties but with increased difficulty and less satisfaction.

[177] Considering the discussion in *McKee* at para. 93-112, I would treat the plaintiff's loss of capacity in this regard as a factor that augments his non-pecuniary damages as opposed to a separate claim.

[178] Based on those aspects of the plaintiff's future care that I have concluded are reasonably necessary on the medical evidence, the total award of damages for the cost of future care is \$144,969.

Special Damages

[179] In personal injury cases, special damages include actual or particular monetary losses that can be easily calculated. An injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Heltman v. Western Canadian Greyhound Lines*, 1966 CanLII 672 at p. 464-465, (BCCA). *X. v. Y.*, 2011 BCSC 944 at para. 281, and *Milina v. Bartsch*, 1985 CanLII 179 (BCSC) at para. 78.

[180] Exhibit 27 is agreed to accurately list the expenses incurred by the plaintiff for medication, Botox injections, physiotherapy, psychological counselling and associated mileage and travel. The total incurred was \$32,433.59.

[181] The defendant argues that if the expenses were incurred due to the accident (as outlined in their third alternative submission), then the plaintiff would be entitled to the cost of prescriptions, counselling, physiotherapy and mileage.

[182] While the defendant suggests an award of \$25,000, I am satisfied that all of the expenses in exhibit 27 were incurred as a result of the injury and should be recoverable. Accordingly, I would award \$32,433.59

Conclusion

[183] For the reasons stated, I award damages to the plaintiff in the amount of \$540,156.59 broken down as follows:

- a) Non-Pecuniary Damages \$160,000;
- b) Past Wage Loss and Past Loss of Earning Capacity \$17,754;
- c) Loss of Future Earning Capacity \$185,000;
- d) Cost of Future Care \$144,969; and
- e) Special Damages \$32,433.59

Costs

[184] Unless there are matters of which I am unaware, the plaintiff is entitled to his ordinary costs.

[185] In accordance with counsel’s request, any issue regarding prejudgment interest, post judgement interest, or other related matters may be deferred. If there is no agreement between counsel, they are at liberty to arrange a case management conference at a mutually convenient time to have the matter addressed.

“Greenwood J.”