

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dhami v. Kennedy*,  
2023 BCSC 894

Date: 20230526  
Docket: M166655  
Registry: Vancouver

Between:

**Satinder Singh Dhami**

Plaintiff

And

**James Kennedy**

Defendants

Before: The Honourable Justice Shergill

## Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.  
January 16-20 and 23-24, 2023

Place and Date of Judgment:

Vancouver, B.C.  
May 26, 2023

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**I. OVERVIEW**

[1] This action is for damages arising out of a motor vehicle collision that occurred on April 1, 2016 (“MVC” or “Collision”). The plaintiff, Satinder Singh Dhami, was a front seat passenger in a 2008 Dodge Charger automobile (the “Dodge Charger”) driven by his brother Amandeep Dhami. When it entered the intersection of Main Street and East 65<sup>th</sup> Avenue in Vancouver, B.C., the Dodge Charger was T-boned by a 2014 Dodge Grand Caravan automobile (the “Dodge Caravan”) operated by the defendant, James Kennedy.

[2] The plaintiff commenced this action in August 2016, against both Mr. Kennedy and Amandeep Dhami.<sup>1</sup> Mr. Kennedy has admitted liability, and the plaintiff has discontinued the action against Amandeep Dhami.

[3] The parties have agreed to \$995 for special damages.

[4] The central issue in this action is the severity of the plaintiff’s injuries and their impact on his ability to earn an income. Mr. Dhami claims for injuries to his neck and right shoulder, chronic pain, fatigue, chronic headaches, depression and anxiety. The plaintiff submits that the Collision has left him with permanent injuries that significantly restrict his function and interfere with his ability to earn an income. He seeks a total award of approximately \$800,000, for non-pecuniary damages, loss of earning capacity, and future care costs.

[5] The defendant concedes that the plaintiff suffered neck symptoms as a result of the Collision but disputes causation with respect to the other injuries. The defendant argues that the plaintiff’s neck injury is relatively minor, and should result in a total award of less than \$60,000. The bulk of this figure is comprised of non-pecuniary damages, with a small award for past loss of earning capacity and future care costs.

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<sup>1</sup> The Notice of Civil Claim mistakenly spells Amandeep Dhami’s first name is “Amardeep”.

**II. EVIDENCE**

[6] This Court heard from a total of seven witnesses, including the plaintiff.

[7] Prakash Singh was Mr. Dhami's supervisor at Raincoast. He testified about the work duties, earnings, and overtime hours at Raincoast that are relevant to the plaintiff's loss of earning capacity claim. Dr. Dalvinder Singh Toor has been the plaintiff's family practitioner since 2008. He was called as a fact witness, and was the sole defence witness to testify in this trial.

[8] Two expert witnesses were qualified to give expert opinion evidence in relation to Mr. Dhami's injuries. Dr. John le Nobel, a physiatrist, assessed Mr. Dhami on May 5, 2020, and September 1, 2022, and prepared medical legal reports on the same dates (the "First le Nobel MLR" dated May 5, 2021, and the "Second le Nobel MLR" dated September 1, 2022). Dr. Raymond Ancill is a psychiatrist who assessed Mr. Dhami on September 2, 2022. He prepared a medical legal report which is dated October 17, 2022 (the "Ancill MLR").

[9] In addition to the medical experts, this Court received expert opinion evidence from Russel McNeil, an occupational therapist who conducted a clinical assessment of Mr. Dhami on October 19, 2022, and Kevin Turnbull, an economist.

[10] Mr. McNeil prepared a Cost of Future Care Report dated October 23, 2022 (the "CFC Report"). Mr. Turnbull prepared two reports which are both dated October 24, 2022. The first is a calculation of the cost of care (the "CFC Calculation") and the second is a loss of earning capacity calculation (the "LOEC Calculation").

[11] No concerns are raised about the credibility of any of the witnesses. However, the defence does raise issues of reliability of the evidence of various witnesses, including the plaintiff.

[12] Credibility and reliability are related but distinct concepts. Reliability relates to the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the

trustworthiness of their evidence, based on their veracity or sincerity: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013).

[13] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case – a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be mistaken in their recollection: *R. v. H.C.*, 2009 ONCA 56 at paras. 41 and 53.

[14] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at p. 357, 1951 CanLII 252 (B.C.C.A.) and *Bradshaw* at para. 186. I have applied those principles here.

[15] Though I am generally satisfied as to Mr. Dhami's veracity and sincerity, there are some material discrepancies in his evidence which suggest that Mr. Dhami's memory is flawed in many respects. This is understandable given the passage of time, and does not impact on my view of his credibility. However, these discrepancies do undermine the reliability of his evidence. For example, Mr. Dhami testified that he left his job at Raincoast in April 2019, a week or so after starting his job at Coast Mountain. However, under cross-examination, it became evident that Mr. Dhami continued his employment with Raincoast for about three months, during which time he took unpaid medical leave. There are also some contradictions between Mr. Dhami's trial evidence and the answers he provided at his examination for discovery held March 6, 2018 (the "Discovery").

[16] I have also considered inconsistencies between Mr. Dhami's evidence and entries contained in medical records, particularly those of Dr. Toor. There are two important things to keep in mind regarding Dr. Toor's clinical records. First, not all the clinical entries were made by Dr. Toor. Dr. Harshbir Toor – who also works at the clinic – saw Mr. Dhami on several occasions and authored some of the entries that are relevant. She did not testify in the trial, and Dr. Toor did not have any personal knowledge of what transpired during those visits. Second, clinical records are often

only a summary of what was discussed during the medical visit, and are by no means comprehensive or complete. At best, they reflect a summary of what the author of the records understood the patient to be telling them – they do not record all of what may have been conveyed during the visits. The clinical records are therefore subject to the usual caution when considering entries regarding medical visits.

[17] As noted by Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114:

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[18] Dr. Toor's explanation of the purpose of the records, the timing of the entries, and the manner in which the information was recorded, together with Mr. Dhami's evidence, confirms that this Court should approach the clinical entries with caution and not place undue weight or emphasis on them. Where there is a conflict between Dr. Toor's records and Mr. Dhami's evidence, I have considered the subject matter, surrounding circumstances, and other reliable evidence in resolving the conflict. I have done the same in relation to entries recorded in other medical records.

[19] I have addressed any specific concerns about the reliability of the other witnesses' evidence, as they arise in these Reasons.

**A. Circumstances of the Plaintiff**

[20] Mr. Dhami is 34 years old. He lives in the Metro Vancouver area with his wife, whom he married in April 2017. They share a residence with his parents and brother's family. Mr. Dhami's wife works part-time as a care aide, and is studying to be a registered nurse. Mr. Dhami is currently employed as a bus driver with Coast Mountain Bus Company ("Coast Mountain").

[21] Mr. Dhami was born in Punjab, India. He immigrated to Canada around 2007 after finishing his high school education. Following his arrival, Mr. Dhami completed a grade 12 English course, and then commenced working.

[22] Mr. Dhami's first employer was a wholesale book distribution company called Raincoast Book Company ("Raincoast"). Mr. Dhami was employed with Raincoast as a warehouse worker from 2007 to 2013, before being promoted to supervisor in the receiving department. He was working in that capacity when the Collision occurred on April 1, 2016.

[23] Mr. Dhami continued working at Raincoast for another three years following the Collision. In April 2019, he started a job with Coast Mountain. Mr. Dhami remained employed at Raincoast until July 2019.

[24] Prior to the Collision, Mr. Dhami was fit and healthy; he was physically active and enjoyed playing cricket, volleyball, and going to the gym. He had no prior injuries or health conditions, and attended the gym five to six days per week.

**B. Circumstances of the Collision**

[25] On Friday April 1, 2016, Mr. Dhami was on his way to the gym with his brother, who was driving. They were heading northbound on Main Street travelling around 30 to 40 kilometers per hour ("kph"). Just as they entered the intersection of 65<sup>th</sup> Avenue, they were struck on the passenger side by the Dodge Caravan. Mr. Dhami did not see the Dodge Caravan until just before the impact. His body was pushed backwards and forwards, and impacted with the car seat and the head rest. Mr. Dhami was wearing his seatbelt.

[26] Mr. Dhami testified that he began to experience some weakness and pain in the right shoulder and neck while still at the Collision scene.

[27] The force of impact pushed the Dodge Charger halfway into the left-hand lane. The parties exchanged contact information at the scene. No emergency vehicles were called to attend at the scene of the Collision.

[28] As the Dodge Charger was not driveable, Mr. Dhami's brother called their uncle to pick them up.<sup>2</sup> Mr. Dhami went home in his uncle's vehicle, rather than attending at the gym as originally planned.

### **C. Injuries, Treatment, Recovery**

[29] Mr. Dhami testified that he was still experiencing pain after returning home from the Collision scene. He took some pain relief medication that evening, and rested over the weekend.

[30] Mr. Dhami returned to work on Monday, April 4, 2016, though he still had pain from the Collision injuries. He testified that he tried to manage his pain with over the counter pain relief medication. When the pain did not abate, Mr. Dhami sought medical treatment.

[31] Mr. Dhami saw Dr. Toor on April 9, 2016, complaining of pain in his neck. Dr. Toor examined Mr. Dhami's neck and back. He noted tenderness and spasm on the posterior and lateral aspect of the neck, with pain on movement. The back examination revealed that Mr. Dhami's movements were "intact" with no reported complaints of back pain. Dr. Toor recommended physiotherapy and referred Mr. Dhami for an x-ray of the cervical spine.

