IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Sharma v. Sagoo,
2023 BCSC 1136

Date: 20230704
Docket: M199896
Registry: New Westminster

Between:

Shiv Raj Sharma

Plaintiff

And

Rupinderjit Sagoo,
Canuck Security Services Limited, and
Honda Canada Finance Inc.

Defendants

Before: The Honourable Justice Walkem

Reasons for Judgment

Counsel for the Plaintiff:	T.L. Martin M. Kazimirski
Counsel for Defendants:	A. Spence D.M. De Baie
Place and Dates of Trial/Hearing:	New Westminster, B.C. February 6-10, 2023 February 13-16, 2023
Place and Date of Judgment:	New Westminster, B.C. July 4, 2023

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INTRODUCTION

[1] This case arose out of a motor vehicle accident which occurred March 11, 2016 on Highway 91 ("the Accident"). The plaintiff, Dr. Shiv Sharma, abruptly stopped when the car in front of him stopped, and was subsequently struck from behind by the defendant, Mr. Rupinderjit Sagoo's, vehicle. Traffic was described as "stop-and-go" and the Accident occurred at a low speed. The defendant estimated his speed at impact to be 5 km/h, though the plaintiff thought the speed was higher. The plaintiff's right foot was jammed into the brake pedal when his car was struck from behind.

[2] Immediately following the Accident, the plaintiff did not exit his vehicle to look at any damage to the vehicles. Instead, for safety, he invited the defendant driver of the other vehicle, who was then employed with Canada Security Ltd., to sit in his car while they exchanged information. The defendant has admitted liability for the Accident.

[3] After the Accident, the plaintiff felt some discomfort in his neck, lower back, right arm and ankles, but felt well enough to drive to downtown Vancouver where he met his wife and her work colleagues for dinner. The plaintiff's vehicle experienced minimal surface damage, and total cost of repairs was $1,339.95.

ISSUES

[4] The issues for determination are:

1. Causation of the plaintiff's injuries;

2. What, if any, damages should be awarded for:

    a. Non-pecuniary loss;

    b. Pre-trial (past) loss of earning capacity;

    c. Future loss of earning capacity;

d. Cost of future care; and

e. Special damages.

CREDIBILITY AND RELIABILITY OF WITNESSES

[5] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 aff'd 2012 BCCA 296, as requiring "an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides". Features relevant to assessing credibility include: the witness's ability and opportunity to observe events; their ability to resist influence to modify recollection; collateral evidence; whether testimony seems unreasonable or unlikely; and, the presence of any motive to lie or stretch the truth (at para. 186).

[6] In addition to the defendant, who testified about the Accident itself, and the plaintiff, I heard testimony from the following lay witnesses: Ms. Jyoti Bhardwaj, who is married to the plaintiff; Mrs. Parveen Sharma, the plaintiff's mother, who works in a management capacity at one of the plaintiff's optometry stores; Ms. Nahal, who also works in a management capacity at one of the plaintiff's optometry stores; and, Dr. Pardeep Dhillon, another optometrist. The following experts testified: Dr. David Koo; Dr. Kelly Apostle; Dr. Paul Bishop; Mr. Daniel Sturgess; and Mr. Ronald Tidball. I outline any questions I had regarding the credibility of any witness testimony below.

BACKGROUND

The Plaintiff Before the Accident

[7] The plaintiff was born in the United Kingdom in 1986 and his family immigrated to Canada in 1991.

[8] The plaintiff's parents owned and operated an optical business. The plaintiff remembers not seeing his parents very much as he was growing up, as they dedicated long hours to the business. The plaintiff's father abused alcohol and experienced other health issues. As the eldest child within his South Asian family,

the plaintiff testified there is a cultural expectation that he set a high standard for his siblings, and to care for his family.

[9] The plaintiff did very well academically. After completing an undergraduate degree in molecular biology at Simon Fraser University, he attended the Southern School of Optometry in Memphis, Tennessee.

[10] The plaintiff and Ms. Bhardwaj met while the plaintiff was at optometry school and doing a clinical rotation in Ontario. They married in July 2013. The couple shared a commitment to working hard. Both are high achievers and intended to keep working after they had kids. They decided to share household responsibilities equally in their marriage. The plaintiff did most cooking and outdoor work, such as mowing the lawn and trimming trees.

[11] In August 2013, the plaintiff set up an optometrist practice at his parents' optometry store. The original store sold glasses and contact lenses but did not offer eye exams. At first, his parents continued to operate the retail sales portion of the business, while the plaintiff offered eye exams. The plaintiff incorporated his business in October 2014.

[12] Business was initially slow as the plaintiff built a patient base from the store's clientele. The plaintiff worked six days per week. The plaintiff's average weekday usually lasted from 8:00 or 9:00 a.m. until 6:00 p.m. He saw six to eight patients per day and exams took approximately 30-45 minutes per patient. The plaintiff spent non-examination times interacting with clients and staff. The plaintiff enjoyed his work, as it allowed him to help his local community.

[13] From August 2013 through to the time of the Accident, the plaintiff worked full-time at the optometry practice. The plaintiff stated business was on an upward trajectory, which was disrupted by Accident-related injuries. He anticipated seeing more patients per day as business grew and as he became more efficient. Patients usually see optometrists depending on their insurer's billing cycles, every one to two years. Number of patient visits increase with repeat cycles.

[14] Prior to the Accident, the plaintiff was physically active and fit. He regularly ran, worked out, and played hockey and basketball recreationally, among other activities. The plaintiff and Ms. Bhardwaj enjoyed travel.

[15] The plaintiff was 29 years old when the Accident occurred, and 36 at trial.

After the Accident

[16] The parties agreed upon this post-Accident chronology:

March 11, 2016	Motor Vehicle Accident
March 14, 2016	First visit with Dr. Singh, former family doctor
March 16, 2016	First treatment with chiropractor
March 29, 2016	First treatment with physiotherapist
September 15, 2016	Consult with Dr. Navraj Heran, neurosurgeon
September 23, 2016	Consult with Dr. James Matthew, orthopedic surgeon
June 14, 2017	First child is born
August 23, 2017	First visit with Dr. Alex Mazurek, current family doctor
January 2019	Purchased retail portion of the optical business from parents
May 8, 2019	First visit with registered massage therapist
January 2020	Contracts first locum optometrist
March 2020	Online store is established
March 24, 2020	Second child is born
January 11, 2021	Consult with Dr. Hooman Sadr, orthopedic surgeon
July 27, 2021	Independent medical examination (“IME”) with Dr. Paul Bishop, spine specialist
September 15, 2021	IME with Dr. Kelly Apostle, orthopedic surgeon
May 2022	Opens second optometry clinic
October 17, 2022	Consult with Dr. David Koo, physiatrist
November 14, 2022	Consult with Dr. John Diggle, neurologist

Post-Accident Pain

[17] The plaintiff says in the aftermath of the Accident he experienced shooting pain in his neck, radiating into his arm, and low back pain connecting to his legs. The plaintiff made an appointment to see his family doctor within a week of the Accident. His doctor prescribed Lyrica, Tylenol 3 and anti-inflammatory medication. The plaintiff undertook treatments with a chiropractor and physiotherapist within a month.

