

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kazemi v. Sturmane*,
2023 BCSC 127

Date: 20230127
Docket: M234612
Registry: New Westminster

Between:

Parviz Kazemi

Plaintiff

And

Madara Sturmane

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

M. Pankiw-Petty
A. Walia

Counsel for the Defendant:

D. Kang
X. Xu, Articled Student

Place and Dates of Trial:

New Westminster, B.C.
August 8-10 and 12, 2022

Place and Date of Judgment:

New Westminster, B.C.
January 27, 2023

I. Introduction

[1] Parviz Kazemi was injured in a car accident on December 22, 2018. The defendant has admitted liability, so only damages were at issue at trial.

[2] At the time of the accident, Mr. Kazemi had three forms of employment. His regular work was at a federal government agency, and he had side jobs as a taxi driver and as a financial advisor. He says his injuries prevent him from working as a taxi driver and also jeopardize his other areas of employment.

[3] The defendants challenge the nature and extent of the plaintiff's injuries and claimed disabilities. They also argue that the plaintiff's claimed losses should be reduced due to his failure to wear a seatbelt and due to injuries he suffered in an unrelated accident at work.

II. Evidence

[4] The plaintiff led evidence from Mr. Kazemi, five collateral witnesses, an economist and two medical experts. The defence called no witnesses.

A. Parviz Kazemi

General Background

[5] Mr. Kazemi is 53 years old; he was 50 on the date of the accident. He is married and has two children. He was born in Iran and educated there, having obtained a bachelor's degree in biology. He immigrated to Canada in 1997. On his arrival, he took ESL classes and in 2002 he completed a computer course at Douglas College.

[6] His first job in Canada was as a security guard. He then found work with an optical chain. While working there he continued his security guard work on a part-time basis. He later obtained a certificate in financial planning and he also took courses at the Justice Institute and qualified as an auxiliary RCMP officer. He worked as an auxiliary RCMP officer from 2003 to 2013.

[7] He worked for a few years with the BC Centre for Disease Control and in 2008 he started a career with the federal government, although it was not clear on the evidence what his initial role was. In 2010 he secured work with Immigration, Refugees and Citizenship Canada, where he worked for five years, following which he obtained a permanent position (as opposed to a “term” position) with the Canada Border Security Agency (CBSA). He moved to Veterans Affairs in January 2016.

[8] Mr. Kazemi explained that his movement through various roles in the federal government was due to his desire to advance to better positions.

Taxi Driving

[9] In early 2018 Mr. Kazemi took the steps necessary to become a taxi driver. He completed a taxi host program, passed a geography exam, obtained a class 4 licence and obtained a chauffeur permit from the City of Vancouver. He then took training with Maclure’s Cabs and began driving taxis on a part-time basis.

[10] Mr. Kazemi said he qualified as a taxi driver in order to earn extra money. He also wanted to see if it was a viable opportunity for investment. His intention was to work one to two shifts each week and also work during his vacation time.

[11] In 2018, he worked 22 shifts (one of which was an unpaid training shift). He said he earned \$600 to \$700 each shift. Although his plan was to work one to two shifts each week, this did not occur in 2018 because cabs were not always available and because he also had to work at his other job as a financial advisor, particularly during the fall RRSP season.

[12] Because cabs were not always available, he also signed up with Black Top Cabs and arranged a necessary amendment to his chauffeur’s licence. He also made inquiries at Yellow Cabs.

[13] The subject accident took place while he was driving a taxi. He says his resulting neck pain, back pain and fear of driving brought an end to his work as a taxi driver.

Veterans Affairs

[14] As already noted, Mr. Kazemi has worked as a Veterans Affairs agent since January 2016. In that role, he works on requests made by or on behalf of military and RCMP members who were injured on duty during their service time. His function is to look at requests for service of various kinds, check the guidelines and make the decision to approve or reject the request.

[15] Each agent has between 900 and 1,500 clients. Mr. Kazemi said that while many veterans are pleasant to deal with, a lot of them are in pain and his interactions necessarily focus on the difficulties they are having. This creates difficulties with what he says is his accident-related PTSD because his clients recount their pain, particularly back pain, and this exacerbates his PTSD.

[16] Prior to the accident Mr. Kazemi had no injuries and he found working with veterans to be satisfying. He hoped to “climb the ladder” either in the department or elsewhere within the federal government. He referred to three postings that he had applied for, without success. One of those postings was for a position as a CBSA officer. The position had a physical ability requirement, which he passed in 2017. He said he could not pass that test now due to his injuries.

[17] Mr. Kazemi said he did not pass the security clearance necessary for the CBSA position. He said there had been a dispute within his strata, an allegation that the council had misappropriated funds, and in the course of that dispute someone had complained he had used his auxiliary RCMP officer’s uniform in an inappropriate manner. This led to his dismissal from the RCMP auxiliary.

[18] Mr. Kazemi disclosed that event during the CBSA security clearance process, and he has concluded this was the reason he did not get the necessary clearance. He filed a grievance about whether he has to disclose his auxiliary RCMP dismissal in future applications, but the issue has not yet been determined or resolved. He said that “most likely” the incident will not affect his ability to get security clearances in future.

[19] He said he does have security clearance for other federal government departments: Transport Canada, Passport Canada and of course, Veterans Affairs.

Financial Advisor

[20] Mr. Kazemi embarked on a side business as a financial advisor in 2014. He took a course, passed an examination, passed an Insurance Council examination and took training in the field. He works independently but is associated with other independent advisors through iFreedom Financial Solutions Inc. (“iFreedom”). He estimates that he spends 15 to 20 hours weekly on his financial planning work.

[21] His financial planning work derives from several sources, including client investments, selling insurance products and training other agents who form part of his team. The latter work results in the payment of “residuals” to Mr. Kazemi for commissions and other income earned by those agents.

[22] The work involves meeting existing clients, making cold calls, working existing contacts and making new contacts. Meetings with clients often take place at informal locations and can be long. One has to be focused to be successful.

Family and Recreational Activities

[23] Mr. Kazemi said that prior to the accident, he and his family enjoyed walking, hiking, shows, movies, short road trips and travelling to such places as the United States and Iran. They did one long road trip to California, where Mr. Kazemi did most of the driving.

[24] He and his wife did a lot of activities with their elementary school-aged children, who are aged 11 and 6. Those activities included biking, hiking, going to the swimming pool and, snow tubing in winter.

[25] Mr. Kazemi said that prior to the accident he enjoyed playing soccer. In his youth he achieved high levels in several martial arts, and later he taught martial arts, but he ended his involvement in the sport when he came to Canada.

Pre-Accident Health

[26] Mr. Kazemi said that prior to the accident he was a very happy, outgoing person. He enjoyed getting together with family and friends.

[27] When asked if he had experienced mental health issues in the past, Mr. Kazemi said that 15 years ago he was harassed at work and he was placed on medication for depression. This lasted six months. His depression resolved and he has had no mental health issues since.

[28] He has been in three prior car accidents, which occurred in 2009, 2011 and 2013. In each he suffered back and neck injuries and received treatments. Those treatments ended prior to the subject accident.

[29] Immediately prior to the subject accident, he was experiencing episodic pain from those prior accidents, but it never interfered with his work and it was not as bad as it is now. His episodic prior back and neck problems prompted an ergonomic assessment at his work. He had a further ergonomic assessment at work after the subject accident and, as a result, he was supplied with a different chair, a standing pad, a sit-stand desk and a footrest.

Household Work

[30] Mr. Kazemi and his family live in a large home in Delta. It is a two-storey house, with a rented suite in the lower level, and has both a front and back yard. He said that, prior to the subject accident, he helped with such inside chores as cleaning, dishes and laundry, but all outside work was his responsibility, including yard maintenance, lawn mowing, pruning, pressure washing and snow removal.

The Accident

[31] The accident took place on December 22, 2018. Mr. Kazemi was driving a taxi with two passengers in the rear seats. He was proceeding on West Georgia Street in Vancouver, near the intersection with Hamilton Street, when the defendant's vehicle changed lanes in front of him and his vehicle struck her vehicle. Mr. Kazemi said he slammed on the brakes just prior to the collision.

[32] Mr. Kazemi said he was lifted from his seat, he hit his head on the A pillar of the taxi and his chest hit the steering wheel. He was not wearing a seatbelt. He was rendered dizzy and had a headache, and felt pain in his chest, back and neck.

[33] He said he was not wearing a seatbelt because taxi drivers are not required to do so when proceeding under 70 km/h. He said it is also a safety issue, because customers sitting behind the driver can use the seatbelt to choke the driver. In this case, he had removed his seatbelt because he was carrying a passenger who had sat behind him.

[34] After the accident, Mr. Kazemi first went with the tow truck to the taxi office, and he then drove himself to Royal Columbian Hospital, the nearest hospital to his residence. He continued to feel pain in his head, chest, neck and back at this time. At the hospital he had x-rays, perhaps also a CT scan, and he was given medication recommendations and told to follow up with his family doctor.

Post-Accident Events

[35] When asked how he was one month after the accident, Mr. Kazemi said the pain was “really bad”. He had pain at all levels of his back, as well as his neck and shoulders. He had “lots of headaches”. He slept poorly, just two to four hours per night, and had nightmares. He testified that he still has nightmares from time to time. His poor sleep interfered with his ability to focus at work.

[36] Mr. Kazemi suffered from anxiety after the accident. He said he would get angry if cut off by another vehicle, and he was excessively cautious in his driving. He also worried when his wife was driving the children as he is excessively concerned they will be injured. These anxieties have continued.

[37] He was off work for nearly a month from both his Veterans Affairs job and his work as a financial planner. He did no taxi driving. He has not done any taxi driving work since the accident. At Veterans Affairs, he was uncomfortable while working. He had pain in his back, neck and shoulders, as well as headaches. He experienced pain while sitting or standing. He informed his supervisor of his

limitations and dealt with the pain by taking “microbreaks”, taking medication and occasionally using the doctors’ examination room at the workplace to lie down on the examination table or the floor.

