IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pruett v. Robert,*
2023 BCSC 49

Date: 20230111
Docket: M1813309
Registry: Vancouver

Between:

Thomas Andrew Pruett

Plaintiff

And

Yvon Robert and Teresa Jane Wagner

Defendants

Before: The Honourable Justice Majawa

Reasons for Judgment

Counsel for the Plaintiff:	N. Hartney F. Balandari
Counsel for the Defendants:	A. Gangji U. Urosevic
Place and Dates of Trial:	Vancouver, B.C. August 8-12, 15-19, and 22-25, 2022
Place and Date of Judgment:	Vancouver, B.C. January 11, 2023

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INTRODUCTION

[1] The plaintiff, Thomas Pruett, was involved in a highway speed rollover motor vehicle accident on May 1, 2018, (the "Accident"). The other vehicle involved in the Accident was driven by the defendant, Yvon Robert. The other defendant is Teresa Jane Wagner, the owner of the vehicle driven by Mr. Robert. Liability and damages are at issue.

[2] Mr. Pruett claims that as a result of the Accident, he suffered multiple injuries to his shoulders, neck, and back that have caused ongoing chronic pain and functional limitations. He also claims that the Accident caused a serious psychological injury. Mr. Pruett claims that his physical and mental health injuries have significantly impacted his life in every respect. He seeks damages for pain and suffering, loss of earning capacity (both past and future), special damages, and the cost of future care.

[3] I have determined that Mr. Pruett and Mr. Robert were equally at fault for the Accident. I have quantified Mr. Pruett's damages as being $648,868[1]. These damages are to be reduced by 50% in light of my conclusion with respect to liability. Consequently, Mr. Pruett is entitled to a total award of $324,434. The following reasons detail my determination of liability and the quantum of damages in this personal injury action.

CREDIBILITY OF THE PLAINTIFF AND LAY WITNESSES

[4] The Court heard evidence from the plaintiff and a number of lay witnesses called on his behalf including his wife, Tanya Pruett, and former co-workers or individuals that Mr. Pruett has been involved with as part of his career as a fence builder, or fencer, over the years. The defendants tendered evidence from a number of lay witnesses including the defendant, Mr. Robert. The defendants also called a

[1] The total amount awarded is an approximation because the award for loss of past earning capacity is a gross award and is subject to applicable deductions.

number of others involved in the fencing industry who had worked with Mr. Pruett in the past.

[5] The defendants suggest that Mr. Pruett's evidence was rife with credibility and reliability concerns such that I should not rely upon his evidence absent independent corroboration. They argue that Mr. Pruett exaggerated his injuries and was evasive and defensive in his testimony.

[6] Given the nature of the soft tissue injuries that Mr. Pruett claims to have suffered, his self-reported symptoms are integral to the determination of the issues before me, and consequently, his credibility and reliability are squarely at issue. Furthermore, given that liability is at issue, the credibility and reliability of the plaintiff, the defendant, and the third-party witness to the Accident must also be assessed in that context. While the principles are the same, I will discuss my findings with respect to the witnesses' credibility and reliability in respect of the Accident during my discussion of liability later in these Reasons.

[7] The assessment of reliability and credibility involve different concepts. Justice E. McDonald succinctly summarized the approach in *Liu v. Keurdian,* 2022 BCSC 1334 at para. 8:

> … As explained in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (Ont. C.A.) at 526 [*Morrissey*], credibility refers to the veracity of a witness's testimony, while reliability is concerned with the accuracy of the testimony based on the ability of the witness to observe, recall and recount the events. A witness who is not credible cannot give reliable evidence on the same point. Further, credibility does not equate to reliability which means that a credible witness may give unreliable evidence: *R. v. H.C.*, 2009 ONCA 56 (Ont. C.A.) at para. 41, citing *Morrissey*, at 526.

[8] Given the nature of Mr. Pruett's reported injuries, I am mindful of the comments made by Chief Justice McEachern (as he then was) in *Price v. Kostryba*, 70 B.C.L.R. 397 at 4, 1982 CanLII 36 (S.C.), with respect to the approach to be taken in cases such as this:

> In *Butler v. Blaylock*, decided 7th October 1980, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a

> plaintiff in actions for damages for personal injuries, because complaints of pain cannot easily be disproved. I then said:
>
> > "I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > "An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury."

[9] However, I am also mindful of this Court's decision in *Rabiee v. Rendleman,* 2015 BCSC 595, in which Justice Sharma considered the above passage and stated:

> [65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."
>
> [66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendant's negligence on a balance of probabilities. I have concluded that Ms. Rabiee has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.

[10] I have considered the often-cited factors summarized by Justice Dillon in *Bradshaw v. Stenner,* 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, in assessing the credibility of the plaintiff and the other lay witnesses and determining whether I will accept all, some, or none of their evidence: *Currie v. Taylor,* 2014 BCCA 51 at para. 33. The factors at para. 186 of *Bradshaw* include:

> …the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether

> the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally [citations omitted]. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[11] I do not agree with the defendants that Mr. Pruett is neither credible nor reliable in respect of his evidence of the nature and extent of his injuries and their effect on his life. Mr. Pruett's evidence was consistent in direct and cross examination and there were no inconsistencies between evidence provided at trial and evidence provided at his examination for discovery.

[12] I do not find the surveillance videos tendered by the defendants to be inconsistent with Mr. Pruett's reported injuries. Those videos depict Mr. Pruett engaged in yard work with his children, shoveling snow, and walking his dog. Mr. Pruett was forthcoming to various medical practitioners about his participation in these types of activities prior to becoming aware that the videos existed. Importantly, there is nothing in the evidence to indicate that Mr. Pruett's description of the effect of engaging in these activities is not credible nor reliable. The same can be said for the difference in his reported change in ability to engage in these types of activities before and after the Accident. While the defendants suggested that the rocks Mr. Pruett was moving to a wheelbarrow with his children were very heavy, there is no direct evidence of the weight of the rocks other than Mr. Pruett's evidence. Brandon Wanner, the private investigator who recorded the surveillance videos, including the video of Mr. Pruett shovelling snow in his driveway on December 31, 2020, testified that he cleared snow that morning at his own residence in Kelowna and that it was "heavy". However, Mr. Wanner does not live in Vernon and did not quantify what he meant by "heavy". Therefore, the only evidence before me in respect of the weight of the snow being shovelled at Mr. Pruett's residence in Vernon on the date in question is Mr. Pruett's testimony which was that the snow on that day was much lighter than the snow that usually falls in the Lower Mainland, due to the colder temperatures.

[13] Moreover, I accept Russell McNeil's evidence in respect of Mr. Pruett's demonstrated limitations during these activities. As will be discussed later, Mr. McNeil is an occupational therapist who was qualified to give expert evidence in this trial. In response to questions posed to him by counsel for the defendants during cross-examination, Mr. McNeil described how he had carefully reviewed the surveillance videos that were tendered by the defendants in this trial. In his opinion, Mr. Pruett demonstrated limited range of motion in carrying out the activities in the videos and demonstrated various behaviours consistent with someone who is guarding and or compensating for injuries consistent with those reported by Mr. Pruett. Dr. William Regan, an orthopedic surgeon qualified to give expert testimony in this trial, and Dr. Raphael Chow, a physiatrist also qualified to give expert testimony in this trial, both reviewed the videos and neither found Mr. Pruett's activities to be inconsistent with this reported shoulder injury.

[14] Contrary to the submissions made by the defendants, I do not find that the voluminous amount of clinical records that the plaintiff was taken to during cross-examination are inconsistent with his testimony. In fact, these clinical records generally support Mr. Pruett's evidence that his symptoms have waxed and waned during the years since the Accident. Thus, the fact that he occasionally reported that he was feeling better on some days than others is not an indication of unreliability or a lack of credibility. To the extent that there were inconsistencies, I find that they are minor and not surprising given the number of clinical visits that Mr. Pruett has had since the Accident: *Edmondson v. Payer,* 2011 BCSC 118 at paras. 34-35.

[15] I do not find Mr. Pruett's claims of pain to be entirely inconsistent with his ability to do certain types of work following the Accident. Mr. Pruett has never claimed to be completely incapacitated nor has he said he was incapable of doing certain things. Rather, he has limitations compared to his pre-Accident function. Moreover, by all accounts, Mr. Pruett had extraordinary strength before the Accident, likely owing to his employment in the fencing industry, his interest in fitness, and/or his genetic predisposition. It is not surprising that he can engage in activities after the Accident, albeit while in pain, that others might not be expected to.

[16] In general, I found Mr. Pruett's testimony to be "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Bradshaw* at para. 186. I do, however, have some concerns that Mr. Pruett tends to slightly exaggerate the effects of his injuries on his ability to engage in his previous occupation of fence building.

[17] In particular, while Mr. Pruett did tell his post-Accident employer at Boundary Fencing ("Boundary") that he had some injuries that would affect his ability to work, his written application for employment did not reflect the level of injuries that he testified to having. Mr. Pruett explained that he understood the questions on the employment application about pre-existing injuries to only be referring to those injuries caused by long repeated periods of strenuous physical labour and not referring to injuries caused by a motor vehicle accident. As he is of the view that his injuries were caused by a motor vehicle accident, he did not indicate he had any such injuries on the written employment application. In my view, this is not a reasonable interpretation of the questions posed on the employment application and Mr. Pruett's explanation for his omission simply does not make sense. Moreover, Mr. Pruett seems to have exaggerated the role his injuries played in his decision to leave that employment at Boundary. Lee Munsey is the owner and operator of Boundary. I accept Lee Munsey's testimony that Mr. Pruett left only two weeks earlier than he had planned to and that he and Mr. Pruett did not have a long conversation about his functional limitations before Mr. Pruett was offered employment, which is inconsistent with Mr. Pruett's testimony.

[18] While I have approached Mr. Pruett's evidence with some caution for the reasons stated above, I do not find that the evidence supports the defendants' contention that his ability to work and enjoy life before the Accidents was any different than he testified to. In particular, Mr. Pruett's description of his psychological injuries is consistent with the other evidence I have accepted.

[19] With two exceptions, I found the evidence of the lay witnesses called by both parties to be credible and reliable. I do not find Todd Corbett to be a credible or

reliable witness and have given his evidence very little weight. Mr. Corbett was the plaintiff's former business partner. He was argumentative and evasive during cross-examination. He stated that he did not have knowledge of certain matters which, as the business's owner, he should have reasonably had. He was unable, or unwilling, to answer questions that involved specific dollar amounts or dates. He testified to not knowing the profits of the company of which he was the principal shareholder and a day-to-day operator. It was clear that Mr. Corbett did not want to answer questions about the business that he felt were irrelevant, even after being instructed to answer questions being put to him unless the Court told him he did not have to.

[20] Mr. Corbett clearly holds animosity for his former business partner and this appears to have tainted his testimony. It was simply not believable that Mr. Pruett's work performance after the Accident did not affect the company's bottom line; Mr. Pruett was being paid the same amount he was being paid before the Accident in circumstances where he was doing very little work for the company. While I accept that the business relationship had soured, and as will be discussed later I find that it would not have lasted another 10 years if the Accident had not happened as Mr. Pruett argues, Mr. Corbett exaggerated the level of discord. Mr. Corbett's evidence of Mr. Pruett being deficient in his fence building capabilities is contrary to that of many other witnesses and I do not accept this evidence. Where Mr. Pruett and Mr. Corbett's evidence conflicts, I prefer Mr. Pruett's.

[21] Also troubling is that, despite my making an order excluding witnesses from observing the proceedings if they had yet to testify, Mr. Corbett was present during the testimony of Angela Schick. Ms. Schick is a current employee of Mr. Corbett's and worked with both Mr. Corbett and Mr. Pruett when they were business partners. Ms. Schick gave her evidence remotely by way of videoconference. During her cross-examination, it became apparent that there was someone else in the room with Ms. Schick who was providing some sort of guidance to her when she was being asked questions about the company's finances. When confronted, Ms. Schick, who had apparently not been made aware of the exclusion order, acknowledged that

Mr. Corbett, who had yet to testify, was in the room with her. When Mr. Corbett testified, he denied having made any comments during Ms. Schick's testimony even though his interruption was clearly audible to those in the courtroom. Had his interruption not been audible, the Court would not have known that he was present. In the circumstances, I am unable to determine how much Ms. Schick's testimony was influenced by Mr. Corbett's presence and guidance. Given my concerns with Mr. Corbett's credibility, and the fact that Ms. Schick is still employed by Mr. Corbett, I give both of their evidence very little weight.