[18] The plaintiff paid for a private MRI because of pain in his neck and right arm. The MRI showed herniated discs in his cervical spine. The plaintiff began to take Wednesdays off work in response to the discomfort he felt from his injuries.

[19] While out with his wife in April 2016, 4-6 weeks post-Accident, the plaintiff experienced progressive difficulty walking and was unable to put weight on his right foot. An MRI showed a peroneal nerve tear. The plaintiff was given a choice between surgery or waiting to see if the injury would resolve over time. He elected not to have surgery, given potential risks.

[20] The plaintiff saw Dr. Heran, a neurosurgeon, in September 2016. At that time Dr. Heran opined that the plaintiff's neck pain was myofascial, and the herniated discs were not causing the neurological symptoms in the plaintiff's hand. Dr. Heran offered the opinion that, while the plaintiff *may* have Thoracic Outlet Syndrome ("TOS"), it was *more likely* his symptoms were related to soft tissue injuries. Dr. Heran advised that the plaintiff could increase his work schedule.

[21] The plaintiff undertook a variety of treatments, including physiotherapy, chiropractic and massage therapy in the years following the Accident. There were significant gaps in time where the plaintiff undertook no treatments between the Accident and trial.

Family Life

[22] Ms. Bhardwaj grew up in the Toronto area, and her family and social support network continue to be located there. Ms. Bhardwaj testified that she would have preferred to stay in Ontario where she was born and raised, and where her friends and family are. She agreed to move to B.C. because it was important to the plaintiff to work at his parents' store, and they both felt it would be better financially.

[23] In June 2017, the couple's daughter was born. In March 2020, the couple's son was born. Their daughter is currently six years old, and son three years old.

[24] Ms. Bhardwaj described the plaintiff before the Accident as fun, energetic and present.

[25] After their daughter's birth in 2017, just over a year post-Accident, Ms. Bhardwaj stated the plaintiff was more active and would play and engage with their daughter. The plaintiff's evidence was that he did not have energy to go on walks during Ms. Bhardwaj's first pregnancy, and was not able to support her during her recovery, or in caring for their daughter. The plaintiff fears Ms. Bhardwaj blamed the lack of walks for her having to get a C-section in the birth of their daughter.

[26] Ms. Bhardwaj testified the plaintiff was not able to provide support to her during her second pregnancy in 2019. Instead, her 22-year-old brother flew from Toronto to support her. Ms. Bhardwaj stated she now feels the plaintiff is disconnected and disengaged and that she feels alone in the marriage.

[27] One instance cited by the plaintiff and Ms. Bhardwaj to illustrate the impact of the plaintiff's Accident-related injuries on his family was a book titled "Mr. Down", created by Ms. Bhardwaj and their daughter. The "Mr. Down" book mirrors a set of children's books by Roger Hargreaves (Mr. Happy, Mr. Greedy, Mr. Brave, Little Miss Helpful, Little Miss Shy, and so on). The plaintiff attributes this to his wife and daughter seeing him "resting" and "down". The plaintiff says he only saw the cover and has not read it, and finds it extremely painful that this was given to him. Ms. Bhardwaj said she was trying to illustrate to the plaintiff her (and their daughter's) experience of the plaintiff's lack of participation in family life, and always laying or sitting down.

[28] The plaintiff says his tendency now is to simply lay down and scroll on his phone at the end of a day. The plaintiff says that he is physically and emotionally drained at the end of a workday, and has trouble getting up in the morning or engaging with his family. He is not as involved as a father or partner as he would like to be.

[29] The plaintiff says his inability to help as much makes him feel “inadequate”. The plaintiff says he is drinking more alcohol than he would like to deal with his pain and the depression he feels. He says, given his father’s alcohol abuse, he is concerned about his own drinking, particularly in front of his kids.

[30] The plaintiff attributes the couple’s lack of physical intimacy to post-Accident pain and resentment.

[31] The couple has sought help through counselling, though both testified their relationship remains troubled.

[32] The plaintiff’s testimony was that the Accident significantly limited his household activities. This testimony was inconsistent with his discovery evidence, where he indicated he had started to cook again within months and resumed outdoor tasks, although outdoor tasks caused pain at times.

[33] Over time, both testified more responsibility has shifted to Ms. Bhardwaj. The plaintiff now participates less in cooking and other household tasks, and is less involved in the life of the family overall. The couple no longer shares household duties 50/50. The couple has hired a nanny who cares for the children and does some cooking. They also hire a home cleaner on a regular basis. As they both intended to work after having children, they said they would have hired a nanny and house cleaner in any case.

[34] From the evidence, this shift occurred in the midst of a number of changed circumstances in the plaintiff’s life, with the Accident being only one factor. Other factors include that the plaintiff:

- continued to grow his optometry practice;
- was appointed to the college of Optometrists, and served on that organization’s Executive and participated in fee negotiations with the government;

- purchased a new location and split his time between the two locations;
- opened an online store; and
- had two young children.

[35] The evidence revealed a distinction between the way the plaintiff and Ms. Bhardwaj view work and what it means to meet one's family obligations.

[36] The plaintiff's testimony was that his family emphasizes hard work, at the cost of time with family. When speaking of his childhood, he recalled his parents were often at work and he rarely saw them. The plaintiff's mother testified she encourages him to work more, and points out that she and his father did. For the plaintiff, finances and generating money are clearly very important.

[37] Ms. Bhardwaj's testimony was that this level of focus on work and making money, if resulting in the plaintiff not "being there" for their family, or actively participating in family life, was not acceptable to her. Ms. Bhardwaj indicated she resents that the plaintiff pours himself into the business and has nothing left for the family at the end of the day. Ms. Bhardwaj observed that the more the plaintiff works, the more withdrawn he becomes from their family.

[38] Although the plaintiff and Ms. Bhardwaj shared similar values prior to the births of their children in terms of work ethic and future goals, it was apparent in the testimony of Ms. Bhardwaj that she would prefer the plaintiff dedicate more time to their family, and she feels resentment in being so far from her own support network and family.