[38] Specifically, Mr. Kazemi had problems standing, typing (with onset of pain after a few minutes), and patience with his clients. Many of the clients require a patient approach as they may be elderly or hard of hearing.

[39] In addition to physical difficulties at work, he also had work-related mental health difficulties in that many of his clients were experiencing the same problems he was, and “it was really tough to deal with these”.

[40] Mr. Kazemi was accommodated at work with a modified schedule, four longer working days each week instead of five, which his doctor had recommended. Mr. Kazemi has a long commute to and from work, which itself was an issue due to the need to stand on public transit, and having three days off allowed for better recovery. These reduced hours ended in July 2022, although there were some intervening events, as described shortly.

[41] Mr. Kazemi has undergone numerous treatments, including physiotherapy, massage, acupuncture, active rehabilitation and chiropractic. He had some trigger point injections in his back and neck from a physiatrist, Dr. Rassem. These helped for a period of time, then their effects subsided and did not help to reduce pain.

[42] Mr. Kazemi has also had counselling sessions, which he said were very helpful. He has had 41 counselling sessions between June 2019 and June 2020. Some counselling was for anxiety and PTSD and other counselling was marital counselling. He would like to continue with counselling.

[43] He still undergoes various treatments and he would like to continue with them, if medically recommended. These include physiotherapy, chiropractic, active rehabilitation and massage. He noted his physician told him to reduce some treatments because he is undergoing “too many treatments at the same time”.

Intervening Injuries

[44] In November 2019, Mr. Kazemi fell while at work and broke his right ankle. A week after that he fell at home while on crutches and broke his finger. The finger fracture led to wrist pain and, later, to “tennis elbow”. The latter conditions started in or around September 2021. All of these injuries or conditions were accepted as workplace-related by WorkSafeBC.

[45] His broken ankle kept him off work from Veterans Affairs until July 2020, a period of eight months. Following the onset of his wrist and elbow pain in or around September 2021, he reduced his hours to six hours per day, although he carried the same case load as before. Those reduced hours ended in July 2022.

[46] His ankle injury prevented him from driving for some time and still gives him pain, particularly if there is any pressure on it. He has finger pain still and it sometimes bothers him when typing. Treatment for his finger injury has ended, and treatment for his wrist and elbow conditions will end in August 2022. At work, he is able to manage his finger issues by taking “microbreaks”. He understands that this pain may be permanent, although it may also resolve.

[47] Mr. Kazemi emphasized that his ongoing neck and back problems are much worse than his ongoing foot or ankle problems.

[48] Mr. Kazemi was injured in December 2021 when a metal pole hit his face. He suffered a concussion, a bleeding nose and headaches. A CT scan was negative. He said those headaches were localized in a different area, whereas his accident-related headaches come up from the back of his neck and take over his whole head.

Current Work Status

[49] When asked about his ability to drive a taxi, Mr. Kazemi said he cannot sit in a car longer than about 45 minutes, and his anxiety makes him too cautious. On the two times he drove a vehicle for a longer period of time, he had to be helped out of the vehicle. On the second occasion he was in pain the whole week. He said he will

not drive a taxi again. He said this will cause him a loss of between \$30,000 and \$40,000 a year.

[50] At Veterans Affairs, he has failed to advance in the department and he feels he is not getting jobs because of his physical injuries. He has filed a discrimination complaint as a result. He noted that he has disclosed to his employer his physical problems but not his PTSD. In one instance, a client experiencing problems similar to his went through an assisted suicide, and this affected Mr. Kazemi. While he told his supervisor of the anxiety that this created for him, and she moved the file to another agent, he did not tell her that he has been diagnosed with PTSD.

[51] He has discussed his lack of promotion with an upper-level manager and “she is looking into it”. He said he has no doubt that but for the injuries he suffered in the accident he would have been promoted.

[52] Mr. Kazemi said “I don’t know how I can continue [with the Veterans Affairs job] because the work takes a toll on my body and mental health”.

[53] As for his work as a financial advisor, he said he is not as active as he would have been without injuries. He does not attend all the twice-weekly office meetings and no longer goes to businesses to drum up work. He feels he would have earned \$50,000 to \$60,000 each year but for the accident. He noted that he earned gross commissions of \$35,245 in 2019, the year after the accident, and these were mostly “override” commissions from business done by agents within his team.

Current Home and Family Life

[54] As noted earlier, Mr. Kazemi now does far less around the house. He mows the lawn but now does so less often. He has been helped by acquiring a self-propelled mower, which was paid for by ICBC. Still, he “pays the price” in the days afterward. He said the back yard “looks bad” and is full of weeds. Formerly he had the nicest yard around.

[55] Within the house, he does not do any laundry, dishwashing or mopping of floors.

[56] He does not play with his children as often, and he isolates more. He has not taken them on walks by the river, as he used to, as he would worry about their safety. Mr. Kazemi said he worries excessively about safety in that he checks the locks on the house repetitively. He knows it is not normal but he “just can’t help it”.

[57] His relationship with his wife has deteriorated to such an extent that it approached the point of divorce. Intimacy has been severely affected.

[58] Mr. Kazemi said he feels he is not the man, nor the father, he was before. He said “I’ve promised what I can’t deliver; I feel [like] a failure”.

Cross-Examination

[59] Mr. Kazemi was cross-examined on his taxi revenues, the expenses he would have had in earning those revenues and his limited expense records. He acknowledged there was a lease cost associated with each shift, which was \$100 per regular shift and \$200 on weekend night shifts.

[60] Some other points elicited on cross-examination are as follows:

- a) he only worked 21 taxi shifts in 2018 because fall and winter is RRSP season and taxi work would have kept him away from his financial advisor work;
- b) he provided his taxi-related expenses to his accountant on a small, single-page note, which provides figures for the total lease cost and total expenses, but with no detail;
- c) in 2018, his net business income from financial advisor work, after expenses, was \$509. He agreed that was “all he took home”. He left it to his accountant to deduct the appropriate expenses;

- d) he agreed that financial markets are currently down and this affects that part of his income that depends on financial performance, but he said a down market is also a more favourable time for buying;
- e) he acknowledged that he saw his physician with complaints of back pain in June 2017 and March 2018, agreeing that prior to the accident he had episodic pain in his back and neck. The chart notes indicated Mr. Kazemi “can’t sit too long”;
- f) he suffered a broken foot at work on November 21, 2019, broke his finger one week later, and was off work until July 2020 because his foot injury meant he could no longer commute to work. He then worked until September 2021, at which time he suffered a wrist injury and tennis elbow injury and subsequently returned to work gradually through reduced hours;
- g) the only reason he could not work full-time hours in September 2021 was because of his injured left wrist;
- h) he went to counselling after his work injury. The worries he expressed to the counsellor related to his inability to do taxi work, his reduced ability to do his financial advisor work, and his uncertain future at Veterans Affairs given his ongoing pain and PTSD. In re-examination, he said he has had over 40 counselling sessions, mostly for mental health issues relating to the accident;
- i) his foot injury was not his main concern as the doctor told him it would heal. His mental health was not related to his ankle injury but to the accident injuries and the nightmares he was experiencing;
- j) his wrist injury affected his ability to do chores because he could not lift with his left hand, but he could not help with chores anyway because of his accident injuries;

- k) gardening was a problem due to the problems with his left hand, but he already had problems doing any gardening because his neck and back pain left him unable to maintain the same position for more than 15 minutes;
- l) he was still having pain in his left wrist and elbow in January 2022. He tried to shovel snow at one point when his father-in-law was unavailable to do it;
- m) his ankle still bothered him in January 2022 if he put too much pressure on it, as when he jogged too long, or he jumped. When asked if jogging did not bother his back, he said “it does after a few minutes”. When discovery from January 2022 was put to him, where he said “a lot of jogging” causes pain to his ankle but not to his back, he agreed this answer was true; and
- n) also on that discovery, he said he goes jogging around his home as there is a school nearby and he does a lap and then goes home.

B. Azam Jalali-Ghadri

[61] Ms. Jalali-Ghadri is Mr. Kazemi’s 42 year old spouse. She and Mr. Kazemi have been married for 15 years. They have two children, aged 11 and six.

[62] Ms. Jalali-Ghadri worked as a medical laboratory technologist in Iran (where she met Mr. Kazemi) and in customer services positions in Canada. She is currently a homemaker.

Before the Accident

[63] Ms. Jalali-Ghadri said that prior to the accident Mr. Kazemi was funny, talkative and social. She said they had a “great relationship”. As a father, Mr. Kazemi was responsible, reliable, eager to spend time with the children and up for all sorts of physical play. As a family, they enjoyed local outings, short road trips to Seattle and locations within British Columbia, and vacations in Iran and California. They enjoyed such activities as cycling, hiking and winter tubing.

[64] Ms. Jalali-Ghadri said that prior to the accident Mr. Kazemi was “always healthy” and “being fit was important to him”. He was a very social person and he had no mental health issues. He helped around the house by vacuuming, attending to the garbage, doing laundry and, sometimes, doing dishes. While Ms. Jalali-Ghadri did the majority of the work inside the home, and was the primary caregiver of the children, Mr. Kazemi assisted and he also did any heavy work. He also drove the children when needed, and played with them. His primary household responsibility was outside the house: gardening, mowing the lawn, garbage and snow removal. He had no physical limitations.

After the Accident

[65] Ms. Jalali-Ghadri found out about her husband’s accident the morning after it happened. He complained of neck and back pain, and headaches. He was very stressed, disoriented and tired. He was also irritable and short-tempered. He spent a lot of time in bed.

[66] Ms. Jalali-Ghadri said Mr. Kazemi walked only with difficulty, and he took time to sit and stand. He had trouble getting out of bed. He did not want to go for walks or play with the children. His level of personal care deteriorated.