[32] The cervical spine x-ray was done on April 13, 2016. It indicated moderate disc height loss with anterior bone spurs in the C5/6 region. Uncinate atrophy was also noted at the C4 to C6 levels, with mild to moderate neural foraminal narrowing on both sides of the C3-4.

[33] The first reference to shoulder pain appears on July 30, 2016, in a CL19 Medical Report prepared by Dr. Toor for ICBC.

[34] A December 2016 entry in Dr. Toor's clinical records suggests that Dr. Toor was considering referring Mr. Dhami to Dr. William Yu, an orthopaedic specialist, for assessment of his ongoing neck and shoulder pain. However, it does not appear that this referral was made. Mr. Dhami had no recollection of ever seeing Dr. Yu or of

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<sup>2</sup> The Dodge Charger was ultimately written off due to the damage.

Dr. Toor mentioning his name to him, and there was no evidence from Dr. Toor about this issue.

[35] On Dr. Toor's recommendation, Mr. Dhami underwent a series of physiotherapy and massage therapy treatments for his neck and shoulder. The physiotherapy started shortly following the Collision. Mr. Dhami testified that the physiotherapy provided him with temporary relief. Mr. Dhami also attended for massage therapy, which he found to be particularly beneficial. Mr. Dhami estimated that he had obtained about 30 to 40 physiotherapy and massage treatments by the date of trial. He may also have done about one to two chiropractic treatments. In 2021, Mr. Dhami started acupuncture. He estimated that he had completed about six to seven acupuncture treatments by the time of trial.

[36] As at the trial date, Mr. Dhami was still getting acupuncture and physiotherapy. Although he testified that he was also getting massage treatments, it was unclear on the evidence whether these were from a registered massage therapist or just from his brother and sister-in-law, who he stated regularly applied mustard oil to alleviate his pain.

### **1. Dr. le Nobel**

[37] In his first MLR, Dr. le Nobel diagnosed Mr. Dhami as having chronic neck and right shoulder girdle pain. He opined that the neck pain was due to myofascial tissue injuries which are superimposed on cervical spine imaging abnormalities noted on April 13, 2016. He opined that the cervical spine abnormalities were asymptomatic prior to, and rendered symptomatic as a result of, the Collision. It was also his opinion that these imaging abnormalities are associated with a worse prognosis.

[38] Dr. le Nobel also diagnosed Mr. Dhami with right shoulder pain due to injury to the right shoulder rotator cuff. The right shoulder pain was accompanied with a painful abduction arc, subscapularis muscle weakness, and biceps tendon tenderness.

[39] According to Dr. le Nobel, Mr. Dhami's sleep has been impacted due to the pain, and he has become deconditioned because of his reduced activity tolerance following the Collision.

[40] In his first MLR at p. 4, Dr. le Nobel provided a guarded prognosis for recovery, with symptoms and limitations continuing into the foreseeable future, i.e. most likely for the next several years and possibly longer. Depending on Mr. Dhami's response to the recommended treatments, Dr. le Nobel was of the view that he will most likely see some – but not complete – resolution of his injuries.

[41] Dr. le Nobel made various treatment recommendations, including: heat application; stretching; light to moderate resistance and neck strengthening exercises; cardiovascular exercise; diarization of his exercises; access to an exercise facility; use of home exercise equipment; assistance of a kinesiologist or exercise-based physiotherapist for a period of ten to 12 months; use of manual therapy and physiotherapy as an adjunct to active rehabilitation; right shoulder MRI; and use of oral, topical, and injected medications.

[42] According to Dr. le Nobel, Mr. Dhami's decreased work hours, subsequent career change, and increased risk of future work absences are all because of the MVC. He noted that this opinion was based on Mr. Dhami's reports to him. He agreed that the plaintiff's failure to provide him with a full and accurate history of his post Collision employment would impair his ability to assess Mr. Dhami's vocational function.

[43] In his second MLR, Dr. le Nobel largely reiterated the opinion in his first report. He also noted that while Mr. Dhami had experienced some symptom reduction compared to the previous assessment in 2020, this did not mean that he would have further resolution of his symptoms. In addition to the MRI suggested in his first report, Dr. le Nobel recommended that Mr. Dhami obtain a repeat x-ray of the cervical spine. Depending on the imaging results, further treatments could include image guided shoulder injections of local anesthetic and corticosteroid, and possible arthroscopic shoulder surgery. Dr. le Nobel also repeated his advice that Mr. Dhami keep a diary of his exercises and supplement his current exercise regime

with strengthening exercises for his neck. Finally, he opined that Mr. Dhami’s injuries “will continue to limit his future employment opportunities”.<sup>3</sup>

[44] I find Dr. le Nobel’s opinion with respect to causation of the right shoulder injury, and Mr. Dhami’s vocational limitations, unreliable, for the following reasons:

- a) He could not explain why he believed that the shoulder injury was related to the MVC. Dr. le Nobel acknowledged that the clinical records did not indicate any reports of shoulder pain until four months following the Collision;
- b) It is unclear how much or what information Dr. le Nobel left out of his second MLR, that might have been material to his opinion. When asked about information that was missing from his second MLR, he simply stated that “I was just lazy in not putting that extra bit in”;
- c) Dr. le Nobel’s opinion regarding vocational function was vague and lacking in detail as to the nature and degree of the vocational limitations; and
- d) Dr. le Nobel was not aware that the plaintiff had taken a second job at Canada Post following the MVC, and while still employed at Raincoast. This information is relevant to the conclusions about the degree of impairment and impact on vocational function.

[45] Consequently, I am unable to place much reliance on Dr. le Nobel’s opinion regarding causation of shoulder injury, and the overall impact of Mr. Dhami’s injuries on his vocational pursuits.

## **2. Dr. Ancill**

[46] Dr. Ancill carried out his assessment of Mr. Dhami via Zoom. As part of his assessment he also spoke to Mr. Dhami’s brother. Dr. Ancill reported that during his interview, Mr. Dhami complained of: neck pain which occurs “all the time” and is worse with physical activity; frequent headaches related to neck pain; constant right

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<sup>3</sup> Second le Nobel MLR at p.5.

shoulder pain which is worsening over time due to avoidance of activity; fatigue worsening later in the day; increased irritability due to pain and frustration; anxiety while in cars; moodiness; poor sleep due to pain; numbness in his right hand; decreased physical activity; and reduced sexual function due to pain.

[47] Dr. Ancill diagnosed Mr. Dhami with the following: (a) Major Depressive Episode, currently mild–moderate, and chronic; (b) Adjustment Disorder with Anxiety, with an enduring stressor (driving and traffic), and chronic; (c) Somatic Symptom Disorder, predominant pain, chronic; (d) Chronic Primary Pain; (e) Fatigue; (f) Chronic Tension Type Headaches; and (g) Kinesiophobia.

[48] According to Dr. Ancil, the Collision is the only “reasonable explanation” for Mr. Dhami’s current complaints and functional impairments. He provided a poor prognosis for recovery, noting that many of the conditions such as the headaches, are “challenging” to treat successfully. Further, he reported that Mr. Dhami is at risk of developing a more serious illness as his pain persists and he continues to have impaired function. He concluded that Mr. Dhami’s injuries have caused him to be partially disabled, and that this will likely continue into the future.

[49] Dr. Ancill recommended the following: treatment with an antidepressant, such as Cymbalta; gabapentin or similar medications to manage the chronic pain; possible referral to a psychiatrist; and possible use of cognitive behavioural therapy. Regarding the latter, he opined that even with a beneficial response, relapse is likely given that Mr. Dhami cannot avoid exposure to triggers.

[50] The reliability of Dr. Ancill’s opinion about the psychological injuries suffered by Mr. Dhami, their causal relationship to the Collision, and prognosis, is seriously brought into question. Dr. Ancill’s MLR was rife with mistakes, many of which were substantive and raise concerns about the care with which Dr. Ancill arrived at his opinion. For example, Dr. Ancill admitted that he made the following errors in his MLR:

- a) He stated that Mr. Dhami was 62 years old at the time of the assessment – when in fact he was almost 3 decades younger;

- b) He indicated that the plaintiff had been involved in multiple collisions, whereas there is only evidence of one MVC;
- c) At certain points he stated that the plaintiff's worst injury is back pain, while at other points he noted that the worst pain is neck pain;
- d) He rated Mr. Dhami's back pain on a scale, while admitting that Mr. Dhami did not report any back pain to him; and
- e) Despite the fact that Mr. Dhami's mother is still alive, Dr. Ancill noted in his report the death of the plaintiff's mother, his bereavement of her death, and his dealing with her estate.

[51] It is difficult to ascertain how much weight Dr. Ancill placed on these incorrect factual assumptions when arriving at his opinion. Regardless, these numerous and substantial errors undermine this Court's ability to confidently rely on Dr. Ancill's conclusions about what psychological injuries Mr. Dhami suffers from, their cause, and their prognosis.

[52] Dr. Ancill's conclusions are also not supported by the other evidence in this case. Mr. Dhami did not report any symptoms of depression or anxiety to Dr. Toor, nor did he mention any sexual dysfunction. At trial, Mr. Dhami denied having any depression prior to his March 2018 Discovery. He explained that his depression only manifested itself after his wife began to comment on his physical restrictions after coming to live with him in 2018. I find this explanation insufficient to address the almost two-year gap between the MVC and the onset of depressive and anxiety symptoms. For his part, Dr. Ancill does not appear to have adequately considered this gap when arriving at this opinion regarding causation. Dr. Ancill also does not appear to have considered the potential psychological impact of the two miscarriages that Mr. Dhami's wife experienced during the relevant time period of onset of psychological symptoms.