FACTS AND SUMMARY OF EVIDENCE

The Plaintiff, the Accident, and the Injuries

[22] Mr. Pruett grew up in Cloverdale, BC. He was 51 years old at the time of trial. He married his wife, Tanya Pruett, in 2006. They have two sons who were teenagers at the time of trial. Mr. Pruett and his family lived in the Lower Mainland until October 2020 when they moved to Vernon where they resided at the time of trial.

[23] Mr. Pruett was in good health prior to the Accident. He described himself as having an "elite health and fitness personality". He suffered a minor shoulder injury while on the job in 2017. Other than the few hours he missed that same day, he did not miss any work as a result of that injury and I find that it had completely resolved within a few weeks. While imaging done after the Accident indicated that Mr. Pruett has some osteoarthritis in his shoulder and some degenerative disc disease in his back which pre-dated the Accident, neither of these were symptomatic.

[24] The Accident occurred on May 1, 2018, when Mr. Pruett was 47 years old. He was driving a Ford F-150 westbound on Highway 1 on his way to work early in the morning. The circumstances of the Accident will be discussed in detail during my consideration of liability. It is uncontested that Mr. Pruett's vehicle was involved in an incident with a vehicle driven by the defendant, Mr. Robert, resulting in Mr. Pruett's truck going off the road at highway speed, rolling, and coming to rest in a ditch. Mr. Pruett's truck was severely damaged; all of the airbags deployed and a passerby had to break a window in order to extricate Mr. Pruett. The insurer concluded that

Mr. Pruett's truck was a complete write-off. The vehicle Mr. Robert was driving was also written-off, although it did not roll over and the damage it sustained did not appear to be as severe as that of Mr. Pruett's.

[25] Mr. Pruett was taken to the hospital in an ambulance and was there for approximately 12-14 hours before he was released. He was in a significant amount of shock following the Accident and recalls first noticing significant pain related to the Accident in the days immediately following. Mr. Pruett first experienced significant pain in his lower and mid back, left shoulder and neck. While his left shoulder was originally worse, his right shoulder became painful in the months following. As time has gone on, his right shoulder has become much worse than his left shoulder and is one of the predominant areas which he continues to experiences pain.

[26] Mr. Pruett reports having bad headaches for the first two to three years following the Accident but says that he has not experienced Accident related headaches for approximately one year. While his left shoulder injury has not completely resolved, it has improved since the Accident and it is not as painful as the right shoulder is. Similarly, his neck pain has also improved over time, although it is still symptomatic.

[27] While he experiences pain on a daily basis, Mr. Pruett describes his physical injuries and the pain he has experienced as being like a roller-coaster. His pain can fluctuate from being near a 10 out of 10, which he describes as being in agony, to being a three to five out of 10, which he describes as being manageable but still painful. The pain, particularly his shoulder pain, negatively affects his sleep. At the time of trial, he testified that he averaged less than four hours of sleep per night in the years since the Accident and just recently started to sleep more than four hours in one night.

[28] At times, Mr. Pruett's pain is exacerbated by activity and at other times there does not appear to be an explanation for why his pain worsens or improves. It appears that Mr. Pruett had made some relative improvement by fall 2021 but he regressed again following his return to fencing.

[29] As will be discussed later, the injuries, pain, and related limitations have significantly affected Mr. Pruett's work, recreational activities, and his mood. Although he admits to being a somewhat passionate and moody person before the Accident, he was generally a happy person who was able to deal with work and personal stress by exercising. He had no mental health concerns prior to the Accident. Since the Accident, he describes his mood as being hopeless and depressed. He is constantly "miserable" and is always unhappy. He has had thoughts of suicide which his wife was aware of even though he has tried to keep this from his family.

[30] Mr. Pruett's symptoms have impacted the relationship he has with his wife and his children. He is unable to participate in many of the sports that he is passionate about with his children and he and his wife are less intimate than they were before the Accident due to Mr. Pruett's pain.

Recreational Activities

[31] Mr. Pruett describes himself as being obsessed with health and fitness prior to the Accident. He testified that he was somewhat socially awkward in high school and used sports as his outlet. He was introduced to weightlifting while in his twenties and became "addicted" to it. He attended the gym to lift weights five to six days per week for approximately 15 years leading up to the Accident. He testified to being able to bench press more than 250 pounds. He also regularly participated in endurance activities such as hiking for 35 km and more than nine hours in challenging terrain in one day. Mr. Pruett was a high-level football player when he was younger and he became very proficient in martial arts in the years leading up to the Accident.

[32] Mr. Pruett was, and continues to be, very health conscious. He is very conscious of what he eats and does not eat pre-processed foods. He takes some supplements such as protein powder and glutamine but does not take any illegal substances such as steroids. He rarely goes out to eat and he does not smoke.

[33] I have no hesitation in finding that Mr. Pruett's exercise routine and physical abilities were a core part of his identity prior to the Accident. I also have no trouble in finding that Mr. Pruett's injuries have significantly affected his ability to participate in the recreational activities that were such a central part of his life before the Accident.

[34] Consistent with the recommendations of his practitioners, Mr. Pruett has remained active since the Accident but he has not been able to return to anywhere near his pre-Accident level of activity. He no longer lifts weights; instead he focusses on pain management and uses rubber bands to perform exercises that his practitioners have taught him. He walks and goes on short hikes but now these amount to less than an hour in duration and less than a few kilometers of distance. He no longer participates in martial arts. Although his sons play football, Mr. Pruett is unable to participate; his shoulder injury is such that he cannot even throw the ball.

Employment

[35] Mr. Pruett graduated from high school in 1989 and he has not obtained any post-secondary education. After a few years in a meat cutting operation, Mr. Pruett obtained employment in the construction industry. He was engaged in what I understand to be a carpentry apprenticeship in his early twenties, but it is not clear to me how far he progressed in that role. For a period of time following his work as a carpenter, he was a salesperson for a health and wellness company selling natural products.

[36] Mr. Pruett began working in the fencing industry in the early 2000s. As far as I understand it, Mr. Corbett, whom Mr. Pruett had known in high school, first offered Mr. Pruett employment as a sub-contractor. In or around 2005, Mr. Corbett, Mr. Pruett and two other individuals incorporated Streamline Fencing ("Streamline") which focussed on the installation of chain-link commercial fencing. Mr. Pruett's role with Streamline included meeting customers, bidding on jobs, and ordering materials. However, it seems that Mr. Pruett's focus was on supervising the two-to-three-person crews and doing much of the construction/installation work himself.

Mr. Corbett's role was focussed on the office-side of the business including sales and communicating with clients.

[37] Streamline developed into a successful business and was one of a handful of commercial chain-link fencing companies that did work for large clients such as BC Hydro and various correctional facilities. Mr. Pruett frequently travelled across the province and into Alberta in his role with Streamline.

[38] This installation of the chain-link fencing that Mr. Pruett spent so much of his time doing is very physically demanding work. Teams consist of two to three people and supervisors are a part of the crew doing the physical labour. While machines are sometimes used to assist, the work often requires significant manual labour such as digging hundreds of holes in which to set the fence posts, moving concrete via wheelbarrows, and moving posts and other fence parts which can weigh between 50 pounds and in excess of hundreds of pounds, over long distances and hard to access locations. Mr. Pruett described himself as being very strong compared to others doing the same work; he would lift double or more what others would. Trystan Richardson, an employee at Streamline who worked with Mr. Pruett, described him as being extremely strong and as a great mentor. Andrew Bratowski, the head of one of Streamline's main materials suppliers, also observed Mr. Pruett demonstrate what appears to be extraordinary strength. He also described Mr. Pruett's work as being excellent. By all accounts, Mr. Pruett had extraordinary strength prior to the Accident.

[39] Since approximately 2014, Mr. Pruett's annual salary from Streamline was $125,000. In or around 2015, Mr. Pruett and Mr. Corbett obtained a loan and bought out Streamline's two other shareholders. Following their departure, Mr. Corbett had 60% of Streamline's shares and Mr. Pruett had 40%. At some point, Mr. Pruett and Mr. Corbett came to an agreement that they would continue to receive their salaries even if they were unable to work for some reason.

[40] Following the Accident, Mr. Pruett was unable to meet the physical demands of his role at Streamline due to his injuries. Former co-workers who testified said that

he was a different person after the Accident than he was before, both in terms of his physical ability and his mood. However, consistent with their agreement, Mr. Pruett continued to receive his $125,000 per year salary.

[41] Mr. Pruett's and Mr. Corbett's relationship deteriorated. In March 2020, the two came to an agreement in which Mr. Pruett's interest in Streamline would be bought out in exchange for a lump sum payment to be made over the course of four years. The reasons why Mr. Pruett ultimately left Streamline are disputed. Mr. Pruett maintains that Mr. Corbett initiated the buyout because of performance and attendance related concerns following the Accident. He felt blindsided given the amount of time and effort he had put into building what had become a successful company. On the other hand, Mr. Corbett says that Mr. Pruett's departure was inevitable regardless of the Accident. He testified that he had contemplated ending the business relationship with Mr. Pruett years before the Accident and had a lawyer draft a letter to Mr. Pruett in this respect. However, he did not produce this letter, and given my concerns with his credibility, I have significant doubt that he had prepared such a letter.

[42] There is, however, evidence that I accept that supports that the business relationship was deteriorating before the Accident and would not likely have continued until Mr. Pruett was 60 years old as he contends it would. It is clear that the two had different views as to the value of their respective roles in the company and this existed prior to the Accident. It also appears that there was some long-standing friction between Mr. Corbett and Mr. Pruett in respect of the extent to which Mr. Corbett wanted Mr. Pruett to move his focus to office-side work in order to expand the business. This was confirmed by Marion Bohnenschuh, who is a former accounting, administrative and human resources officer for Streamline. Ms. Bohnenschuh left Streamline in 2017 for health reasons, currently resides in Nova Scotia, and does not appear to have an interest in the outcome of these proceedings.

[43] Ms. Bohnenschuh had the opportunity to observe Mr. Pruett and Mr. Corbett's relationship in the years leading up to the Accident. Although Mr. Pruett and Mr. Corbett were sometimes friendly with each other, she testified that their relationship could be very tense for months on end. She described it as a roller coaster and it did not surprise her to find out that Mr. Pruett had been bought out of the company a few years after she left.

[44] Furthermore, it does appear that Mr. Pruett was the subject of a number of complaints by members of the public and some other staff in respect of his behaviour on and off the job site. I accept Ms. Bohnenschuh's testimony that Mr. Pruett's temperament could be aggressive, coarse, and abrasive and that she received complaints from some other employees to this effect. Ms. Bohnenschuh also testified to having received a number of complaints about Mr. Pruett driving aggressively from members of the public. While I did not allow this evidence to be admitted for the purpose of determining whether or not Mr. Pruett was driving aggressively on the day of the Accident, or for the purpose of determining if he was actually driving aggressively on the particular occasions that were the subject of the complaints, I did permit this evidence to be admitted for the fact that the complaints were made and as part of the constellation of factors that describe Mr. Pruett's relationship with Streamline.

[45] Ms. Bohnenschuh testified that the complaints she received were a concern for Streamline's reputation because the vehicle which Mr. Pruett was driving was decaled with the company's name and logo. This is completely understandable and accords with common sense. Although Ms. Bohnenschuh raised a number of these complaints with Mr. Pruett, she did not notice any change in his behaviour on or off the job site.

[46] As part of his separation from Streamline in April 2020, Mr. Pruett was subject to a non-competition clause that prohibited him from working or owning a business in the chain-link fencing industry in the Lower Mainland for four years. Given that

restriction and his injuries, Mr. Pruett and his family relocated to Vernon in October 2020.