[67] When asked about any mental health changes, Ms. Jalali-Ghadri said Mr. Kazemi was “so irritable”, arguing a lot and complaining about pain. He became more anxious about the children’s safety, for example, when they played in the street, and when she went out with the children he worried about whether they had arrived safely.

[68] Mr. Kazemi did not speak about the accident much, but he declared that their plans for the future had been ruined and he expressed distress about finances.

[69] He did not help as much around the house. He did no outside work except lawn mowing with a special mower, which was done less frequently and took longer than it did formerly. Ms. Jalali-Ghadri’s father looked after snow clearing. There is

no gardening done and the back yard is “a disaster”. Inside housework is not being done as frequently and its state is also “a disaster”.

[70] Their social life fell off because they turned down social invitations. Ms. Jalali-Ghadri said they lost many friends. Activities as a family became very occasional as Mr. Kazemi did not want to do any activities and so she did activities with the children without him. Their relationship suffered as Mr. Kazemi was short tempered and prone to be argumentative. Intimacy was rare, and was difficult for Mr. Kazemi due to pain. She said their relationship was so bad that “at times, we were close to divorce”. Ms. Jalali-Ghadri became burnt out and depressed and resorted to taking prescription anti-anxiety medication and counselling. She has no time to be with friends and no time to herself. She feels isolated.

[71] Their children have been affected because there is less interaction with them. The children are also more stressed, with their son asking if his father will “stay alive” and their daughter expressing concern about her parents’ marital problems.

[72] Mr. Kazemi complains of pain with varying frequency. His back pain is always there, and he has neck pain and, sometimes, headaches. He also complains of fatigue.

[73] They have been on one post-accident road trip, to Terrace, where Ms. Jalali-Ghadri did most of the driving. They had to take more breaks because sitting was hard for Mr. Kazemi.

[74] Their financial situation has changed. Their arrangement was that Mr. Kazemi was the breadwinner and she looked after the children and the home. She had not planned to work, but now she has to find a job. Towards that end, she took a bookkeeping course, but very recently she secured a position with Passport Canada. She is just awaiting a security clearance before starting that work.

[75] In cross-examination, Ms. Jalali-Ghadri acknowledged Mr. Kazemi had a workplace accident that gave him trouble walking and kept him off work for awhile. He could not walk to the bus stop, or stand because his leg was in a cast. He also

had an issue with his left hand and wrist. He had therapy for these injuries “probably” for a couple of years, although she was not certain.

[76] She agreed that his hand injury is a problem for Mr. Kazemi in terms of gardening, but said that back pain is the main issue there.

C. Behjat Bayat

[77] Ms. Bayat has been a financial advisor with iFreedom since 2016. She also works full-time as a licensed practical nurse. She was trained as a financial advisor by the plaintiff. After that training she saw Mr. Kazemi in twice-weekly general office meetings, periodic seminars and in occasional one-on-one meetings.

[78] She learned of Mr. Kazemi’s accident after noticing he was not attending meetings. He missed most of the office meetings “for a while”, then attended perhaps one meeting a week, although he would leave early. Occasionally she gave him a ride home, or he would take a taxi.

[79] Ms. Bayat said she could see that Mr. Kazemi was not comfortable. He was not focused at meetings, he could not sit for long, his face was red, and he was “not the same person”. On those occasions when she gave him a ride he would put his seat back fully in order to lie down, and he appeared uncomfortable. He also had a hard time getting in and out of the car.

[80] In-office meetings ceased during the pandemic, but instead meetings were held by Zoom.

[81] Ms. Bayat estimates she puts in a minimum of 10 to 13 hours a week working as a financial advisor. She does not have any agents under her. Her 2020 earnings as a financial advisor were \$30,000, though she said she was not as active as she would have liked.

[82] In cross-examination, Ms. Bayat said she thought she earned \$35,000 in 2017, perhaps \$25,000 to \$30,000 in 2018, and \$70,000 to \$75,000 in 2019.

[83] She noted that her income as a financial advisor is in part dependent on growth of the investments. If there is growth, she earns a commission, but if the value of the assets decreases, she will get no income from existing clients and any income she earns would come from securing new clients.

[84] In re-examination, Ms. Bayat said a financial advisor needs to be able to focus in order to find new clients and to update existing client information.

D. Karnjit Sihota

[85] Mr. Sihota is a financial advisor and is the co-founder of iFreedom. As of 2021, Mr. Sihota has focused on his clients only, and the other co-founder runs the company. Formerly, he was responsible for the day to day operation of the company. The company has over 60 financial advisors, who are registered as independent contractors.

[86] Mr. Sihota has known Mr. Kazemi for 13 or 14 years. Prior to the pandemic, he saw Mr. Kazemi once a month. He did not see Mr. Kazemi much during the pandemic. Mr. Sihota did not know how many hours Mr. Kazemi devoted to his financial advisor work, saying that the amount of time advisors put in is up to them. Generally, the more hours they put in, the more revenue they generate.

[87] There are no set hours, but 15 to 20 hours per week would be typical for a part-timer. Residual income is paid for business done previously, as where funds are being managed. By contrast, commission income is paid up-front. An advisor can also generate revenue by building a team of advisors, as this brings about team leader income. A team leader trains advisors, takes them into the field and helps them with paperwork.

[88] Part-time advisors generate revenue in the range of \$30,000 to \$60,000 each year. Due to the pandemic, the company's best years were 2020 and 2021, which saw "a lot of money in the system". He said business is now "back to normal".

[89] Mr. Sihota said financial advisors become qualified through a certification process. They must also put in 15 to 20 hours of self-education each year.

[90] Mr. Sihota said Mr. Kazemi was “an average advisor with consistent business”. He was aware Mr. Kazemi was in an accident but he did not recall any details.

[91] When asked what an advisor has to do to grow his or her business, Mr. Sihota said they have to get leads, do networking, meet people, generate relationships and acquire a clientele. Most part-time advisors meet clients “in the field”, meaning in their homes or in coffee shops.

E. Sina Mehrbarzin

[92] Mr. Mehrbarzin is the plaintiff’s nephew. He works as a CBSA officer.

[93] Prior to the accident, Mr. Mehrbarzin saw Mr. Kazemi daily. He explained that they used to live on the same floor of an apartment building, so he saw Mr. Kazemi often.

[94] Mr. Mehrbarzin was aware Mr. Kazemi had two side jobs in addition to his job at Veterans Affairs. He said Mr. Kazemi showed an interest in working at the CBSA, as he asked about salary, specific roles, and what the work environment was like.

[95] Mr. Mehrbarzin said the base salary at CBSA is \$89,000 per year, but there are shift premiums and overtime available.

[96] Mr. Mehrbarzin said that prior to the subject accident, Mr. Kazemi was a normal, healthy and active person. He described Mr. Kazemi as cordial and happy. After the accident, Mr. Kazemi did not come around to their house as much, and Mr. Mehrbarzin spent more time with Mr. Kazemi’s wife and children without Mr. Kazemi present. Mr. Kazemi was not as engaging as he had been, and he was reluctant to meet up with Mr. Mehrbarzin and his family. Mr. Kazemi complained of getting a sore back with longer car rides.

[97] Mr. Mehrbarzin noted that Mr. Kazemi is not as playful with his (Mr. Kazemi's) son as he used to be. Mr. Mehrbarzin noted that Mr. Kazemi's son is "pretty rambunctious".

[98] In cross-examination, Mr. Mehrbarzin said he was aware that Mr. Kazemi broke his ankle at one point. He was not aware Mr. Kazemi had taken time off due to a workplace injury.

F. Seyed Mohammad Shahrokni

[99] Mr. Shahrokni is a work colleague of Mr. Kazemi's at Veterans Affairs. He has been with Veterans Affairs since 2015.

[100] Mr. Shahrokni met Mr. Kazemi when the latter started with Veterans Affairs in January 2016. They went on a couple of out-of-town training sessions together in 2016 and 2017. On one of the trips they went to the mosque together, and he noted Mr. Kazemi had no difficulty getting up and down for prayers.

[101] Mr. Shahrokni said Mr. Kazemi had a lot of energy and he joked with people at work. He was enthusiastic, not shy about asking questions, and was very helpful to Mr. Shahrokni, who is legally blind.

[102] Mr. Shahrokni said the role of Veterans Affairs agent is a difficult one. Each agent is responsible for about one thousand files. He said the client population can be divided into two groups: younger veterans from the Afghanistan and Iraq conflicts, and older veterans from the Second World War and the Korean War. The veterans have a lot of needs and may have both physical and mental health issues, with the latter including bipolar disorders, depression and PTSD. He said PTSD is the most common mental health issue with veterans. The most common physical issues with veterans are neck and back injuries. Interactions with veterans occur constantly during an agent's day.

[103] Mr. Shahrokni works in the same office as Mr. Kazemi. They commute together at times; at one point, they did so daily.

[104] Mr. Shahrokni learned of Mr. Kazemi's accident about two weeks after it happened. He said Mr. Kazemi was off work "a few weeks" or "a bit over a month".

[105] They still commuted together at times, though by this point Mr. Kazemi had moved residences. Mr. Kazemi no longer walked as fast as he used to and he had difficulty with stairs. He would grab Mr. Shahrokni's arm as he sat down or got up from sitting, and he grimaced and held his breath in apparent pain.

[106] At work, Mr. Kazemi did not joke as much as he used to and his mood had changed. He mentioned that commuting was difficult for him and he spoke of retiring earlier. At lunch, Mr. Kazemi would retreat to the on-site doctor's bed to rest.

[107] Mr. Shahrokni transferred to another office in late 2019 and so he did not see Mr. Kazemi from that point onward.

G. Dr. Soma Ganesan – Psychiatrist

[108] Dr. Ganesan assessed Mr. Kazemi on April 20, 2022 and provided a report dated April 22, 2022. The assessment was done by Zoom.