[53] Consequently, I have placed very little weight on Dr. Ancill's overall opinion, with the exception of those parts that are supported by the other evidence at trial.

**3. Russel McNeil**

[54] The functional capacity tests performed by Mr. Dhami during his assessment with Mr. McNeil suggest that he has restriction to various parts of his body, as follows:<sup>4</sup>

- a) Active range of motion restrictions were noted in cervical extension, lateral flexion, and rotation; right shoulder flexion, extension and abduction; and trunk extension, lateral flexion, and rotation;
- b) Grip strength below average but Mr. Dhami was still able to do repetitive grasping;
- c) Upper extremity strength was noted as moderate to severe weakness in left shoulder; severe weakness in right shoulder; slight to moderate weakness in left shoulder abduction; and moderate to severe weakness in right shoulder abduction;
- d) Moderate to severe bilateral elbow flexion weakness; slight to moderate weakness in left elbow extension; and moderate to severe weakness in right elbow extension;
- e) Unilateral weakness on right shoulder, which was approximately 50 to 70% weaker than the left;
- f) Two handed lifting below 5<sup>th</sup> percentile; and
- g) Two handed carrying at 10<sup>th</sup> percentile.

[55] Based on the assessment, Mr. McNeil opined that Mr. Dhami demonstrated moderate restrictions in his capacity to perform home maintenance and yard work, such as general cleaning – including cleaning gutters – power washing and mowing the lawn. He found him to be severely restricted in trimming hedges, and completely unable to do painting or fence and deck maintenance.

[56] Mr. McNeil was cross-examined on his methodology and the validity of the results. I am satisfied that the methodology was sound, and Mr. Dhami put in a reasonable effort when tested. Mr. McNeil was also asked to comment on the differences between the cervical range of motion test results he recorded and those noted by Dr. le Nobel about one month prior. Mr. McNeil explained, convincingly,

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<sup>4</sup> CFC Report at p. 6.

that it was difficult to compare the two, as he did not know how Dr. le Nobel had done the testing. I also note that no evidence was elicited from Dr. le Nobel or the plaintiff, on this issue. Thus, I am unable to find any inconsistencies in Mr. Dhami's functional testing results obtained by Mr. McNeil and how he presented himself before Dr. le Nobel.

[57] It is important to note that Mr. McNeil's opinion is based on the totality of Mr. Dhami's physical conditions, which include his neck, shoulder, and back. I am satisfied that Mr. McNeil's conclusions about Mr. Dhami's functional ability to perform various tasks are reliable, though they are only of limited assistance due to the fact that not all of Mr. Dhami's physical restrictions observed by Mr. McNeil are causally related to the Collision.

[58] While there is no doubt that Mr. Dhami has physical limitations in performing various activities, the extent to which these are compensable, depends on their cause.

#### **D. Causation**

[59] In order to succeed in his claim for damages, Mr. Dhami must prove two things: first, that the defendant was negligent and second, that the defendant's negligence caused the injury: *Perry v. Vargas*, 2012 BCSC 1925 at para. 98. In this case, the defendant has admitted that his negligence was the cause of the Collision.

[60] Establishing causation for an injury requires the plaintiff to prove on a balance of probabilities, that the injury would not have occurred but for the accident: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14, 1996 CanLII 183 (S.C.C.).

[61] In *Resurface Corp. v. Hanke*, 2007 SCC 7, Chief Justice McLachlin (as she then was), explained the "but for" test as follows:

[23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p.327, *per Sopinka J.*

[62] I turn now to the various injuries complained of.

**1. Neck**

[63] Mr. Dhami testified that while his neck pain continues to bother him, it has improved since the date of the Collision. By the summer of 2017, the pain had become intermittent. By the date of his Discovery, he felt that he was about 70% better in terms of the neck pain. He currently experiences pain in the neck several days per week, with symptom free days. The pain is aggravated by certain physical activities, including attending at the gym and shoulder checking.

[64] I am satisfied that Mr. Dhami's neck complaints are causally related to the Collision. Though there is evidence of pre-existing abnormalities in the cervical spine, the evidence supports a finding that these were asymptomatic prior to the Collision, and were rendered symptomatic due to the force of impact in the Collision.

**2. Shoulder**

[65] The plaintiff testified that his right shoulder pain started while he was still at the scene of the Collision. Initially the pain was very sharp. However, it improved over time. By the time of the Discovery, the shoulder mostly bothered him when he slept at night. For approximately one year prior to the trial, the pain has remained relatively constant.

[66] He currently experiences right shoulder pain about two to three days per week. The pain in the shoulder comes synonymously with the pain in his neck. It is exacerbated by physical activity or lifting, as well as frequent shoulder checking while driving. Symptoms in his shoulder dissipate when he is not doing any physical activity.

[67] I accept that Mr. Dhami experienced some shoulder pain at the scene of the Collision. No issues have been raised with the plaintiff's credibility, and it is unlikely that he would be mistaken about his recollection that he was feeling some pain in his shoulder while still at the scene of the Collision. Further, Mr. Dhami made admissions against self interest, such as denying he had back pain due to the

Collision, which suggest that he was being forthright with respect to his claim that he experienced right shoulder pain at the MVC.

[68] However, on a preponderance of probability, I find that Mr. Dhami's shoulder pain experienced at the scene of the Collision was minor, of short duration, and intimately connected to the neck pain. In coming to this conclusion, I specifically reject the notion that the acute soft tissue shoulder injury or rotator cuff injury referenced by Dr. le Nobel, or the right shoulder, arm, and hand restrictions and limitations noted by Mr. McNeil, are causally related to the Collision.

[69] In my view, there is insufficient evidence to support a finding that the Collision was the cause of Mr. Dhami's complaints of right shoulder pain after July 2016. I say this for two reasons. First, I note the four-month absence of right shoulder complaints in the medical records. Dr. le Nobel testified that acute soft-tissue injuries typically take no more than ten to 14 days to present themselves. In this case, Mr. Dhami did not report symptoms to Dr. Toor for four months. This gap is too long to infer a causal connection. While it is possible that Mr. Dhami may have told Dr. Toor about having some shoulder pain prior to July 2016, I find that it is highly unlikely that Dr. Toor would not have recorded it in the clinical records if the pain was more than trivial. In my view, the absence of any reference to shoulder pain in the multiple medical visits which occurred between the Collision and July 30, 2016, supports the conclusion that if Mr. Dhami did report the shoulder pain to Dr. Toor, the pain was minor and indistinguishable from the complaints of neck pain.

[70] Second, I note that simply because symptoms appear in the same part of the body, does not mean that the plaintiff has met the evidentiary burden of proving that the symptoms are progressive manifestations of an injury received in a motor vehicle accident: *Kalashnikoff v. Halat*, 2020 BCSC 557 at para. 53.

[71] The burden of proof for causation is on the plaintiff. Thus, the defendant is not required to find an alternate cause for the right shoulder complaints recorded in the clinical records from July 2016. In this case, there is a lack of reliable medical opinion evidence indicating a connection between the injuries sustained in the MVC,

and the symptoms noted by Dr. Toor on July 30, 2016, and further by Dr. le Nobel during his more recent assessments of the plaintiff.

[72] In *White v. Stonestreet*, 2006 BCSC 801, Justice Ehrcke commented on the need to carefully analyze evidence where an inference is made regarding causation from a temporal sequence of events. The issue in *White* was whether the plaintiff's ongoing lower back complaints were related to the subject accident:

[70] The basis for the opinion of the plaintiff's experts on the issue of causation essentially came down to the proposition that since the plaintiff did not have lower back pain before the accident, but developed lower back pain after the accident, the accident must have been the cause.

...

[74] The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of *post hoc ergo propter hoc*: "after this therefore because of this."

[75] In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

[73] Justice Ehrcke concluded that the plaintiff failed to prove that the motor vehicle accident contributed to their ongoing back complaints: see also *Amlani v. Holland*, 2022 BCSC 1502, where this Court found a four-month gap in seeking medical treatment undermined the argument of a causal relationship between a collision and the plaintiff's injuries.

[74] Similar to the experts in the *White* case, I find Dr. le Nobel's failure to consider the timing of Mr. Dhami's report of right shoulder symptoms troubling. Dr. le Nobel tried to defend his opinion on right shoulder causation by inferring a right shoulder complaint into Dr. Toor's May 4, 2016 clinical entry, despite the fact that Dr. Toor did not mention the shoulder. Dr. le Nobel subsequently admitted that this assumption was speculative. Dr. le Nobel also attempted to explain Mr. Dhami's

four-month delay in reporting pain in the right shoulder by stating it could be referred or compensatory pain. I find this comment also speculative.

[75] The plaintiff has failed to establish that the acute soft-tissue injury and injury to the right rotator cuff are causally connected to the Collision.

[76] Even if I was to accept that there was a causal connection between the right shoulder pain reported to Dr. Toor in July 2016, and the MVC, I find that Mr. Dhami fully recovered from this injury by early 2017. Following the December 2016 notation in Dr. Toor's records suggesting that he was considering a referral to Dr. Yu, there are no further references to shoulder pain until July 21, 2018. Mr. Dhami explained that the absence of clinical entries in the GP records was because he "may" have had less pain in the shoulder during this time. In my view, even if the causal connection was established from the MVC to the July 30, 2016 complaints of pain, the one-and-a-half-year gap (from December 2016 to July 2018) in the medical documentation breaks the causal chain, such that Mr. Dhami's current shoulder injury and related pain cannot reasonably be connected to the MVC.