[47] Prior to the Accident, Mr. and Ms. Pruett had planned on purchasing and operating a food truck after he retired from Streamline, which he testified would have been at age 60. The couple moved their plans up after he was bought out from Streamline. Mr. Pruett was unemployed from April 2020 until September 2021; during that time, he used the funds he received from the buyout of his Streamline shares to pay for his living expenses and took steps to purchase and modify the food truck. The food truck became operational in April 2022.

[48] In September 2021, Mr. Pruett applied for and obtained employment at Boundary in Vernon, BC. Mr. Munsey was aware that Mr. Pruett had some physical limitations from a motor vehicle accident and that he would need to take some time off to attend treatment appointments. Mr. Munsey hired Mr. Pruett as a foreman despite his injuries because of his considerable experience in the industry and the difficulty in finding such experienced workers. Mr. Pruett was paid approximately $35 per hour and received a premium for overtime.

[49] Unlike Streamline's commercial clients, Mr. Pruett testified that the work he did for Boundary was focussed on residential fencing; however, Mr. Munsey testified that Mr. Pruett worked mostly on agricultural fencing which is less physically demanding than the industrial chain link fencing that Mr. Pruett installed at Streamline. Boundary's employment records show that Mr. Pruett worked nearly full time for periods but missed some days which Mr. Pruett says are due to his injuries, and had to leave early on others. Mr. Munsey recalls that Mr. Pruett would take time off after particularly physically demanding days on the job. The evidence before me supports a deterioration in Mr. Pruett's physical condition that coincides with his return to fencing work.

[50] Mr. Pruett's employment at Boundary ceased in June 2022. Mr. Munsey testified that by spring 2022 he expected Mr. Pruett to work at Boundary until the end of June because Mr. Pruett had told him that he would be operating his food

truck during the summer. Mr. Pruett told Mr. Munsey he was in too much pain to continue and ended his employment two weeks earlier than Mr. Munsey expected. Despite his absences, Mr. Munsey was very happy with Mr. Pruett's work and testified that he would not hesitate to hire him back.

[51] It is not entirely clear to me when Mr. Pruett began to operate his food truck business but it appears to have begun in April 2022 while Mr. Pruett was working at Boundary. Between April 2022 and July 26, 2022, the gross sales from the food truck were approximately $25,000. Mr. Pruett estimates that materials and overhead cost about 43% of gross sales, before any salary is paid to him and his wife who operates the food truck with him. At the time of trial, Mr. Pruett had not returned to work at Boundary, or any other fencing operation. His stated intention was to continue with the food truck operation.

Housekeeping

[52] Little evidence was led on Mr. Pruett's ability to do household chores and yard work prior to the Accident. Ms. Pruett testified that he currently does about 20% of the yard work that he used to do before the Accident. She also testified that he currently tries to do all of the household chores he used to do before the Accident but it takes him longer to complete the tasks and that the family steps up to assist. The clinical records suggest that the completion of some yard work tasks such as shovelling snow and moving gravel would aggravate his physical symptoms and cause Mr. Pruett discomfort in the days following.

[53] I find that Mr. Pruett is capable of completing the household and yard work tasks that he completed prior to the Accidents, although he requires some adjustments and a longer time to complete those tasks.

Treatments

[54] Mr. Pruett has received extensive treatment from various practitioners in the years since the Accident including kinesiology, physiotherapy, massage therapy, chiropractic treatments, and acupuncture. The evidence indicates that Mr. Pruett has

attended more than 300 such appointments since the Accident. He gets some relief from physiotherapy and massage therapy when he has flare-ups of his symptoms. He has implemented exercises and techniques learned from his physiotherapist and kinesiologist into his daily routine. He uses ice packs and heating pads with some limited success.

[55] Mr. Pruett began attending counselling a few months before the trial of this matter began. While he is somewhat reluctant to discuss his mental health problems, he has found these sessions to be helpful and has learned some tools and techniques which assist him in dealing with his mood.

[56] Mr. Pruett prefers not to take prescription medications and is particularly concerned with the possibility of addiction. I accept that his reluctance to do so is attributable to his focus on and preference for health food and natural remedies as well as the experience he had growing up with a father who struggled with substance use and prescription medication dependence.

[57] Following the independent medical examination Mr. Pruett had with the psychiatrist retained by the defendants, Mr. Pruett talked to his general practitioner about prescription medication for his depression. Mr. Pruett was prescribed Zoloft but only took the prescription for less than two weeks. He testified that he discontinued taking the prescription because the side effects were not tolerable.

EXPERT MEDICAL AND CAPACITY EVIDENCE

Orthopedic Surgeons

[58] The plaintiff and the defendant each tendered an expert report from orthopedic surgeons.

[59] Dr. William Regan is an orthopedic surgeon whose clinical practice focuses on shoulder reconstruction and joint replacement surgery. He was qualified as an expert witness to give opinion evidence on the diagnosis, prognosis, causation, and treatment of musculoskeletal injuries of the shoulder and spine. He examined

Mr. Pruett on April 25, 2022, and prepared an independent medical report on behalf of the plaintiff dated May 6, 2022.

[60] Dr. Richard Kendall is an orthopedic surgeon, and like Dr. Regan, he has a particular expertise in shoulder surgery. He too was qualified as an expert witness to give opinion evidence on the diagnosis, prognosis, causation, and treatment of musculoskeletal injuries of the shoulder and spine. He examined Mr. Pruett on October 28, 2020, and prepared an independent medical report on behalf of the defendants dated November 17, 2020. He also authored a response report dated May 9, 2022, in respect of various documents he was provided by defence counsel.

[61] Drs. Regan and Kendall both testified at trial.

[62] Dr. Regan diagnosed Mr. Pruett with myofascial pain in both shoulders and found that it was “super-imposed” upon degenerative osteoarthritis. He also made a diagnosis of chronic soft tissue and/or myofascial spine pain. In Dr. Regan’s opinion, Mr. Pruett’s shoulder and back injuries are a result of the Accident. He acknowledged that Mr. Pruett did not initially report pain in his right shoulder. Dr. Regan noted that Mr. Pruett’s osteoarthritis in both of his shoulders pre-dated the Accident and was asymptomatic prior to the Accident.

[63] In Dr. Regan’s opinion, the onset of pain in Mr. Pruett’s right shoulder pain some months after the Accident is consistent with the Accident being the cause of the injury. In cross-examination, he explained that the onset of Mr. Pruett’s right shoulder pain was still within the acute phase of the injuries arising from the Accident and could have been made worse by Mr. Pruett overcompensating with his right shoulder due to symptoms he was experiencing in his left shoulder.

[64] Dr. Regan opined that Mr. Pruett’s symptoms and ongoing chronic pain cannot be attributed to the pre-existing osteoarthritis. In Dr. Regan’s opinion, the pre-existing osteoarthritis in Mr. Pruett’s shoulders and the degenerative disc disease in his spine placed Mr. Pruett in a vulnerable state for injury. In his view, even without the Accident, Mr. Pruett would likely have developed pain in his

shoulders arising from the osteoarthritis that would limit his range of motion; however, he could not say when such symptoms would likely have developed.

[65] Dr. Regan's prognosis for Mr. Pruett is guarded, particularly in light of the fact that he has a combination of osteoarthritis and some myofascial injury. While surgery might be helpful, it is Dr. Regan's opinion that the possible benefits are difficult to predict without the use of guided injections first. If surgery was performed, Mr. Pruett would be required to wear a sling for approximately six weeks followed by six months of rehabilitation. In Dr. Regan's opinion, this surgery is more of a pain management tool and would not return Mr. Pruett's shoulders to its pre-injury state.

[66] Dr. Kendall's diagnosis is not entirely clear based on his report. He appears to agree with Dr. Regan that Mr. Pruett is suffering from a soft tissue injury in his shoulder, neck and low back. Dr. Kendall's opinion on the causation of Mr. Pruett's osteoarthritis is similar to that of Dr. Regan's; he opines that the osteoarthritis is most likely related to Mr. Pruett's work and recreational history and not the result of the Accident. Like Dr. Regan, Dr. Kendall is of the opinion that Mr. Pruett's osteoarthritis would likely have become symptomatic even without the Accident but he too is unable to say when.

[67] Unlike Dr. Regan, Dr. Kendall is of the view that Mr. Pruett's right shoulder symptoms, having been delayed in onset, are not the direct result of the Accident. In his opinion, the pre-existing degenerative arthritis "may" be partially or fully responsible for Mr. Pruett's symptoms. However, during cross-examination, he acknowledged that Mr. Pruett's right shoulder symptoms could be the result of overcompensation arising from injuries suffered to the left shoulder during the Accident, particularly if there was no intervening accident or event that could explain the right shoulder pain. There is no evidence of such an intervening event in this case. Moreover, Dr. Kendall did not explain why, in the circumstances, Mr. Pruett's symptoms would be more likely related to his pre-existing arthritis than as a result of the Accident. In fact, he appears to agree with Dr. Regan that it is difficult to make a definitive diagnosis or prognosis without further diagnostic testing including

injections. Consequently, I find that the opinions of Drs. Regan and Kendall on causation are actually quite similar and I prefer Dr. Regan's more well-founded opinion on causation.

[68] Dr. Kendall opined that Mr. Pruett's physique at the time he examined him is that of a "body builder" and is inconsistent with someone "who is incapable of physical labour and is leading a sedentary lifestyle." He goes on to suggest that Mr. Pruett would not be able to "naturally" maintain his physique without significant work in the gym or without the use of anabolic steroids. He concludes that Mr. Pruett is more physically active than he describes. Dr. Regan, on the other hand, does not hold this opinion. Rather, he says that in his experience, people can maintain a physique like that of Mr. Pruett's without attending the gym frequently and without taking steroids. In his opinion, a person's physique, and their ability to maintain it or not, is a combination of genetics and physical activity.

[69] I do not accept Dr. Kendall's opinion with respect to Mr. Pruett's physique and how he obtained or maintained it. Dr. Kendall acknowledged that he did not know what Mr. Pruett's physique was like before the Accident and agreed that is a relevant factor in determining whether someone has maintained or improved their physique. Moreover, the evidence is clear that Mr. Pruett is not leading a "sedentary" lifestyle or is "incapable" of physical labour. He has never taken that position. Rather, Mr. Pruett says that he is significantly limited compared to his pre-Accident capabilities. Dr. Kendall clearly did not believe Mr. Pruett's denial of taking steroids or attending the gym more frequently than he reported. In my view, Dr. Kendall's opinion on how Mr. Pruett attained or maintained his physique factored into his opinion on causation and the extent of Mr. Pruett's injuries. However, there is no evidence before me to contradict Mr. Pruett's testimony in this respect or that supports Dr. Kendall's conclusion and I find that Dr. Kendall's opinion in this respect is based upon assumptions that are not in the evidence before me.

[70] Dr. Kendall noted, and placed a significant amount of weight, on the fact that Mr. Pruett presented with a significant psychological overlay and that this emotional

lability is a contributing factor to his ongoing pain and disability. This is not an unreasonable conclusion to have come to in light of the state of emotional distraught that Mr. Pruett was in at the time he was examined. However, it seems to me that Dr. Kendall has significantly downplayed the physical injuries or has not factored them into his diagnosis and prognosis to the same extent that Dr. Regan did. In fact, Dr. Kendall acknowledged that Mr. Pruett's mood presentation during examination made it difficult for him to make a diagnosis based on an anatomical problem. Dr. Regan had no such difficulties and I accept his opinion. Overall, I find Dr. Regan's report to be more helpful to the Court in light of the other evidence that I have accepted.

Physiatrist

[71] Dr. Raphael Chow is a physiatrist and was qualified as an expert witness in the field of physical medicine and rehabilitation to give an opinion on the diagnosis, causation, and prognosis of the plaintiff's musculoskeletal injuries. Dr. Chow examined Mr. Pruett on September 23, 2020, and prepared an independent medical report on behalf of the plaintiff dated October 15, 2020. Dr. Chow testified at trial.