[39] After the Accident, the plaintiff's overall patient visits increased in 2016 and 2017. The plaintiff argues these numbers would have grown at a greater rate but for the Accident. In the seven years since the Accident, the plaintiff says the detrimental impacts from the Accident have increased.

[40] Optometry examination equipment requires the plaintiff raise his hands to shoulder level or higher, and he also has to extend his neck forward, which causes pain. He says he has to hold his neck at an awkward angle to avoid further pain. Using computers to enter or review patient data involves similar movements. The plaintiff argues that, as a result of his Accident-related injuries, these tasks are painful, particularly when repeated over and over, day after day.

[41] The plaintiff argues that absent the Accident, he would be able to see 20-25 patients per day, Monday to Friday. Currently, he sees approximately 11 patients per day, 4 days per week. The plaintiff says, even with this reduced schedule, taking one day off from patient exams, while still seeing patients at two clinics, that his symptoms are worsening.

[42] As he and his wife started their family, the plaintiff says his goal was to work about 268 days per year, five days per week and some Saturdays, accounting for vacation time. He says this forecast has been impacted by Accident-related injuries.

[43] The plaintiff describes himself at the end of a work day as “having nothing left to give”, “wiped out” and “falling apart”. He attributes this to Accident-related pain.

[44] The plaintiff’s evidence was that he does not see himself as having the success he feels he could have achieved, but for the Accident. Though his family is doing okay financially, the plaintiff says he feels pressured to earn more money. The plaintiff says he feels he has a “financial gun” to his head with the obligations he has to do well for his family. He feels that he should be able to work more hours, see more patients, and earn more money.

Lay Witnesses–Work

[45] Several witnesses were called who spoke about the symptoms that the plaintiff experiences personally and at work.

[46] Ms. Parveen Sharma, the plaintiff’s mother, testified the plaintiff often appears sore or to be in pain, and that he is unhappier and quieter. I found Ms. Sharma to

have exaggerated her evidence on some points, for example, saying “all” of the optometrist store’s clients became the plaintiff’s clients, or her account of how busy the plaintiff was seeing patients when he initially set up business, which was contradicted by the plaintiff’s own evidence that business was initially slow. Ms. Sharma said she “kept pushing” the plaintiff to take more patients, despite that he told her he was in pain, particularly in 2018. She said she was concerned that his income would suffer if patients were turned away, or if locums were hired.

[47] Aman Nahal has worked at the optometry store since 2015, and is currently in a management role at one of the clinics. Ms. Nahal said the plaintiff is seeing less patients now than pre-Accident, engages less with staff and clients, and appears to be in pain. She said the plaintiff used to see patients in 20-minute slots, but now appointments run 30-45 minutes. She agreed the plaintiff is seeing less patients now because he is only at the clinic two days per week, and he divides his time with the other clinic and takes a day off.

[48] The defendant points out that Ms. Nahal gave conflicting evidence, stating that the pre-Accident examination visits were 20 minutes on direct-examination and then saying they were 30 minutes on cross-examination. This is also contradicted by the plaintiff’s own evidence that visits during that time period were required to be more comprehensive and were around 45 minutes.

[49] Dr. Dhillon, a professional acquaintance of the plaintiff, testified about his experience as an optometrist who operates his own store in Surrey. Dr. Dhillon worked 6-7 days per week to build his patient base, eventually settling at 5 days per week, seeing 21-25 patients per day, and close to 30 on some days. He has regular 20-minute exam blocks, with emergency visits and walk-in patients slotted in between.

[50] Dr. Dhillon said his store makes less retail profit from locums, than from himself. Dr. Dhillon said that building a practice which can be sold is often part of a retirement plan for optometrists. He testified that some patients find another optometrist if he cannot schedule them when they want, or if they are offered an

appointment with a locum. There was no information about Dr. Dhillon's personal circumstances, or choices he made to allocate time in his personal life to support those patient visit numbers. Dr. Dhillon referred to needing to do some physical activity to keep himself healthy.

[51] The defendant questioned whether the numbers Dr. Dhillon suggested he saw were sustainable or constant. The defendant argues that Dr. Dhillon's assertion that he sees 21–25 patients per day was overly optimistic as it was based on 20-minute appointments, yet he agreed on cross-examination that full comprehensive examinations could take up to 60 minutes. Seeing 25 patients at 20 minutes each would require 8.5 hours of exam time, while Dr. Dhillon's clinic is only open for 8 hours.

[52] The plaintiff argues that, but for the Accident, it is reasonable to expect his practice would have developed in a comparable way to Dr. Dhillon's, and he would have seen 20-25 patients per day, five or sometimes six days per week

[53] The defendant argues the pre-Accident description of the plaintiff's clinical practice, revealed in testimony of the plaintiff and his witnesses, was exaggerated and contradictory. Post-Accident in 2016, excluding vacation time, the plaintiff worked a similar number of days per month from March 2016 to October 2016 as in the six months immediately preceding the Accident. In 2016, the plaintiff saw 10.4 patients per day; 10.2 in 2017; 10.0 in 2018; 12.9 in 2019; 14.4 in 2020; 12.4 in 2021; and 8.3 in 2022.

[54] The defendant says that, even if I were to accept the plaintiff can only perform at a level of seeing 15 patient visits per day, the plaintiff is not seeing that number of patients. The defendant argues the evidence suggests the patient base may not be available, and the lack of available patients, rather than Accident related injuries, accounts for the plaintiff's patient visit numbers.

College of Optometrists

[55] In 2017, the plaintiff was appointed to the College of Optometrists for a three-year term. He then served as treasurer on the Executive. He led a team negotiating a new fee structure with the provincial government. The plaintiff withdrew from the College Board in May 2022. He argues that, absent pain associated with the Accident, he would have been able to continue his work with the College. The defendant points out the plaintiff's withdrawal coincided with the purchase of the second practice location.

Purchase of Parents' Share of Business

[56] In January 2019, the plaintiff purchased the retail portion of his parents' store. The plaintiff's mother, remains employed in a management capacity at the store. The plaintiff suggested that this purchase was made above-value, which I took to mean he paid more than market value, as a means of supporting his family.

Locums

[57] Over time, the plaintiff has hired locums who do patient examinations. The first locum was hired in January 2020, nearly four years post-Accident. The parties disagreed about whether hiring locums was a natural and expected development for a growing business, or whether their hiring was more related to the plaintiff's injuries.