### **3. Right Hand Numbness and Headaches**

[77] Mr. Dhami testified that he experiences numbness in his right hand and fingers when he is getting physiotherapy and massage therapy treatments. In addition, the numbness appears several times a week when he is sleeping. This is related to his difficulty sleeping on his right side, and subsequently forgetting to change sides when he is in bed, causing his hand to go numb. He also testified to experiencing headaches one to two times a week, which last several hours. He takes Advil or Tylenol to manage the headache pain.

[78] Mr. Dhami testified in his direct evidence that the onset of both the right-hand numbness and the headaches, was in 2022. The more than five-year gap between the MVC and the onset of right-hand numbness and headaches, is far too long to support any causal connection. I find that there is insufficient evidence that the numbness in the right hand and headaches are caused by the Collision.

#### **4. Back**

[79] There is no evidence that Mr. Dhami suffered an injury to his back in the Collision. Indeed, Mr. Dhami admitted in cross-examination that he did not suffer any back injury from the Collision.

#### **5. Psychological Injuries**

[80] In my view, there is little reliable evidence that supports a finding that Mr. Dhami is suffering from a Major Depressive Episode or Somatic Symptom Disorder. Dr. Ancill is the only healthcare professional to have found that Mr. Dhami suffers from these psychological conditions. I have already noted significant concerns about the reliability of Dr. Ancill's opinion, which was based on an assessment conducted almost six-and-a-half years following the Collision. Further, Dr. Ancill agreed that his mental health assessment of Mr. Dhami was a snapshot in time, and it would be helpful to confirm his diagnosis of Major Depressive Disorder with a repeat clinical test of the Plaintiff sometime in the future.

[81] In any event, even if I accept that Mr. Dhami is suffering from these conditions, there is a lack of evidence supporting a causal connection between the Major Depressive Episode and Somatic Symptom Disorder, and the MVC. Mr. Dhami testified that he experiences low mood, which is related to his wife commenting on his sensitivity to touch, and decreased sexual intimacy due to his pain. However, reliable evidence supporting a connection between these events and the Collision is lacking. As noted elsewhere, Mr. Dhami did not report issues with sexual intimacy to Dr. Toor, nor did he provide a satisfactory explanation for failing to do so.

[82] There are also very few references in the clinical records to Mr. Dhami experiencing any psychological issues related to the Collision. The entries that do exist, indicate a denial of symptoms, or suggest that they fully resolved. For example, Dr. Toor noted on December 20, 2017, that Mr. Dhami denied having symptoms such as nervousness, depression, stress or memory loss. On June 7, 2018, he noted that Mr. Dhami "has been complaining of anxiety in the past" and that the "symptoms are no more there".

[83] Mr. Dhami conceded that he did not mention any psychological symptoms to Dr. Toor related to the Collision. He explained that these were too personal or sensitive an issue to mention to his GP. However, I question the reliability of that statement, given that Mr. Dhami did discuss these intensely personal matters with Dr. Ancill, and also spoke to Dr. Toor about his and his wife's difficulty with conceiving. Notably, Dr. Ancill admitted that the references in the clinical records to Mr. Dhami denying having psychological symptoms were not factored into his opinion on causation.

[84] While there is some evidence to suggest that Mr. Dhami is experiencing chronic pain, fatigue, and Kinesiophobia, I find that these are due to a combination of the effects of the neck injury and the shoulder injury. Only the neck injury is related to the Collision.

[85] Finally, I turn to the diagnosis of Adjustment Disorder with Anxiety, with an enduring stressor (driving and traffic). Mr. Dhami testified about having driving anxiety, particularly when he is near the Collision scene, or when he sees accidents or near accidents. Despite being anxious, this does not seem to have impacted Mr. Dhami's day to day function. Mr. Dhami testified that he routinely passes by the MVC scene when necessary. Further, not only has Mr. Dhami continued driving following the Collision, he has taken a job which requires him to drive full-time. Thus, while I accept that Mr. Dhami has had some driving anxiety related to the MVC, I conclude that it is minor, and does not have any measurable impact on his life.

### **III. NON-PECUNIARY DAMAGES**

[86] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 274, 1985 CanLII 179 (B.C.S.C.), aff'd [1987] B.C.J. No 1833 (B.C.C.A.); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105.

[87] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (20 October 2006), the Court of Appeal set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; 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: *Stapley* at para. 46. The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Stapley* at para. 46 citing *Giang v. Clayton*, 2005 BCCA 54 at para. 55. Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks for physical or psychological reasons. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77 at para. 28, citing *McTavish v. McGillivray*, 2000 BCCA 164 at para 73.

[88] The award is to be fair to both parties, and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.

[89] The plaintiff seeks a non-pecuniary damages award of \$110,000. In support, the plaintiff relies on the following authorities: *Hann v. Lun*, 2022 BCSC 1839; *Chernichen v. Mundy*, 2022 BCSC 1704; and *Ahonen v. Thauli*, 2013 BCSC 1607.

[90] The defendant submits that an appropriate award for non-pecuniary damages is in the range of \$40,000 to \$55,000. In support, the defendant relies on the following authorities: *Erwin v. Buhler*, 2017 BCSC 362; *Cheema v. Bains*, 2021 BCSC 1766; and *Moody v. Hejdanek*, 2018 BCSC 380.

[91] Neither the plaintiff's nor the defendant's cases are directly applicable to Mr. Dhami's circumstances. The plaintiff's cases illustrate persons who had injuries that were much more significant and which had a greater impact on their work and recreational pursuits, than Mr. Dhami. The defendant's cases are also distinguishable, in that the injuries experienced by those plaintiffs are less impactful than those suffered by Mr. Dhami.

[92] As noted elsewhere, prior to the Collision Mr. Dhami was a healthy man in his late twenties. He was physically active and enjoyed playing cricket and volleyball, as well as going to the gym. The Collision caused Mr. Dhami to suffer soft tissue injury to his neck. Seven years following the Collision, Mr. Dhami continues to experience significant and chronic pain as a result of the neck injury. Though he has seen improvement in the ensuing years, he has not achieved full recovery despite the myriad of treatments and medications. His prognosis is guarded and it is unlikely that he will fully recover even with recommended treatment.

[93] Mr. Dhami's neck pain is associated with a previously asymptomatic condition that has now been rendered symptomatic. It impacts his ability to work, and restricts his movement. Mr. Dhami experiences increased pain when keeping his neck in a sustained backwards position while reversing a forklift, or doing shoulder checks.

[94] To his credit, Mr. Dhami did not take any time off work, and tried to maintain as much physical activity as possible. Though his pain continues to restrict his ability to play cricket or volleyball, Mr. Dhami has been able to return to his main recreational activity, going to the gym. He attends the gym at the same level of frequency that he was at before, but with decreased intensity.

[95] The MVC has caused him to experience driving anxiety, though this is mild and has had no measurable impact on his activities. He has some kinesiophobia in relation to the neck injury, as well as fatigue.

[96] The injuries have also impacted Mr. Dhami's quality of life in other ways. Despite his stoicism, it is evident that Mr. Dhami has some distress about his pain affecting intimacy with his wife, whom he married a few years following the Collision.

[97] The injuries have also impacted Mr. Dhami's ability to perform various domestic chores, specifically in three areas: housecleaning duties (such as vacuuming), house maintenance duties (such as painting and gutter cleaning), and yard work (such as lawn mowing and weeding). Mr. Dhami lives in an extended family structure, whereby domestic duties are shared between different family members. He testified that he and his brother are primarily responsible for

maintenance and upkeep of the exterior of the house, including yard work. I have addressed any pecuniary losses in relation to the house maintenance and yard work under the category “Housekeeping Capacity”. However, for those items that are not compensated for under that claim, it is appropriate to include (as I have done) in Mr. Dhami’s general damages award, an amount recognizing the impact of the Collision on Mr. Dhami’s ability to perform all of his domestic chores.

[98] In relation to the housecleaning duties, Mr. Dhami testified that the primary indoor domestic chore that he was responsible for pre-Collision, was vacuuming. He also occasionally helped with the laundry. These activities have both been impacted due to pain in his neck and shoulder. For example, Mr. Dhami stated that he has difficulty vacuuming the stairs due to increased pain in the shoulder region when lifting the vacuum cleaner or holding it in an awkward position. As a result, he has to sometimes seek assistance from his brother. However, most of the vacuuming tasks can be completed by him, albeit with pain, by changing hands frequently.

[99] Bearing in mind that no two cases are alike, I find that the injuries sustained by Mr. Dhami are closer in similarity to the precedents relied on by the plaintiff. However, the material difference between the plaintiff’s cases and Mr. Dhami’s situation, is that Mr. Dhami’s pain experience is confounded by various non-compensable injuries. Mr. Dhami suffers from an acute soft tissue injury and rotator cuff injury to his right shoulder, which are unrelated to the Collision. Mr. Dhami also has headaches and right-hand numbness, which are also not causally related to the Collision. In addition (bearing in mind that the reliability of Dr. Ancill’s diagnosis is questionable), Mr. Dhami has been diagnosed with a Major Depressive Episode and Somatic Symptom Disorder, neither of which are attributable to the MVC. The evidence leads me to conclude that Mr. Dhami would have suffered all of these non-compensable injuries regardless of the Collision. The pain and suffering, and loss of enjoyment of life that flow from them, are therefore not the responsibility of the defendant.