Diagnoses

[109] Dr. Ganesan provided the following "diagnostic impression":

As a result of the motor vehicle accident in 2018, Mr. Kazemi suffers from the following:

1. Post-traumatic stress disorder. He is currently still suffering from moderate symptoms, and obsessive intrusive thinking about harm to himself or his family members is fairly prominent and bothers him every day. Although he has some improvement in his bad dreams, nightmares, and flashback memories, the fear is still prominent as recorded in his symptoms in the PCL-5 symptom checklist.
2. Generalized anxiety disorder, mild to moderate. It appears there has been some significant improvement.
3. Chronic pain syndrome. It appears that his neck pain, shoulder pain, and low back pain started after the accident and his physical condition became complicated after the work-related accident as mentioned in other clinicians' notes. It appears that his neck pain and back pain has a daily impact on his ability to perform his work and affects his personal life and family life.

Recommendations

[110] Dr. Ganesan made the following recommendations:

- a) continued counselling with a focus on a cognitive-behavioural approach. A minimum of 25 further sessions, with further sessions if needed, and “touch base” sessions once a month after that for one to two years;
- b) psychotropic medication to help with hyperarousal symptoms related to his PTSD. This should continue for at least two to three years, with frequent follow-up through his family physician;
- c) marital counselling, with the number of sessions to be determined by the counsellor; and
- d) appropriate pain treatment as prescribed by a specialist.

Prognosis

[111] Dr. Ganesan gave the following prognosis:

It is not possible to expect that he will become symptom-free, but with appropriate treatment and his determination to try to maintain his work he will put in a lot of effort to continue attending rehabilitation treatment, pain treatment, and continuing with his job, but he will likely need to have his job modified as currently provided by his employer. If he is exposed to further psychosocial stressors, his emotional difficulties will become aggravated, which would affect his physical condition, as is already happening now because of increased work pressure. This will put him at high risk of losing his job or of not performing appropriately at work, which will affect his level of function and would likely affect his ongoing contract.

There is no possibility of his returning to driving a taxi as he did before the accident. It is fortunate that he has been able to maintain his full-time job, but he is at continuous risk of not performing appropriately.

The prognosis for fully recovering emotionally and physically is guarded.

Cross-Examination

[112] In cross-examination, Dr. Ganesan agreed he relied on Mr. Kazemi’s self-report, although he also had information from medical records and his answers to

certain specific questions. Dr. Ganesan did not have any information available to him from collateral sources.

[113] It was Dr. Ganesan’s understanding that Mr. Kazemi’s workplace accident caused him to be off work for a month, with a gradual return to work after that. He agreed that not being able to work can affect a person in terms of their finances, and “financial worry is substantial here”. He did not in any way explore the contribution of the workplace injuries to his disability, although he again said his understanding was that the workplace injury caused a one-month absence from work. He said, “if it was longer, I would have to know how long”.

[114] Dr. Ganesan agreed Mr. Kazemi has already undergone marital counselling, but he said that counselling should continue.

H. Dr. Tony Giantomaso – Physiatrist

[115] Dr. Giantomaso is a specialist in physical medicine and rehabilitation. He assessed Mr. Kazemi on April 7, 2022 and prepared a report dated April 22, 2022.

Diagnoses

[116] Dr. Giantomaso provided the following accident-related diagnoses:

- a) post-traumatic cervical sprain/strain injury consistent with a WAD-II injury, chronic;
- b) post-traumatic thoracic sprain/strain injury, grade 1-2, chronic;
- c) exacerbation and aggravation of pre-existing lumbar sprain/strain injury, grade 1-2, chronic.

[117] Dr. Giantomaso also diagnosed the following as being pre-existing or unrelated to the accident:

- a) pre-existing history of chronic low back pain; and
- b) occasional issues with mood.

[118] Finally, he noted the following diagnoses that arose after the accident:

- a) right ankle fracture and left finger sprain relating to a workplace injury and slip and fall in 2019; and
- b) a mild concussion in 2020.

[119] Dr. Giantomaso said that his findings on physical examination were consistent with soft tissue injury only, with no indications of a more serious level of injury or injury to peripheral nerves or the spinal cord. He saw no basis to embark on further medical imaging or tests.

[120] Dr. Giantomaso noted that while Mr. Kazemi did have pre-existing low back pain, he told Dr. Giantomaso that the accident-related low back pain is much worse than pre-accident levels. As for the neck or upper back pain, Dr. Giantomaso said there was no significant prior history of pain in those areas that would be “better explained” by other injuries.

Impairments

[121] Dr. Giantomaso described Mr. Kazemi’s reported impairments as follows:

Parviz Kazemi relates ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms. This included limitations in sitting tolerance, standing tolerance, lifting, pushing and pulling tolerance and some limitations in driving tolerance and occasional sleep disruption and difficulties with higher level physical activities.

These self-reported limitations, in my opinion, are reasonable given his post-traumatic injuries. In my opinion he is capable of full-time sedentary work such as his current job at Veterans Affairs and similar types of work. Driving taxi would more likely than not be limited due to his most significant low back pain. Otherwise, he may require occasional time off for flare-ups and therapy and would likely have difficulties working prolonged hours or overtime hours.

Prognosis

[122] Dr. Giantomaso said the following about prognosis:

It is now several years post-trauma. The vast majority of improvement through natural history and rehabilitation would have been expected to have occurred in the first 6 to 12 months post-trauma or earlier. Thus, in my opinion on a balance of probabilities, in all likelihood he will continue to

experience chronic pain to some degree long term in the future. By following my recommendations he may experience decreased pain and increased function in the future, however this should be considered part of a long-term pain management strategy and should not necessarily be considered curative.

Recommendations

[123] Dr. Giantomaso recommended:

- a) ongoing active rehabilitation (at least 16 to 24 sessions) with a certified personal trainer or kinesiologist, with Mr. Kazemi to work out on his own after that;
- b) an ergonomic assessment of his workstation at his home and office;
- c) passive therapies can be accessed on occasion to address flare-ups, although these are unlikely to change the overall prognosis;
- d) consideration should be given for a referral to a pain management specialist. Trials of facet blocks and radiofrequency ablation could also be considered; and
- e) medication management could be considered, particularly neuropathic pain medications.

Cross-Examination

[124] In cross-examination, Dr. Giantomaso said:

- a) Mr. Kazemi reported pre-accident occasional low back pain; and
- b) ankle pain, or a finger sprain, lasting more than two years would be considered “chronic”. For an interarticular fracture he would wait the full two years before concluding it was an chronic or ongoing issue.

III. Positions of the Parties

A. Plaintiff

[125] The plaintiff noted the diagnoses of Dr. Ganesan and Dr. Giantomaso and emphasized the serious effects the accident-related injuries have had on the plaintiff's life. The plaintiff also reviewed the number and frequency of the treatments Mr. Kazemi has undergone, and said this demonstrates the effort it takes just to maintain his current functioning level.

[126] The plaintiff said the other, non-accident injuries he has suffered, do not affect his day-to-day life, as the accident injuries do. In any event, the medical prognosis is that his ankle symptoms could and left finger injury may resolve, and the treatments he is receiving for his wrist and tennis elbow are ending shortly.

Non-Pecuniary Damages

[127] Mr. Kazemi seeks an award of non-pecuniary damages of \$195,000. He says the following are comparable cases (with the non-pecuniary damages awards in brackets): *Vo v. Navarro*, 2021 BCSC 1534 (\$160,000); *Valand v. Campbell*, 2021 BCSC 439 (\$190,000); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000).

Loss of Past Earning Capacity

[128] Mr. Kazemi seeks an award to compensate for losses he says he suffered at all three of his jobs.

[129] First, he claims \$4,898 for the month of work he lost at Veterans Affairs. Second, he says that, but for the accident, he would have earned \$42,480 each year from taxi driving. Using a loss period of 3.63 years from the date of the accident to the date of trial, and excluding the eight months he could not work due to his workplace ankle injury, the plaintiff calculates this loss at \$128,254.

[130] Finally, for his financial advisor work, he says that but for the accident, he would have earned \$50,000 each year from that source, meaning that he lost between \$14,700 and \$19,600 annually in the years leading up to trial. He seeks an

award totalling \$61,240 for that loss. These three areas of loss total \$194,392. The plaintiff suggests 20 percent as an appropriate rate of tax, and so advances this claim, net of taxes, at \$155,514.

Loss of Future Earning Capacity

[131] The plaintiff says that, but for the accident, he would have continued his job at Veterans Affairs, worked one to two shifts per week as a taxi driver and also worked part-time as a financial advisor. He said that, health permitting, he would have kept up his employment at all three jobs until age 70 or 75.

[132] Specifically as to each job, the plaintiff submits he is now unable to work as a taxi driver, he is unable to attend properly to his financial advisor clientele or build new clientele, and he struggles at his Veterans Affairs job and it is possible he will not be able to continue with that employment.

[133] The plaintiff quantifies his claim as follows:

- a) taxi work: he calculates his future loss on the basis of annual losses of \$42,480, being 1.5 shifts each week for 40 weeks each year, with average earnings of \$708 on each shift. The claim totals \$415,072;
- b) financial advisor: this loss is calculated based on an annual loss of \$14,245 (the difference between his expected earnings of \$50,000 and his 2021 earnings of \$35,245). This claim totals \$144,167; and
- c) Veterans Affairs: the plaintiff submits there is a real and substantial possibility he will not be able to maintain this job due to chronic pain and his mental health issues. He puts this risk at 65 percent on the basis of Dr. Ganesan's view of his "high risk". With "without accident" future earnings at Veterans Affairs totalling \$710,433, the "with accident" claim is 65 percent of that, or \$461,781.

[134] The plaintiff's total claim for loss of future earning capacity is \$1,021,020.