[58] The plaintiff has generated revenue from the work of locums, even after accounting for the cost of paying them. The plaintiff argues he would have done more work himself absent injuries, and that he generates more retail income per patient himself than locums do.

Start of Online Business

[59] In March 2020, the plaintiff started an online store to sell optometric product as a response to the COVID-19 pandemic. The online store was very successful.

[60] The plaintiff argues he would have opened the online store in any event, regardless of the Accident. The plaintiff minimized the amount of time required for

the online business. He argues he did not lose any in-store revenue due to his time building, and managing, the online store. He further argues his time managing the online store is minimal, and that he has hired staff to take over tasks associated with the online store.

[61] The defendant points out that, in the plaintiff's examination for discovery in August 2022, he said he was spending four to eight hours per week on the online business. The defendant further argues that the online store was a mitigation measure to address loss of income, and gains made from the online store should be considered in assessing the plaintiff's losses.

Purchase of Second Practice

[62] In May 2022, the plaintiff purchased a property and opened a second optometry practice. The plaintiff testified he sees this second location as a real estate investment for his retirement.

[63] The plaintiff works two days per week at each clinic location; splitting his time between the two locations. The defendant takes a day off between seeing patients at both locations. He says this is to rest and recover from Accident-related symptoms. Locums in each location see less patients than the plaintiff. The defendant points out that if patients are lost due to the plaintiff's unavailability at either location, the fact that he works at two clinics, so has less time at each, must be taken into account.

[64] The defendant argues the addition of a second location could be reasonably expected to increase the plaintiff's management and oversight responsibilities, and questions whether the day the plaintiff says he takes off from patient visits due to Accident-related injuries is not, in fact, partially spent on management and oversight of the two locations, as well as the online store.

CAUSATION

[65] The question of causation asks whether a plaintiff's injuries were caused by a breach of the standard of care owed by the defendant to the plaintiff in the circumstances. A plaintiff must establish, on a balance of probabilities, that the

defendant's negligence caused or materially contributed to their injury beyond the range of *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [*Athey*] at paras. 13-17.

[66] Pre-existing injuries and medical conditions, as well as intervening events which worsen a plaintiff's condition, should be considered in assessing causation. The impact of intervening events may also be a factor in assessing damages: *Athey*, at paras. 32-35. Where other tortious and non-tortious factors are found to contribute to the plaintiff's injuries, this may be reflected in a percentage discount. See: *Chavez-Salinas v. Towe*r, 2017 BCSC 2068 at para. 445; *Grewal v. Sanghera*, 2021 BCSC 621 at para. 129;and, *MacGregor v. Bergen*, 2019 BCSC 315 at para. 105.

Medical Evidence

[67] All of the medical experts were tendered by the plaintiff. The defendant did not call any expert medical evidence.

Dr. Apostle (Orthopaedics)

[68] Dr. Kelly Apostle is an orthopaedic surgeon qualified to give testimony in the field of orthopaedic medicine, with a subspecialty in foot and ankle injuries. Despite the fact that the plaintiff's foot injury did not appear to become acute until approximately 6 weeks after the Accident, Dr. Apostle said that with this particular type of injury, this presentation was not unusual.

[69] Dr. Apostle diagnosed the plaintiff with a *peroneus brevis* avulsion to his right foot. She opined this injury was caused by the Accident given both her examination and review of MRI imaging from 2016 and 2019. With respect to the plaintiff's "disability and functional restrictions", Dr. Apostle found that he was "fine to continue his work as an optometrist" and that the injury was "unlikely to progress to giving him symptoms at low level activities such as completing his regular job or day-to-day activities". Dr. Apostle felt that the injury would impact the plaintiff's ability to participate in recreational activities, such as running or "aggressive physical activity"

to the degree he had pre-Accident. She opined the injury was permanent and persistent, but unlikely to deteriorate over time.

Dr. Bishop (Spine Medicine)

[70] Dr. Paul Bishop was qualified to give expert evidence in the treatment and management of non-operative spine pathology. Dr. Bishop opined that the plaintiff suffered from chronic mechanical neck pain with a discogenic component; soft tissue injury right scapula; and right elbow and hand symptoms secondary to peripheral neuropathy.

[71] Dr. Bishop's report found a "strong causal relationship" between the Accident and the plaintiff's:

- "right-sided neck pain", saying that "his subsequent post-MVA clinical course is entirely consistent with having suffered injuries to the soft tissues of his neck and also to the intervertebral discs of his cervical spine in the subject motor vehicle Accident. The injuries he has suffered to his cervical spine intervertebral discs may be de novo injuries or a rendering symptomatic of pre-existing disc pathology";

- "right scapula (*i.e.* levator scapulae muscle origin area) pain and the trauma of this Accident"; and

- "right elbow and right hand symptoms", and suggested testing for "underlying peripheral neuropathy and/or a component of thoracic outlet syndrome".

Dr. Koo (Physiatrist)

[72] Dr. Koo, a physiatrist, testified the plaintiff experienced a moderate level of disability overall, but given the type of job that he does, and the particular movements it requires, his injuries present more of a disability or impairment to his day-to-day living than they would for someone in another profession. Dr. Koo noted

the plaintiff's pain escalates through the work week and with successive days worked. Dr. Koo's report stated:

> At present [the plaintiff's] overall level of disability would be best characterized as moderate. He has mildly restricted and painful neck range of motion, as well as neck, upper back and right shoulder pain with extremes of neck flexion and extension, prolonged static positioning of the neck, as well as repetitive reaching and use of the right arm away from the plane of his body.

[73] Dr. Koo's opinion was that the plaintiff had pre-existing degenerative changes in his spine (normal age related) that may have made him more vulnerable to the injuries caused by the Accident.

DISCUSSION

Position of the Parties

[74] The plaintiff submits that his Accident-related injuries are chronic and severe enough to reduce his earning capacity. The plaintiff argues his injuries impact his ability to function at home and professionally; that his neck and right arm injuries require him to take breaks between patients; and, that they limit him to part-time work. As a result, he argues he sees fewer patients per day and cannot grow his practice as he had planned. He suggests he will be forced to sell his practice and retire early.

[75] In addition, the plaintiff says he experiences stress, anxiety, and depression, though he says this is not diagnosed. He also states an increase in his alcohol consumption, and attributes this to the physical pain and emotional impacts he feels as a result of the Accident. No psychological report or evidence was adduced.

[76] The defendant concedes that the plaintiff sustained injuries in the Accident, but says these injuries have largely resolved or are episodic and less severe than the plaintiff suggests. The plaintiff identified Accident-related injuries as the source of fractures in his marriage. The defendant argues that the attribution of problems in the plaintiff's marriage to Accident related injuries was an over-simplification of changes in the couple's relationship.

