IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Carriere de Davide v Westland Insurance Group Ltd.*, 2024 BCSC 686

Date: 20240425
Docket: S186638
Registry: Vancouver

Between:

Mark Carriere de Davide

Plaintiff

And

Westland Insurance Group Ltd.

Defendant

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Plaintiff:	K. Gourlay S.E. Gibson
Counsel for the Defendant:	M.M. Skorah, K.C. A.D. Gubeli M.E. Willcock
Place and Dates of Trial:	Vancouver, B.C. October 16-20, 23-24, 26-27, 2023
Place and Date of Judgment:	Vancouver, B.C. April 25, 2024

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I. OVERVIEW

[1] This is an insurance broker negligence claim that arises from a motor vehicle accident (the "Accident") involving an underinsured motorist. The plaintiff is Mark Carriere de Davide (the "Plaintiff" or "Mr. Carriere de Davide"). The defendant is Westland Insurance Group Ltd. (the "Defendant" or "Westland"), a brokerage that sells Insurance Corporation of British Columbia ("ICBC") Autoplan policies. Mr. Canrriere de David alleges that Westland failed to give him adequate advice about underinsured motorist protection ("UMP") coverage.

[2] Mr. Carriere de Davide regularly purchased his Autoplan policy from Westland's sales office in Whistler. At the relevant time, that policy automatically included $1 million worth of basic underinsured motorist protection ("Basic UMP"). For an additional premium of $25, however, $2 million worth of underinsured motorist protection ("Excess UMP") could be obtained instead. Prior to the Accident, Mr. Carriere de Davide never chose to get the optional Excess UMP coverage.

[3] The Accident occurred in July 2016. Mr. Carriere de Davide was a passenger in one of the two cars involved. He was seriously injured. The driver of the car he was riding in was at fault. She only carried $200,000 worth of third party liability insurance. With his Basic UMP coverage, Mr. Carriere de Davide received approximately $665,000 in compensation from ICBC. This amount is much less than what he estimates his actual loss resulting from the Accident to be.

[4] Mr. Carriere de Davide now sues Westland for not having properly counselled him about the benefits and costs of Excess UMP coverage. While he does not remember his specific interaction with Westland's agent, Mr. Carriere de Davide says that if he had understood that he could get an extra $1 million worth of UMP for just $25, he would certainly have bought it. Because he did not buy it, he surmises that the agent must not have offered and sufficiently explained it to him. Therefore, he argues that Westland should be found liable for its agent's negligence. Mr. Carriere de Davide seeks a damages award of $1 million, reflecting the amount

of additional compensation he says he would have received from ICBC had he purchased Excess UMP.

[5] Westland denies any liability. While its agent who sold Mr. Carriere de Davide his policy, Ashley Ouellette ("Ms. Ouellette"), does not remember their specific transaction either, she says that her standard practice was to always offer and explain Excess UMP to each of her customers. Therefore, she surmises that she must have done so with Mr. Carriere de Davide. Furthermore, he signed an insurance contract and initialled the portion that confirmed his choice to decline the Excess UMP coverage option. Westland therefore argues that its agent did not fall below the applicable standard of care, and did not cause Mr. Carriere de Davide's loss. In the alternative, if Westland is found liable, it says that Mr. Carriere de Davide is only entitled to a fraction of what he is claiming given the actual damages he sustained in the Accident, and because of his contributory negligence at the time of the insurance transaction.

[6] I accept that Westland owed Mr. Carriere de Davide a duty of care when it sold him his Autoplan policy. I also find that the applicable standard of care required Westland's agent to offer him Excess UMP, and to explain its benefits and costs, but did not require the agent to recommend that it be purchased. As to what transpired when Mr. Carriere de Davide bought his Autoplan policy at Westland in May 2016, I prefer Ms. Ouellette's evidence on a balance of probabilities. In particular, I find that Ms. Ouellette provided an adequate explanation of Excess UMP to Mr. Carriere de Davide, and that he still chose not to purchase it. I am also not persuaded that Mr. Carriere de Davide would have purchased Excess UMP had he been actively encouraged by Ms. Ouellette to do so. As Mr. Carriere de Davide has not established that Westland breached its duty of care or caused him any loss, his claim must be dismissed.

II. BACKGROUND

A) Factual Background

1. The Plaintiff's Circumstances Prior to the Accident

[7] Mr. Carriere de Davide was born in 1984. He grew up in Laval, Quebec. After graduating from high school, he attended Dawson College in Montreal to study sciences, but did not complete the program.

[8] In 2003, when he was 19 years old, Mr. Carriere de Davide left Quebec and moved permanently to Whistler, British Columbia. He did so in order to pursue his passion for skiing.

[9] Once in Whistler, Mr. Carriere de Davide found work as a ski instructor. In 2005, he began working in the hospitality industry. He was primarily a bartender, although he also worked as a restaurant manager for a time. He was initially employed at establishments operated by Gibbons Whistler, including Buffalo Bills, The Longhorn Saloon, and Tapley's Pub. From June 2013 until the Accident, he worked at Garibaldi Lift Company. These restaurant jobs enabled Mr. Carriere de Davide to earn a comfortable living while still enjoying skiing and other recreational activities at Whistler year-round. He even managed to purchase a 3-bedroom townhouse in Whistler, which he now lives in with two roommates who are his tenants.

[10] Prior to the Accident, Mr. Carriere de Davide was very physically and socially active. He had many friends, and was respected and appreciated by his co-workers. He also had no relevant pre-existing health issues.

2. The Accident

[11] No direct evidence was led about the Accident itself. Mr. Carriere de Davide does not have any independent recollection of it, and no other eyewitnesses were called to describe what happened. That said, a police collision reconstruction investigation report was entered into evidence, and the parties effectively agreed on the circumstances of the Accident. They are as follows.

[12] On July 9, 2016, Mr. Carriere de Davide was riding as a passenger in a Pontiac Grand Am. The car was owned and driven by his then girlfriend. They were travelling southbound on the Sea to Sky highway that connects Whistler with Vancouver. When the Pontiac was approximately 30 kilometers south of Squamish, it rounded a curve in a 60 km/h speed zone. The driver oversteered, causing the Pontiac to spin into the northbound lane where it struck another vehicle, a Volkswagen Golf. The point of impact was on the right (passenger) side of the Pontiac and the front of the Volkswagen.

[13] It is not necessary to determine who caused the Accident since Mr. Carriere de Davide's claim is directed at the insurance broker and its alleged responsibility for the extent of UMP coverage he had at the time. However, the claims adjuster responsible for Mr. Carriere de Davide's file testified that ICBC was of the view that the driver of the Pontiac was wholly at fault for the Accident.

3. The Plaintiff's Injuries and Treatment

[14] Mr. Carriere de Davide was rendered unconscious by the force of the collision. Emergency services attended, and he was taken by ambulance to a hospital in Squamish before being airlifted to Vancouver General Hospital. He was diagnosed with having suffered a severe traumatic brain injury, as well as various bone fractures in his neck, shoulder, spine, chest, and pelvis. He also sprained his ankle, and lacerated his kidney, liver, spleen, bowel, and colon.

[15] Mr. Carriere de Davide was ultimately hospitalized for five months, only returning to his Whistler home in December 2016. He has received extensive treatment for his injuries, including physiotherapy, occupational therapy, visual therapy, speech therapy, kinesiology, and counselling.

4. The Plaintiff's Circumstances After the Accident

[16] Mr. Carriere de Davide has not done any paid work since the Accident. However, he did make two attempts at taking on volunteer jobs. The first was at a golf course in 2018. It involved cleaning yardage markers for three hours once per

week. He did this just for the summer. The second was at a sports complex in 2019. It involved doing laundry and cleaning fitness equipment for two hours per week. He did this for less than a year. Mr. Carriere de Davide found the tasks exhausting and has not volunteered since.

[17] In terms of physical activities, Mr. Carriere de Davide is now mobile and can walk on his own, although he tires easily. He no longer does any of the sports that he used to enjoy, including skiing, mountain biking, skydiving, softball, soccer, and hockey. He does play golf occasionally, such as when he visits his father's cottage in Eastern Ontario, but will only play nine holes at a time.

[18] With respect to his social life at Whistler, Mr. Carriere de Davide rarely interacts with anyone other than his roommates. This introverted existence stands in sharp contrast to his situation prior to the Accident. Mr. Carriere de Davide does maintain a strong relationship with his father who still lives in Quebec. However, the geographical distance between them limits their opportunities to spend time together.

[19] Following the Accident, Mr. Carriere de Davide made a claim for compensation to ICBC. Its most significant component was based on his UMP coverage since the at-fault motorist (i.e., the driver of the Pontiac) had only basic third-party liability coverage of $200,000. Furthermore, claims with respect to this latter coverage were made by and paid out to the injured occupants of the Volkswagen as well.