Cost of Future Care

[135] The plaintiff claims the sum of \$295,002 for various treatments and expenses, including physiotherapy, chiropractic, massage therapy, acupuncture, counselling, active rehabilitation, marriage counselling, ergonomic assessments and medication.

In-Trust Claim

[136] The plaintiff claims the sum of \$30,000 as an amount to be awarded to Ms. Jalali-Ghadri in trust, for the services and other efforts she has provided to care for the plaintiff and look after the household generally.

[137] The following is a summary of the plaintiff's claim:

Non-pecuniary damages:	\$195,000
Past loss of earning capacity (net):	\$155,514
Loss of future earning capacity:	\$1,021,020
Cost of future care:	\$295,002
In trust award:	\$30,000
Special damages (agreed):	\$10,000
Total:	\$ 1,706,536

B. Defendant

[138] The defendant takes issue with the plaintiff's claims concerning the nature and extent of his injuries, and disagrees with the damages claimed. The defendant accepts there was an aggravation of pre-existing neck and back pain and that the plaintiff suffers from mild anxiety as a result, but he disputes Dr. Ganesan's diagnosis of PTSD and has several criticisms of Dr. Ganesan's report and testimony.

[139] The defendant submits the plaintiff should be found negligent for failing to wear his seatbelt, as his neck and back injuries could have been largely prevented had he done so. While accepting that the burden of proving contributory negligence

is on the defendant, he argues that common sense should lead to that conclusion and should result in a 25 percent reduction of all damages except special damages. The defendant cited a number of cases in support of this argument, including: *Schenker v. Scott*, 2013 BCSC 599; *Zoney v. Wakefield*, [1994] B.C.J. No. 1299, 1994 CanLII 962 (S.C.); and *Goronzy v. McDonald*, 2020 BCSC 869.

[140] Relying on *Schweitzer v. Li*, 2021 BCSC 52, the defendant also submits there should be a substantial reduction – 50 percent – for the past income loss claim to account for the several significant injuries the plaintiff has suffered unrelated to the accident. His right ankle injury, in particular, prevented him from working at all, and he was only able to resume work when work-at-home arrangements were put in place during the pandemic.

[141] These unrelated injuries also affected his ability to do his work as a financial advisor, as he could not travel, meet clients, take any notes (the plaintiff is left-handed) or do any typing. These injuries would also have restricted his ability to do taxi work and certainly would have prevented him from putting in 12-hour shifts. These same restrictions ought to result in a 10 percent reduction from future losses and non-pecuniary damages.

[142] The defendant says non-pecuniary damages ought to be assessed at \$72,000, citing the following cases in support: *Abraha v. Suri*, 2019 BCSC 1855; *Chaudhry v. Henville*, 2021 BCSC 2318; *Dueck v. Lee*, 2019 BCSC 1936; and *Griffioen v. Arnold*, 2017 BCSC 490, rev'd in part on other grounds, 2019 BCCA 83.

[143] As for past income loss, the defendant says there is no evidence that the plaintiff lost income at Veterans Affairs due to the accident. Specifically, the defendant notes the absence of any evidence showing the plaintiff's sick days were insufficient, or that they were bankable, or that there was a requirement that they be repaid. The defendant notes the plaintiff never reported his PTSD to Veterans Affairs and has never sought any workplace accommodations.

[144] Although the defendant accepts that the plaintiff was unable to do any taxi work between the accident date in December 2018 and November 21, 2019, the day he broke his ankle, quantification of that loss is problematic because the plaintiff did not keep adequate records. Given the plaintiff's knowledge of financial matters in his role as a financial advisor, an adverse inference ought to be drawn against the plaintiff on this aspect of his claim.

[145] The defendant submits that this loss ought to be quantified at \$6,500 (\$5,200 net of taxes), based on 250 hours of lost taxi work over the 11-month period in question at the rate of \$26 per hour.

[146] The defendant says the plaintiff would not have done any taxi work in 2020 or 2021 due to both his unrelated injuries and the pandemic.

[147] As for any loss of income from financial advising work, the defendant says the plaintiff has failed to prove any loss. The defendant also notes the net income reported by the plaintiff on his income tax returns is minimal: \$259 in 2017 and \$509 in 2018, against revenues of \$14,252 and \$28,205 in those respective years. The defendant says the plaintiff led no evidence about his expenses other than saying they were declared properly, yet he asserted that he "took home" the gross revenue figure.

[148] The \$6,500 figure already referred to also provides the basis for the defendant's assessment of loss of future earning capacity because there is no real and substantial possibility of any loss of income from his Veterans Affairs work and there is no proven loss for his financial advisor work. Using the appropriate multiplier brings about a present value of the loss of \$54,002, which should be discounted by 50 percent due to the plaintiff's workplace injuries and a further 10 percent for his pre-existing condition. The resulting award is therefore \$24,301.

[149] The defendant submits that any loss of housekeeping capacity ought to be reflected in the non-pecuniary damages award, although the defendant also submits the workplace-related injuries also affect his housekeeping capacity.

[150] As for the claim for an in-trust award, the defendant says there is no evidence that Ms. Jalali-Ghadri did anything beyond what a family member would do.

[151] As for cost of future care, the defendant argues that the items must be medically justified and reasonable. The defendant accepts that active rehabilitation and its follow-up are reasonable, as is the psychological counselling. These items total about \$8,000, and the cost of medication would bring the amount to \$10,000.

[152] The following is a summary of the defendant's position on damages:

Non-pecuniary damages:	\$72,000
Past loss of earning capacity (net):	\$5,200
Loss of future earning capacity:	\$24,301
Cost of future care:	\$10,000
In trust award:	\$0
Subtotal:	\$111,501
Less 25% for contrib. negligence:	(\$27,875)
Special damages (agreed):	\$10,000
Total:	\$93,626

C. Plaintiff's Reply

[153] The plaintiff replied to the defendant's argument that he should be found contributorily negligent for failing to wear a seatbelt. First, he notes that he was exempt from seatbelt wearing as he was operating a taxi at a speed less than 70 kilometres per hour. Second, he had a valid basis for doing so, as he was trained to do so in order to eliminate the risk that a violent passenger could use the seatbelt to choke or restrain him. Finally, the plaintiff argues that the defendant has failed to establish that his injuries would have been reduced had he been wearing a seatbelt.

[154] The plaintiff also made submissions in reply to the defendant's arguments on the significance of the plaintiff's workplace injuries and of the plaintiff's pre-accident neck and back pain.

IV. Discussion

A. Credibility and Reliability

[155] I am satisfied the plaintiff told the truth to the best of his ability. However, I did note a tendency on his part to express fears that were not always proportionate to an objective view of his actual difficulties. The most obvious example had to do with his expressed fears about being unable to carry on with his employment at Veterans Affairs. He worries that he will not be able to continue that work, yet he has done little or nothing to raise those issues with his employer or ask for suitable workplace accommodations. In this regard, it is worth noting that the plaintiff works in a unionized setting and the employer is a large, sophisticated organisation which would be well aware of its duties as an employer.

[156] The plaintiff's tendency in this regard causes me to be cautious when considering his testimony concerning the severity of his injuries and their effects.

B. Findings of Fact

[157] The clinical findings of Dr. Giantomaso were largely unchallenged, with the defendant focusing instead on certain pre-accident physical and mental health issues, which I conclude were relatively modest in nature, as well as the workplace-related injuries. The defendant did challenge the findings of Dr. Ganesan but, as discussed below, that challenge was not successful.

[158] Dealing first with the pre-accident physical issues, I accept the plaintiff experienced episodic low back pain from prior car accidents and note these were significant enough to prompt an ergonomic assessment at work, but I also accept that his pre-accident back pain did not interfere significantly with his work.

[159] I find the plaintiff's accident-related physical injuries to be as found by Dr. Giantomaso, that is, sprain or strain injuries to the plaintiff's cervical and thoracic

spine and an aggravation and exacerbation of a pre-existing lumbar sprain or strain injury. He experiences low back pain almost every day, and neck and upper back pain on most work days.

[160] I also accept Dr. Giantomaso's characterization of Mr. Kazemi's functional impairments:

Parviz Kazemi relates ongoing activity limitations and participation restrictions in avocational, vocational and recreational realms. This included limitations in sitting tolerance, standing tolerance, lifting, pushing and pulling tolerance and some limitations in driving tolerance and occasional sleep disruption and difficulties with higher level physical activities.

[161] The defendant urged the Court to reject the testimony of Dr. Ganesan because Dr. Ganesan did not have an accurate grasp of the amount of work time the plaintiff lost due to his workplace injuries. Put another way, the defendant submits Dr. Ganesan did not sufficiently canvass the role the workplace injuries had on the plaintiff's mental state.

[162] The defendant's cross-examination of Dr. Ganesan was very limited and his cross-examination on the point in question was even more limited. Dr. Ganesan was asked if being unable to work could affect a person, and Dr. Ganesan said words to the effect that it can affect finances and "financial worry is substantial here". It must be remembered, however, that the plaintiff's workplace injuries were covered by WorkSafeBC. The evidence confirmed he received income from this source. These injuries were not a significant source of his financial worries.

[163] Dr. Ganesan was also asked whether he considered the plaintiff's injuries in terms of type – accident-related versus workplace-related – when considering the effects on the plaintiff's recreational, social and domestic life. Dr. Ganesan replied that he did not analyse it in that way, noting that the plaintiff's pain was more global in nature. He noted that the specialist in physical medicine and rehabilitation addressed what pain was caused by what body area, and he relied on that. I digress briefly to note that Dr. Ganesan was presumably referring to a May 2021 report from physiatrist Dr. Mariam Rassem, which Dr. Ganesan referenced in his

report. In his own report, Dr. Ganesan noted Dr. Rassem had diagnosed the plaintiff as having chronic low back pain and neck pain, and he did not note any comment about issues arising from workplace injuries. Notably, Dr. Rassem's consultation took place after the plaintiff's workplace injuries.