[77] The defendant argues the plaintiff's description of constant and increasing pain since the Accident is inconsistent with the fact that he largely stopped treatment and medication in 2016; increased the number of daily patients he saw post-Accident; and saw close to his maximum number of patients in 2019.

Analysis and Conclusion

[78] Pre-existing conditions are a negative contingency that must be considered when assessing damages: *Leung v Mok*, 2020 BCSC 1456 at para. 60. In addition to Mr. Sharma's pre-existing disc degeneration, the responsibilities of a young family is a relevant contingency to be considered in assessing damages: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 26. However, this "does not eliminate the need to undertake a complete analysis of the pain and suffering caused by the accident": *Gordon v. Ahn*, 2017 BCCA 221 at para. 33.

[79] Based on Mr. Sharma's pre-existing degenerative disc condition and the factors outlined above, I find there is a real and substantial possibility he would have suffered the losses he claims to some degree, regardless of the Accident. Significant life changes have impacted the plaintiff's personal and professional life, apart from the Accident. These include the initiation of several new business ventures, growing professional responsibilies, and the births of his children. For these reasons I find it appropriate to apply a negative contingency of 10% to the awards of damages for non-pecuniary losses, and past and future loss of income.

GENERAL DAMAGES

Law

[80] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*] at para. 46, the Court of Appeal outlined factors to be considered when assessing non-pecuniary damages. These include: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism. The

compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. The plaintiff seeks $180,000 in non-pecuniary damages and pointed to the following authorities for determining non-pecuniary damages: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, $180,000 [*Pololos*]; *Fletcher v. Biu*, 2020 BCSC 1304, $200,000; and *Gill v. Dhaliwal*, 2021 BCSC 1562, $180,000.

[81] The defendant referred to these authorities as appropriate guides for the range of non-pecuniary damages: *Fatla v. McCarthy*, No. 2022 BCSC 577, $110,000; *Singh v. Paquette*, 2022 BCSC 1579, $120,000; and *Montazamipoor v. Park,* 2022 BCSC 140, $110,000. The defendant submits $115,00 is an appropriate non-pecuniary award.

Analysis and Conclusion

[82] At the time of the Accident, the plaintiff was a young man in good physical health, who was fit and active. He had some pre-existing disc degeneration, as was indicated by Dr. Koo. Subsequent to the Accident, the plaintiff tore his left rotator cuff while exercising. The repetitive motions required by his job exacerbated the plaintiff's Accident-related injuries. On the evidence before me, I find the plaintiff suffered soft tissue injuries to his neck, shoulders, and back, which result in right arm pain and numbness, and a peroneal tear to his right foot. He experiences episodic headaches. Over time, the plaintiff's injuries have focused on his neck, shoulder, and arm on his right side. The plaintiff's foot has recovered but he still feels pain at times which is aggravated by longer walks, prolonged standing, or walking on rough terrain.

[83] There were significant gaps in treatment that the plaintiff sought. The plaintiff stopped taking prescription medications shortly after the Accident (filling his last prescription on March 14, 2016) and did not take prescription medications again for what he says were Accident-related injuries until July 19, 2022. He also stopped chiropractic treatment and physiotherapy treatment in 2016 (for his neck); had some

physiotherapy in 2018 for his foot; and, only occasionally has had RMT treatment over the past 7 years.

[84] The repetitive nature of the plaintiff's work, and specific motions he is required to make, mean that these moderate injuries have a more significant impact on the plaintiff's life than they may have for someone in another profession.

[85] I accept the plaintiff has suffered minimal loss in terms of his personal relationships, and that he does not enjoy certain activities to the same level he did pre-Accident due to discomfort in his foot, neck and shoulder. However, I also note that while not at the same level, the plaintiff has continued to exercise, and take walks and vacations with his wife.

[86] I do not find, on a balance of probabilities, that the difficulties that the plaintiff experiences in his relationship and personal life, including his increased use of alcohol, are entirely, or even primarily, attributable to Accident-related injuries.

[87] The plaintiff is entitled to be compensated for the losses suffered as a result of these Accident related injuries.

[88] The authorities cited by the plaintiff involved plaintiffs who had suffered severe, chronic and often degenerative physical and psychological injuries. I do not find these cases to be particularly helpful.

[89] I find the cases cited by the defendant to be more analogous to the circumstances of the plaintiff, particularly *Fatla*. There, the plaintiff suffered injuries similar to those of the plaintiff. Expert evidence tendered at trial showed her injuries had impacted nearly every aspect of her life to some degree. She was awarded $110,000 in non-pecuniary damages.

[90] In consideration of the *Stapley* factors, and on review of the cases cited by the parties, non-pecuniary damages are set at $110,000. For the reasons set out above, a 10% negative contingency is applied to this award.

[91] The total award for non-pecuniary damages is $99,000.

PAST & FUTURE LOSS OF EARNING CAPACITY

[92] A primary point of disagreement between the parties was the plaintiff's actual absent-Accident earning capacity and how his income trajectory was impacted by the Accident. Generally, I did not accept the plaintiff's assessment of his economic loss, which I found to be overly optimistic and not supported by the evidence.

[93] In *Harle v. Williams*, 2020 BCSC 1684 [*Harle*] at para. 45, the court noted a plaintiff's "own perception" that they had a diminished capacity to earn income in the future "is insufficient". They must show that there is a "realistic possibility" they "will be less able to compete in the marketplace with economic consequences, not merely psychological ones": *Harle,* citing *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[94] I have sympathy for the plaintiff who is clearly beset with the notion that he is not doing as well as he should be financially, and who feels a tremendous amount of pressure from various sources. I do not find the past and future loss of income claims submitted by the plaintiff to be realistic, as I outline further below.

[95] I find, on a balance of probabilities, even if the plaintiff would have opened the online store in any event, the amount of time the he spent, and continues to spend, on the online store decreases his availability for patient exams. I also find that the addition of a second optometry location increased the plaintiff's oversight and management responsibilities and resulted in less patient time at each clinic.

[96] These findings are factors in my reasoning below.

Expert Evidence on Economic Loss

[97] Each party presented an expert who opined on the best way to calculate an award for past loss of earnings, and loss of future earning capacity. Mr. Daniel Sturgess was proffered by the plaintiff; Mr. Ronald Tidball was proffered by the defendant.