[20] Mr. Carriere de Davide's claim was ultimately settled with ICBC in July 2020. He received a total payment of $665,356.64, broken down as follows:

Payment Source	**Amount**
At Fault Motorist's Third Party Liability Policy	$90,150.00
Future Total Temporary Disability Benefits	$91,796.00
Part 7 Rehabilitation Fund (Funds Remaining)	$43,215.00
Mr. Carriere de Davide's UMP Policy	$440,195.64
TOTAL	$665,356.64

[21] While Mr. Carriere de Davide had $1 million worth of UMP (i.e., Basic UMP), $559,804.36 was deducted from this amount. This was to account for ICBC rehabilitation benefits, past and future total temporary disability benefits (ICBC and Canada Pension Plan), and Mr. Carriere de Davide's *pro rata* share of the at-fault motorist's third-party liability coverage. In other words, the actual amount of the Basic UMP coverage he was able to access after the applicable deductions was $440,195.64. The propriety and accuracy of these calculations have not been put into question by the parties.

5. The Plaintiff's Insurance Transactions

[22] Mr. Carriere de Davide did not initially own a motor vehicle when he moved to British Columbia in 2003. The first time he purchased ICBC Autoplan insurance was in February 2006, after he bought a Jeep Cherokee in Quebec which he drove to British Columbia with his father.

[23] Mr. Carriere de Davide would continue to make at least one purchase of an Autoplan policy every year. He did so for his Jeep until it was sold in or around 2009, after Mr. Carriere de Davide had inherited a Chrysler Intrepid from a grandparent. He kept that car for about a year, and then traded it in for a Ford F150 pickup truck in July 2010. The only other vehicle he insured prior to the Accident was a motorcycle that he acquired in 2011, but which he sold after just a few months.

[24] With one exception, Mr. Carriere de Davide's Autoplan insurance purchases were always made from Westland at its sales office located in Whistler. The exception was in July 2010 when he insured his F150 pickup at the Ford dealership in Squamish at the time he bought it.

[25] The documentary evidence of Mr. Carriere de Davide's insurance purchases includes contracts he signed and information stored in Westland's computer system. This material dates from February 24, 2006 to May 27, 2018. The most relevant evidence relates to the May 19, 2016 transaction which Westland's agent, Ms. Ouellette, is alleged to have conducted negligently. This is the transaction that resulted in the Autoplan policy that was in effect at the time of the Accident. It will be

discussed in more detail in the liability analysis portion of these reasons for judgment.

[26] The table below sets out a summary of the insurance coverage Mr. Carriere de Davide bought at each of the 21 transactions for which documentary evidence was tendered, as well as a verbatim reproduction of notes inputted by Westland's agents into Westland's computer system (with some personal information removed).

Date	Coverage Purchased	Agent Notes
2/24/06	$200K third party liability, no additional optional coverage	*"...BCDL SIGHTED CUSTOMER HAS DECLINED ALL EXCESS INSURANCE INCLUDING COL/COMP"*
8/01/06	$200K third party liability, no additional optional coverage	"...*TPL/PO RATE CLASS/ TERRITORY F CON'FD. XTPL/COLL/COMP/LOU RPLUS/XUMP DECLINED. BCDL SIGHTED*."
2/22/07	$1M third party liability, plus optional comprehensive coverage ($300 deductible)	Blank
9/14/07	$1M third party liability, plus optional comprehensive coverage ($300 deductible)	*"...BCDL...SIGHTED. RATE CLASS/TERRITORY/PO COV CONFIRMED. DEC ROADSIDE+/COLL/COMP/XUMP*"
2/27/08	$1M third party liability, plus optional comprehensive coverage ($300 deductible)	Blank
10/02/08	$1M third party liability, plus optional comprehensive coverage ($300 deductible)	Blank
04/15/09	$200K third party liability, no additional optional coverage	Blank
11/10/09	$2M third party liability, no additional optional coverage	Blank
7/24/10	$2M third party liability, plus optional comprehensive ($300 deductible) and collision	Blank (insurance purchased at Ford dealership in Squamish; Westland was not the broker for this transaction)

	($500 deductible) coverage	
11/09/10	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	*"...BCDL...SIGHTED RATE CLASS/TERR/COV/PO CONFIRMED 10 YR RATE CLASS DISCUSSED*."
3/16/11	$200K third party liability, no additional optional coverage (motorcycle policy)	*"...COV/PO/TERR/RATECLASS CONFRMD BCDL SIGHTED DECL ANY ADDITIONAL COVERAGES*"
4/15/11	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	*"...ADDR CHGN ONLY COV/TERR/RATELCASS CONFRM BDL SIGHTED DECL ANY CHNGS"*
11/03/11	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	"*...BCDL3 SIGHTED COV/TERR/PO/RATEC DISCUSSED AND CONFIRMED NO CHANGES MADE TO POLICY"*
4/21/12	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	"*SIGHTED BCDL OF RO...CONFIRMED COV/TER/RATEC/PO/USE NO CHANGES TO POLICY ADDED TO AND FROM WORK*"
4/29/13	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	"*...SIGHTED BCDL/CONFIRMED PO/TERR/RATECLAS/TPL/COLL/COMP*"
4/17/14	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	*"...COV CONF PO CONF BCDL SIGHTED TERR RATE CONF*"
5/17/15	$2M third party liability, plus optional comprehensive ($300 deductible) and collision	"*...BCDL SIGHTED CONF RO IS PO TERR F TPL 2M COL 500 COMP 3000 DEC LOU RSP EXUMP. CONF RC 023 ADDRESS AND CONTACT PHONE NUMBER*"

	($500 deductible) coverage	
5/19/16	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	"*...SIGHTED BCDL OF RO CONF TERF/023/SAME PO NO CHANGES TO COVERAGES DEC LOU AND ROADPAKCGES CALLED MERNA AT BEU TO CONFIRM CLAIM DETAILS CALLED PILLAR AT PAYMENT TO PAY $2643.13 FOR -43*"
4/26/17	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	"*...sighted bcdl/confirmed po/terr/023/tpl/col/comp/decl rdp"*
4/13/18	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage	*"...BCDL SIGHTED OF RO CONFIRMED TER F 023 RO IS PO COVERAGE IS FOR 2MILL TPL 500 COLL 300 COMP*"
5/28/18	$2M third party liability, plus optional comprehensive ($300 deductible) and collision ($500 deductible) coverage and $5M extension of underinsured motorist protection (UMP)	*"...bcdl sighted of ro confirmed 5mill tpl*"

[27] These entries confirm that Mr. Carriere de Davide never bought Excess UMP prior to the Accident, including the time he attended at Westland's Whistler sales office on May 19, 2016 and purchased the Autoplan policy that was in effect when the Accident occurred. In addition, Mr. Carriere de Davide also declined Excess UMP when he renewed his policy following the Accident on April 26, 2017 and on April 13, 2018.

[28] It was only on May 28, 2018 that Mr. Carriere de Davide made his first purchase of Excess UMP. On that day, he went to Westland's Whistler sales office for the express purpose of buying $5 million worth of UMP coverage for $40. Mr. Carriere de Davide testified that he did so on the advice of his father.

B) Procedural Background

1. The Parties' Positions

[29] On June 11, 2018, Mr. Carriere de Davide filed a notice of civil claim against Westland and "Jane Doe" - the then unknown Westland agent who sold him the Autoplan insurance policy that was in effect at the time of the Accident. A response to civil claim was filed on July 27, 2020. On the opening day of the trial, it was agreed that Jane Doe would be removed from the style of cause and that Westland is the sole defendant in this action.

[30] Mr. Carriere de Davide's position as set out in his pleadings and closing argument can be summarized as follows.

[31] Mr. Carriere de Davide alleges that Westland owed him a duty of care when it sold him ICBC Autoplan insurance on May 19, 2016. On that date, Westland's agent failed to provide Mr. Carriere de Davide with appropriate counsel and advice in relation to UMP coverage. In particular, Westland's agent did not explain that for a premium of only $25, Mr. Carriere de Davide could have had Excess UMP coverage of $2 million rather than just Basic UMP coverage of $1 million. If this had been explained to Mr. Carriere de Davide, he would have purchased Excess UMP. Accordingly, Westland breached the applicable standard of care, and caused a loss to Mr. Carriere de Davide which manifested itself when he was injured by the underinsured motorist responsible for the Accident on July 9, 2016. Since the quantum of his losses stemming from the Accident exceeds $2 million, Mr. Carriere de Davide would have had an additional $1 million worth of coverage to indemnify these losses had he bought Excess UMP rather than the Basic UMP that Westland's agent sold him. Accordingly, Mr. Carriere de Davide seeks an award of $1 million in damages from Westland to compensate him for the negligence of its agent.