[164] Returning to the cross-examination of Dr. Ganesan, counsel asked him whether his opinion would change if he (Dr. Ganesan) was wrong about the amount of work time lost, presumably referring to the time lost due to workplace injuries. Dr. Ganesan said words to the effect that he would have to "know about that and know why [that was]". The point was not explored beyond that.

[165] In brief, I did not find that the cross-examination of Dr. Ganesan undermined his expert testimony and opinion in any way. It was clear from the evidence generally, and not just from the testimony of the plaintiff, that the plaintiff's accident-related injuries and pain symptoms, the financial consequences of those injuries and the anxiety caused by the accident itself, were by far the most predominant sources of his psychological distress.

[166] Accordingly, I accept the evidence of Dr. Ganesan concerning the plaintiff's psychological injuries, being: (1) post-traumatic stress disorder (PTSD) – moderate; (2) generalized anxiety disorder – mild to moderate; and (3) chronic pain syndrome.

[167] As for the plaintiff's workplace-related injuries, Mr. Kazemi broke his ankle in a workplace accident on November 21, 2019 and, a week later, he broke his left index finger and thereafter developed troublesome symptoms with his wrist and elbow. These workplace injuries kept him off work from Veterans Affairs until July 2020 (eight months) and kept him on reduced hours (six hours per day) from about September 2021 to July 2022.

[168] These workplace-related injuries, although much less problematic than his accident injuries, continue to bother him and cause pain at times. His ankle is painful when any pressure is put on it, and he still has finger pain that sometimes bothers him when typing. He deals with the latter by taking "microbreaks".

[169] I am satisfied on the evidence that, as a result of the plaintiff's accident injuries, he isolates more, withdraws from social interaction, is irritable and does not play or interact with his children as he did pre-accident. His marital relationship has been strained to the breaking point. He has had driving anxiety, which has improved, and generalized anxieties about the safety of his family, which Dr. Ganesan attributed to PTSD. Although he continues to work at a reasonably well-paying job at Veterans Affairs, he feels he is a failure.

[170] The plaintiff's situation is complicated by the several post-accident injuries and health issues he has had. Although these injuries have caused the plaintiff more lost time from work than did the accident injuries, I am satisfied that the pain in his neck and back have been, and will be, far more significant in terms of pain, suffering and loss of enjoyment of life than the workplace-related injuries.

V. Contributory Negligence

[171] As noted earlier, the defendant submits the plaintiff should be found to be contributorily negligent for failing to wear his seatbelt. The plaintiff responds that he was not under a legal obligation to wear a seatbelt, he had valid reasons for not doing so and, in any event, there is no basis on which to conclude his injuries would have been less serious had he worn a seatbelt.

[172] At the time of the subject accident, taxi drivers were exempt from wearing a seatbelt when proceeding at less than 70 km/h: *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 32.02. I note that this particular provision has since been repealed: B.C. Reg. 166/2019, s. 4. The plaintiff was proceeding at a speed less than 70 km/h at the time of the accident. The plaintiff accepts that the statutory seatbelt exemption is not a complete answer to the defendant's argument, but says the fact that he was not legally obliged to wear a seatbelt is nonetheless significant.

[173] The plaintiff's decision whether to wear a seatbelt involved an assessment of risk on his part, as the risk of not wearing a seatbelt had to be weighed against the risk of a seatbelt being used by a passenger to restrain or choke him. I note that at the time of the accident the plaintiff was driving a taxi on a Saturday night in

downtown Vancouver – a time when the risk of assault by a passenger might well be the greatest – with a passenger seated behind him.

[174] The plaintiff testified that it was part of his training that, for safety reasons, he should remove his seatbelt when he had a passenger sitting directly behind him. This is evidence of the standard of care in relation to the wearing of seatbelts by taxi drivers. The plaintiff’s decision not to wear a seatbelt was therefore consistent with that standard of care.

[175] A similar analysis in *Provost v. Bolton*, 2017 BCSC 1608, at paras. 215–23, rev’d on other grounds 2020 BCCA 86, leave to appeal to SCC ref’d, 39260 (19 November 2020), resulted in a finding that a police officer had acted reasonably in not wearing his seatbelt.

[176] The defendant cites two contrary cases, *Goronzy* and *Zoney*, which are referenced earlier in these reasons. In each case the plaintiff taxi driver was found contributorily negligent for failing to wear his seatbelt, despite not being legally obliged to do so. However, in each of those cases there was no mention of any reasoned basis for doing so, as there is here. The Court in *Goronzy* simply said the driver “took a risk by not wearing a seat belt” (at para. 188), and in *Zoney* the Court said the plaintiff was negligent in that respect just like any automobile occupant would be (at para. 2). In the present case, however, it was not a matter of simply taking a risk or being just like any other vehicle occupant, but instead it was a matter of weighing the risk associated with not wearing a seatbelt against the risk that a worn seatbelt would be used to assault or incapacitate the driver. Furthermore, in neither of those cases was there any evidence of the standard of care, as there is here. These cases are therefore distinguishable.

[177] In any event, I am not satisfied the defendant has met his burden of showing the plaintiff’s injuries would have been reduced by using a seatbelt. I accept that inferences and common sense can sometimes lead to that conclusion, particularly in obvious situations, but the situation here is not obvious. The plaintiff hit his head on the A pillar of the vehicle and his chest hit the steering wheel, and if head and chest

injuries were significant complaints here I might have drawn the inference that seatbelt use might have prevented or reduced the injuries. Instead, the plaintiff's primary physical injuries are to his neck and back. Every day in the courts we see plaintiffs who have suffered neck and back injuries despite wearing a seatbelt. For that reason, the defendant was obliged to do more than rely on mere inference.

[178] The final point is that the plaintiff's injuries are not just physical in nature. As the plaintiff submits, his PTSD is defined in part by flashbacks, nightmares and recurring thoughts about vehicle accidents. His anxiety disorder is characterized by anxiety about driving. His chronic pain syndrome is attributed to his neck and back pain. The defendant led no evidence as to how wearing a seatbelt would have prevented these psychological injuries or reduced their effects.

[179] For those reasons, I conclude the defendant has failed to establish that the plaintiff should be found contributorily negligent for failing to wear a seatbelt.

VI. Assessment of Damages

A. Non-Pecuniary Damages

[180] I have reviewed the cases cited by the parties and considered the various well-known factors applicable to the assessment of non-pecuniary damages, as set out in *Stapley v. Hejslet*, 2006 BCCA 34, in light of the findings I have made.

[181] The cases cited by both the plaintiff and defendant are, for the most part, readily distinguishable from the present. I deal first with the plaintiff's cases, with the non-pecuniary awards in brackets.

[182] In *Valand* (\$190,000), the plaintiff, a community health care worker, suffered injuries that became chronic in nature and brought on an anxiety disorder. His symptoms ended his career, with the Court finding that he was not competitively employable in any capacity. That is not the case here.

[183] Similarly, in *Pololos* (\$180,000) the plaintiff had not been employed in the seven years since the accident and, due to his "inaccurate self-perception" (at

para. 17), which the Court found was genuine, was unlikely to return to the workforce. Again, that is not the case here.

[184] *Vo* (\$160,000) is the most similar of the plaintiff's cases. There, the plaintiff, a seamstress/tailor, suffered from chronic pain in her neck, shoulders and back. She was found to have myofascial pain syndrome, generalized anxiety disorder and PTSD. She reported she was now less efficient at work by about 25 percent due to an inability to concentrate.

[185] Given the near-comparable awards for non-pecuniary damages in *Valand* and *Pololos*, where the plaintiffs could no longer work in any capacity, *Vo* seems to be something of an outlier.

[186] I turn now to the defendant's cases. These too are distinguishable. In *Abraha* (\$70,000), the plaintiff suffered from depression and anxiety, and was a changed person who was now irritable, short-tempered and withdrawn. However, her pain was described as being "intermittent" (at para. 19). In *Chaudhry* (\$80,000), the plaintiff had suffered from pre-existing severe depression and anxiety, as well as prior chronic hip and back pain. These were obviously significant because the plaintiff had been off work for five years prior to the accident due to these pre-existing conditions. In *Dueck* (\$75,000), the plaintiff suffered chronic pain in her neck and low back, as well as disabling headaches, but her conditions had no effect on her ability to earn income from her catering and piano instruction businesses. Notably, the award of \$75,000 included compensation for the plaintiff's loss of housekeeping capacity. Finally, in *Griffioen* (\$75,000), the plaintiff was clinically depressed prior to the accident and the Court found that her physical injuries ought to have resolved fully in nine to 12 months. Again, that is a far cry from the present case.

[187] From my consideration of all these matters, I conclude that the sum of \$110,000 is a fair and proper assessment of non-pecuniary damages in this case.

B. Past Loss of Income

[188] I am satisfied that the plaintiff's accident injuries and symptoms prevented him from working as a taxi driver. I am also satisfied that those same issues left him less able to attend to his work as a financial advisor. In both cases I am satisfied there is a financial loss, but quantification of the loss is no easy task.

[189] As for the plaintiff's work at Veterans Affairs, I am satisfied the plaintiff was off work for about a month due to the accident, but the evidence does not disclose any loss associated with that. There was no loss of pay and no loss shown concerning sick leave. The defendant's submissions noting an absence of evidence concerning available sick days or whether sick days were bankable or were to be repaid, were not met with any response from the plaintiff. For that reason, I make no award for that aspect of the plaintiff's claim.

Taxi Work

[190] I deal first with the period of loss relating to taxi work. The parties agree that the plaintiff would have been unable to do any taxi work after he broke his ankle on November 21, 2019, which is an intervening event. The defendant argues that the plaintiff would also have not done any taxi work in 2020 and 2021 due to both the pandemic and his workplace injuries, but I do not accept that submission. I accept that taxi work would have been very limited in the acute stages of the pandemic, likely meaning that there would have been no taxi work available to the plaintiff for perhaps four months starting in March 2020 which, as it happens, roughly coincides with his July 2020 return to work from his ankle injury in any event.