[98] I had difficulty with projections made by both. I mean no disrespect to either of the financial experts. Each provided a report based on the information they were provided. I found that the data on which they based their opinions, was incomplete.

Mr. Sturgess

[99] Mr. Sturgess relied upon the figures provided by the plaintiff, though cross-referenced them with other records. There were still areas where there were discrepancies which he pointed out in his report. Originally, Mr. Sturgess did not forecast a loss. This was amended when he was provided with further information from the plaintiff.

[100] The defendant points to the fact that the plaintiff corresponded directly with Mr. Sturgess on numerous occasions through telephone and emails, and questioned the neutrality of the evidence as well as the underlying reliability of the source material provided by the plaintiff himself.

[101] Mr Sturgess did not provide calculations for 2022, and did not calculate in the revenue from online sales.

[102] In addition, Mr. Sturgess was unaware the plaintiff had purchased and was operating a second retail clinic until he reviewed the responsive report prepared by Mr. Tidball. Mr. Sturgess noted the plaintiff was seeing significantly less patients at the new location, and that he had calculated loss numbers on the basis that the plaintiff was seeing patients only at the original location.

[103] Mr. Sturgess' opinion was based on an assumption the plaintiff was spending "minimal" time with the online store, and he agreed that if the plaintiff was spending more time building, managing or operating the online store that this would impact projections as it would mean that the plaintiff had less time available to see patients. Additionally, unattributed walk-in purchases were attributed to the plaintiff, and there was no consideration that there were retail sales even prior to the plaintiff working at the practice.

Mr. Tidball

[104] Mr. Tidball provided two expert reports – one of which was a response to Mr. Sturgess' report.

[105] Mr. Tidball concluded the plaintiff had reached maximum capacity by November 2017 and in the result forecast past loss at $15,050. He opined there was no loss, on an earnings basis, beyond 2019, unless there was a finding that the plaintiff was able to "conduct 2,726 visits in 2019, notwithstanding his injuries and was only able to conduct 1,628 visits in 2020 due to his injuries." I do not find on a balance of probabilities that those factual assumptions have been established.

[106] While the defendant agrees the plaintiff's practice was still developing at the time of the Accident, they say the evidence shows that his days worked following the Accident were similar to the pattern worked in the six months immediately proceeding the Accident, and that he actually saw more patients per day post-Accident (10.4 in 2016 compared to 7.4 in 2015). The defendant argues the plaintiff reached his maximum patient load in 2019 (12.9), and that the 14 patients per day suggested by the plaintiff is not supported by evidence. Mr. Tidball estimated the plaintiff's past loss of income at $46,000, at the upper range.

[107] Mr. Tidball did not calculate any future loss, finding that the plaintiff reached his maximum patient load in 2019 and then chose to reduce the number of patients he saw to focus on other aspects of the business.

Discussion

[108] Overall, I was unable to rely on the numbers forecast by either economic expert. As I have said, each provided a report based on the information available to them. There were gaps in that information. I find the projections of lost client visits, based on the plaintiff's own projections, to be overly ambitious and not supported in evidence.

Past Loss of Earning Capacity

Law

[109] Compensation for past loss of earning capacity is based on what a 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; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. A plaintiff must show, on a balance of probabilities, "a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient": *Sendher v. Wong*, 2014 BCSC 140, at para. 161.

[110] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only their past net income loss. This means that in the ordinary course, the court must deduct the amount of income tax payable from the lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.

Position of the Parties

[111] The plaintiff seeks damages of $197,000 for past income loss, adopting the opinion outlined by Mr. Sturgess in his report.

[112] The defendant says the plaintiff's past wage loss is $34,938.40. This is based on the amount calculated by Mr. Sturgess for losses from 2016 through 2018 of $53,752 and then applying a tax rate of 35%. They accept Mr. Sturgess' submission the plaintiff suffered no loss in 2019, and that he was either unaffected by the Accident or he had worked through the pain.

[113] The defendant says it has not been demonstrated the plaintiff suffered any losses from 2019 through 2022, relying in part on this determination by Mr. Tidball and further indicating any calculations by Mr. Sturgess post-2019 are unreliable given the absence of information relevant to the assessment, such as the time the plaintiff was spending developing the online store or in tending to management responsibilities.

Analysis and Conclusion

[114] I find, on a balance of probabilities, that the plaintiff's past wage loss should be set at $53,752, based upon the calculations of Mr. Sturgess for lost wages from 2016 and through to the end of 2018. I accept the evidence of both experts that the plaintiff suffered no loss in 2019, and further that the evidence of past wage loss for the years 2020-2022 is unreliable and speculative. This amount represents a judgment of what is a fair and reasonable award, based on a consideration of the factors and contingencies presented by the parties, rather than a precise calculation.

[115] For the reasons set out above, I apply a further 10% negative contingency to this amount. The total award for past wage loss is $48,373.80. This amount is subject to income tax deductions, pursuant to s. 98 of the *Insurance (Vehicle) Act*. I apply a 20% tax rate. Total amount of this award is $38,699.04.

Future Loss of Earning Capacity

Law

[116] A claim for loss of future earning capacity raises two key questions: (1) has a plaintiff's earning capacity been impaired by their injuries; and, if so (2) what compensation should be awarded for the resulting financial harm that will accrue over time? The appropriate means of assessing loss of future earning capacity will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) [*Brown*]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871.

[117] The essential task of the Court is to compare the likely future of a plaintiff's working life if the accident had not happened with a plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia,* 2011 BCCA 144 at para. 32; *Pololos* at para. 133. These determinations are difficult because they involve calculations of "possibilities, and there is no one right answer". However, the law is clear in terms of process and these calculations are to "tethered to the evidence, not to averages and approximations based on imprecise evidence": *Dornan v. Silva,* 2021 BCCA 228 at para. 134 [*Dornan*].

[118] The Court of Appeal, in *Rab v. Prescott,* 2021 BCCA 345 [*Rab*], set out the three-step process for assessing future income loss claims at para. 47:

1. "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*)";

2. "The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss"; and

3. "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".

[119] Loss can be quantified, as explained in *Perren v. Lalari*, 2010 BCCA 140 [*Perren*], according to an "earnings" or "capital asset" approach:

> [32] … The former approach will be more useful when the loss is more easily measurable … The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*…

[120] The language of "capital asset" in *Brown* came from the Supreme Court of Canada's decision in *Andrews v. Grand & Toy Alberta Ltd*., [1978] 2 S.C.R. 229, 1978 CanLII 1, where Justice Dickson wrote at 251:

> We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings, supra*. A capital asset has been lost: what was its value?
>
> [Emphasis added.]