[32] Westland's position as set out in its pleadings and closing argument can be summarized as follows.

[33] Westland acknowledges that it owed Mr. Carriere de Davide a duty of care when it sold him his Autoplan insurance coverage. Westland also agrees generally with Mr. Carriere de Davide that the standard of care required its agent to provide appropriate counsel and advice regarding the availability of Excess UMP. Westland says that its agent did so, and that Mr. Carriere de Davide nevertheless elected not to purchase Excess UMP. Mr. Carriere de Davide therefore assumed the risk of being injured by an underinsured motorist to an extent exceeding the level of the Basic UMP coverage that he bought. As such, Westland neither breached the applicable standard of care, nor did it cause Mr. Carriere de Davide the loss that he alleges.

[34] Westland also presents an alternative position in the event the Court disagrees with its primary position and finds Westland liable in negligence. If this is the case, Westland denies that the amount of Mr. Carriere de Davide's loss for which Westland is responsible should be assessed at $1 million, for two reasons. First, Westland says that the quantum of the actual personal injury damages Mr. Carriere de Davide sustained as a result of the Accident was only $1,714,200. Therefore, if he had bought Excess UMP coverage, the additional compensation he would have received from ICBC as compared to what he received with his Basic UMP coverage would have been $714,200. Second, Westland says that Mr. Carriere de Davide was 75% contributorily negligent by not paying sufficient attention to the agent's explanations and making the necessary inquiries to ensure that he understood Excess UMP coverage before declining it. In these circumstances, the total quantum of damages for which Westland would be responsible if found liable in negligence would be only $178,550 (i.e., $714,200 X 25%).

2. Factual Evidence

[35] The trial of this matter took nine days. The factual evidence before the Court consisted of an agreed chronology, documentary material entered into evidence in accordance with the parties' document agreement, and the testimony of nine witnesses.

[36] Six of those witnesses were called by the Plaintiff. Their names and relationship to Mr. Carriere de Davide are as follows (set out in order of appearance):

1) Mark Carriere de Davide: the Plaintiff himself;
2) Silvio de Davide: the Plaintiff's father;
3) John Byrne: the Plaintiff's former roommate;
4) Michael Wilson: the Plaintiff's former co-worker;
5) Scott Mitchell: the Plaintiff's current roommate; and
6) Sandra Martin: the ICBC claims adjuster who handled the Plaintiff's file.

[37] The remaining three witnesses were called by Westland. Each one was a former Westland employee. Their names and the scope of their knowledge of the background facts of this matter are as follows (set out in order of appearance):

1) Derryck Knapp-Tweedlie: former Westland agent who sold Autoplan insurance to Mr. Carriere de Davide at the Whistler sales office on May 17, 2015;
2) Sherry Hilliard: former Westland agent (since 2011) and manager (since 2013) of the Whistler sales office until June 30, 2016; and
3) Ashley Ouellette: former Westland agent who sold Autoplan insurance to Mr. Carriere de Davide at the Whistler sales office on April 21, 2012 and on May 19, 2016.

[38] The two most significant factual witnesses were, of course, Mr. Carriere de Davide and Ms. Ouellette. Counsel for Westland urged the Court to be skeptical of Mr. Carriere de Davide's evidence, both in terms of his credibility and his reliability. Counsel for Mr. Carriere de Davide took issue only with the reliability of Ms. Ouellette's testimony.

[39] In my view, both Mr. Carriere de Davide and Ms. Ouellette provided testimony that was forthright, responsive, and genuine. As such, I have no concerns with their credibility in the sense of their subjective honesty when answering counsel's questions under oath. On the other hand, the testimony of both witnesses in relation to the key question of what occurred at Westland's Whistler sales office on May 19, 2016 presents some obvious reliability concerns. They stem from the witnesses' candid admissions that neither can remember that specific transaction, and therefore can only surmise what happened based on circumstantial indicators. I will address this further in my discussion of Westland's alleged breach of its duty of care to Mr. Carriere de Davide later in these reasons.

[40] As for the other factual witnesses, no issues were raised with respect to their credibility or reliability by counsel for the parties. In so far as those portions of their testimony that relate to the issues in dispute, I have no concerns either.

3. Expert Evidence on the Plaintiff's Injuries

[41] Five expert witnesses testified and provided opinion evidence in relation to Mr. Carriere de Davide's injuries. This expert evidence can be summarized as follows.

Dr. Donald Cameron

[42] Dr. Cameron is a neurologist who was retained by the Plaintiff to prepare an expert report on the extent of the brain injury that was suffered by Mr. Carriere de Davide as a result of the Accident. Dr. Cameron was qualified without objection as an expert capable of giving opinion evidence in the field of medicine with a special expertise in neurology. His examination of Mr. Carriere de Davide was conducted on June 15, 2023.

[43] Dr. Cameron reports that Mr. Carriere de Davide still suffers from ongoing focal neurological deficits and diffuse cognitive deficits as a result of the severe traumatic brain injury he sustained in the Accident. Dr. Cameron feels that these deficits are permanent. They include decreased memory and concentration, word-

finding difficulties, speech difficulties, memory issues, irritability, mood swings, sleep impairment, and an inability to socialize or be with large crowds.

[44] It is Dr. Cameron's opinion that Mr. Carriere de Davide is permanently and competitively unemployable as a result of the Accident. Dr. Cameron also feels that Mr. Carriere de Davide's brain injury places him at an elevated risk of developing Alzheimer's dementia in the future.

Dr. Gabriel Hirsch

[45] Dr. Hirsch is a physiatrist who was retained by the Plaintiff to prepare an expert report on Mr. Carriere de Davide's physical injuries. Dr. Hirsch was qualified without objection as an expert capable of giving opinion evidence in the field of medicine, with special expertise in the field of physiatry. He conducted two assessments of Mr. Carriere de Davide. The first was on July 25, 2018. The second was on May 20, 2020.

[46] Dr. Hirsch reports that Mr. Carriere de Davide suffered a large number of injuries in the Accident, the most significant of which was a severe traumatic brain injury. He fractured bones in his neck, chest, shoulder, spine, and pelvis, and sprained his ankle. In addition, he experienced lacerations and tears to his kidney, liver, spleen, small bowel, colon, and aorta.

[47] Dr. Hirsch opines that Mr. Carriere de Davide's brain injury has caused him permanent impairment. As a result, Mr. Carriere de Davide will not be able to re-enter the workforce or continue his education. Even limited volunteer work will be challenging for Mr. Carriere de Davide given his reduced physical and mental stamina.

Dr. Sonia Packwood

[48] Dr. Packwood is a neuropsychologist who was retained by the Plaintiff to prepare an expert report on Mr. Carriere de Davide's psychological injuries. She was qualified without objection as an expert in neuropsychology capable of giving opinion

evidence in that field. Her assessment of Mr. Carriere de Davide was conducted on July 20 and 21, 2017.

[49] Dr. Packwood opines that Mr. Carriere de Davide suffered a severe traumatic brain injury during the Accident. Afterwards, he experienced various physical problems, including reduced function of his feet, numbness, reduced sensation, and vision disturbances. He also experienced cognitive and emotional problems, including language difficulties and difficulty focusing, especially in social situations. He also had behavioral difficulties associated with social isolation and difficulty adapting to his condition. It is Dr. Packwood's view that but for the severe traumatic brain injury and other physical injuries sustained in the Accident, Mr. Carriere de Davide would not be presenting the severity of cognitive, emotional, and behavioural difficulties that he did at the time of her assessment.

Robert Corcoran

[50] Mr. Corcoran is an occupational therapist who was retained by the Plaintiff to prepare a functional capacity evaluation. He was qualified without objection as an expert capable of giving opinion evidence in the area of an individual's functional capacity and with respect to the future care needs of disabled individuals. His assessment of Mr. Carriere de Davide was conducted on June 19 and 20, 2023.

[51] Mr. Corcoran is of the opinion that Mr. Carriere de Davide is not competitively employable in any capacity as a consequence of multiple physical, cognitive, and behavioural limitations. He cannot independently manage deep housekeeping or home maintenance and repairs. He has significantly diminished stamina for work intensive standing activity, and cardiovascular difficulty with more strenuous physical activity. He is obese and physically deconditioned. He is at high risk for falls given these issues coupled with his impaired sensitivity and limited self-awareness. Mr. Carriere de Davide also has impaired fine dexterity functions which impact his ability to perform manual tasks safely and properly.

[52] Mr. Corcoran provided a cost of future care report in respect of Mr. Carriere de Davide that contains a number of recommendations for counselling, therapy,

treatment, and equipment. They will be discussed in the damages analysis portion of these reasons for judgment.