[72] Dr. Chow diagnosed Mr. Pruett with chronic neck and shoulder/girdle pain as well as chronic pain in the mid and lower back. In his opinion, Mr. Pruett has myofascial pain syndrome which Dr. Chow defines as a condition involving a hard band within muscle which causes local and referred pain, as well as tenderness which affects the function of the central nervous system. Increased muscle stress and overload causes peripheral sensitization and central sensitization in the spinal cord. This condition is commonly seen in accident-related cases.

[73] Dr. Chow noted Mr. Pruett's mood and anxiety related issues but deferred to the appropriate expert to opine on this. He found that Mr. Pruett exhibited the signs of late whiplash syndrome due to his chronic pain combined with psychological, cognitive issues, and sleep disturbance.

[74] In Dr. Chow's opinion, Mr. Pruett's physical injuries are a direct result of the Accident. Dr. Chow opined that the Accident materially contributed to Mr. Pruett's

right shoulder injury, due to overcompensation arising from the injuries suffered to the left shoulder.

[75] The way in which Mr. Pruett's pain was elicited when Dr. Chow manipulated his shoulder led Dr. Chow to conclude that the pain is less likely related to pain in Mr. Pruett's shoulder joint as would be the case if it was attributable to arthritis. Consequently, Dr. Chow opined that Mr. Pruett's pain is more likely related to myofascial injuries than the degenerative arthritis or disc issues. In this respect, his opinion is similar to Dr. Regan's. Like Drs. Regan and Kendall, Dr. Chow would expect Mr. Pruett's osteoarthritis of the shoulder to become symptomatic at some point in time if he continued to do heavy manual labour but could not say when that would likely have happened absent the Accident.

[76] Like Dr. Regan, Dr. Chow does not agree with Dr. Kendall that Mr. Pruett's physique indicates that he was working out at the gym more than he reported or that he was taking steroids. He agrees with Dr. Regan that genetics play a significant role in an individual's ability to maintain their physique. He also notes that that Mr. Pruett has never been bedridden and that Mr. Pruett's reported activity level is consistent with the rate of muscle wasting that would be expected.

[77] Dr. Chow's prognosis for Mr. Pruett's recovery is guarded given the amount of time Mr. Pruett has been symptomatic. In his opinion, Mr. Pruett has likely reached his maximum medical recovery.

Psychiatrists

[78] Dr. Zohar Waisman and Dr. Eugene Okorie are psychiatrists. Both were qualified to give their expert opinion on the diagnosis, causation and prognosis of psychological injuries and conditions. Dr. Waisman examined Mr. Pruett on November 5, 2020, and authored an independent medical report on behalf of the plaintiff dated November 19, 2020. Dr. Okorie first authored a report on behalf of the defendants in response to Dr. Waisman's report dated December 23, 2020. On November 19, 2021, Dr. Okorie examined Mr. Pruett and authored a report dated January 19, 2022. Drs. Waisman and Okorie both testified at trial.

[79] Both of the psychiatrists agree that Mr. Pruett is suffering from significant psychological injuries as a result of the Accident. In particular, they both agree that Mr. Pruett is properly diagnosed as having major depressive disorder and that it was caused by the Accident and the associated chronic pain.

[80] The only real disagreement is whether Mr. Pruett meets the criteria for having a somatic symptom disorder ("SSD"). The significance of the difference in the psychiatrists' opinions on diagnosis is in respect of prognosis and treatment. An individual with SSD and major depressive disorder has a worse prognosis than one who does not have SSD. Furthermore, medication to treat symptoms of depression are more likely to be effective in those that do not have SSD.

[81] Dr. Waisman diagnosed Mr. Pruett as having SSD with predominant pain, persistent and severe. Dr. Waisman explains that the criteria for SSD is as follows:

> A. One or more somatic symptoms that are distressing or result in significant disruption of daily life.
>
> B. Excessive thoughts, feelings or behaviors related to the somatic symptoms with associated health concerns are manifested by at least one of the following:
>
> 1. Disproportionate and persistent thoughts about the seriousness of one's symptom.
>
> 2. Persistently higher level of anxiety about health or symptoms.
>
> 3. Excessive time and energy devoted to these symptoms or health concerns.
>
> C. Although any one somatic symptom may not be continuously present, the state of being symptomatic is persistent, typically more than six months.

[82] In Dr. Waisman's opinion, Mr. Pruett suffers from excessive thoughts and feelings related to his chronic pain condition as manifested by persistently higher level of anxiety about health or his pain symptoms.

[83] Dr. Okorie disagrees that Mr. Pruett has SSD. Rather, in his opinion, a more appropriate diagnosis is that Mr. Pruett has developed an adjustment disorder arising from the trauma of the Accident and the resulting pain and functional limitations. According to Dr. Okorie, Mr. Pruett does not meet the criteria of having

SSD. In his view, Mr. Pruett is not disproportionately focussed on his symptoms and pain. Rather, given his understanding and acceptance of Mr. Pruett's physical injuries and pain, Mr. Pruett's focus is proportionate to his significant injuries and limitations, particularly compared to his pre-Accident level of function and the way in which his sense of self was significantly derived from his physical abilities. Moreover, Dr. Okorie is of the view that Mr. Pruett's ability to engage in the work he did after the Accident is inconsistent with someone who has SSD, who is usually functionally dependent upon others and cannot hold down a job.

[84] I prefer Dr. Okorie's conclusion with respect to Mr. Pruett's psychological conditions. His explanation as to why Mr. Pruett is not properly diagnosed with SSD is persuasive. Justice Lamb came to a similar conclusion in *Bath v. Singh,* 2022 BCSC 431 at para. 138. I accept Dr. Okorie's opinion that Mr. Pruett's ability to hold a job is not consistent with the first criteria relied upon by Dr. Waisman in coming to his conclusion, namely that Mr. Pruett's daily life is significantly disrupted by his symptoms to the extent required by the diagnostic criteria. Furthermore, given that I have generally accepted Mr. Pruett's reports of the severity of his pain, I agree with Dr. Okorie that he is not excessively focussed on his pain or inappropriately avoidant of physical activity. Rather, his focus on pain and his limitations do not appear to be unreasonably worse than a person with a similar physical condition. I agree with Dr. Okorie's conclusion as set out in his report:

> Additionally, Dr. Waisman described Mr. Pruett as a person for whom the core aspect of his personal identity revolved around his ability to maintain important roles, responsibilities, and commitments. Mr. Pruett's personality style, his eagerness to return to work and his future work aspirations are inconsistent with a person who is excessively preoccupied with and overly invested in their pain as a patient with Somatic Symptom Disorder would do.

[85] This does not mean that I do not accept that Mr. Pruett is suffering from a significant psychological injury. To the contrary, it is clear on the evidence before me that Mr. Pruett's psychological injuries resulting from the Accident are significant, regardless of which diagnosis is correct. I accept that Mr. Pruett has expressed a desire to harm himself and that his risk of self harm and suicide is elevated in light of the diagnosis of major depressive disorder and his reluctance to talk about his

mental health challenges. The injuries and their effect on his function has, in my view, struck at the core of how Mr. Pruett defined his sense of self and worth. I accept that there is a high correlation between the likelihood of Mr. Pruett's physical symptoms improving and his psychological prognosis.

Radiologist

[86] Dr. Douglas Connell is a radiologist and was qualified to give his expert opinion in the interpretation of radiographs in respect to musculoskeletal injuries and conditions. He prepared a report on behalf of the defendants dated February 13, 2021. Dr. Connell did not examine Mr. Pruett; rather, he reviewed the CT scan of Mr. Pruett's spine, chest, and abdomen that was taken on the day of the Accident.

[87] In Dr. Connell's opinion, the CT scan showed the soft tissues of the cervical region as being normal. He did not observe any abnormal positioning or displacement and did not observe any disc protrusions. In his view, the CT scan did not indicate an acute soft tissue injury. Dr. Connell observed indications of osteoarthritis in both shoulders. Dr. Connell concluded that there are no injuries present which would have been caused by the Accident.

[88] During cross examination, Dr. Connell acknowledged that he is unable to comment on the presence of chronic pain in Mr. Pruett following the Accident and that he would defer to orthopedic surgeons and physiatrist opinions with respect to causation of that pain. He also acknowledged that Mr. Pruett could have suffered injuries in the Accident that could not be seen on the imaging. During his testimony, Dr. Connell stated that an MRI is a better diagnostic tool for soft tissue injuries and that such injuries will sometimes not be visible on a CT but are on an MRI. Furthermore, he acknowledged that the lack of an abnormality or "serious injury" in a CT scan does not mean that the individual does not have pain; rather, it means that the individual does not need to be admitted to hospital.

[89] In light of Dr. Connell's admission as to the limits of the use of CT scans for soft tissue injuries, his acknowledgement that his observations do not mean that Mr. Pruett did not experience pain, and his reasonable concession that he would

defer to orthopedic surgeons and physiatrists with respect to diagnosis and causation of Mr. Pruett's injuries, I have not given Dr. Connell's opinion on causation any weight. In my view, his report only serves to support the already uncontroverted conclusion that Mr. Pruett had osteoarthritis in his shoulders prior to the Accident.

Functional Capacity Evaluations

[90] Russell McNeil and Sheila Branscombe are occupational therapists and work capacity evaluators. Both were qualified to give their expert opinions in functional capacity evaluations and cost of future care assessments. Mr. McNeil assessed the plaintiff on October 27, 2020, and prepared a report at the request of Mr. Pruett dated November 9, 2020. Ms. Branscombe assessed the plaintiff on November 16 and 17, 2021, and prepared a report at the request of the defendants dated January 4, 2022. She also prepared a report dated December 29, 2020, in response to Mr. McNeil's November 9, 2020, report. Mr. McNeil and Ms. Branscombe both testified at trial.

[91] In Mr. McNeil's opinion, Mr. Pruett is not capable of working in occupations that have more than sedentary physical demand characteristics. In his opinion, Mr. Pruett has the ability to manage sedentary jobs with accommodations. Mr. McNeil opined that Mr. Pruett did not demonstrate the capacity to obtain the full strength demands of light or medium work. In his opinion, Mr. Pruett would be restricted in occupations in these categories that require reaching above and below shoulder level as well as certain bending, twisting and crouching positions. Mr. McNeil did not explicitly comment on whether Mr. Pruett is capable of performing the duties of a food truck operator. His report notes Mr. Pruett's statement that he expects to perform the customer service role, while his wife would cook. However, it is reasonable to expect that a food truck operator must complete tasks which require reaching. Overall, Mr. McNeil concluded that Mr. Pruett would struggle to maintain a productive work pace for tasks requiring reaching and handling, and would likely require accommodations that would adversely affect his ability to compete in the open job market.

[92] In Mr. McNeil's opinion, Mr. Pruett is not physically suited for his vocation as a fence builder either on a part-time or full-time basis. Mr. McNeil's assessment led him to conclude that Mr. Pruett would be restricted in his capacity to perform the prolonged standing, constant reaching and repetitive spinal positioning. He also would not have the capacity to perform the required repetitive crouching and/or kneeling.

[93] Mr. McNeil concluded that Mr. Pruett has the capacity to perform short or intermittent periods of light household chores such as light cleaning and tidying.

[94] In Mr. McNeil's opinion, the plaintiff's reports of pain and ongoing physical restrictions were generally consistent with his measured and observed abilities. However, Mr. McNeil concluded that Mr. Pruett tended to overestimate his lifting and carrying capacity and to underestimate his capacity to perform tasks requiring spinal positioning and reaching.

[95] Ms. Branscombe came to a very different conclusion with respect to Mr. Pruett's capacity to work as a fence builder; she concluded that the plaintiff is capable of working in that occupation on a full-time basis. Importantly, Mr. Pruett was working as a fence builder for Boundary at the time Ms. Branscombe conducted her assessment and her conclusion appears to have been largely influenced by this. Ms. Branscombe acknowledges that Mr. Pruett reported that he was working at a slower pace than he did before the Accident. She also opines that Mr. Pruett will likely experience pain after a day of working when he is required to reach at or above shoulder level or when he is required to stoop more frequently.