[121] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11, the Court of Appeal discussed that the capital asset approach was appropriate, in “less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident.”

Position of the Parties

[122] The plaintiff argues he should be compensated for loss of future income using an earnings-based approach and assuming he would have continued to work up until age 70 at full capacity, but for the Accident.

[123] In support of this position, he presented evidence of Dr. Dhillon as a comparison of what his patient-load and practice should look like for someone of his level of experience and expertise, estimating he should have been able to accomplish a maximum patient load of 20-22 patients a day and an annual income of between $250,000–$350,000. The defendant says these calculations are of little assistance, as there was no information before the court regarding other factors present in Dr .Dhillon’s life such as family or other business responsibilities, nor of the sustainability of some of the numbers proposed by Dr. Dhillon. I agree.

[124] Mr. Sturgess based his estimates on the plaintiff working 268 days/year and seeing approximately 2,760 patients annually, for a pre-tax loss of $116,000 per year. With retirement at age 70, the total loss would be $2,886,000. Applying a 10% deduction to account for walk-in clients, the total loss is $2,597,400. Mr. Sturgess’ calculations are based on several categories of loss, including lost client fees, lost retail sales and expenses to pay locums. He based his calculations upon historical data, growth assumptions and assumptions provided by the plaintiff’s counsel. As indicated above, Mr. Sturgess was not provided with information regarding the plaintiff opening a second location, nor is it clear he had accurate information regarding the amount of time the plaintiff spent in management and oversight responsibilities, or in operating the online store.

[125] The plaintiff argues Mr. Sturgess' calculations is a conservative number, as it does not account for the plaintiff's own goal of seeing 20-22 patients per day and requires no growth in the current patient load.

[126] The plaintiff also argues the court must consider a loss in the valuation of his business, stating it is common for optometrists to sell their business upon retirement. The plaintiff calculates the reduction in value of the business to be a loss of $2,988,760, suggesting a 50% decrease in potential value had the Accident not occurred. I did not understand either party to address the appreciation of the real estate asset that the second optometry business presented, although the plaintiff testified he purchased the second office as an investment.

[127] The plaintiff says his loss of earning capacity ranges from $2,597,400 to $5,899,069 plus the reduced sale value of his business which is estimated to be $2,988,760.

[128] The plaintiff argues that a contingency cannot be speculative to be considered. He says a negative contingency to be considered is that his physical disability will continue to decline, and a positive contingency is that he may be able to increase his patient load. Considering positive and negative contingencies, and the scenarios outlined above, the plaintiff claims $6,000,000 for loss of future income.

[129] The defendant takes the position that calculations for loss of future income should be calculated using the capital asset approach. They agree the plaintiff has demonstrated a loss of capacity, but argues the loss is not easily measurable as:

a) the amounts the plaintiff would have earned "but-for" the Accident are speculative;

b) the plaintiff's overall income has grown;

c) the assumptions relied on by Mr. Sturgess, including those provided by the plaintiff, are erroneous; and,

d) the plaintiff has not demonstrated any loss with retail sales.

The additional reasons outlined connect to these factors.

[130] The defendant says the plaintiff's total business income in 2019 of $95,000 is an appropriate measure for future income loss as it reflects his highest annual income since the start of his practice. The defendant further says 2019 appropriately reflects the plaintiff's earning capacity, as it does not include annual income from the online sales. They say online sales should not be included as the store was not created, nor were sales affected, by the Accident. Based on three years' valuation using this approach, the defendant says the plaintiff's loss of future earning capacity is $285,000.

[131] In addition, the defendant says a negative 20% contingency should be applied, for a total award of $228,000 under this head of damages. In support of this they cite *Dunn v. Heise*, 2021 BCSC 754 [*Dunn*], where Justice Matthews considered at paras. 202–203 that a 20% negative contingency may be used where there is no specific evidence on an appropriate discount rate provided by the experts.

Analysis

[132] The defendant concedes that the plaintiff meets the first two steps of the *Rab* test. The plaintiff has proven an impairment of his earning capacity and there is a real and substantial possibility the impairment will cause a loss in the future. I agree.

[133] I now turn to the third step of the *Rab* test. In assessing the value of the possible future loss, it is necessary to assess the likelihood of future loss occurring. The court must assess the difference between the without-accident earning capacity and the with-accident earning capacity: *Dornan*, at para. 156; *Rab*, at para. 65. That amount may be further adjusted based on applicable contingencies, where there is a real and substantial possibility of a future event occurring: *Dornan*, at paras. 131-133.

[134] For future loss of income, the plaintiff proposed an earnings approach which went beyond Mr. Sturgess's calculations of a loss of $116,000 per year projected out to a retirement at age 70, and included his own projections for a loss in the sale of his business coming to a total claimed amount of $6,000,000.

[135] The defendant submits that the case at bar falls into the category of a "less clear-cut" case, and suggest, per *Perren* at para. 32, that a capital asset approach should be used as the loss is not easily measurable.

[136] I found the future loss calculations proposed by the plaintiff to be too optimistically generous, unreasonable and unsupportable on the evidence. I do not accept that the earnings approach is appropriate to calculate the plaintiff's losses given that I do not find that those losses can be calculated with any confidence based on the evidence provided. On the evidence, it was not clear to me that the lost patient visits the plaintiff calculated future income loss on, actually existed. Further, the figures presented do not account for the plaintiff's obligation to mitigate losses and for the way his income may continue to grow through the online sales or growth of the patient base at either location.

[137] The plaintiff characterized himself as being new to practice and theorized that he would become increasingly proficient, seeing increasing numbers of patients as he continued in practice. However, by the time of the Accident, he had practiced on his own for nearly two-and-a-half years. He was recognized within his field and serving with the College, which he continued to do until recently.

[138] I do not accept the plaintiff's assessment of the number of patients he could be seeing absent the Accident in an average day. Additionally, his projections have not taken into account other factors that, absent-Accident, impacted his income trajectory. For example, the fact that having obligations to his young family, including two children born post-Accident, and to a partner who did not have her family or social circle nearby to offer support, impacted his availability to work. He also saw less patients as his management and oversight duties for a growing practice with a second location and online component grew.

[139] Given the circumstances and unknowns, I do not accept that an earnings approach is appropriate. I agree with the defendant that the capital asset approach is best suited to the present circumstances.