Shannon Smith

[53] Ms. Smith is an occupational therapist who was retained by the Defendant to prepare a report in response to Mr. Corcoran's expert opinion. She was qualified without objection as an expert capable of giving opinion evidence in respect of functional capacity evaluation and cost of future care. She did not conduct an in-person assessment of Mr. Carriere de Davide.

[54] Instead, Ms. Smith simply provided a rebuttal report in response to Mr. Corcoran's cost of future care report. Her views will also be discussed in the damages analysis portion of these reasons for judgment.

4. Expert Evidence on the Defendant's Sales Practices and Standard of Care

[55] Two expert witnesses testified and provided opinion evidence in relation to sales practices of Autoplan insurance brokers in British Columbia: (1) Monica Woldring on behalf of the Plaintiff; and (2) Kevin McIntyre on behalf of the Defendant. Both witnesses prepared primary expert reports and rebuttal expert reports. They also address, to varying extents, the issue of the standard of care that is applicable to insurance brokers generally and to Westland in particular.

[56] While counsel for Mr. Carriere de Davide took no issue with Mr. McIntyre's reports, counsel for Westland objected to both of Ms. Woldring's reports. The objection was made on four grounds:

> (a) the opinions expressed in Ms. Woldring's reports are too vague or generalized to be relevant or necessary to assist the trier of fact;
>
> (b) Ms. Woldring's primary report does not describe the factual assumptions on which the opinion is based;

(c) Ms. Woldring's reports contain opinions on clients' state of mind when purchasing Excess UMP, which is outside the scope of her knowledge; and

(d) Ms. Woldring's rebuttal report impermissibly attacks Mr. McIntyre's qualifications.

[57] Westland's objection was the subject of a mid-trial application. At my request, counsel also addressed the more general question of whether expert evidence in relation to the applicable standard of care is necessary in this case, a question whose answer had the potential to impact whether any of the two brokers' expert reports could be admitted into evidence. Counsel for each party provided helpful submissions in relation to both this general question and Westland's specific objection regarding Ms. Woldring's expert reports.

[58] I ultimately ruled that the reports are admissible, with the exception of the portions of Ms. Woldring's report that purport to set out the state of mind of clients who purchase Autoplan policies through insurance brokers. I also indicated that it was premature for me to decide whether standard of care expert evidence was required, and that I would defer that determination to my final judgment.

[59] Following this ruling, Ms. Woldring and Mr. McIntyre testified about the opinions set out in their reports. Their expert evidence can be summarized as follows.

Monica Woldring

[60] Ms. Woldring was qualified as an expert insurance broker capable of giving evidence with respect to the standard of care of insurance brokers in the sale of insurance products, including Autoplan products. She was asked by the Plaintiff to answer two questions in her primary report dated July 14, 2023.

[61] The first was to indicate what is expected of a reasonable insurance broker in terms of documenting client interactions, especially with respect to documenting

coverages offered to, and declined by, insureds. Ms. Woldring stated that a reasonable insurance broker would fully document discussions with clients.

[62] The second was to set out the typical practice of a reasonable Autoplan broker in the mid-2010s as it relates to explaining Excess UMP and offering it to clients such as Mr. Carriere de Davide for purchase. Ms. Woldring first noted that some, but not all, brokers would give their customers ICBC-produced pamphlets to explain Excess UMP coverage. She also said that while some brokers would automatically add Excess UMP coverage to the Autoplan policies of all their clients who qualified, most would just offer all the excess coverages to clients because they are paid a commission to sell Autoplan policies.

[63] Ms. Woldring also prepared a rebuttal report dated August 25, 2023 in which she was asked to comment on Mr. McIntyre's expert report, particularly with respect to the latter's opinion that an insurance broker would meet the standard of care when dealing with a customer who only has Basic UMP by asking whether the customer would like to increase that coverage. Ms. Woldring opined that Mr. McIntyre's statement would have been a good comment to clients at one time, but that this is no longer the case. She stated that once Excess UMP became available, "the conversation needed to be changed to explain the change and get the customers to pay an additional $25 premium for this extra coverage".

Kevin McIntyre

[64] Mr. McIntyre was qualified as an expert insurance broker qualified to give evidence with respect to the standard of care of a broker in auto insurance, including ICBC transactions, personal lines of insurance, and commercial insurance. He was asked by the Defendant to answer two questions in his primary report dated July 19, 2023.

[65] The first was to set out the standard of care required of an insurance broker in Westland's position when dealing with an insured with respect to Excess UMP. The second was to opine on whether Westland met the standard of care when it offered Excess UMP to Mr. Carriere de Davide.

[66] Mr. McIntyre stated that a reasonable standard of care would entail a discussion of the client's current coverage, a simple description of coverage where needed, and a seeking of the client's approval to either maintain or change their coverage levels. He also noted that brokers must judge how hard to push a client, since brokers who press too hard to sell insurance can create an unwelcome customer experience. If the coverage appears in order and reasonable, there is no obligation on the part of the broker to be pressing and persistent in trying to sell higher limits of coverage. Mr. McIntyre concluded that, based on the assumed facts (particularly Ms. Ouellette's standard practice for dealing with Autoplan clients and Mr. Carriere de Davide's written acknowledgement of having declined Excess UMP), the standard of care had been met in this case.

[67] Mr. McIntyre also prepared a rebuttal report dated August 31, 2023 regarding three specific aspects of Ms. Woldring's report. First, with respect to Ms. Woldring's opinion on the use of ICBC pamphlets, Mr. McIntyre said that, in his opinion and experience, they were simply informational in nature and not commonly used as a sales aid with every client. Second, Mr. McIntyre commented upon Ms. Woldring's assertion that some brokers would automatically add Excess UMP coverage to all their clients who qualified. Mr. McIntyre opined that this would be a very unusual, unethical, and unacceptable practice for a broker to employ. Third, Mr. McIntyre took issue with Ms. Woldring's statement suggesting that brokers would offer all excess coverages to clients in order to generate commissions. Mr. McIntyre stated that the standard of care dictates that brokers must offer insurance coverage without considering what they might earn from sales commissions.

III. ANALYTICAL FRAMEWORK

[68] Given the parties' positions, the analytical framework for adjudicating Mr. Carriere de Davide's action is as follows.

[69] I will first consider the question of whether Westland is liable in negligence for the manner in which it advised Mr. Carriere de Davide in respect of his Autoplan

policy that he purchased on May 19, 2016. If the answer is no, then Mr. Carriere de Davide's action will have to be dismissed.

[70] If the answer is yes, I will then turn to the quantification of his damages resulting from Westland's negligence ("Broker Negligence Damages"). This will first require an assessment of the quantum of personal injury damages Mr. Carriere de Davide would ordinarily have been entitled to obtain in a hypothetical successful action against the person responsible for the Accident ("PI Damages"). As claimed by Mr. Carriere de Davide, such damages could include: (1) general (non-pecuniary) damages for pain and suffering; (2) past loss of earning capacity; (3) loss of future earning capacity; (4) cost of future care; and (5) an in-trust claim.

[71] If the total quantum of his PI Damages is $2 million or more, then Mr. Carriere de Davide will be entitled, in principle, to an award of $1 million in Broker Negligence Damages. If the total quantum of his PI Damages is between $1 million and $2 million, then Mr. Carriere de Davide's conceptual entitlement to a Broker Negligence Damages award would be calculated by deducting $1 million from his PI Damages quantum. If Mr. Carriere de Davide's PI Damages are under $1 million, then Mr. Carriere de Davide will not be entitled to any Broker Negligence Damages. These potential outcomes reflect the difference between the Basic UMP coverage of $1 million that Mr. Carriere de Davide had, and the Excess UMP coverage of $2 million that he says he would have had but for Westland's negligence.

[72] Finally, a further reduction in the Broker Negligence Damages amount may be required if I find that there was contributory negligence on the part of Mr. Carriere de Davide with respect to his actions at the Westland office on May 19, 2016.

IV. ANALYSIS: LIABILITY

A) Principles of Insurance Broker Negligence Law

[73] There are four elements that a plaintiff must establish on a balance of probabilities in order to succeed in a negligence claim: (1) that the defendant owed a duty of care to the plaintiff; (2) that the defendant's behaviour breached the standard

of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 at para. 3.

[74] With respect to the first two elements of negligence, the leading case on the standard of care applicable to insurance brokers is the Supreme Court of Canada's decision in *Fletcher v. Manitoba Public Insurance Co.,* [1990] 3 SCR 191. As in the case at bar, it involved a claim arising from a plaintiff who alleged that he suffered a loss when he failed to purchase UMP as a result of deficient advice. Unlike Westland, a private insurance broker, the defendant in *Fletcher* was the public insurance company itself (i.e., Manitoba's equivalent to ICBC in British Columbia). The Supreme Court of Canada nevertheless discussed the applicable standard of care for private insurers as well. It did so by reference to the Ontario Court of Appeal's decisions in *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada,* (1977), 1977 CanLII 1182 (ONCA), 17 O.R. (2d) 529 (C.A), and *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.,* (1984), 4 C.C.L.I. xxxvii (Ont. C.A.); aff'g (1983) 1 C.C.L.I. 34 (Ont. H.C.)