[96] In her responsive report, Ms. Branscombe notes that Mr. McNeil's testing indicated that Mr. Pruett was incapable of doing "only" four items at the demands required for the heavy occupation category – trunk strength, static and dynamic strength, and extent flexibility. Ms. Branscombe did not adequately explain how one could be capable of full-time employment in an occupation for which they do not have the strength capacity in important aspects of the job. Rather, she testified that perhaps Mr. Pruett could complete the job with some modifications such as the use

of an exoskeleton. There is no evidence before me that indicates that such a tool or modification is available for use in the fencing industry.

[97] I agree with Ms. Branscombe that Mr. Pruett has demonstrated the ability to work full-time in the fencing industry by way of his employment with Boundary. However, in my view, Ms. Branscombe's opinion seems to have been unduly influenced by the fact that Mr. Pruett was working as a fence builder at the time she conducted her assessment. While I accept that this is an indication that Mr. Pruett was able to do the job at that time, it does not mean that he should do that job or that he did not experience exacerbation of his symptoms as a result. As discussed earlier, I have accepted that Mr. Pruett left his position at Boundary at least in part due to the pain he was experiencing. It is uncontroverted that he missed time from work due to his injuries. Mr. Pruett's vocation as a fence builder is undoubtably in the heavy physical demand category. Ms. Branscombe's own testing indicates that Mr. Pruett is not capable of meeting those strength demands. Ms. Branscombe's testimony and conclusions suggested that she did not believe Mr. Pruett's stated levels of restriction or reports of pain. For example, she was very reluctant to admit that behaviour that Mr. McNeil described as consistent with guarding and injury was to be expected and was consistent with this reported pain. However, it is notable that her reliability testing does not support a conclusion that Mr. Pruett was malingering. In the circumstances, I have given her report little weight.

[98] Ms. Branscombe did not provide an opinion on whether Mr. Pruett is capable of performing the duties of a food truck operator.

[99] While I am not of the view that Mr. McNeil's report was successfully undermined in cross-examination, in weighing his opinion, I have considered that Mr. McNeil conducted his assessment almost two years before trial and that his assessment is based upon Mr. Pruett's function at that particular point in time. In my view, Mr. McNeil's opinion is of limited use in commenting on Mr. Pruett's function at times after the Accident and leading up to the assessment, as well as after the assessment and leading up to trial. I have placed greater weight on Mr. Pruett's

testimony and the testimony of the various lay witnesses and medical experts than on either of the functional capacity evaluators in respect of Mr. Pruett's current and likely future functional limitations.

LIABILITY

The Parties' Positions

[100] As discussed earlier, the Accident occurred on May 1, 2018, when Mr. Pruett was driving his Ford F-150 pickup truck westbound on Highway 1 on his way to work early in the morning. Mr. Pruett's vehicle was involved in an incident with a vehicle driven by the defendant, Mr. Robert resulting in Mr. Pruett's truck going off the road at highway speed, rolling, and coming to rest in a ditch.

[101] Liability for the Accident is contested.

[102] The plaintiff submits that the relevant statutory provisions applicable to the case at bar is s. 144(1) of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 (the "*Act*") which states:

> 144 (1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[103] Mr. Pruett's position is that Mr. Robert is 100% responsible for the Accident. Mr. Pruett argues that Mr. Robert breached s. 144(1)(b), in part, because he was following too closely and his speeding up and slowing down amounts to driving without reasonable consideration for others. He submits that Mr. Robert failed to use reasonable care to keep his vehicle under control and within the lane he was travelling in and as a result, he breached the standard of care.

[104] The defendants argue that Mr. Pruett and Mr. Robert are equally responsible for the Accident. The defendants submit that both parties' conduct in the moments leading up to the Accident fell short of the standard of reasonably prudent motorist.

They argue that Mr. Pruett instigated and participated in a game of “cat and mouse” with Mr. Robert whereby one vehicle would speed up, catch up to the other and try to cut the other off, and vice versa. They submit that this dangerous game of “cat and mouse” culminated in Mr. Pruett causing the Accident by swerving in front of Mr. Robert.

The Law

[105] Pursuant to s. 4 of the *Negligence Act,* R.S.B.C. 1996, c. 333, where a plaintiff has contributed negligently to causing his own injury, the court must determine relative degrees of fault. The court must ask whether the plaintiff failed to take reasonable care for his or her own safety and whether that failure was one of the causes of the accident: *Bradley v. Bath*, 2010 BCCA 10 at para. 27. As stated in *Graham v. Carson,* 2014 BCSC 726, aff’d 2015 BCCA 310, at para. 21:

> … A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable, prudent man he might be hurt himself. That was the reasoning of Denning L.J. in *Jones v. Livox Quarries* […], which was adopted by the Supreme Court of Canada in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* […]

[106] In determining contributory negligence, the court is not to assess the extent to which the loss may be said to have been caused by the conduct of each. Rather, the task is to assess the respective blameworthiness of the parties. Fault or blameworthiness evaluates the parties' conduct in the circumstances, and the extent or degree to which it may be said to depart from the standard of reasonable care: *Alberta Wheat Pool v. Northwest Pile Driving Ltd*., 2000 BCCA 505 at paras. 45-46; *Bradley* at para. 24. If the court is unable to determine the degrees of fault, liability must be apportioned equally: *Negligence Act,* s. 1(2).

Analysis

[107] The only admissible evidence before the Court from which liability can be determined is the testimony of Mr. Pruett, Mr. Robert and that of Jordan Brewster, an independent third-party witness to the Accident. Neither party tendered expert evidence in respect of the Accident. The defendants submit that the Court should

draw an adverse inference for the plaintiff's failure to do so; however, I decline to make such an inference. The court is not required to make an adverse inference where a party fails to call a witness. Rather, the decision is discretionary, taking into account all the circumstances and considering the likelihood that a material witness, over whom one party has exclusive control over, would have given evidence contrary to that party's case: *Singh v. Reddy*, 2019 BCCA 79 at paras. 8-10. In this case, an accident reconstructionist is not a material witness over whom the plaintiff has exclusive control.

[108] Mr. Pruett tendered photographs he says that he took the day following the Accident of what he says are skid marks from his and Mr. Robert's vehicles. I agree with the defendants that interpreting the skid marks in the photographs requires expert evidence. Given that I did not have the benefit of such expert evidence, I have given no weight to the photographs for the purposes of determining liability.

[109] Mr. Pruett testified that he was travelling in the fast lane at approximately 100 km/hour during rush hour at the time of the Accident. He says that the first time he observed the vehicle driven by Mr. Robert was when he noticed headlights rapidly approaching in his rear-view mirror and then tailgate him closely. Mr. Pruett testified that he kept a constant speed. Shortly thereafter he says that he remembers seeing a flash of light in his rear-view mirror and then he was spinning 180 degrees and heading backwards before flipping and rolling into the ditch. From his perception, Mr. Pruett testified that he believes that Mr. Robert went to pass him, lost control, veered back and made contact with Mr. Pruett's rear bumper causing him to spin. Mr. Pruett denies being engaged in a "cat and mouse" game with Mr. Robert, or that he was speeding, changing lanes rapidly, or driving aggressively in any manner in the moments leading up to the Accident.

[110] Mr. Robert testified that the first time he saw the plaintiff's vehicle was when Mr. Pruett entered the highway at the Mt. Lehman exit. At that time, Mr. Robert says he was driving in the left lane and that Mr. Pruett abruptly crossed two lanes of traffic and moved directly in front of him, ostensibly cutting him off. While Mr. Robert

admits that he was angry at being cut off, he denies engaging in any aggressive driving behaviour with Mr. Pruett. Mr. Robert says he backed off and kept his distance and observed Mr. Pruett honking and flashing his lights at vehicles in front of him in an effort to pass them in the busy rush hour traffic. This went on for approximately two minutes. In his evidence in chief, Mr. Robert suggested that Mr. Pruett cut him off on a number of occasions leading up to the Accident but in cross-examination he said that Mr. Pruett cut him off only once.

[111] Mr. Robert testified that shortly thereafter, while he was approximately one car length distance behind Mr. Pruett, he tried to change lanes. At the same time, he says that Mr. Pruett changed lanes so abruptly that Mr. Roberts lost control of his vehicle as he tried to avoid the plaintiff, and the back end of Mr. Pruett's truck swerved and he went off the road. Mr. Robert says that he tried to steer back to the left lane to avoid a collision but says he oversteered and lost control of his vehicle and ended up in the ditch. Despite the admission to the contrary in his response to civil claim, Mr. Robert denies that his vehicle made contact with Mr. Pruett's truck at any time.

[112] Jordan Brewster was driving on Highway 1 at the time of the Accident and gave evidence of his observations during the time leading up to and including the Accident. Mr. Brewster does not know Mr. Pruett or Mr. Robert and there is no indication in the evidence that he has an interest in the outcome of this litigation.

[113] Mr. Brewster testified that he first noticed the truck being driven by Mr. Pruett when he saw him approaching rapidly in his rear-view mirror and Mr. Pruett passed him on the right. He estimates that at that time Mr. Pruett was driving approximately 120 km/hour and described Mr. Pruett as driving aggressively. I pause to note that there is no evidence before me in respect of the posted speed limit at the location where the Accident occurred. Mr. Brewster observed the plaintiff slow down when he was "blocked in" by a semi truck that had merged onto the highway near the McCallum Road exchange. The plaintiff then passed the truck and another vehicle on the right-hand shoulder of the road. It is my understanding that one of the

vehicles that Mr. Brewster observed Mr. Pruett pass on the shoulder was the vehicle driven by Mr. Robert.

[114] At this point, Mr. Brewster says that both the plaintiff and the defendant began playing a game of “cat and mouse” whereby one would catch up to the other, move in front and then rapidly press the brakes, or “brake test” the other. His testimony was that the plaintiff and defendant swapped places and brake tested the other three or four times over the course of a few kilometres. He saw both vehicles swerve across the white dashed lane marker.

[115] When the vehicles were approximately 150 feet ahead of Mr. Brewster, he testified that he observed Mr. Pruett’s truck swerve when Mr. Robert’s vehicle was behind him. Mr. Robert lost control of his vehicle and struck Mr. Pruett’s truck. Mr. Brewster is certain that Mr. Robert’s vehicle made contact with the rear bumper of Mr. Pruett’s truck causing it to spin, flip and roll into the ditch. Following the Accident, Mr. Brewster stopped his vehicle, and after confirming Mr. Robert was alright, he ran across the highway to assist Mr. Pruett whose truck was in the ditch. He used a tool that had likely come from the back of Mr. Pruett’s truck to break the driver window in order to help Mr. Pruett, who was covered in blood, get out of the vehicle.

[116] In *Bradshaw* at para. 187, Dillon J. discussed how the testimony of disinterested non-party witnesses may assist with the assessment of credibility:

> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[117] While there were some minor inconsistencies in Mr. Brewster's testimony, such as the Accident having occurred when there were three lanes of traffic, but the evidence suggesting that there were two lanes, his version of events was not shaken on cross-examination. I accept Mr. Brewster's testimony in respect of the way in which the Accident occurred and the way in which the parties were driving in the moments leading up to it over that of the testimony of Mr. Pruett and Mr. Robert. Mr. Brewster's testimony was persuasive. He answered questions directly and clearly. Unlike Mr. Robert and Mr. Pruett, Mr. Brewster is a disinterested non-party. He had an excellent vantage point from he could observe the Accident and the moments leading up to it. In my view, he provided evidence in a detailed and compelling manner and he did not exaggerate. I accept that he vividly recalls the details of the Accident given his involvement in helping a blood covered Mr. Pruett out of his vehicle following the Accident. Mr. Brewster's evidence is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[118] I agree with counsel for the defendants that both parties' conduct in the moments leading up to the Accident fell markedly short of the standard of reasonably prudent motorist, who would not have instigated or engaged in a high-speed "cat and mouse game" with another car on the highway at all, let alone during morning rush hour. It is very fortunate that no one else was injured or killed as a result of the parties' negligent behaviour on Highway 1 that day.