[100] It is extremely difficult to parse out, with any degree of precision, the pain and suffering and loss of enjoyment of life experienced by Mr. Dhami due to the

compensable injuries, versus the non-compensable ones. These numerous non-compensable injuries co-exist with Mr. Dhami's compensable injuries, and contribute to his overall pain and his functional restrictions. Thus, while I accept that the range of \$110,000 to \$115,000 represents a reasonable figure for Mr. Dhami's pain and suffering, and loss of enjoyment of life, it is appropriate to reduce his non-pecuniary damages award by 35% to account for these non-compensable injuries and conditions which are contributing to Mr. Dhami's overall pain experience.

[101] After considering all of the evidence in this case, and factoring in a 35% reduction for the non-compensable injuries, I conclude that a fair and reasonable sum to compensate Mr. Dhami for his non-pecuniary loss due to the defendant's negligence, is \$75,000.

**IV. LOSS OF INCOME EARNING CAPACITY**

[102] The plaintiff submits that the Collision has interfered in his earning capacity and consequently, he should be awarded \$323,660 to compensate him for that loss. This figure is based on his position that but for the Collision, he would have: (a) become a truck driver; (b) remained working at Raincoast but earning higher wages; or (c) been able to work more overtime hours at his current and former jobs.

[103] The defendant argues that the only capacity loss proven on the evidence is \$2,716.88, which represents lost overtime hours from the Raincoast job. Alternatively, the defendant submits that if the Court finds there is a possibility of a "future event leading to loss of income due to his injuries", then the plaintiff should receive a future loss of earning capacity award of \$45,000 (representing 6 months salary).

**A. Evidence**

[104] Mr. Dhami testified that prior to the Collision, he had an interest in becoming a truck driver. As a result, while he was still working at Raincoast, he obtained a Class 1 drivers licence. However, he was unsuccessful in getting a job in this field, and continued working at Raincoast.

[105] As a supervisor in the receiving department, Mr. Dhami's duties at Raincoast included operating a forklift, power jack, propane lift, and order picker, and stocking shelves. The main job was driving a forklift to load and unload trucks, which often required driving backwards. In order to reverse the forklift, he had to do frequent and sustained movement of his neck to look back over his shoulder.

[106] Following the MVC, Mr. Dhami had no difficulty driving the forklift forwards. However, he found it painful to look backwards on a sustained basis. Though he continued working, he was placed on light duties, which primarily involved completing paperwork, cleaning, or inventory. Mr. Dhami testified that because he was on light duties, he was not permitted to receive pay raises or do overtime. To this latter point, the documentary evidence indicates that Mr. Dhami did in fact put in overtime hours after the Collision, although to a lesser extent than what he worked before the MVC.

[107] Though Mr. Dhami hoped to stay on at Raincoast and eventually become a manager, he left the job in 2019 due to ongoing pain and restrictions in fulfilling his job duties. He testified he did not want to continue working at Raincoast in a different department as this would mean a decrease in his hourly rate.

[108] Some of Mr. Dhami's evidence regarding his employment at Raincoast was corroborated by Mr. Singh, who is a supervisor in the receiving department at Raincoast. Mr. Singh has been employed in this capacity for about 22 years. He testified that Mr. Dhami's job at Raincoast required him to work 40 hours per week, and operate a forklift for about two to three hours per day. Mr. Dhami was good at his job, and seemed to enjoy it. Following the Collision, Mr. Singh testified that Mr. Dhami was having a lot of difficulty driving the forklift backwards. A few weeks following the MVC, Mr. Dhami stopped driving the forklift and was placed on light duties.

[109] Mr. Singh testified that Mr. Dhami complained to him about experiencing neck and shoulder pain, and having difficulty turning backwards. Though he saw Mr. Dhami lift boxes of books after the Collision which weighed 20 to 40 pounds, Mr. Singh also noticed that Mr. Dhami would rub his neck and shoulder after doing

so. He interpreted this to mean that Mr. Dhami was experiencing pain in those parts of his body after those activities.

[110] As a supervisor, Mr. Singh was being paid \$25 per hour. There were a total of four supervisors at Raincoast, and two managers. Mr. Singh (who has greater seniority than Mr. Dhami did when he was working at Raincoast), would like to become a manager. However, he testified that it is very difficult to secure a manager's job as it depends on the existing managers leaving their current positions. When Mr. Dhami left Raincoast, Mr. Singh was working about ten overtime hours per week. In 2022, this increased to about ten to 15 overtime hours.

[111] In 2017 or 2018, Mr. Dhami took a second job working at the City of Vancouver in the sewage department. His job was to install sewer pipes. The job duties required him to shovel wet sand, amongst other things. Mr. Dhami found the shovelling exacerbated the pain in his shoulder and neck. Mr. Dhami quit after working about two to three weeks, as his increased pain made it too difficult for him to manage working the job.

[112] Around 2018 or 2019, Mr. Dhami took a second job working at Canada Post. He worked there for about two years, on an on-call basis, working eight-hour shifts. The Canada Post job duties were similar to Raincoast, and required Mr. Dhami to load and unload boxes from trucks. Mr. Dhami stated that he left the job at Canada Post because it required too much bending and lifting.

[113] Around the summer of 2018, Mr. Dhami applied for a job at Coast Mountain. Mr. Dhami was asked in cross-examination about a document in his Coast Mountain employment records indicating that he had participated in a functional assessment in December 2018. Mr. Dhami stated that he underwent eyesight and drug testing at LifeMark Health Centre ("LifeMark") but denied participating in a functional capacity examination. He stated he was there for only about ten to 15 minutes and was not asked to perform any tests. Though Mr. Dhami did not deny that he was able to do the things that were checked off in the document (such as climbing, carrying, lifting, jumping), he did not veer from his position that he did not actually perform any of these tests. According to Mr. Dhami, the completion of the form was a "formality".

Mr. Dhami's evidence on this issue is uncontroverted; no witness was called from LifeMark to explain what transpired during Mr. Dhami's visit.

[114] In any event, as I noted, Mr. Dhami does not take issue with the suggestion that he was able to complete all the duties of the Coast Mountain job in December 2018.

[115] He was offered a job at Coast Mountain in March 2019, and started working there on April 8, 2019. At the commencement of his employment with Coast Mountain, Mr. Dhami was required to undergo training, for which he was paid \$22.83 per hour. The training took several months to complete. During this time, Mr. Dhami remained employed with Raincoast. He juggled the two jobs by obtaining three medical notes from Dr. Toor, stating that he was too sick to work at Raincoast during the period of April to July 2019. Mr. Dhami explained that while his injuries were interfering with his ability to work at Raincoast, he was physically able to do the job at Coast Mountain. He did not get paid by Raincoast during the time of his medical leave, though he may have used up some of his vacation time. Mr. Dhami's earnings from Raincoast in 2019 were \$14,718, which is consistent with him only working for the first few months of that year at Raincoast.

[116] Upon completion of the training at Coast Mountain, Mr. Dhami's wage rate was increased to \$24.46 per hour. Mr. Dhami's employment earnings from Coast Mountain reflect a year-to-year increase in earnings and overtime hours. In the 36.87 weeks worked in 2019, Mr. Dhami earned \$39,995<sup>5</sup> in income from Coast Mountain, including \$1,019 in over time. In 2020, Mr. Dhami worked for 51.86 weeks, and earned \$62,106, including \$1,383 in overtime. In 2021, Mr. Dhami worked 52.29 weeks, and made \$80,276, including \$6,739 in overtime. In 2022, Mr. Dhami worked 48.70 weeks, and his earnings increased yet again to \$93,998, which included \$18,315 in overtime.

[117] There is no indication that Mr. Dhami has suffered any time loss due to his MVC injuries since he started working as a bus driver. A letter from the employer

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<sup>5</sup> All figures are rounded off to the highest dollar.

commended Mr. Dhami on his perfect attendance for each of the years between 2019 to 2021. According to the employment records, Mr. Dhami was only absent from work in 2022 for 22.5 hours.

[118] Mr. Dhami testified that he is able to do his job at Coast Mountain because it does not require backing up. However, after three to four hours he does get tired due to shoulder checking. Though a regular shift is 7.5 hours, he is permitted to work split shifts, meaning he works only a few hours before taking a break. Mr. Dhami also puts in overtime hours, which he estimates he does two to three times a week, for two to three hours at a time.

[119] He sometimes does pole pulling for overtime pay, but finds this to be physically challenging as he has to use his shoulder to reach overhead and pull the pole down. Mr. Dhami testified that had he not been injured, he would put in more overtime at Coast Mountain.

[120] Mr. Dhami testified that he would have preferred working as a truck driver or continuing with his job at Raincoast. However, those jobs are unattainable due to his neck and shoulder pain. Specifically, he cannot perform frequent shoulder checking or keep his neck in a sustained backward position as required to reverse a forklift or truck.

[121] Mr. Dhami plans to continue working at Coast Mountain. He testified that the Coast Mountain job is the easiest job physically for him to perform. If his neck and shoulder improve, he would like to return to Raincoast or take up trucking.

## **B. Legal Framework**

[122] Damages for impairment of earning capacity are awarded to provide a plaintiff with full compensation for all their pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 42. The purpose of the award is to restore the plaintiff to the position they would have been in but for the accidents.