[75] The following extracts from *Fletcher* are instructive:

> In my view, *Fine's Flowers* stands for the proposition that private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs. I note that Professor Snow has summarized the effect of *Fine's Flowers* in "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co*." (1979), 9 Man. L.J. 165, in the following terms, at p. 169:
>
> > The implication of this case and many others like it in recent years seems clear. Consumers who place their faith in insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent. ... [T]he extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent. Moreover, given the general situation of the principal relying very heavily on the expertise of the agent, it does not seem to be an unreasonable burden for an insurance agent to bear. [Emphasis added.]
>
> The duty of care owed by an insurance agent was further elaborated in *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co*. (1983), 1 C.C.L.I. 34

> (Ont. H.C.) (conf. on appeal (1984), 4 C.C.L.I. xxxvii (Ont. C.A.)). It was held in that case that where the customer adequately describes the nature of his or her business to the agent, the onus is then on the agent to review the insurance needs of the customer and provide the full coverage requested. Should an uninsured loss occur, the agent will be liable unless he or she has pointed out the gaps in coverage to the customer and advised him or her how to protect against those gaps.
>
> It is clear that within the insurance industry, as also within the courts, private insurance agents and brokers are viewed as more than mere salespeople. ...
>
> ...
>
> In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.

[76] Based on *Fletcher* and the jurisprudence cited therein, I understand that the general contours of an insurance broker's duty of care to customers are as follows:

a) the insurance broker has a stringent duty to provide the customer with information, counsel, and advice about available insurance coverage to meet the customer's needs;

b) where the customer adequately describes their situation, the onus is on the insurance broker to review the customer's insurance needs and provide the full coverage requested; and

c) should an uninsured loss nevertheless occur, the insurance broker will be liable unless it points out the gaps in coverage to the customer and provides advice on how to protect against those gaps.

[77] With respect to the last two elements of negligence – damages and causation – the "but for" test is used. There must be a demonstration that but for the negligent behaviour of the defendant, the plaintiff's damages would not have occurred: *Resurface Corp. v. Hanke,* 2007 SCC 7 at para. 22. This is fundamentally an

examination of whether the harm is too unrelated to the wrongful conduct to justify holding the defendant liable: *Mustapha* at para. 12.

B) Did the Defendant Owe a Duty of Care to the Plaintiff?

[78] There is no question that Westland owed a duty of care to Mr. Carriere de Davide within the context of their insurance broker-customer relationship. This is properly conceded by Westland. The first element of Mr. Carriere de Davide's negligence claim is present.

C) Did the Defendant Breach its Duty of Care to the Plaintiff?

[79] There are three aspects to the assessment of whether Westland breached its duty of care to Mr. Carriere de Davide. First, the Court must make a factual determination of what happened on May 19, 2016 when Mr. Carriere de Davide purchased his Autoplan policy from Westland with the assistance of its agent, Ms. Ouellette. Second, the Court must determine the specific standard of care that applied in the circumstances. Third, the Court must decide whether the conduct of Ms. Ouellette fell below this standard of care.

The May 19, 2016 Insurance Transaction

[80] The parties' competing narratives regarding what transpired between Mr. Carriere de Davide and Ms. Ouellette on May 19, 2016 at Westland's Whistler sales office are set out here. As has already been noted, neither one is based on direct eyewitness recollection since both Mr. Carriere de Davide and Ms. Ouellette do not remember their specific interaction. Instead, they are based wholly on circumstantial indicators that the two witnesses spoke about at trial.

[81] Mr. Carriere de Davide effectively testified that Excess UMP was not offered and explained to him by Ms. Ouellette. He said that he knew this to be the case since otherwise he would have paid the $25 premium and purchased Excess UMP. Mr. Carriere de Davide further testified that, prior to the Accident, he did not understand the concept of UMP coverage. He also did not understand the distinction between third-party liability coverage (insurance that provides compensation to others when the insured is liable for their damages) and first-party insurance

(coverage that provides compensation for an insured's own direct losses). In addition, Mr. Carriere de Davide said he believed that since he had previously raised his third-party liability coverage limit to $2 million (from the basic $200,000 coverage), he was covered "for everything". He also stated several times that "my priority is me", suggesting that his primary insurance concern was to protect himself from losses as opposed to ensuring that adequate compensation is available for losses experienced by others.

[82] On the other hand, Ms. Ouellette effectively testified that she did offer and explain Excess UMP to Mr. Carriere de Davide. She said that she knew this to be the case since she had a routine standard practice that she followed when serving Westland's Autoplan customers. It was guided by Westland's computer system that Ms. Ouellette used to input client information while effecting transactions. Once the system specifically prompted her to discuss Excess UMP, she would show the client their driver's licence (which she would have asked the client to physically hand to her at the start of the transaction) and advise them that with their licence they were automatically covered for $1 million in the event they were hit walking, driving, or biking, and the person who hit them was uninsured or underinsured. She would then ask the client if they wanted to increase this coverage to $2 million, for $25 a year. If the client had questions about that, she would answer them. Once the client had chosen whether to accept or decline Excess UMP, she would key into the computer system either "Y" (yes) or "N" (no), as appropriate.

[83] The only documentary evidence presented with respect to the transaction was the insurance contract signed by Mr. Carriere de Davide on May 19, 2016, and a printout of Ms. Ouellette's agent notes that she had entered into the computer at that time.

[84] The contract contains a section which states that Excess UMP was declined as follows:

> LOSS OF USE DECLINED
> ROADSIDE PLUS COVERAGE DECLINED
> No Excess UMP purchased on this Transaction
> 10YR Rate Class Discussed; Other Coverages.

> I am aware that a higher liability limit is available.
> The above coverages have been explained to me.
> Any refund payable may be applied to the original credit card
> which was used for the initial transaction.

[85] There is a circle next to this wording which Ms. Ouellette made, and Mr. Carriere de Davide's handwritten initials are inside that circle. Immediately below this text, there is a block titled "Customer Signature". Mr. Carriere de Davide's signature appears on this line.

[86] Finally, Ms. Ouellette's agent notes for the transaction read as follows:

> "*...SIGHTED BCDL OF RO CONF TERF/023/SAME PO NO CHANGES TO COVERAGES DEC LOU AND ROADPAKCGES CALLED MERNA AT BEU TO CONFIRM CLAIM DETAILS CALLED PILLAR AT PAYMENT TO PAY $2643.13 FOR -43*"

[87] Ms. Ouellette explained that these notes indicate that no changes were requested by Mr. Carriere de Davide to the level of insurance coverage he had under his previous Autoplan policy. They also expressly indicate that loss of use and emergency roadside expense coverage were declined. However, they contain no specific mention of Excess UMP.

[88] Ms. Ouellette also explained the notes' reference to calls made to "Merna at BEU" and to "Pillar at Payment". She said it means that she would have separately contacted two ICBC employees to address an outstanding claim made against Mr. Carriere de Davide, which he appears to then have paid off in order to maintain his 10-year safe driving discount. Because of these phone calls, Ms. Ouellette surmises that the full transaction with Mr. Carriere de Davide would likely have lasted about 30 minutes, rather than the 15 minutes that is typical for a renewal of an Autoplan policy.

[89] On a balance of probabilities, I prefer and accept Ms. Ouellette's evidence regarding the events of May 19, 2016 at the Westland Whistler office, and I reject the contradictory evidence provided by Mr. Carriere de Davide.

[90] Specifically, I find that Ms. Ouellette's standard practice of explaining Excess UMP was followed on that date. This means that she took Mr. Carriere de Davide's driver's licence as a visual aid, and pointed out that, as a licence holder, he automatically had Basic UMP coverage of $1 million, but also could elect to purchase Excess UMP coverage of $2 million for a cost of $25 more. Mr. Carriere de Davide declined this option, following which Ms. Ouellette keyed "N" (no) into Westland's computer system. Mr. Carriere de Davide later confirmed his choice to decline this optional coverage when he wrote his initials next to the words "No Excess UMP purchased on this Transaction" on the insurance contract. I do not find that Mr. Carriere de Davide asked Ms. Ouellette any questions about Excess UMP, or that she elaborated upon her standard explanation of UMP coverage that she habitually gave to clients. I also do not find that Ms. Ouellette made any particular recommendation regarding whether Mr. Carriere de Davide should buy Excess UMP or continue with his Basic UMP coverage.