[119] In my view, both parties failed to meet the requisite standard of care by:

a) continuing to engage in the "cat and mouse" game over the course of several kilometres at speeds in excess of 100 km/hour;

b) entering into the other's lane of travel when it was not safe to do so; and

c) by failing to maintain a safe distance between their respective vehicles when following the other.

[120] While it is likely that Mr. Robert was following too closely behind Mr. Pruett at the time of the Accident, it is also likely that Mr. Pruett made an unsafe swerving manoeuvre at the moment immediately before the Accident. Moreover, Mr. Pruett's aggressive driving in the minutes leading up to the Accident cannot be ignored in determining his degree of blameworthiness for the Accident and nor can Mr. Robert's. Their aggressive driving is part of the context that caused the Accident. Both of them departed from the standard of care in an equal degree and, in my view, Mr. Pruett and Mr. Robert were equally responsible for the Accident. Therefore, I find that Mr. Pruett is 50% liable for the Accident.

CAUSATION

[121] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury before damages are assessed. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimis*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, [1997] 1 W.W.R. 97; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[122] The defendants accept that the plaintiff sustained soft tissue injuries to the upper and lower back, and major depressive disorder as a result of the Accident. I agree. The evidence I have accepted, including that of the medical experts, is that these injuries were caused by the Accident. The defendants submit that Mr. Pruett developed an adjustment disorder, rather than SSD, as a result of the Accident. I have already explained why I accept this diagnosis during my discussion of the psychiatrists' reports.

[123] The defendants argue that Mr. Pruett's right shoulder symptoms are not caused by the Accident and would have occurred in any event. The defendants say that the plaintiff's complaints of shoulder pain are attributable to the natural progression of his underlying degenerative osteoarthritis. I disagree with the defendants on this point and find that Mr. Pruett's right shoulder symptoms are a result of the Accident beyond a *de minimus* range.

[124] While Mr. Pruett's right shoulder symptoms did not present until four to five months after the Accident, as discussed earlier, there is expert evidence that supports a conclusion that the Accident caused and materially contributed to the right shoulder symptoms. In formulating his opinion, Dr. Regan considered the timing of the onset of the right shoulder symptoms and concluded that they were caused by the Accident, likely as a result of Mr. Pruett overcompensating following a direct injury to his left shoulder, which was also caused by the Accident.

[125] In his report, Dr. Kendall opined that Mr. Pruett's right shoulder pain was not caused by the Accident, but is rather a result of his pre-existing osteoarthritis. However, during cross-examination, he acknowledged that it was possible that Mr. Pruett's right shoulder pain was indirectly caused by the Accident in the manner described by Dr. Regan. Furthermore, I accept Dr. Regan's opinion, which was unshaken on cross-examination, that the pain experienced by Mr. Pruett in his shoulder has a wider distribution than what is known to occur in osteoarthritis of the shoulders. Consequently, Dr. Regan did not agree that Mr. Pruett would have developed the right shoulder pain he complained of solely as a result of the osteoarthritis. It should also not be overlooked that Dr. Chow concluded that Mr. Pruett's right shoulder injury was caused by the Accident, although he did acknowledge that the link was not as strong as it was with respect to his other physical injuries.

[126] The defendants appear to suggest that if the osteoarthritis is not the cause of the right shoulder symptoms then it is the result of some intervening event that occurred after the Accident. However, there is no evidence that there is such an intervening event. To conclude as such would be mere speculation.

DAMAGES

Duty to Mitigate

[127] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[128] Once the plaintiff has proved the defendant's liability for his or her injuries, to establish a failure to mitigate, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[129] *Sulinska v. Payne*, 2021 BCSC 202 recently referred to the test for failure to mitigate by not pursuing recommended treatment:

> [62] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:
>
> > In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.
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> [63] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Justice Garson further discussed the nature of the test as follows:
>
> > [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment.
>
> [Emphasis in original.]

[130] The defendants' mitigation argument is focussed on Mr. Pruett's decision to not take prescription anti-depressant medication. They submit that Mr. Pruett's psychological symptoms would have "significantly improved" if he had availed

himself of anti-depressant medications. They rely on Dr. Okorie's opinion that 80% of people who suffer from depression and take the prescribed medication recover.

[131] Mr. Pruett tried anti-depressants for less than two weeks; however, he did not like the side effects and he stopped taking them. Mr. Pruett testified that he is very hesitant to take prescription medications. Mr. Pruett's reluctance to take prescription medications is derived from his childhood experience of growing up with a father who had a substance use issue with prescription medications. Mr. Pruett's focus on health and fitness and natural remedies also partially explains his reluctance and possible sensitivity to the ingestion of prescription medication.

[132] In Mr. Pruett's particular circumstances, I do not find that the defendants have shown that Mr. Pruett acted unreasonably by not taking anti-depressant medications for longer. The decision to take such medications is a highly personal decision that involves many factors including the likelihood and tolerance of side effects: *Sharma v. Day,* 2020 BCSC 1365 at para. 183. In my view, it is also a reasonable factor for Mr. Pruett to consider his father's substance use problem in his decision to stop taking them. Moreover, there is no evidence from the prescribing physician that Mr. Pruett was recommended to continue taking anti-depressants.

[133] Furthermore, the evidence is not clear as to what extent anti-depressants would have reduced Mr. Pruett's damages. While Dr. Okorie stated that 80% of people who take anti-depressants recover, he acknowledged that there is a significant interplay between the pain Mr. Pruett experiences and the extent of his depression. In light of Mr. Pruett's chronic pain and its poor prognosis, the defendants have not proven that taking anti-depressant medications would have reduced Mr. Pruett's damages to an extent that warrants a reduction based on his failure to mitigate.

[134] The defendants have not met the onus of proving either element required for the Court to make a finding that Mr. Pruett failed to mitigate his damages.

Non-Pecuniary Damages

[135] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, are only a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[136] The factors that should be considered in making an award of non-pecuniary damages are well established and were set out by the Court of Appeal in *Stapley v. Hejslet,* 2006 BCCA 34 at para. 46. They include the plaintiff's age, nature of the injury, severity and duration of the pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, impairment of mental and physical abilities, loss of lifestyle, and the plaintiff's stoicism.

[137] I have thoroughly described the injuries and their effect on Mr. Pruett earlier in these Reasons. For the present purposes, I will only emphasize the following.

[138] Mr. Pruett is an individual who defined his sense of self and worth in large part based upon his physical abilities, both vocationally and recreationally. I accept that he has a significant amount of chronic pain arising from the Accident and that he experiences sleep disruption, pain in his neck, back and shoulders on a daily basis since the date of the Accident, although it ebbs and flows to a certain extent. Mr. Pruett's life has been dramatically affected by his injuries. He can no longer participate in many of the recreational activities that consumed so much of his time before the Accident, and those that he can participate in are significantly limited. The vision of who he wanted to be as a father and a husband has been negatively impacted by the Accident. His prognosis for a recovery from his physical symptoms is guarded.

[139] Moreover, it is undeniable that Mr. Pruett's mental health has deteriorated significantly as a result of the Accident. The experts agree that he has major depressive disorder arising from the Accident. While there is disagreement as to

whether Mr. Pruett is properly diagnosed with SSD, the psychiatrists agree that Mr. Pruett's state of mental distress is acute which has affected many aspects of his daily life. He demonstrated suicidal ideation. Regardless of whether he has SSD or an adjustment disorder, the prognosis in respect of Mr. Pruett's mental health symptoms is interrelated with his pain. In light of the poor prognosis for his physical conditions, it is likely that the prognosis for Mr. Pruett's mental health is also poor.

[140] Mr. Pruett cites the following cases in support of an award for non-pecuniary damages in the amount of $230,000:

a) *Gill v. Apeldoorn,* 2019 BCSC 798, where the court assessed non-pecuniary damages in the amount of $200,000 (which counsel submits is $223,503 in 2022 dollars).

b) *McCaffery v. Arguello*, 2017 BCSC 1460, where the court assessed non-pecuniary damages in the amount of $200,000 (which counsel submits is $234,000 in 2022 dollars).

c) *Wright v. Admiraal*, 2022 BCSC 742, where the court assessed non-pecuniary damages in the amount of $200,000.

d) *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96, where the court assessed non-pecuniary damages in the amount of $225,000 (which counsel submits is $240,000 in 2022 dollars).

[141] The defendants submit that an award of $100,000 is appropriate. They say that this award should be subject to a 20% deduction for Mr. Pruett's pre-existing osteoarthritis in his shoulders and a further 20% for his failure to mitigate (which I have rejected above). The defendants cite the following cases as being comparable to the case at hand:

a) *Latreille v. Downey,* 2020 BCSC 976, where the court assessed non-pecuniary damages in the amount of $90,000.

b) *Lamont v. Prat,* 2021 BCSC 1294, where the court assessed non-pecuniary damages in the amount of $125,000.

c) *Javan Parast v. Curry,* 2020 BCSC 877, where the court assessed non-pecuniary damages in the amount of $75,000.

[142] I find that the cases relied upon by Mr. Pruett generally involve plaintiffs with much more severe psychological injuries than Mr. Pruett and/or they have traumatic brain injuries that Mr. Pruett does not have. For example, the plaintiff in *Gill* was unable to care for their personal hygiene and had attempted suicide. The plaintiff in *McCaffery* had a mild traumatic brain injury, underwent surgeries and had a disfigurement to their arm which caused severe psychological effects. The plaintiffs in *Wright* and *Steinlauf* had mild traumatic brain injuries and PTSD.

[143] On the other hand, I find that the cases relied upon by the defendants involve plaintiffs with far less severe injures than those that I have found Mr. Pruett to suffer from and/or those plaintiff's pre-existing conditions were much more severe than Mr. Pruett's osteoarthritis. Moreover, *Lamant* and *Javan*, relied upon by the defendants, involve plaintiffs where the court held that the plaintiff had significantly exaggerated their symptoms.

[144] Mr. Pruett does not seek a separate award for loss of housekeeping capacity. I find that Mr. Pruett's loss of housekeeping capacity is more in keeping with a loss of amenities or increased pain while completing such tasks. Consistent with the reasonable position taken by the plaintiff, it is, in my view, more appropriate to include the award for this loss in the award of non-pecuniary damages as opposed to making a separate award. In the circumstances, it is within my discretion to do so: *Kim v. Lin*, 2018 BCCA 77 at para. 33. Moreover, the circumstances of this case are not "special" such that a segregated non-pecuniary award is warranted: *Riley v. Ritsco,* 2018 BCCA 366 at para. 102.

[145] Considering the principles and factors set out in *Stapley* and in the authorities provided by counsel, and considering Mr. Pruett's circumstances and prognosis, I conclude that a fair and reasonable award is $150,000.

[146] The defendants argue that Mr. Pruett's pre-existing osteoarthritis would have become symptomatic absent the Accident. As such, they submit that the "crumbling skull" doctrine is applicable and that Mr. Pruett's damages should be subject to a 20% deduction. The crumbling skull doctrine was described in *Athey* at paras. 34 and 35:

> [34] [. . .] The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
>
> [35] The so-called "crumbling skull" rules simple recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.
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> [Emphasis in original.]

[147] In my view, it is appropriate to make a small reduction to the non-pecuniary damages award in light of Mr. Pruett's pre-existing osteoarthritis in his shoulder. In my view, this case is different from the situation in *Penland v. Lofting,* 2008 BCSC 507, which the plaintiff relied upon in support of his position that no deduction should be made. Unlike in the case now before the Court, in *Penland* there was no evidence that the underlying osteoarthritis the plaintiff was diagnosed with was a degenerative, progressive disease. Further, in *Penland* there was no evidence that the underlying condition would become symptomatic absent the accident. That is not the case here: I accept the evidence of Drs. Kendall and Regan that the plaintiff's osteoarthritis would likely have become symptomatic at some point in the future.