[191] I do not agree that the plaintiff's workplace-related injuries would have prevented him from doing any taxi work beyond the time that his ankle injury healed. His finger, wrist and elbow issues were relatively modest and would not likely have interfered with his ability to drive a taxi.

[192] As a final point regarding the amount of taxi work, the plaintiff conceded that he limited his taxi driving in the fall and winter of each year because that is RRSP

season and he is busy with his financial advising work. In 2018, for example, he worked just two shifts in September, three abbreviated (one-half) shifts in December, and none at all in October and November.

[193] From this evidence, I consider it fair to conclude that, but for the accident, the plaintiff, during those periods he was not disabled by his ankle injury, would have worked an average of perhaps three shifts per month from January to September each year, or 27 shifts per year. This accords both with the 21 shifts he actually worked during a full year in 2018 and with his testimony about registering with another taxi company in order to access greater taxicab availability. This means 27 shifts in each of 2019 and 2021, nine shifts in 2020 (July to September) and 21 shifts in 2022 (January to July, given the trial in August), for a total of 84 shifts.

[194] I do not accept the plaintiff's submission that he would have worked 60 shifts per year. He already had two other jobs and his testimony suggests he was a fully involved father to his children, and so his available time would have been extremely limited. Instead, I conclude the plaintiff's past work volume is the best indicator of the amount of taxi work he would have done. I also appreciate that he worked some shorter shifts in December 2018 and my earlier analysis does not include taxi shifts in December, but I have taken this into account by using an average of three shifts per month for nine months, which is higher than the 2.1 shifts per month (21 shifts in 10 months) he actually worked in 2018. Using an average of three shifts per month for the nine-month period takes into account *some* December work and for an increase in shifts worked due to better taxicab availability.

[195] The amount the plaintiff earned each shift is a matter of disagreement. The plaintiff argues he would have earned \$708 a shift, which he says is his average per-shift net earnings in 2018. In his testimony, he said he earned \$600 to \$700 a shift.

[196] The defendant criticized the quality of the plaintiff's record-keeping in terms of his taxi-related expenses and urged the Court to draw an adverse inference against the plaintiff on this issue. He argues this aspect of the plaintiff's loss ought to be

assessed on the basis of a \$26 hourly wage (as shown in a printout from a government webpage) and 250 hours of lost work in 2019.

[197] It is true that the plaintiff's record of his taxi-related expenses is perhaps as simple as it could possibly be, insofar as it consists merely of a single piece of notepaper (which he said he gave to his accountant), with total figures for lease costs (\$3,800) and other expenses (\$813.31), but with no other expense-related detail. However, there was certainly no incentive for the plaintiff to incorrectly or perhaps even falsely under-report his expenses because the information on this note generated the net income figure that he reported for income tax purposes. This gives the figure at least some element of reliability. It is also consistent with the plaintiff's testimony. I see no proper basis for drawing an adverse inference against the plaintiff in these circumstances. I also note it was always open to the defendant to lead evidence as to the improbability of the figures put forward by the plaintiff.

[198] I place no weight on the website page the defendant put to the plaintiff's economist, Mr. Wickson, showing hourly wages for Lower Mainland taxi and limousine drivers, with \$26 per hour shown as the high end. Mr. Wickson noted that this was hourly rate survey information only (and it is important to note the plaintiff was not paid in that fashion) and it would not take into account gratuities or hours worked. He testified that, for those reasons, the webpage was not "useful information". I agree with that observation.

[199] Although the evidence of the plaintiff on the matter of his taxi-related expenses and net taxi income lacks underlying detail, I accept it is a sufficiently reliable basis on which to assess a reasonable amount for this part of the plaintiff's loss. Rounding the per-shift net earnings figure to \$700, I find the plaintiff's pretrial loss from taxi work to be \$58,800 (84 shifts x \$700).

Financial Advisor Work

[200] As already noted, I accept that the plaintiff's accident-related injuries left him less able to attend to his work as a financial advisor. He was less able to identify and meet new clients, market to existing clients, and engage and train financial

agents under him, and so there is a likely loss here. However, I conclude the plaintiff would have also been hampered at least somewhat in that line of work as a result of the broken ankle he suffered on November 21, 2019, because he was less mobile and less able to meet with clients.

[201] I begin the quantification analysis by listing the plaintiff's sources of income, including his gross and net income from his work as a financial advisor, as shown in the following table ("FA" indicating figures relating to his work as a financial advisor):

	Vet. Affairs	FA - Gross	FA - Net	Taxi - Gross	Taxi - Net
2014	\$49,920	\$8,066	(\$434)		
2015	\$52,887	\$11,356	–		
2016	\$57,370	\$16,127	\$8,047		
2017	\$60,311	\$14,252	\$259		
2018	\$58,782	\$28,205	\$509	\$20,189	\$15,076
2019	\$61,105	\$32,042	\$11,851		
2020	\$63,649	\$30,390	\$9,525		
2021	\$72,708	\$35,245	\$12,395		

[202] The plaintiff says that, but for the accident, he would have earned \$50,000 per year from his financial advisor work. For his part, the defendant notes the paltry net earnings from this source in the two years prior to the accident and notes the plaintiff's revenues actually increased after the accident.

[203] The plaintiff did not explain the wide variance between revenue and net income in 2018 and 2019, and did not provide expense detail in any of the years. There was also no expense detail in his income tax returns, which is surprising given that an income statement (income tax form T2125–Statement of Business Activities, or an equivalent document), is usually part of an income tax return for a self-employed person. The absence of this information makes it very difficult to assess the loss here.

[204] I do not accept the plaintiff would have had net earnings of \$50,000 but for the accident as the foregoing table shows that his net earnings have never exceeded \$12,000, approximately. I accept it is possible he might have had *revenues* in the \$50,000 range, but of course it is the plaintiff's net earnings that are relevant in terms of financial loss. The plaintiff suggests that the net income figures are merely the result of his accountant's ingenuity and do not reflect the actual income he received, but in the absence of evidence to the contrary, I conclude that I ought to assume the accuracy and legitimacy of the expenses claimed.

[205] While I am satisfied that the accident had an impact on the plaintiff's revenues, specifying a number is very difficult as the assessment is necessarily speculative. I am unable to put much, if any, weight on the plaintiff's confident statement of his likely revenues, which he equated to his actual income. Doing the best I can on the basis of the limited evidence available, I hazard the view that he would have had revenues of \$40,000 in 2019 and 2020, \$50,000 in 2021, and \$20,000 in 2022 to the date of trial.

[206] In coming to those figures, I have considered: (1) but for the accident, the plaintiff would have had increased revenue in 2019, though he would have been hampered as of November 21, 2019 due to his ankle injury; (2) his impaired mobility, and thus his ability to meet people, would have continued through July 2020 due to his ankle injury; (3) as Mr. Sihota testified, 2020 and 2021 were very good years for the company and so the figure for 2021 should be higher, with 2020 held at the same level due to the ankle injury; and (4) business settled back down somewhat in 2022, but because of the trial it is only a partial year.

[207] Assuming the plaintiff's actual revenues to the date of trial in 2022 were half of his actual full-year revenues in that year, the cumulative revenue shortfall is about \$34,800 (\$8,000 in 2019, \$9,600 in 2020, \$14,800 in 2021 and \$2,400 in 2022).

[208] Against those revenues there must be a deduction for expenses. Given the wide variation between the gross and net figures, the best that I can do is take an average. Over the years listed, the plaintiff's cumulative net earnings (\$42,152,

which also reflects the one year with a loss) have been 24 percent of his cumulative revenues (\$175,683). Applying that same proportion to his revenue shortfall results in a total loss of net income of \$8,352 (.24 x \$34,800), or \$8,400, rounded.

[209] I assess the plaintiff's past loss of income at \$67,200 (\$58,800 + \$8,400).

C. Loss of Future Earning Capacity

Legal Principles

[210] For convenience, I set out the principles relating to the loss of future earning capacity as summarized in *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258, a summary that has been quoted in other cases:

[129] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring – see the discussion in *Dornan* at paras 93-95.

[Emphasis in original.]

[131] *Rab* states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [*Brown*]. The questions are whether:

- 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- 2) The plaintiff is less marketable or attractive as an employee to potential employers;
- 3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- 4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[132] In considering the second and third steps set out in *Rab*, 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, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. See also *Dornan* at paras. 93-94.

[211] From both the medical evidence and the evidence generally, it is clear the plaintiff meets all the *Brown* factors. However, I bear in mind that while physical jobs, for example, are now foreclosed to the plaintiff, he was never going to do very physical work.

[212] I turn next to the question: whether there is a real and substantial possibility the plaintiff's accident-related injuries will cause a pecuniary loss. I am satisfied they will cause a pecuniary loss from his work as a taxi driver and as a financial advisor, but the risk to his employment with Veterans Affairs stands on a different footing.

Veterans Affairs

[213] I will first address the plaintiff's Veterans Affairs employment. I conclude it is highly unlikely that the plaintiff's accident injuries will cause a pecuniary loss in future. The plaintiff suffered no identifiable loss associated with that job during the four-year post-accident period. His employer has accommodated him in the past and will, to the point of near-certainty, accommodate him in future. The only real issue here is whether my conclusion about future pecuniary loss being "highly unlikely" means there is still a real and substantial possibility of a pecuniary loss.