[91] I am confident that I can make these findings since Ms. Ouellette was an experienced insurance agent, having worked at Westland for approximately six years at the time of the transaction. As such, she would by then have had many occasions to conduct Autoplan sales such as the one she effected with Mr. Carriere de Davide on that day. In addition, Ms. Ouellette's manager and supervisor, Ms. Hilliard, testified to how exceptionally competent and thorough Ms. Ouellette was as an employee. This was confirmed by Westland's performance evaluation documentation that was entered into evidence. While it is of course possible that Ms. Ouellette may have failed to offer and explain Excess UMP coverage to Mr. Carriere de Davide on May 19, 2016, I find this to be highly unlikely given that she was essentially following a familiar sales script that was prompted by a computer system which required her to key in the customer's specific decision on whether or not to buy Excess UMP.

[92] I also find it perfectly understandable that Mr. Carriere de Davide declined Excess UMP coverage on May 19, 2016, as he had always done on the 16 previous occasions when he had bought Autoplan policies at Westland, starting in 2006.

There is no indication that his personal circumstances had somehow changed in 2016 so as to suggest that he might then have been inclined to obtain Excess UMP or to make any other changes to his Autoplan coverages that were different from what he had been content with in the past. This was notwithstanding the fact that there were some previous occasions when changes to certain other coverages were made by Mr. Carriere de Davide. For example, the extent of his third-party liability, comprehensive, and collision coverage on his car varied from 2006 to 2010, after which his choices became consistent. In my view, these past changes show that Mr. Carriere de Davide, a secondary school graduate who lived independently in the Whistler home he purchased and who was gainfully employed in responsible service positions, had at least a basic understanding of Autoplan insurance and the ability to make informed decisions about it. I so find despite Mr. Carriere de Davide's testimony regarding his pre-Accident state of knowledge about insurance, of which I am skeptical of its reliability given the lack of a clear explanation as to why he apparently understands UMP now yet claims not to have understood it then.

[93] Furthermore, I do not accept Mr. Carriere de Davide's assertion that the fact that he did not purchase Excess UMP is effective proof that that such coverage must not have been offered and properly explained to him. This assertion amounts to an invitation to the Court to apply the maxim of *res ipsa loquitur* ("the thing speaks for itself"), a concept that the Supreme Court of Canada held to be inapplicable to Canadian negligence law in *Fontaine v. British Columbia (Official Administrator),* [1998] 1 SCR 424, 1998 CanLII 814 (SCC) at para. 27:

> [27] It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[94] I also do not find that the agent notes made by Ms. Ouellette constitute persuasive circumstantial evidence that her standard practice in relation to offering

and explaining Excess UMP was not followed, as counsel for the Plaintiff urged me to do. As can be seen from the table at paragraph 26 above, the 21 agent notes in relation to Mr. Carriere de Davide's Autoplan transactions from February 2006 to May 2018 are incomplete, cryptic, and inconsistent. Only three of them expressly mention Excess UMP, even though it is apparent that Mr. Carriere de Davide declined this coverage at every transaction save the last one, on May 28, 2018. However, even the agent note in respect of that final purchase contains an error in that it reads "*5 mill tpl",* an incorrect reference to third-party liability (TPL) coverage as opposed to the Excess UMP that was actually bought. As such, I find the reliability of these notes to be questionable, particularly in a context where I am being asked to infer that a standard practice was not followed because of the absence of a note confirming that it was.

[95] Indeed, the notion that standard practice evidence will not necessarily be discounted because of a lack of corroboration through a business record was clearly explained by Justice Marzari in *Gilmore v. Love,* 2023 BCSC 1380, a medical negligence action:

> [61] All of the practitioner defendants rely upon evidence of their "standard" or "usual" practice to supplement the charting and their lack of direct recollection of the events of Abigail's labour and delivery.
>
> [62] It is well-established that the court may consider evidence of a medical practitioner's common or usual practice, and even give it significant weight. The usefulness and admissibility of such evidence was expressed in *Belknap v. Meakes,* 1989 CanLII 5268, 64 D.L.R. (4th) 452 (B.C.C.A.) as follows:
>
> > [39] If a person can say of something he regularly does in his professional life that he invariably does it in a certain way, that surely is evidence and possibly convincing evidence that he did it in that way on the day in question.
> >
> > [40] *Wigmore: On Evidence*, vol. IA (Tillers, rev. 1983), states that there is no reason why habit should not be used as evidence either of negligent action or of careful action (para. 97), and that habit should be admissible as a substitute for present recollection. *Phipson on Evidence*, 13th ed. (1982), paras. 9-22, reaches a similar conclusion.
>
> [63] Even where there is medical charting evidence, but those charts contain no documentation of a particular act, "evidence of standard practice is admissible as evidence of what happened": *Wiebe v. Fraser Health Authority,* 2018 BCSC 1710 at para. 118. This court has also stated that: "the absence of a chart note will not deprive a health practitioner of the ability to rely on his or her standard practice on a matter": *Parhar v. Weaver,* 2021 BCSC 123 at para. 84.

> [64] Finally, Justice Power summarized how evidence of standard practice can be used and weighed, with reference to the leading authorities, in *McKerr v. CML Healthcare Inc.,* 2012 BCSC 1712:
>
> > [8] There are numerous examples in the case law of the use of usual practice evidence and examples where it has been preferred over independent recollection: *Belknap v. Meakes*, 1989 CanLII 5268 (BC CA), 64 D.L.R. (4th) 452, 1 C.C.L.T. (2d) 192 (B.C.C.A.); *Erbaturr v. Carruthers*, [1990] B.C.J. No. 772 (S.C.); *Friedsam (Guardian ad litem of) v. Ng*, 1993 CanLII 1129 (BC CA), [1994] 3 W.W.R. 294, 86 B.C.L.R. (2d) 335 (C.A.); and *Mirembe v. Tarshis*, [2002] O.T.C. 456 (S.C.J.). Ultimately, however, each case turns on an assessment of the totality of the evidence and on the evidence itself in determining what weight to give to usual practice evidence.
>
> [65] The weight I give to the standard practice evidence of the various medical practitioners in this case depends on the substance of the evidence itself, including the extent to which it is persuasive evidence that something was likely done because it is consistently done by that practitioner in the same or similar circumstances.

[96] I apply these principles here. In particular, I repeat that I give substantial weight to Ms. Ouellette's evidence of her standard practice, which was echoed by her colleague Mr. Knapp-Tweedlie, and by her supervisor Ms. Hilliard. In my view, this evidence was not undermined by the agent notes that were tendered into evidence.

[97] I also note parenthetically that the question of whether Westland or Ms. Ouellette's documentation practices were reasonable is not strictly relevant to this insurance broker negligence action. A failure to take adequate notes to corroborate facts showing a lack of broker negligence is not conclusive proof that the insurance transaction itself was negligently conducted. Furthermore, such a failure without more does not provide a stand alone basis for a cause of action in negligence.

[98] That said, Ms. Ouellette did explain why neither of the agent notes she made when selling Autoplan insurance to Mr. Carriere de Davide expressly mentioned Excess UMP. With respect to the impugned May 19, 2016 transaction, she surmised that this might be explained by the fact that she had to input additional information about her telephone calls to ICBC about Mr. Carriere de Davide's outstanding claim, and the computer system's character limits for agent notes. With respect to their earlier April 21, 2012 transaction (which neither Ms. Ouellette nor Mr. Carriere de

Davide remembers either), she surmised that her notetaking may have been less thorough at that earlier point in her career.

[99] While not entirely persuasive, I am prepared to accept Ms. Ouellette's explanations for the absence of any mention of Excess UMP on her agent notes. However, this is of no real import given that I am not inclined in any event to afford weight to the agent notes as evidence of what was or was not discussed on May 19, 2016 because of their overall lack of reliability. In other words, the agent notes are fundamentally a neutral factor in my weighing of the parties' competing factual narratives regarding what happened on that date at Westland's Whistler sales office.

[100] In brief, I find that, on May 19, 2016, Ms. Ouellette did offer and provide an explanation of Excess UMP to Mr. Carriere de Davide. It involved a comparison of: (1) his existing $1 million Basic UMP coverage which by default he would continue to have at no additional cost; and (2) the $2 million Excess UMP coverage he could buy for an extra $25. Mr. Carriere de Davide then chose to decline the optional Excess UMP coverage, which resulted in him being covered under Basic UMP instead.