[148] Although neither expert could say when it would have become symptomatic, neither equivocated on their opinion that it would have eventually caused him pain

and limited his range of motion, particularly given Mr. Pruett's without Accident level of physical activity both recreationally and at work. In my view, this evidence satisfies the requirement that there be a measurable risk that the plaintiff's pre-existing condition would have detrimentally affected the plaintiff in the future absent the Accident. In my opinion, the uncertainty with respect to when this condition would have become symptomatic can be addressed in my determination of the amount of the appropriate discount. In all of the circumstances, I find that a reduction of 5% is appropriate. Consequently, Mr. Pruett's award for non-pecuniary damages is assessed to be $142,500 ($150,000 less 5% or $7,500).

Loss of Earning Capacity

[149] An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[150] The proper analysis for past and future diminished earning capacity was summarized in *Grewal v. Naumann,* 2017 BCCA 158. Justice Goepel was writing in dissent, however, the majority agreed with the following analysis:

> [48] … If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
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> [Emphasis added.]

Past Loss of Income Earning Capacity

[151] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30:

> [30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.
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> [Emphasis added.]

[152] Mr. Pruett claims a gross amount of $253,912 under this head of damages. This amount is based upon his submission that, but for the Accident, his ownership share in Streamline would not have ended and he would have continued to have been paid $125,000 per year in 2020, 2021, and 2022. As discussed earlier, Mr. Pruett received his $125,000 per year salary from the date of the Accident until March 2020. At that time, Mr. Pruett and Mr. Corbett came to an agreement in which Mr. Pruett's interest in Streamline would be bought out in exchange for a lump sum payment to be made over the course of four years and he stopped receiving his $125,000 per year salary. Consequently, Mr. Pruett's claim for past loss of income earning capacity is for the period between March 2020 and the date of trial in August 2022. His claim is calculated on the difference between what he says he would have earned from Streamline and what he did earn from his employment at Boundary in 2021 and 2022.

[153] The defendants submit that Mr. Pruett is not entitled to any amount for past loss of earning income capacity. They argue that Mr. Pruett and Mr. Corbett's business relationship would have ceased absent the Accident and, as such, it is not accurate or reasonable to conclude that Mr. Pruett would have continued earning $125,000 per year from Streamline in the without Accident scenario. Furthermore, Mr. Pruett's buyout from Streamline included a non-competition clause which would have further restricted Mr. Pruett's earning capacity absent the Accident. In any event, the defendants argue that Mr. Pruett's employment at Boundary in Vernon in 2021 and 2022 is illustrative of Mr. Pruett's ability to work as a fencer, and that

therefore, his injuries did not limit his capacity to earn income in the years leading up to trial.

[154] As discussed earlier, Mr. Pruett did obtain a fencing job at Boundary in September 2021. I accept that he found the job to be physically difficult despite the fact that it was a lighter type of fencing work than he did at Streamline. The records indicate that Mr. Pruett missed approximately 40 days of work in the eight months he was employed at Streamline. This is significant when compared to the fact that he missed almost no days in the nearly 15 years he worked at Streamline leading up to the Accident. Nonetheless, Mr. Munsey, the owner of Boundary, testified that he was very happy with Mr. Pruett's work and he would hire him back even though he knows of his injuries.

[155] While I accept that his decision to leave Boundary was partly related to the exacerbation of his symptoms, as stated earlier, I find that Mr. Pruett has slightly exaggerated the role his injuries played in his decision to leave his employment at Boundary. Nonetheless, I do accept that Mr. Pruett's injuries impacted his ability to earn income in the years between March 2020 and the date of trial. As discussed thoroughly in these reasons, Mr. Pruett has suffered from some significant injuries that have affected his function. He was unable to work at the level he did before the Accident.

[156] As discussed earlier, I have found that there is a real and substantial possibility that Mr. Pruett and Mr. Corbett's business relationship would have ended prior to the trial even absent the Accident. While I have given very little weight to Mr. Corbett's testimony for the reasons described earlier, there is ample evidence before me from which I can conclude that Mr. Pruett would have left, or been forced to leave, Streamline absent the Accident. This includes a history of driving complaints, personal issues, complaints by staff, and the different visions for their roles held by Mr. Corbett and Mr. Pruett as described by the former HR officer Ms. Bohnenschuh. However, I do not accept the defendants' position that it would have ended exactly when it did absent the Accident.

[157] It is likely that Mr. Pruett's sporadic attendance at Streamline following the Accident and the cost of his salary played a significant role in the end of the business relationship. I accept that Mr. Corbett became frustrated with that state of affairs despite his rather unbelievable testimony that he, as the majority owner of the company, was not concerned with the fact that the company was paying Mr. Pruett a significant salary and not receiving very much work in return.

[158] In the circumstances, I find that the Accident accelerated the deterioration of Mr. Pruett's and Mr. Corbett's business relationship by approximately one year and that absent the Accident, there is a real and substantial possibility that it would have ended in mid-2021.

[159] If Mr. Pruett had not left Streamline until mid-2021, he would have earned $200,000 to $225,000 from Streamline between January 2020 and mid-to-late-2021. In actuality, he earned $31,250 from Streamline between January 2020 and March 2020. He earned a further $36,423 from Boundary in 2021 and 2022.

[160] The determination of the plaintiff's loss under this head is not a mathematical calculation; rather, it is an assessment made by weighing possibilities and probabilities of hypothetical events: *Grewal,* at para. 49. In light of my finding that Mr. Pruett left his job at Boundary at least in part for reasons unrelated to his injuries (i.e. to operate his food truck business in the warm weather season), and given my conclusions with respect to the possible end of Mr. Pruett and Mr. Corbett's business relationship, I assess Mr. Pruett's gross past loss of income earning capacity as being $150,000. This amount is subject to applicable deductions which I expect that counsel can agree upon.

Loss of Future Income Earning Capacity

[161] The Court must answer two questions to determine a plaintiff's claim for loss of future earning capacity: 1) has the plaintiff's earning capacity been impaired by his injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time: *Pett v. Pett*, 2009 BCCA 232 at para. 8. As with past income loss, while it is somewhat attractive to apply a mathematical

calculation, the assessment of the loss is a matter of judgment and must be based on the evidence as a whole: *Rosvold v. Dunlop,* 2001 BCCA 1 at para. 18. The way in which the assessment is carried out will vary from case to case: *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.); *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.).

[162] There are two possible approaches to an assessment of loss of future earning capacity: the "earnings approach" from *Steenblok v. Funk*, [1990] B.C.W.L.D. 1417, 1990 CanLII 3812 (C.A.), and the "capital asset approach" in *Brown*. Both approaches are correct. The earnings approach will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: *Perren* at para. 12.

[163] Even where the capital asset approach is appropriate, the court should "ground itself as much as possible in factual and mathematical anchors": *Knapp v. O'Neill,* 2017 YKCA 10 at paras. 17–19.

[164] In the recent decision of *Rab v. Prescott*, 2021 BCCA 345, the Court of Appeal provided guidance in respect of the analysis of damages for loss of future income earning capacity. Justice Grauer held that once it is proven that there is a real and substantial possibility of a future loss of income, the court must then assess the likelihood of that loss materializing using the test for assessing whether a future hypothetical event will occur. The three-step process is described in *Rab* at para. 47:

> [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 added.]

[165] The approach in *Rab* was very recently re-affirmed and further explained in *Ploskon-Ciesla v. Brophy,* 2022 BCCA 217.

[166] The Court must then review the overall fairness and reasonableness of the award: *Gregg v. Ralen*, 2018 BCSC 171 at para. 153.

[167] Mr. Pruett submits that his future loss of future income earning capacity is best assessed using a modified capital asset approach, relying on certain mathematical anchors, representing his diminished capacity in relation to his without-Accident expected earnings. He submits that the award should be in the amount of $836,049.

[168] The defendants submit that Mr. Pruett's injuries resulting from the Accident have resulted in only a minor impairment to the types of jobs the plaintiff is able to do and that he remains capable of preforming the job requirements in at least light- to medium-strength roles. Further, they argue that Mr. Pruett has demonstrated his ability to function in physically demanding roles as evidenced by his ability to work at Boundary on a nearly full-time basis in late 2021 and early 2022. They submit that an award of one year's income would be appropriate in the circumstances. The defendants submit that the appropriate salary upon which to base this award is his earnings at Boundary which, including premiums for overtime, would amount to approximately $94,380.

[169] I accept that the plaintiff's approach is an appropriate anchor from which I may assess a suitable award under the capital asset approach. This approach compares his likely future earnings and then applies a percentage representing a diminishment of his income earning capacity. A similar approach was taken in *Hoffman v. Luan*, 2021 BCSC 811 at para. 53.

[170] I find that the first and second steps as set out in *Rab* have been met. In my view, Mr. Pruett has established that there is a potential future event that could lead to a loss of capacity. That is, he suffers from a chronic injury to his shoulder, neck, and back. I find that there is a real and substantial possibility that these injuries will

impair his ability to earn income in the future (as they have in the past). As stated earlier, I accept that those injuries have persisted and that he will likely experience symptoms, to some degree, for the rest of his life. On the evidence before me, I find that Mr. Pruett is likely to be able to work only part-time in the fencing industry and not for an indefinite period of time.

[171] The considerations discussed in *Brown*, at para. 8, are relevant to determining whether there has been an impairment in his capital asset (i.e. his income earning capacity). Those considerations include 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 him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[172] Although I have placed little weight on the opinions of the functional capacity evaluators, the evidence before me supports a finding that Mr. Pruett is less capable of earning income and less marketable or attractive as an employee. His strength and endurance have undoubtably been negatively affected by the injuries he has suffered in the Accident. While he remains capable of sedentary work with accommodations, that is a far cry from the work he was capable of prior to the Accident and his job opportunities are likely limited. I acknowledge that Mr. Pruett was able to work in the fencing industry in Vernon for a period of time in late 2021 and early 2022. However, this employment did negatively impact his symptoms as is reflected in the clinical records at the time of this employment. It is unlikely that Mr. Pruett would be able to sustain full-time employment as a fencing foreman or labourer for a long period of time.

[173] Importantly, as discussed earlier, Mr. Pruett derived a significant amount of his self worth from his proficiency as a fencer. There is no doubt that Mr. Pruett

views himself as being less valuable as a person capable of earning income in the labour market as result of his injuries.

[174] I find that even though Mr. Pruett and Mr. Corbett would likely have dissolved their business relationship by mid-2021 absent the Accident, Mr. Pruett would have likely continued to excel in the fencing industry had he not been injured. However, I do find that the opportunities would have likely been somewhat limited as he would likely have been prohibited from working in the commercial fencing industry in the Lower Mainland for some period of time in any event following the buyout of his shares, although he may have been able to continue working in the residential or agricultural fencing industries. His opportunities would also have been limited by his pre-existing osteoarthritis.

[175] The third step is to assess the value of Mr. Pruett's possible future loss. As stated in *Rab,* this step must include an assessment of the relative likelihood of the possibility occurring. As has often been said, this analysis will always entail an element of crystal ball gazing. In assessing the loss, the Court is not to engage in a mathematical calculation: *Rosvold* at para. 18.

[176] The plaintiff submits that, but for the Accident, he would have worked until the age of 60 earning $125,000 per year either at Streamline or at a comparable fencing company. Mr. Pruett uses the discount rate of 1.5% prescribed in s. 1(a) of the *Law and Equity Regulation*, B.C. Reg. 352/81, pursuant to s. 56 of the *Law and Equity Act,* R.S.B.C. 1996 c. 253, and the multipliers found in R. Dean Wilson et al, *Civil Jury Instructions*, loose-leaf (consulted on 14 December 2022), 2d ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009), Appendix E at G-32 ("*CIVJI*"), to calculate the present value of his without Accident earning capacity. He submits that this amounts to a lifetime loss of income in the amount of $1,045,063. He submits that the Accident has resulted in a loss of 80% of his future earning capacity such that he is entitled to a future loss of income in the amount of $836,049. He says that this reflects a conclusion that, although he has a residual

earning capacity, he will likely never work full time as a commercial fencing foreman again.

[177] In my opinion, the defendants' position that Mr. Pruett is entitled to only one year of salary does not reflect the extent of the impact the injuries Mr. Pruett suffered in the Accident has had on his earning capacity. However, I also do not accept Mr. Pruett's submission. In my view, Mr. Pruett has over-estimated his without-Accident future income earning capacity and underestimated his residual earning capacity.