[140] In applying a capital asset approach, though not a mathematical formula, the court is required to make findings of fact to demonstrate how the valuation was made. If a plaintiff continues to earn income at or close to their pre-accident level, but has suffered an impairment that may affect the plaintiff's ability to continue doing so at some point in the future, or if there is a shortage of reliable evidence of what the plaintiff's post-accident future earning capacity may be, then the court may use an amount based on the plaintiff's pre-accident annual income over one to three years to calculate the without-accident future earning capacity: *Rab*, at paras. 66-73, and *Patterson v. Solymosi*, 2019 BCSC 1508 at para. 104. The amount should reflect a plaintiff's before–and after–accident circumstances: *Rab*, at para. 74, citing *Pololos*, at para. 133.

[141] When calculating an award using the capital asset approach, the judge must consider the factors outlined in *Brown* and “make findings of fact as to the nature and extent of the plaintiff’s loss of capacity and how that loss may impact the plaintiff’s ability to earn income”: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[142] On the evidence before me, I cannot find that the plaintiff’s practice would have grown to the size he has indicated it should have. Rather, I find the calculations proposed by the plaintiff to be optimistic and speculative, and that it is more likely the patient load is not available to support the number of patients the plaintiff forecast he would have seen absent the Accident. I further find additional factors and responsibilities in the plaintiff’s personal and professional life impact how much time he is able to devote to seeing patients.

[143] I now consider the positive and negative contingencies which impact the plaintiff’s future earning capacity. In considering contingencies, the court must distinguish between general and speculative contingencies. General contingencies are those that are within the realm of human experience, such as changes in the

labour market or early retirement. Specific contingencies are those that pertain to the plaintiff specifically, and which are grounded in evidence. They must be more than speculative possibilities: *Dornan* at para. 92.

[144] The plaintiff argues a positive contingency should be applied, based upon their projections of loss of future earning capacity.

[145] The defendant says a 20% general negative contingency should be applied to any award under this head of damages, citing *Dunn* at paras. 202–203 in support of this. There are several specific contingencies outlined throughout these reasons, and I have found, on a balance of probabilities that a negative 10% contingency should be applied.

[146] The plaintiff has other business ventures outside of seeing patients, and his income will grow with the growth of his business, quite apart from his own time spent on examinations. The plaintiff purchased the second store, a real estate investment being paid for through the operation of the optical business, and this asset will grow.

[147] I consider that while the plaintiff may continue to experience the pain and discomfort brought about by the repetitive nature of his job, and he may need to retire early as a result of increasing pain caused by his Accident-related injuries. On this point, I note the plaintiff may have experienced physical pain in the future even without the Accident, related to pre-existing disc degeneration in his back, and repetitive nature of his work.

[148] Based on this analysis and using the capital asset approach, I award the plaintiff $285,000, which represents three years worth of earnings at an amount of $95,000 per year, which is the equivalent of his total wages in 2019.

[149] Based on the positive and negative contingencies discussed above, I apply a 10% negative contingency to the overall damage award. The total award for loss of future income is $256,500.

COSTS OF FUTURE CARE

[150] The purpose of an award for costs of future care is to restore an injured person to their original position as much as possible as if the accident had not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. The assessment is made based on what is reasonably necessary, taking into consideration whether a plaintiff is likely to use the recommended care item and contingencies for improvement or deterioration of the plaintiff: *Prempeh v. Boisvert,* 2012 BCSC 304, at paras. 107–108 and *Izony* at para. 74.

[151] The plaintiff argues he has been diligent in following the treatment recommendations, and all future care costs are supported by the medical evidence.

[152] The defendant argues that, "[e]xcept for the orthotic shoes no evidence has been led with respect to the cost of future care such that any award for cost of future care would be speculation."

[153] The plaintiff claims for future care:

- Psychologist: $225/visit x 12 sessions = $2,700.
- Massage/Physio/Osteopathy/Acupuncture: $95/visit x 30 sessions = $2,850/year. As seen in the plaintiff's special damages, these treatments have cost between $80 for a 30-minute Physiotherapy appointment and $110 for a 45-minute Massage Therapy appointment. Exact prices will depend on location and practitioner. An average of $95 per session is being used for this calculation.
- Custom Orthotics: $1,200/2 years = $600/year.
- Supportive Shoes (*e.g.* Hoka brand) = $200/year.

[154] The plaintiff says that these costs should be covered for the equivalent of 15 years, to account for these contingencies.

[155] The plaintiff claims a total amount of $55,000 for costs of future care.

[156] Despite the assertions of the plaintiff he has been diligent with medical treatment, there were, in fact, lengthy gaps until 2021 where the plaintiff did not seek medical care or other supportive treatments. While the lack of use of a particular item or service in the past is not determinative, it may be relevant to the court's analysis: *Izony* at para. 74.

[157] I find the treatments recommended as being supported in the evidence. However, based on the plaintiff's prior history of stopping treatments, or undertaking them only periodically, I do not find the amounts proposed as reasonable nor realistic. I do not find, on a balance of probabilities, that he would access the treatments as he proposes. I award costs of future care as follows:

- Massage $95/visit x 5 for 4 years = $1,900
- Physio $95/visit x 5 for 4 years = $1,900
- Custom Orthotics/Supportive Shoes: $1,450
- Psychologist: $225/visit x 6 sessions = $1,350

Total award for costs of care: $1,900 + $1,900 + $1,450 + $1,350 = $6,600.

SPECIAL DAMAGES

[158] The parties agreed to $3,653.70 in special damages, with amounts for mileage and landscaping remaining in dispute.

[159] With respect to mileage, the plaintiff admitted that for some of the treatment with Back & Body Wellness he travelled from his Scott Road clinic location for treatment which is only 1.5 km away. In closing, the parties agreed the claim for mileage should be reduced by 50% to account for these sessions.

[160] With respect to the landscaping, there was no evidence led with respect to the specific landscaping the receipts represent, nor is there evidence that it was a task that the plaintiff, himself, could not have performed. With the lack of specific evidence the claim relating to landscaping is dismissed.

[161] Generally, I understood the parties to agree on the total claim for special damages, apart from that of landscaping. I award a total of $4,353.70 under this head of damages.

SUMMARY OF DAMAGES

[162] I award the following damages:

a)	Non-pecuniary damages:	$99,000
b)	Past loss of earning capacity:	$38,669.04
c)	Future loss of earning capacity:	$256,500
d)	Cost of future care:	$6,600
e)	Special damages:	$4,353.70
	Total:	**$405,122.74**

[163] This award is subject to any applicable *Insurance (Vehicle) Act* deductions.

[164] The plaintiff is entitled to his costs in this matter.

[165] If the parties cannot agree upon costs, they may make written submissions of no more than 5 pages.

"A. Walkem J."