The Applicable Standard of Care

[101] The general contours of the standard of care that apply to a broker when selling insurance to a client are as set out in *Fletcher* and are summarized above. However, the specific requirements are contextual and will depend upon the circumstances surrounding the transaction in any given case. This was noted by Justice Fleming in *Schellenberg v. Wawanesa Mutual Insurance Company,* 2019 BCSC 196 at para. 118; aff'd 2020 BCCA 22:

> [118] I entirely agree with Hub's assertion that the content of the standard of care for an ordinary reasonable and prudent insurance broker cannot simply be imported from other decisions. The requisite standard of care or the measure of what is reasonable will always depends on the particular facts.

[102] I also agree that past caselaw does not dictate the precise standard of care. However, this does not mean that historical insurance broker negligence

jurisprudence is irrelevant. In addition to *Fletcher,* five potentially helpful UMP insurance broker negligence cases were brought to my attention:

> (1) *Sjodin v. Insurance Corp. of British Columbia,* [1986] BCJ No. 1423 (SC); aff'd [1988] BCJ No. 2665 (CA);
>
> (2) *Engel v. Janzen,* [1989] B.C.J. No. 1038 (SC); aff'd [1990] BCJ No. 561 (CA);
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> (3) *Miller v. Guardian Insurance Co. of Canada,* [1995] AJ No. 840 (QB); aff'd [1997] AJ No. 808 (CA);
>
> (4) *Regehr v. Co-Operators General Insurance Company,* 1998 ABQB 428; and
>
> (5) *Mann v. British Columbia Automobile Association,* 2004 BCSC139.

[103] Three of these cases are of particular assistance given their similar factual backgrounds to that of the case at bar: *Sjodin, Regehr,* and *Mann.* In each case, the insurance broker defendant was found to have offered UMP to the plaintiff customer and the primary issue was the sufficiency of the explanation of this coverage. Furthermore, these were all cases in which the plaintiff did not ask the defendant broker for "maximum" or "full" insurance coverage. The same cannot be said for *Fletcher, Engel,* and *Miller,* where the plaintiffs communicated a desire to have as much policy coverage as possible (or, in the case of *Engel*, requested advice on the impact of fully cancelling a policy), which strongly influenced the Court's particular determination of the standard of care in these cases. Accordingly, I will draw specific guidance primarily from *Sjodin, Regehr* and *Mann,* rather than the factually distinguishable cases of *Fletcher, Engel,* and *Miller.*

[104] I begin with *Sjodin,* a case in which a plaintiff who had declined UMP sued ICBC for the alleged negligence of its agent after suffering a loss at the hands of an unknown driver that exceeded the minimum coverage. Based largely on standard

practice evidence, the trial judge made the following finding about what occurred at the time the plaintiff bought his Autoplan policy:

> [14] I have concluded that the more probable scenario was that [the agent] asked the plaintiff if he wanted the coverage and the plaintiff declined it – without any explanation being sought or given. It is to be remembered that on a number of prior occasions he had declined the coverage and it seems likely that, for whatever reason, he continued with that pattern. And so the question remains – was the mere offering of the coverage a sufficient fulfilment of his duty to the plaintiff?

[105] Justice McKay answered this question in the affirmative by effectively stating that, in the circumstances, the agent met the applicable standard of care by offering UMP coverage, and was under no duty to go further and encourage the plaintiff to buy it:

> [15] ... Automobile insurance is something that is familiar, in general terms at least, to all who operate motor vehicles. Such an agent who offers the coverage and receives an unequivocal "no" is entitled to assume that the customers knows what he is refusing and had his own reasons for that refusal. ... What we have here is the annual renewal of motor vehicle insurance coverage – a rather straightforward proposition which is well understood by those who operate motor vehicles. The customer is asked as to the coverage he wants. He is free to inquire about anything he does not understand. There is, in my view, no duty on the part of the agent to go further. ...
>
> ...
>
> [20] There is no question that there was a serious omission in the coverage obtained by the plaintiff. That omission could have been eliminated by UMP coverage at a nominal fee. It may well be that if the coverage had been fully and clearly explained with a strong recommendation that he take it – that he would have done so. We will never know. I cannot say, however, that in the circumstances of this case the agent was remiss in his legal duty to the plaintiff.

[106] Justice McKay's decision was affirmed by our Court of Appeal in *Sjodin v. Insurance Corporation of British Columbia,* [1988] B.C.J. No. 2665 (CA). While counsel for Mr. Carriere de Davide argued that *Sjodin* is no longer good law since it predates the Supreme Court of Canada's decision in *Fletcher,* I do not agree. In fact, *Sjodin* was expressly mentioned and discussed in *Fletcher* without any adverse commentary on the British Columbia courts' analysis and finding that the defendant's

agent had not failed in the duty to inform the plaintiff about UMP at the time he purchased his Autoplan policy.

[107] The second case is *Regehr*, a decision of the Alberta Court of Queen's Bench. The trial judge, Justice Veit, preferred the agent's explanation of what was discussed when the plaintiff declined UMP coverage, largely because the agent also followed a standard practice. It involved a basic explanation of UMP which the plaintiff accepted without asking for further advice. Justice Veit found that this met the applicable standard of care as follows:

> [24] [The plaintiff] says that the explanation given to him by [the agent] was inadequate. He says that if she had properly explained it, of course he would have bought the coverage. He says that she should have told him that the coverage protected him if he was a pedestrian. He says that she should have told him that the coverage protected him every time he walked out the door of his house.
>
> [25] The explanation that [the agent] gave to [the plaintiff] was not perfect, but it was reasonable. She explained the elements of the protection to him. She gave him examples of situations in which the protection would come into play. She was not required to tell [the plaintiff] about every fact situation in which the coverage would be helpful. She essentially did tell him that there were a lot of uninsured and under insured drivers on the road so that he was always at risk. [The plaintiff] appeared to understand the explanation given and said that he did not want the coverage and did not see himself in a situation where he might need the coverage. Because of the explanations that had been given to him, [the agent] was entitled to conclude that [the plaintiff] was exercising his prerogative to refuse elective coverage. She was not obliged to wrestle him to the ground on this issue.

[108] The third helpful UMP decision is *Mann v. BCAA,* 2004 BCSC 139. The trial judge, Justice Drost, set out the general parameters of the standard of care in these terms:

> [71] It is the duty of a public insurer to provide all the information a customer needs concerning the available range of coverage (including such things as UMP) so that the customer may make an informed choice about the level of coverage he or she needs: *Fletcher v. Manitoba Public Insurance Co.* 1990 CanLII 59 (SCC), [1990] 3 S.C.R. 191; [1990] S.C.J. No. 121, paras. 58 and 74.

[109] In this case, the plaintiff testified that she declined Excess UMP because the defendant's agent had mistakenly explained to her that the $2 million third-party

liability coverage she purchased included UMP to that level. Justice Drost rejected this testimony, preferring that of the agent who explained her standard practice regarding what she would tell customers about UMP. The trial judge ultimately found as follows:

> [83] ... Both [the agent and her supervisor] assert, and I accept, that it was standard practice to draw to the attention of persons purchasing insurance to the amount of UMP coverage which was provided as part of the Basic Compulsory Autoplan Coverage, and to the fact that an additional $ 1million of UMP coverage could be purchased for an additional premium of $15.
>
> [84] I found [the agent] to be a truthful witness. I accept her evidence concerning the state of her knowledge on August 26, 1994 about the terms and conditions of UMP coverage, and I find it most unlikely that, in view of the routine she had developed, she would have told the plaintiff that because she was renewing her Third Party Liability coverage at $2 million she would automatically have UMP coverage in a similar amount.
>
> ...
>
> [86] On the evidence, I am not persuaded that [the agent] failed to accurately explain the extent of basic UMP coverage to [the plaintiff] and offer to her the opportunity to purchase additional UMP coverage for the sum of $15. Accordingly, the plaintiff's claims against BCAA and [the agent] are dismissed.

[110] I now proceed to determine the specific standard of care that applies in the case at bar. In doing so, I note that, as in *Sjodin, Regehr,* and *Mann,* this is a case involving the purchase of automobile insurance by a plaintiff who had done so previously. To paraphrase Justice McKay's remarks in *Sjodin,* this is a type of transaction that is generally familiar to all car owners in British Columbia since they must typically deal with an Autoplan insurance broker at least once per year to renew their coverage. It is not an especially complicated or specialized transaction, and can be readily understood by most customers.

[111] As such, I find that an Autoplan insurance broker has a stringent duty to provide customers with information, counsel, and advice about all available insurance coverage to meet the customer's needs, including UMP. So long as the customer adequately describes their situation, the broker must review the customer's insurance needs and provide the full coverage requested by the customer. However, that duty does not extend to go further and encourage

customers to purchase Excess UMP. This is particularly the case for customers who have a history of declining Excess UMP in the past, who do not make any specific inquiries in response to the agent's explanation of Excess UMP, and who give no sign of a failure to understand the concept of UMP.