[123] The value of the plaintiff's earning capacity loss may be measured in different ways. For example, it could be assessed on the basis of actual earnings the plaintiff would have received; the replacement costs of the tasks the plaintiff is no longer able to do; an assessment of reduced company profits; or the amount of secondary income that has been lost: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 31, citing Kenneth Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at p. 205-06.

[124] Claims for past and future loss of earning capacity are subject to the same legal test, i.e. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Grewal* at para. 48. Assessing the likelihood of hypothetical and future events is more appropriate than applying the balance of probabilities test, because what would have happened in the past, absent injury, is no more 'knowable' than what will happen in the future: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

[125] Hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, referencing *Athey* at para. 27; see also *Dornan v. Silva*, 2021 BCCA 228 at paras. 93–94.

[126] The onus is on the plaintiff to demonstrate that the injuries suffered in the accident have impaired the plaintiff's income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 32–33. The court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.

[127] The legal principles that apply to a claim for loss of future earning capacity were clarified by the Court of Appeal in three judgments authored by Justice Grauer: *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.

[128] In *Rab*, the Court of Appeal restated the proper approach for assessing loss of future earning capacity. At para. 47, Justice Grauer provided the following three-step analysis to guide an assessment of future earning capacity, “particularly where the evidence indicates no loss of income at the time of trial”:

- a) The first is evidentiary whether the evidence discloses a *potential* future event that could lead to a loss of capacity (i.e., chronic injury, future surgery or risk of arthritis);
- b) 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; and
- c) If such a real and substantial possibility exists, then the third step is to assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[129] In general, the value of the plaintiff’s capacity to earn is equivalent to the value of the earnings they would have received in the past or the future, had the tort not been committed: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 15. The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

### C. Analysis

[130] I am satisfied that Mr. Dhami has established that the injuries suffered in the MVC have impaired his income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss.

[131] Prior to the Collision, Mr. Dhami was a physically fit individual, with no functional restrictions. He now has a neck injury which causes him significant pain, and restrict his ability to freely move his neck.

[132] I accept that Mr. Dhami left his job at Raincoast due to his inability to fulfill the job duties for a forklift driver. In particular, he was not able to maintain a sustained backwards posture to reverse the forklift, or operate the other equipment requiring

repeated movements or twisting of his neck. However, only part of this is due to the MVC injuries. The evidence discloses that Mr. Dhami’s inability to perform these physical tasks and movements is due to a combination of his compensable neck injury, and his non-compensable shoulder injury.

[133] Mr. Dhami’s employment earnings from 2015 to 2022 are as follows:

2015	\$44,000
2016 <sup>6</sup>	\$47,411
2017	\$43,968
2018	\$49,149
2019 <sup>7</sup>	\$54,713
2020	\$62,106
2021	\$80,276
2022	\$93,998

[134] Mr. Dhami’s employment records indicate that in 2015, he worked 127 overtime hours. In the first three months of 2016, he had already worked 85 overtime hours before the Collision. Mr. Dhami worked approximately 56 more overtime hours in the ensuing nine months to the end of 2016. In 2017, Mr. Dhami worked only 28 overtime hours at Raincoast – this dropped to 14 overtime hours in 2018. He did not work any overtime at Raincoast in 2019.

[135] Based on the first three months of 2016, Mr. Dhami was averaging about 28.3 overtime hours per month.<sup>8</sup> This is lower than Mr. Singh’s own experience of averaging about ten hours per month, but higher than Mr. Dhami’s personal monthly average in 2015 of 10.6 overtime hours. Given that a number of factors may have affected Mr. Dhami working overtime, including seniority or availability of overtime

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<sup>6</sup> The Collision year.

<sup>7</sup> Commenced working at Coast Mountain.

<sup>8</sup> 85 hours ÷ 3 months = 28.33 hours per month-

hours and availability to work, in my view, it is more appropriate to consider Mr. Dhami's own experience rather than what Mr. Singh may have done.

[136] I find it is likely that Mr. Dhami would have continued averaging about the same number of overtime hours following the Collision, as he had done in the first three months of 2016, but for the Collision. Allowing for some variance for vacation or other time off, I find that on average, Mr. Dhami would have put in 25 overtime hours per month following the Collision, but for his injuries. This amounts to 225 hours for the period April to December 2016. In contrast, he only worked 56 overtime hours during this period. This results in a loss of 169 overtime hours for 2016.

[137] In 2017, Mr. Dhami put in 28 overtime hours. This is half of what he actually worked in the last nine months of 2016. The evidence is that Mr. Dhami's condition was improving over time, which should have meant more rather than less overtime hours worked.

[138] The records indicate that Mr. Dhami did not work any overtime from January 2017 to June 2017. Mr. Dhami did not provide any evidence about how long he was off for his wedding which occurred in April 2017, though it is reasonable to infer that it was more than a few weeks, given that his wife lived in India. Nor did he provide any evidence about how many regular hours he worked between January to June 2017, though such information is provided for the period June 24, 2017, onwards. There are also other gaps in the evidence which have not been explained. For example, with respect to the City of Vancouver job, Mr. Dhami did not provide any T4 or other evidence that would provide clarity on whether he worked at that job in 2017 or 2018, or precisely how long he was employed there. Given the importance of this evidence to assessing Mr. Dhami's loss, and the lack of any explanation for why it was not provided, I have made an adverse inference that Mr. Dhami did not provide this information as it would not have been beneficial to his case.

[139] The evidence leads me to conclude Mr. Dhami was available to work fewer overtime hours at Raincoast in 2017 than in 2016, on account of his wedding and his second job at the City of Vancouver. Doing the best that I can with the evidence I

have, I assume that Mr. Dhami's maximum overtime hours that he would have been available to work in 2017, absent Collision, were 228.

[140] After deducting for the 28 overtime hours he did work in 2017, this yields a loss of about 200 overtime hours in the 2017 year.

[141] Despite only working 14 overtime hours at Raincoast in 2018, Mr. Dhami's total annual income actually increased from the previous year. It is clear on the evidence that this was due to a combination of his full-time job at Raincoast, and his part-time job at Canada Post. Mr. Dhami testified that he started at Canada Post around 2018 or 2019, and worked at the Canada Post job for about two years. There is no indication that he was working at Canada Post when he took the Coast Mountain job. I therefore infer that Mr. Dhami started working at Canada Post in 2018. Once he took this second job, I find that Mr. Dhami was not available to work additional overtime hours at Raincoast, other than what he actually put in for 2018 and 2019.

[142] I am also unable to conclude on the evidence that Mr. Dhami suffered any loss of income or income earning capacity, with respect to the Canada Post job.

[143] Following commencement of the Coast Mountain job, I find that Mr. Dhami has not suffered any pre-trial loss. Mr. Dhami specifically took that job as he considered it to be within his physical abilities. He has attested to being able to work overtime hours, despite the pain. Though he asserted that had he not been injured, he would put in more overtime at Coast Mountain, there is no evidence that overtime work was actually offered to Mr. Dhami which he had to turn down due to his injuries.

[144] Consequently, I conclude that no income loss, or income earning capacity loss, has been made out for the 2018 to 2022 years.

**1. Assessing Past Loss**

[145] Mr. Dhami's past income loss can be assessed using his hourly rates at the time of each loss. The evidence is that Mr. Dhami was paid for overtime at "time-and-a-half".

[146] Mr. Dhami lost a total of 169 overtime hours in 2016. Based on Mr. Dhami's 2016 hourly rate of \$17.50, his overtime rate is \$26.25 per hour. Mr. Dhami's total loss of overtime pay for 2016 is \$4,436.25.

[147] Mr. Dhami lost 200 overtime hours in 2017. Mr. Dhami's hourly rate was increased in April 2017 to \$17.85, thus changing his overtime hourly rate to \$26.78 for the remaining months of the 2017 year. I conclude that Mr. Dhami lost 50 overtime hours between January to March 2017, at \$26.25 per hour (\$1,312.50). He lost another 150 overtime hours at \$26.78 per hour, for the remaining nine months (\$4,017.00). Mr. Dhami's total loss of overtime pay for 2017 is \$5,329.50.

[148] Mr. Dhami's total past loss of income thus totals \$9,765.75. However, as indicated elsewhere, Mr. Dhami was also experiencing non-compensable injuries which impacted his functional abilities. It is therefore appropriate to reduce Mr. Dhami's past loss of income by 25%. This figure is lower than the 35% reduction for non-pecuniary damages to allow for the fact that some of the non-compensable injuries which cause Mr. Dhami pain and suffering (such as the psychological injuries) have no measurable impact on his earning capacity. It also accounts for the fact that the injuries which do impact Mr. Dhami's ability to perform his job duties (such as the right shoulder injury) did not manifest themselves for the entire period of time that Mr. Dhami suffered the loss of income.

[149] Bearing in mind that this is an assessment and not a precise mathematical calculation, and after accounting for the 25% reduction for non-compensable injuries, I assess Mr. Dhami's past income capacity loss attributable to the Collision to the date of trial, at \$7,300.

## 2. Assessing Future Loss

[150] I turn now to Mr. Dhami's argument that he would have worked as a truck driver, but for the MVC. The evidence fails to establish a loss of earning capacity specifically related to employment as a truck driver. First, there is no evidence that Mr. Dhami would have been able to get a job as a truck driver. Although he had obtained a Class 1 driving licence before the MVC, Mr. Dhami testified that he was not able to find any jobs in that field, despite applying to companies such as Purolator. Second, no evidence was provided regarding the anticipated or average earnings of a truck driver. There is simply no evidence that Mr. Dhami would have earned more money as a truck driver than he is earning currently at Coast Mountain, or that he could have earned at Raincoast.