[178] As stated earlier, I have found that Mr. Pruett's relationship with Mr. Corbett and Streamline would have dissolved before the trial absent the Accident. On the evidence before me, Mr. Pruett's salary of $125,000 per year reflects a premium as a partial business owner above and beyond what he would have been paid as a non-owner foreman. There is no indication in the evidence that he would have likely entered into another partial ownership arrangement with another company; in fact, the evidence suggests that Mr. Pruett was much better suited for the labour and foreman role than the ownership role.

[179] The evidence before me is that a fencing foreman with Mr. Pruett's experience and skills would likely earn between $75,000 and $100,000 per year. Given his proficiency in the field, I find that, absent the Accident, Mr. Pruett would likely have earned $100,000 per year. Using the *CIVJI* multiplier proposed by the plaintiff for nine years of work following trial, I find that Mr. Pruett's likely without-Accident earnings would be $836,050.

[180] In determining Mr. Pruett's loss of income earning capacity, I must consider the various positive and negative contingencies that may affect this capacity. Relevant contingencies in the present case include that Mr. Pruett's condition may improve, and conversely, that he may become ill or die or have been removed from the workforce due to causes unrelated to the Accident. I also must consider that Mr. Pruett's pre-existing osteoarthritis would likely have become symptomatic at some point before his planned retirement absent the Accident. In addition, I must consider the possibility that Mr. Pruett would have retired earlier than the age of 60

and embarked upon his dream of owning and operating a food truck in the without-Accident scenario.

[181] Considering these negative and positive contingencies, I find that a fair and reasonable assessment for Mr. Pruett's loss of income earning capacity on a capital asset approach is $300,000.

[182] In considering the fairness and reasonableness of this award, I note that it is roughly equivalent to a loss equal to 30-40% of his without Accident lifetime earnings of $836,050, based on his diminished earning capacity. In my view, a diminishment of capacity in this amount is more consistent with the evidence than a diminishment of 80% as the plaintiff has submitted. In particular, it is consistent with the evidence in respect of the time that Mr. Pruett missed from work at Boundary due to his injuries. It also reflects the likelihood that, as Mr. Pruett ages, he will be less able to tolerate pain.

Cost of Future Care

[183] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-Accident condition, insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[184] It is not necessary that a physician testify to the medical necessity of each item claimed; however, there must be some basis in the evidence whereupon the trier of fact can draw a link between the professional's assessment of pain and disability with the recommended treatment: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 39.

[185] In *Sharma v. Chui,* 2019 BCSC 2115, the Court said the following about adjustments to be made and contingencies to be applied to the assessment of damages for the cost of future care:

> [120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.
>
> [121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: *Maltese v. Pratap*, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: *Langille v. Nguyen*, 2013 BCSC 1460 at para. 234.

[186] An assessment of damages for cost of future care is also not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[187] Mr. Pruett claims $102,191 for the cost of future care. His claim is based upon Mr. McNeil's cost of future care report. The defendants submit that the plaintiff is only entitled to between $1,440 and $2,560 for psychotherapy.

Pain Management Devices

[188] Mr. McNeil makes a number of recommendations under the heading "Pain Management". These include recommendations to address Mr. Pruett's sleep difficulties such as a contoured pillow, a body pillow and a mattress topper. Mr. McNeil did not discuss these, or any of his cost of future care recommendations with Mr. Pruett. There is no indication in the evidence before me as to whether Mr. Pruett already has any of these devices, nor is there any evidence as to whether he would likely use them in the future. Therefore, I decline to award them.

[189] Mr. McNeil also recommends a heating pad. Ms. Pruett testified that the plaintiff uses a heating pad as a means of managing his pain and I find that it is a reasonably necessary item. Mr. McNeil recommends that a heating pad be replaced every three years; however, Mr. Pruett has not demonstrated that this rate of replacement is reasonably necessary for his purposes. I find that a one-time cost of $75 is reasonable.

Homemaking Assistive Devices

[190] Mr. McNeil recommends a lightweight vacuum, a steam mop, and a cordless electric scrubber. There is no evidence before me that Mr. Pruett would be likely to use any of these items and it is not clear to me that he engaged in these particular types of household chores before the Accident. Furthermore, it is likely that the Pruetts already own a vacuum, a mop and some sort of tool to scrub the shower and bathtub. There is no evidence before me of the difference in cost between the items recommended and the ones likely owned by the Pruetts (i.e. the difference in cost between a lightweight vacuum and a regular vacuum). I decline to make an award for these items.

Homemaking Assistance, Home Maintenance, and Yard Work

[191] Mr. McNeil recommends what he refers to as “seasonal cleaning” which he describes as a service that would perform heavy seasonal cleaning chores two days per year. It is not entirely clear to me that Mr. McNeil is recommending. The evidence before me is that Mr. Pruett still shares in household chores and duties but that he takes longer to complete them. Ms. Pruett testified that the entire family helps out to get the chores done. In my view, assistance with seasonal cleaning is not reasonably necessary and I decline to make an award for it.

[192] Mr. McNeil recommends that Mr. Pruett be provided with assistance to maintain his property and home for two hours per week, 30 weeks per year at a cost of $2,700 per year. Mr. Pruett seeks an award of $54,000 for this future care item which represents Mr. McNeil’s yearly estimate for the next 20 years. It is not clear to me how Mr. McNeil arrived at his estimate of two hours per week for 30 weeks per

year. While it may take him longer than it used to, it is clear to me that Mr. Pruett is capable of doing many home maintenance and yard work tasks; this much is evident from the surveillance videos that depict him shoveling snow and moving rocks. Mr. Pruett also testified to moving and spreading gravel. Although I accept that engaging in these activities causes Mr. Pruett some exacerbation of his pain, my impression is that Mr. Pruett enjoys engaging in these activities. Mr. Pruett has not provided evidence demonstrating that any gratuitous work done by his family caused them direct economic loss, or that the work replaced expenses which would have been incurred if his family were not available to do the work: *Borth v. Lee*, 2005 BCSC 1517 at para. 97.

[193] While increased pain in performing household tasks, and a decreased pace in completing them are compensable losses, I have already accounted for this loss in my award of non-pecuniary damages. For these reasons, I decline to make an award under this head.

Pain Management Program

[194] Mr. Pruett seeks $15,000 in respect of the provision of a multidisciplinary pain management program. Mr. McNeil states that these programs cost between $10,000 and $15,000 and describes this type of pain management program as follows:

> This is a program that involves a team of healthcare providers including a pain physician, psychiatrist, psychologist, physiotherapist, occupational therapist, kinesiologist, pharmacist, and/or other healthcare providers as needed. The emphasis is on education about chronic pain and the development of coping techniques as well as trying to focus on increased physical activity.

[195] Drs. Chow, Regan, and Waisman all recommended that Mr. Pruett would benefit from participation in a multidisciplinary pain management program. In his testimony at trial, Dr. Okorie stated that he would “not object” to Mr. Pruett’s participation in such a program. I disagree with Ms. Branscombe that Mr. Pruett has already attained the services offered in such a program. While Mr. Pruett has engaged the services of many of the professionals that form such a multidisciplinary

team, they were not part of a formal team with a coordinated approach as described by the experts who testified.

[196] In my view, given the interrelated nature of his physical and mental health symptoms, Mr. Pruett would benefit from such a program; particularly in light of his aversion to prescription medication, including pain medication. Mr. Pruett has participated in many of these treatment modalities separately and I find that he would likely participate in an organized coordinated program. I find that $15,000 is a reasonable amount for his participation in a multidisciplinary pain management program.

Occupational Therapy, Physical Therapy and Massage Therapy

[197] Mr. McNeil recommends six sessions with an occupational therapist to address cognitive and behavioural pain management strategies. He estimates the cost as being $1,344. While Mr. Pruett submitted that this would be complementary to the pain management program, I am unclear as to how it differs. As I understand it, the pain management program discussed above includes the participation of an occupational therapist. It appears to me that providing a separate award would be double counting, and consequently, I decline to make such an award.

[198] Mr. McNeil recommends ongoing physiotherapy and massage sessions to manage Mr. Pruett's chronic pain and to assist with managing his pain during flare-ups of his symptoms. Mr. Pruett seeks 24 sessions of physiotherapy at a total of $2,160 and 60 sessions of massage therapy for a total of $5,400.

[199] Mr. Pruett has engaged in physiotherapy and massage therapy on a very frequent basis since the Accident and finds that it can help his flareups. I find that he is likely to continue doing so if these treatments are made available to him. Dr. Chow recommends physiotherapy and massage therapy for Mr. Pruett in order to manage his flareups. During cross-examination, Dr. Kendall opined that physiotherapy and massage therapy are not effective in providing a "cure" and he did not recommend them. When asked further about this, Dr. Kendall said he has a "personal bias" against such treatments and then stated that they may, in fact, provide some

temporary relief and assist with managing flareups. Given Dr. Kendall's admitted bias against such treatment, I give his original opinion that they are not recommended very little weight.

[200] In my view, the amounts sought by the plaintiff for physiotherapy and massage therapy to manage flare-ups of his symptoms are reasonable and therefore I award $2,160 and $5,400, respectively.

Psychological Counselling

[201] Both parties agree that Mr. Pruett is entitled to psychological counselling as part of his future cost of care award; however, they differ on the amount. The plaintiff seeks monthly sessions for five years totaling $12,000. The defendant says that Mr. Pruett is entitled to between 12 and 16 sessions of psychotherapy amounting to between $1,440 and $2,560.

[202] It is clear that psychological counseling is reasonably necessary in the circumstances. After being assessed by Dr. Okorie in November 2021, Mr. Pruett was convinced that he should commence counselling. Since then, he has attended counselling sessions and finds them helpful even though he initially found it uncomfortable to talk about his mood and other mental health conditions. I find that he will use such services in the future if they are made available to him.

[203] Dr. Waisman recommended that Mr. Pruett receive 52 sessions of psychotherapy (once per week over the course of one year). In his responsive report, Dr. Okorie opined that Dr. Waisman's treatment recommendation was excessive and he recommended 12 to 16 sessions in total, aimed at teaching Mr. Pruett skills to manage his pain, anxiety and depression. He repeated this recommendation in the report he wrote following his examination of Mr. Pruett in November 2021. I note that Dr. Okorie's recommendation was made in combination with a recommendation for psychotropic medications. Given that Mr. Pruett has no intention of taking prescription medications, he may need more psychotherapy than the amount recommended by Dr. Okorie. However, I am not persuaded that he would need the amount recommended by Dr. Waisman.

[204] In my view, the amount proposed by the plaintiff is reasonable and I award $12,000 for this cost of future care item.

Summary of Cost of Future Care Award

[205] In sum, I award the following cost of future care items:

Pain Management Devices	$75
Pain Management Program	$15,000
Physiotherapy	$2,160
Massage Therapy	$5,400
Psychological Counselling	$12,000
Total	$34,635

Special Damages

[206] The parties have agreed that Mr. Pruett is entitled to $21,733 of special damages and I award that amount.

CONCLUSION

[207] Mr. Pruett's claim for damages is allowed and the defendants are jointly and severally liable for the damages awarded. In summary, I award the following:

Non-Pecuniary Damages	$142,500
Gross Past Loss of Income	$150,000[2]
Future Loss of Earning Capacity	$300,000
Cost of Future Care	$34,635
Special Damages	$21,733
Subtotal	$648,868

[208] The entirety of the damages award is subject to a reduction of 50% due to my conclusion that Mr. Pruett is equally liable for the Accident. Consequently, Mr. Pruett's total award is $324,434.

COSTS

Subject to circumstances of which I am unaware, the plaintiff is entitled to his costs of the action at Scale B. Should the parties wish to make submissions on costs, they may arrange to do so with Supreme Court Scheduling. Any such arrangements to speak to the matter of costs must be made within 45 days of the date of these Reasons for Judgement.

"Majawa J."

[2] The gross award for past loss of income earning capacity is to be reduced to a net amount by applying the applicable deductions which I expect counsel to be able to agree upon.