[214] The plaintiff grounds this aspect of his claim on Dr. Ganesan's mention of the plaintiff being at "high risk of losing his job". That is a very selective and thus somewhat misleading excerpt from Dr. Ganesan's report. This is the full passage:

It is not possible to expect that he will become symptom-free, but with appropriate treatment and his determination to try to maintain his work he will put in a lot of effort to continue attending rehabilitation treatment, pain treatment, and continuing with his job, but he will likely need to have his job modified as currently provided by his employer. If he is exposed to further psychosocial stressors, his emotional difficulties will become aggravated, which would affect his physical condition, as is already happening now because of increased work pressure. This will put him at high risk of losing his job or of not performing appropriately at work, which will affect his level of function and would likely affect his ongoing contract.

There is no possibility of his returning to driving a taxi as he did before the accident. It is fortunate that he has been able to maintain his full-time job, but he is at continuous risk of not performing appropriately.

[Emphasis added.]

[215] First, the underlined phrase says "if he is exposed to further psychosocial stressors". That is a big "if". Dr. Ganesan then speaks of two different consequences, "losing his job" and "not performing appropriately at work", mentioning the latter twice. From a mental health perspective, his difficulties at work are associated with his having to deal with veterans who are facing some of the same issues he faces, yet he has never reported that to his employer or sought any accommodation for it. I conclude the plaintiff is in a position to effect changes that would mitigate his workplace psychosocial stressors, which would address Dr. Ganesan's "if" scenario. Any other potential psychosocial stressors that might arise appear to be entirely speculative.

[216] In his testimony, the plaintiff expressed the view that his injuries were the real reason he had failed to advance within Veterans Affairs. He offered no evidence to support that belief, other than his own beliefs or suspicions. I note that he was also unsuccessful in several applications he made within the federal public service prior to the accident. I do not accept that the plaintiff's failure to advance in his current employment is related to the injuries he suffered in the accident.

[217] I acknowledge that the plaintiff testified about a pre-accident employment application he made to the CBSA, an application he says was unsuccessful because he failed to pass the necessary security clearance. He said this career would no longer be open to him as he could no longer pass the physical examination. However, in submissions, the plaintiff said that, but for the accident, he would have continued working at Veterans Affairs. He made no submission that there was a lost opportunity to work at the CBSA which, it appears, may have involved a somewhat higher salary.

[218] Although the plaintiff made no submission about any loss associated with this potential opportunity, I will deal with it out of an abundance of caution. There are two key points. First, the plaintiff did not pass the security clearance. Although he had challenged that decision through a grievance procedure and, at trial, gave reasons why he thought the decision ought to be overturned, it is very difficult to assess whether he would have, or will, overcome that impediment. Second, the intervening workplace injuries appear to be significant enough in themselves to have at least potentially prevented the plaintiff from passing the necessary physical examination. There is no evidence specific to this point and so no conclusions can be drawn here. The question comes down to whether the plaintiff has proven a real and substantial possibility of a future pecuniary loss associated with this potential event. I conclude he has not.

[219] Following careful consideration of these issues, I conclude the plaintiff has failed to demonstrate there is a real and substantial possibility that his accident injuries will cause him pecuniary loss associated with his job at Veterans Affairs.

Taxi Driving

[220] I previously quantified the plaintiff's pretrial loss of taxi income at \$18,900 per year (27 shifts per year x \$700 per shift). I conclude this is also the proper basis for the assessment of the future loss associated with taxi driving. The multiplier to age 70 is 9.771, which brings about a present value total of \$184,672.

[221] One substantial contingency – non-participation in the labour force – is already reflected in that multiplier. I do not accept the defendant’s submission that there should be a 50 percent reduction for workplace injuries and a further 10 percent deduction for pre-existing issues. The workplace injuries, once healed, do not appear to be the type of injuries that would interfere with the ability to drive a taxi. I accept that the plaintiff’s pre-existing occasional back problems and problems with mood would have made it more likely he would miss occasional shifts, and so I consider it reasonable to reduce the present value figure by five percent. The net amount is therefore \$175,438 ($.95 \times \$184,672$), which I round to \$175,500.

Financial Advisor

[222] I previously quantified the pretrial portion of this loss at \$8,400, which covered a 44-month period. This translates to about \$2,300 per year. Using the same multiplier (9.771) and the same deduction for pre-existing issues (five percent) the present value of the future loss associated with this line of work is \$21,350.

[223] The total award for loss of future earning capacity is \$196,850 ($\$175,500 + \$21,350$).

D. Cost of Future Care

[224] In his written submissions, the plaintiff argued that he will need 52 physiotherapy sessions and 52 massage therapy treatments each year. In oral submissions, this was reduced to 12 treatments per year. Dr. Giantomaso recommended passive therapies “on occasion to address flare-ups” and, based on that recommendation, I conclude 12 sessions per year of some sort of passive therapy is appropriate. At \$90 per session (based on past cost, rounded), this is \$1,080 per year, with a present value lifetime cost of \$23,245. I expect that the plaintiff would have needed this sort of treatment on an occasional basis had the accident not occurred, so I reduce this sum by five percent, for a net amount of \$22,100, rounded.

[225] Dr. Giantomaso recommended an ergonomic assessment for the plaintiff's workstation at Veterans Affairs, but this has now been done. I see no reason to have such an assessment also performed at the plaintiff's home as any need for ergonomic changes to his home office should now be fairly apparent.

[226] Dr. Giantomaso also recommended further active rehabilitation, a minimum of 16 to 24 sessions, an item of care that the defendant did not oppose. I take the midpoint (20 sessions), the cost for which (at \$90 per session) is \$1,800.

[227] Dr. Ganesan recommended cognitive-behavioural therapy and certain medications. He recommended an initial 25 therapy sessions, with follow-up sessions once a month after that for one or two years. Again taking the midpoint (18 months), this means a total of 43 sessions. At \$200 per session for a higher-level counsellor, the total is \$8,600.

[228] Dr. Ganesan also recommended marital counselling, but I note this has already taken place.

[229] Dr. Ganesan recommended the plaintiff take psychotropic medications for two or three years, though he noted the plaintiff was averse to taking this sort of treatment. The plaintiff did not provide evidence of the cost of this medication. Dr. Giantomaso recommended a trial of neurogenic pain medication, the cost of which was \$165 per year, with a present value lifetime cost of \$3,582. The plaintiff also claimed \$50 per year for over-the-counter pain medication.

[230] Given the evidence of the plaintiff's medication reluctance, I conclude that it is unlikely the plaintiff will continue with the psychotropic medications recommended by Dr. Ganesan beyond a trial period. The neurogenic pain medication may or may not work, as it is not known whether the plaintiff's neck and back pain are neurogenic in nature.

[231] In these circumstances, I consider it best to make a global award that reflects the positions of the parties, the likelihood the cost will actually be incurred and the

relatively small cost that would have been incurred in any event due to occasional low back pain. I assess medication costs at \$4,000.

[232] The total of the allowed items is \$36,500.

E. In-trust Claim

Legal Principles

[233] In *Bradley v. Bath*, 2010 BCCA 10, the Court of Appeal said:

[43] An in-trust award is one made to a plaintiff in trust for one or more of his or her family members, who are not named as parties to the action, as compensation to the family members for additional work done by them as a result of the impaired capacity of the plaintiff to perform housekeeping chores or to care for themselves. It was affirmed as a recoverable award by this Court in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.).

...

[49] The principle recognized in *Kroeker v. Jansen* is that an in-trust award is to compensate for a diminution in the ability to carry out household tasks (even if those tasks are performed gratuitously by a family member). As illustrated in *Cummings v. Olson* (1996), 82 B.C.A.C. 241, this Court will set aside an in-trust award if there is no foundation in the evidence for such an award.

[234] In *Dykeman v. Porohowski*, 2010 BCCA 36, the Court of Appeal said:

[28] Since *Kroeker*, it has been settled law in this province that “housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family.” In *Kroeker*, such recovery was allowed under the heading of ‘loss of future ability to perform household tasks’, but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., *McTavish v. MacGillivray*, 2000 BCCA 164 at paras, 43, 51-7, *per* Huddart J.A.; *West v. Cotton* (1995) 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and *Campbell v. Banman* 2009 BCCA 484. The reasoning in *Kroeker* has been extended beyond “spousal” services to services rendered by other members of a family: see *Boren v. Vancouver Resource Society*, *Dufault*, *McTavish v. MacGillivray*, *Bystedt v. Hay*, all *supra*. Such awards are colloquially referred to as “in trust” even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see *Feng v. Graham* (1988) 25 B.C.L.R. (2d) 116 (C.A.) at 9-10; *McTavish*, *supra*.

[Emphasis in original.]

[235] Finally, in *Bystedt v. Hay*, 2001 BCSC 1735, rev'd on other grounds 2002 BCCA 634, the Court listed a number of factors for consideration when assessing in-trust claims:

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[236] From the evidence, I am satisfied Ms. Jalai-Ghadri is now bearing more of the household duties than before. She now does the heavier tasks in the home that were formerly done by the plaintiff, and she does the activities with the children and is the primary driver in the family. Although she has attempted some outside work, she testified that it just does not get done anymore. She feels overwhelmed and burnt out.

[237] Although the defendant argues that Ms. Jalai-Ghadri has merely done what would be expected of a family member, I am satisfied she has done more than that and, moreover, she has suffered somewhat in attempting to do it all.

[238] I am satisfied that an award of \$20,000 is appropriate in the circumstances.

F. Special Damages

[239] As noted earlier, the parties have agreed on special damages at \$10,000.

VII. Conclusion

[240] I assess damages in this matter as follows:

Non-pecuniary damages:	\$110,000
Past loss of earning capacity (gross):	\$67,200
Loss of future earning capacity:	\$196,850
Cost of future care:	\$36,500
In-trust award	\$20,000
Special damages:	\$10,000
Total:	\$440,550

[241] Court order interest applies to the pecuniary awards. The parties have leave to address any matters necessary to finalize the award.

[242] Unless there are matters the parties wish to raise on the issue of costs, the plaintiff will have costs.

“Blok J.”