[151] In terms of any loss of earnings related to the Raincoast job, there is insufficient evidence to establish that Mr. Dhami would have made more money there than at his current employment with Coast Mountain. Mr. Dhami's argument seems to in part, be premised on Mr. Singh's earnings, and also the possibility of him obtaining a manager's job. Mr. Singh's evidence is that he is currently making \$25 per hour in the supervisory position. When Mr. Dhami completed his training at Coast Mountain he was already making \$24.46 per hour; his current hourly rate is approximately \$32. Thus, even if I accept that Mr. Dhami would have been performing the same job as Mr. Singh, no loss is made out in relation to Mr. Dhami.

[152] I also do not accept that there is a reasonable and substantial possibility that Mr. Dhami would have been promoted to the job of manager at Raincoast. Based on Mr. Singh's evidence, management jobs are very scarce. The managers tend to stay in their positions for a very long time, and a vacancy only opens up if the former manager retires or otherwise leaves their position. Mr. Singh, who had greater seniority than Mr. Dhami, testified that he has been waiting for years to become a manager but no vacancies have opened up. In my view, even if Mr. Dhami had stayed at Raincoast, there is no real and substantial possibility that he would have been able to get a job as a manager, given that he would have to compete for this job with other candidates. Further, even if I were to accept that a real and substantial

possibility of such an event existed, there is no indication that Mr. Dhami would have earned more money as a manager than he is currently earning at Raincoast.

[153] I turn now the claim associated with future loss of overtime hours at Coast Mountain. Mr. Dhami testified that he is restricted in how much overtime he can work at Coast Mountain, as it depends on scheduling and seniority. Further, a bus operator cannot drive more than 13 hours in a day. Nevertheless, Mr. Dhami worked 100.22 overtime hours in 2021, and 290.5 overtime hours in 2022. Since he started working at Coast Mountain, he only had three sick days and was commended for his perfect attendance for three years.

[154] While the evidence does not establish that Mr. Dhami has experienced a loss of overtime hours at the Coast Mountain job, I am satisfied that Mr. Dhami has suffered a future loss of earning capacity, based on the impairment of a capital asset.

[155] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 the Court explained the difference between using an earning approach or a capital asset approach:

[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.

[156] In this case, I find that the capital asset approach is more appropriate, as Mr. Dhami has not had any loss of income in the several years leading up to the trial.

[157] In *Rab* at paras. 35–36, Justice Grauer noted that the considerations set out in *Brown v. Golajiy* (1985), 26 BCLR (3d) 353 at para. 8, 1985 CanLII 149 (B.C.S.C.)

are useful for assessing whether there has been an impairment of the capital asset, namely whether:

- a) the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) the plaintiff is less marketable or attractive as an employee to potential employers;
- c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[158] The evidence leads me to conclude that there is a real and substantial possibility that the plaintiff will suffer an impairment in his earnings should he lose his job at Coast Mountain. In coming to this conclusion, I accept, for example, that Mr. Dhami will have difficulty with doing the job of a truck driver, or working as a forklift operator. Both these jobs are jobs for which he is qualified: the truck driver job by virtue of his Class 1 licence, and the forklift operator job by virtue of his work experience at Raincoast.

[159] Both prior to and following the Collision, Mr. Dhami has proven himself to be an ambitious, driven man, who is diligent and hard working. However, he is limited by his education to performing more physically demanding jobs. His injuries are permanent, and restrict his ability to perform jobs which place strain on his neck, or require a sustained posture for his neck. There is real risk that should Mr. Dhami lose his job at Coast Mountain for any reason, he would be restricted from the jobs that are available to him.

[160] In my view, Mr. Dhami has established that the MVC has rendered him less capable of earning income from all types of employment. Given his physical restrictions as supported by the functional assessment performed Mr. McNeil, I find he is less marketable as an employee and does not have the ability to take advantage of all job opportunities that would have been available to him but for the Collision. He is thus less valuable to himself in a competitive labour market.

[161] In *Deegan v. L'Heureux*, 2023 BCCA 159 the Court noted that it may be appropriate in some cases for the court to assess a future loss of earning capacity award on a capital asset basis, using a number of years of employment earnings: at para. 84, citing *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (B.C.C.A.) at para. 43. I find that this is such a case. Mr. Dhami's situation is complicated by the interconnected impact of the compensable and non-compensable injuries on his employment profile. There is also a lack of evidence that supports using a capital asset loss method based on percentage of impairment.

[162] In this case, I find that using two years loss of earnings based on Mr. Dhami's current job, is an appropriate and fair way of assessing his impairment of future earning capacity applying the loss of capital asset approach. I thus assess the loss at \$190,000, to which the following contingencies apply.

### 3. Contingencies

[163] After a claim for loss of capacity is accepted by the court, the court must consider both positive and negative contingencies when conducting this analysis: *Kellett* at para. 77.

[164] This includes considering whether the plaintiff's pre-existing condition has impacted this head of damages.

[165] In *Dornan*, the Court outlined the approach to contingencies, as follows:

[94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. As Mr. Justice Savage put it in *Gao v Dietrich*, 2018 BCCA 372:

[34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[166] Thus, a contingency reduction for pre-existing conditions must be made if there is a “real and substantial possibility” it could have affected the plaintiff’s future earnings.

[167] In this case, Mr. Dhami’s acute right shoulder and rotator cuff injury, as well as headaches and right-hand numbness, meet the real and substantial possibility test. In my view it is appropriate to assign a 30% deduction to account for the real and substantial possibility that these conditions would have impaired Mr. Dhami’s earning capacity regardless of the Collision. This figure is lower than the 35% deduction made for the non-pecuniary damages, for some of the same reasons as noted in the deduction made to the past loss of income. In my view, not all of Mr. Dhami’s non-compensable injuries which cause him pain and loss of enjoyment of life (and will continue to do so into the foreseeable future) can reasonably be anticipated to have a measurable impact on his future earning capacity.

[168] I find that it is appropriate to assign a 30% deduction for the non-compensable injuries to the future loss of earning capacity award, rather than using the 25% deduction applied to the past income loss. This is because the 25% figure also accounted for the fact that not all of Mr. Dhami’s non-compensable injuries had manifested themselves by the time the loss had accrued. In the case of future loss of earning capacity, all of Mr. Dhami’s non-compensable injuries have now manifested themselves.

[169] This Court must also consider case specific negative and positive contingencies. I have considered the possibility that the plaintiff’s condition may improve over time or with further treatment; that the plaintiff may have earned more money annually than the projected annual income; or that he may have stopped working prior to age 65 or beyond age 65. In my view, all of these contingencies set each other off, and thus have no overall impact on the future loss award.

[170] I turn then to general labour market contingencies. In *Gray v. Lanz*, 2022 BCSC 2218 at paras. 91–93, Justice Gomery reviewed the various authorities regarding labour market contingencies. He noted that whereas a 20% contingency had been applied in cases such as *Dunn v. Heise*, 2021 BCSC 754 at para. 202; *Montazamipoor v. Park*, 2022 BCSC 140 at paras. 105–109; *Hann v. Lun*, 2022 BCSC 1839 at paras. 111–113, the Court of Appeal’s recent decisions in *Dornan, Steinlauf v. Deol*, 2022 BCCA 96, *Dunn v. Heise*, 2022 BCCA 242, and *Kringhaug v. Men*, 2022 BCCA 186 suggest that the general labour market contingency deduction should be more modest.

[171] Given Mr. Dhami’s age and the nature of his occupation, I find that a labour market contingency deduction of 10% is appropriate. This is lower than the 20% contingency deduction which was applied in *Hann* to a plaintiff similar in age to Mr. Dhami. However, the distinguishing feature is that Mr. Dhami is working in a unionized job, which offers him far more job security than the plaintiff in *Hann*. Nevertheless, the risk remains that Mr. Dhami may lose his job, in which case there is a real and substantial risk that he may have difficulty in immediately securing alternate employment.

[172] After accounting for case specific contingencies of 30% and general labour market contingency of 10%, I conclude that Mr. Dhami is entitled \$114,000 for future loss of earning capacity. In my view this figure is both fair and reasonable.

## V. COST OF FUTURE CARE

[173] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position they would have been in had the collision not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30; *Milina* at para. 184.

[174] A claim for future care is established if: (1) there is medical justification for the claim; (2) the claim is reasonable; and (3) the expense is likely to be incurred by the

plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113–115, citing *Milina* at paras. 184, 211; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 210–212.

[175] Once a claim is established, the court requires evidence of the amounts claimed in order to assess costs of future care: *Patterson v. Gauthier*, 2019 BCSC 633 at para. 98, citing *Manky v. Scheepers*, 2017 BCSC 1870 at para. 154.

[176] A cost of future care award assessment is subject to a discount rate of 2%: *Pearson v. Savage*, 2020 BCCA 133 at para. 104; see also s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and s. 1 of the *Law and Equity Regulation*, B.C. Reg, 352/81. A future cost of care award can be justified without the need for expert reports: *Moges v. Sanderson*, 2020 BCSC 1511 at para. 168.

[177] Mr. McNeil opines that Mr. Dhami would benefit from using a body pillow, heat pad, and TENS machine for pain management. These range in cost of \$45 to \$90 per item, and will need to be replaced at variable periods of time over Mr. Dhami's lifetime.

[178] Mr. McNeil also provides the following rehabilitation or "health maintenance" costing:

- a) About \$200 in exercise equipment, most of which will have to be replaced every three years;
- b) Fitness pass at a yearly cost of \$462.70;
- c) Massage therapy, physiotherapy and chiropractic treatments, with an aggregate total of about \$3,200 per year, at 12 sessions per treatment per year;
- d) Psychological counselling estimated at \$2,700 per year for 12 sessions; and
- e) Botox injections ranging from \$2,200 to \$4,400 per year, at a frequency of every three months.

[179] The defendant resists a future care cost award, with the exception of physiotherapy treatments. It is submitted that the plaintiff has established entitlement

to five sessions with a physiotherapist, which according to Mr. McNeil's report, would cost about \$450.

[180] There is evidence that Mr. Dhami purchased a TENS machine and found it beneficial to manage his pain. I am satisfied that entitlement to a TENS machine, replaced every five years, has been established, at an annual costs of \$67.50, to Mr. Dhami's anticipated lifetime. Using the multiplier provided by Mr. Turnbull, this amounts to \$483 including tax. I also consider a heat pad to be medically justified and likely to be used. The \$69.99 cost to Mr. Dhami's lifetime, replaced every three years, is \$807 including tax.

[181] I reject the claim for exercise equipment as there is no evidence from Mr. Dhami that he would use home exercise equipment rather than attending at the gym. Further he has been attending consistently at the gym both prior and subsequent to the Collision. There is no evidence that his need for the gym pass has been necessitated by the Collision.

[182] While Mr. Dhami has used massage therapy and physiotherapy to his benefit, there is no evidence that he would use those treatments in the amount and frequency suggested by Mr. McNeil. In my view, an allowance for physiotherapy (annual cost of \$1,080 for 12 sessions) and massage therapy (annual cost of \$1,320 for 12 sessions) are warranted for a total period of five years. This amounts to a total cost of \$12,000.

[183] However, no entitlement to chiropractic treatment coverage has been established. There is insufficient evidence that Mr. Dhami has used chiropractic treatments in the past, that he found them beneficial, and that he would use them in the future.

[184] I also reject the claim for psychological counselling. There is insufficient evidence that Mr. Dhami is suffering from depression, let alone depression which is attributable to the MVC.

[185] I also reject the claim for botox injections. Though Dr. Ancill suggested botox injections, he did not provide any evidence about the required frequency or duration. Nor is there any evidence from Mr. Dhami that he would get botox injections if offered to him.

[186] I conclude that a sum of \$13,290 for future care costs is sufficient to address Mr. Dhami's health needs in the future on account of the injuries sustained in the MVC. This figure is both fair and reasonable, medically necessary, and is an amount likely to be incurred to Mr. Dhami's benefit.

## VI. HOUSEKEEPING CAPACITY LOSS

[187] I turn now to the claim for impairment of housekeeping capacity. I agree with the defendant that the claim sought by the plaintiff for yard work falls under loss of housekeeping capacity, and not future care costs.

[188] In *LaRocque v. LaRocque*, 2019 BCSC 655 I noted the following principles which apply to loss of housekeeping capacity awards:

[160] In *Morena* [*Morena v. Dhillon*, 2014 BCSC 141] at paras. 169-174, the Court outlined the principles related to the distinction between an award for loss of housekeeping capacity and an award for costs of future care. The former is "an asset that is lost" whereas the latter is "an additional expense one will incur in the future": *Morena* at para. 170. An award for future care costs compensates for costs provided to the plaintiff; loss of housekeeping capacity is a loss to the plaintiff's own ability to do household work.

[161] Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks, whereas a pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77, paras. 27-37.

[162] Whichever approach a court takes, the award must be reasonable, that is, "tied to the actual loss of capacity which justifies the award in the first place": *Kim* at para. 34.

[189] In *McKee v. Hicks*, 2023 BCCA 109 the Court clarified the approach for assessment of housekeeping capacity, and outlined the principles from *Kim* and *Riley v. Ritsco*, 2018 BCCA 366. At para. 67, the Court in *McKee* cited *Ali v. Stacey*,

2020 BCSC 465 at para. 67 with approval as providing a helpful summary of the *Kim* and *Riley* principles, as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.  
(at para. 67.)

[190] As noted earlier, Mr. Dhami has experienced challenges with performing housecleaning duties (such as vacuuming), performing house maintenance duties (such as painting and gutter cleaning), and doing yard work (such as lawn mowing and weeding).

[191] The non-pecuniary damages award already accounts for Mr. Dhami's difficulties with performing housecleaning duties and other chores around the inside and outside of the home. However, there are other duties that Mr. Dhami is no longer able to perform due to his injuries, and for which he must obtain assistance from his brother.

[192] I accept that Mr. Dhami has difficulty with some yard work, such as cutting the grass, cleaning the gutters, or painting his house. As noted by Mr. McNeil, Mr. Dhami is not restricted in all yard-work. Indeed, he opines that Mr. Dhami should continue to do some of these yard work tasks (such as planting and weeding), as an adjunct to his exercise program. According to Mr. McNeil, Mr. Dhami requires assistance with some of these heavier yard work and home maintenance chores. Mr. McNeil has averaged these out to taking about two hours per week. Because of Mr. Dhami's evidence that he shared these chores with his brother pre-Collision, Mr.

McNeil has reduced this estimate to one hour per week, at an approximate yearly cost of \$2,340. However, I conclude that a number of contingencies need to be considered in assessing the loss of housekeeping capacity award.

[193] Mr. Dhami attested to living in an extended family system, and sharing the yard work and house maintenance/repair responsibilities with his brother. It is not unusual in an extended family system, for there to be a great deal of give and take, and for chores to be divided between various family members according to their aptitudes, availability of time, and what is considered equitable. Thus, it is difficult to say how much of the assistance provided by Mr. Dhami's brother may actually be gratuitous. For example, it would not be unreasonable to expect that for the duration of the time that Mr. Dhami is sharing the same residence as his brother, he may take on a greater share of the lighter yard work, while his brother takes on the heavier tasks, with there being no appreciable pecuniary loss occurring in that situation.

[194] Further, for other items (such as painting the house or cleaning the gutters) any award needs to factor in the common practice for many homeowners to outsource these tasks, even if they are physically capable of performing them, due to lack of time. Finally, it is possible that the plaintiff's condition may respond favourably to treatment and improve over time.

[195] There is also the opposite possibility that Mr. Dhami's losses will be greater in the future than what is anticipated. Though there is no indication on the evidence that Mr. Dhami intends to live separately from his brother, there is a realistic possibility that the families may split at some point in the future, into two separate households. Thus, Mr. Dhami may suffer an even greater pecuniary loss related to his need for replacement services, if he can no longer share the yard work or other duties with his brother.

[196] Consequently, in my view, it is appropriate to apply an overall reduction of 40% to the figure presented by Mr. McNeil. This 40% deduction accounts for the various negative and positive contingencies noted above.

[197] I now turn to Mr. Dhami’s non-compensable injuries, which I find are playing, and will continue to play, a significant role in his ability to perform domestic duties. It is evident that Mr. Dhami’s shoulder condition plays a much more significant role in restricting him from performing his household duties, than it does with respect to his work. When asked why he could not perform certain household tasks such as mowing the lawn and vacuuming, Mr. Dhami invariably identified his shoulder as the primary injury which limits him in performing those specific tasks.

[198] After having regard to all of the evidence in this case, I conclude that it is appropriate to reduce the annual replacement cost by a further 50% to account for Mr. Dhami’s non-compensable injuries as being a contributing factor in his inability to perform all the heavier household chores related to yard work and home maintenance.

[199] Using Mr. McNeil’s annual figure of \$2,340 for replacement services, I have applied a 40% deduction for the contingencies, bringing this figure to \$1,400 per annum. To this figure, I have applied a deduction of 50% to account for the pre-existing conditions that are directly impacting Mr. Dhami’s pecuniary loss under this head of damages. This brings the total annual figure to \$700, which I find Mr. Dhami will reasonably experience as his replacement cost for services until age 75.

[200] Mr. Turnbull provided a multiplier of 26.388 to assess Mr. Dhami’s present value of his future loss to age 75. This yields a figure of approximately \$18,500 (\$19,425 with tax).

**VII. SPECIAL DAMAGES**

[201] The parties have agreed on special damages of \$995.

**VIII. SUMMARY OF DAMAGES**

[202] For the foregoing reasons, the plaintiff is entitled to the following quantum of damages as a result of the defendant’s negligence:

Non-pecuniary Damages	\$ 75,000
Loss of Earning Capacity	\$114,000

Loss of Housekeeping Capacity	\$ 19,425
Costs of Future Care	\$ 13,290
<u>Specials</u>	<u>\$ 995</u>
<b>Total</b>	<b>\$222,710</b>

[203] I also award the plaintiff interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

**IX. COSTS**

[204] The general rule is that costs follow the event. I am not aware of any reason that warrants a departure from this rule. The plaintiff was successful and as such he is entitled to his costs at Scale B for a matter of ordinary difficulty.

[205] If there are settlement offers or other matters that I am not privy to, a party may prepare written submissions up to a maximum of five (5) pages in length (excluding attachments), for my consideration. These should be submitted through Supreme Court Scheduling within 45 days of this Order. Responding submissions are to be provided seven (7) days thereafter and are not to exceed five (5) pages. Any Reply submissions are to be provided within seven (7) days following receipt of Response submissions, and are limited to three (3) pages.

[206] Absent further submissions, this costs order will stand.

“Shergill J.”