[112] Before turning to apply this standard to the facts of this case, it should be noted that I have determined the standard without having recourse to the expert evidence tendered by the parties on this issue. In my view, the matter is non-technical and within the knowledge and experience of the ordinary person. As such, the situation falls within one of the two recognized exceptions to the principle that expert evidence on the standard of care is generally required in professional negligence cases (the other is where the actions of the defendant are so egregious that it is obvious that the conduct falls short of the standard of care): *495793 Ontario Ltd. (Central Auto Parts) v. Barclay,* 2016 ONCA 656 at para. 57 and *Krawchuk v. Scherbak,* 2011 ONCA 352 at paras. 133 and 135.

[113] The same was done in the six UMP cases discussed above (i.e., *Fletcher, Sjodin, Engel, Miller, Regehr,* and *Mann*), none of which reference expert evidence of any kind in the reasons for decision. I also note that counsel for Mr. Carriere de Davide and counsel for Westland both accept that the Court can decide this case in the absence of evidence from expert insurance brokers. This is notwithstanding the four expert broker reports that were tendered by the parties, apparently out of an abundance of caution.

[114] That said, if I am wrong and this is a case where expert evidence is required to determine the standard of care, I would have relied on Mr. McIntyre's reports in preference to those of Ms. Woldring. In particular, I agree with Mr. McIntyre's description of the standard of care of an Autoplan insurance broker that I have summarized above at paragraph 66. On the other hand, Ms. Woldring's reports do not set out a clear opinion on this issue, although she seems to suggest in one that brokers should "get the customers to pay" for Excess UMP without explaining how and why this would be appropriate. I do not accept this suggestion as I agree with

Mr. McIntyre that to effectively require a broker to “wrestle the customer to the ground” (paraphrasing the words of Justice Veit in *Regehr* at para. 25) to get them to purchase optional insurance coverage would make for an unnecessarily unpleasant client experience, which need not and ought not to be encouraged by jurisprudence.

Application of the Standard of Care to the Transaction

[115] Having determined that the applicable standard of care required Westland’s agent to offer and explain Excess UMP to Mr. Carriere de Davide but did not require her to expressly encourage him to purchase it, I find that Ms. Ouellette has met this standard. In particular, all three aspects of the *Fletcher* test summarized above at paragraph 76 of these reasons are met.

[116] First, I am satisfied that the explanation Ms. Ouellette provided to Mr. Carriere de Davide regarding the relative benefits and costs of paying an additional $25 for Excess UMP to obtain $2 million worth of coverage as opposed to being content with $1 million worth of coverage through Basic UMP was adequate in the circumstances of this case. These circumstances include the fact that Mr. Carriere de Davide was a longstanding customer of Westland’s Whistler sales office who had been offered and declined Excess UMP on multiple occasions, and the fact that he did not indicate either a particular interest in or a lack of understanding of this type of optional coverage prior to the Accident.

[117] Second, I am satisfied that Westland’s agent provided the UMP coverage actually requested by Mr. Carriere de Davide (i.e., Basic UMP) after she had conducted her standard review of his insurance wants and needs, which I also find to have been adequate in these circumstances.

[118] Third, to the extent that having $1 million worth of Basic UMP rather than $2 million worth of Excess UMP can be considered a “gap” in coverage, Ms. Ouellette identified it for Mr. Carriere de Davide and explained that it could be addressed by paying an extra premium of $25.

[119] Furthermore, I do not agree with counsel for the Plaintiff's argument that Ms. Ouellette fell below the required standard of care since she did not provide Mr. Carriere de Davide with a specific recommendation to buy Excess UMP. Counsel based this assertion on Mr. Carriere de Davide's relative youth, the fact that he lived in Whistler, and because he was purchasing certain other optional coverages (e.g., collision, comprehensive, and third-party liability above the minimum required amount). In my view, the applicable standard of care does not require an agent to first divine from a customer's age, residence, and willingness to purchase other insurance coverage that Excess UMP might be of particular interest to them, and to then actively recommend that they buy it. This is especially so when the agent is dealing with a repeat customer for whom these factors have been pre-existing for some time, and the customer does not give some indication that they are now of concern to them.

[120] In sum, I find that there has been no breach of the applicable standard of care by Westland. The second element of Mr. Carriere de Davide's negligence claim is not established.

D) Did the Defendant Cause Injury to the Plaintiff?

[121] As has already been noted, the question of whether Westland caused injury to Mr. Carriere de Davide requires an application of the "but for" test. In the case at bar, this question can be formulated as follows: but for the manner in which Ms. Ouellette advised Mr. Carriere de Davide regarding his UMP coverage options, would Mr. Carriere de Davide have purchased Excess UMP rather than being content with Basic UMP?

[122] Mr. Carriere de Davide submits that the answer to this question is yes. The evidence he provides in support of this submission is his testimony to the effect that had Excess UMP been offered and explained by a Westland agent with an effective recommendation that this coverage would be of benefit to him, he would have done so. He notes in particular the relatively low premium of $25 when compared to the

total cost of $1,494 that he paid for his Autoplan policy on May 19, 2016, and the fact that he had over $14,000 in his bank account at that time.

[123] Westland submits that the answer to this question is no. It urges the Court to view Mr. Carriere's evidence with caution, as it is a self-interested statement of past intention made with the benefit of hindsight.

[124] In *Arndt v. Smith,* [1997] 2 SCR 539 at paras. 1 to 17, the Supreme Court of Canada set out the causation test to be applied to a negligence claim when a determination must be made of what the plaintiff's actions would have been if the defendant had not committed the allegedly negligent act or omission. It is a modified objective test that requires the court to consider what a reasonable person in the circumstances of the plaintiff would have done if faced with the same situation, while taking into account the plaintiff's particular concerns and special considerations that affect them specifically. As such, it differs from a purely objective test.

[125] The test is also not purely subjective. This is because of the inherent unreliability of plaintiffs' hypothetical assertions of what they would have done in situations that they did not actually face. The difficulty with such subjective hindsight evidence has been the subject of some commentary in the jurisprudence. An example is the following statement of Justice Neilson (then of this Court) in *Newton v. Marzban,* 2008 BCSC 328 at para. 761:

> [761] In considering that issue, I am mindful that I must resist the tendency to view the plaintiff's decision to settle with "the acuity of vision given by hindsight": *Karpenko v. Paroian, Courey, Cohen & Houston,* (1980), 1980 CanLII 1588 (ONSC), 117 D.L.R. (3d) 383 at 398 (Ont. H.C.J.). I adopt the view of Groberman J. in *Sports Pool Distributors Inc. v. Dangerfield,* 2008 BCSC 9 at para. 97, that in cases of professional negligence a bare assertion that a client would have behaved differently if he or she received proper advice should be viewed with some scepticism. Like Mr. Justice Groberman, I endorse this observation of Southin J.A. in *Hong Kong Bank of Canada v. Touche Ross & Co.* (1989), 1989 CanLII 2737 (BCCA), 36 B.C.L.R. (2d) 381 at 392 (C.A.):
>
> > It is always easy for a witness to say what he would have done and for a judge to say he accepts that assertion. But such evidence is, in truth, not evidence of a fact but evidence of opinion. It should be tested in the crucible of reason.

[126] I therefore cannot simply accept Mr. Carriere de Davide's statement that he would have purchased Excess UMP had it been offered, explained, and recommended to him by a Westland agent. It must be "tested in the crucible by reason" by considering what a reasonable person in Mr. Carriere de Davide's circumstances would have done at the time, taking into account his individual concerns and considerations.

[127] I also do not accept the notion that the relatively low cost of Excess UMP must inevitably lead to the conclusion that any reasonable person would buy it. To that end, I agree with the following observation of Justice Veit in *Regehr* at para. 20:

> [20] The relatively low cost of the insurance does not determine the issue one way or the other. [The plaintiff] argues that the extra coverage was only $5 for 6 months and that it is inconceivable that he would have refused it. I do not accept that argument as persuasive. If a person believes that they do not need something, even $5 is too much to pay for it.

[128] Furthermore, it must be kept in mind that a customer who declined Excess UMP was not then left without any coverage at all in respect of losses caused by uninsured and underinsured motorists. That customer still benefited from the Basic UMP coverage of $1 million, a significant amount.

[129] Ultimately, I am not satisfied on a balance of probabilities that Mr. Carriere de Davide has met the modified objective test for causation in this case. In particular, I do not find that if there had been active encouragement by Ms. Ouellette to buy Excess UMP on May 19, 2016, a reasonable person in Mr. Carriere de Davide's circumstances with his individual concerns and considerations would likely have purchased $2 million worth of UMP coverage, rather than maintaining the existing UMP coverage of $1 million that had been in place for the previous 10 years.

[130] I so find in particular because Mr. Carriere de Davide presented as someone who, prior to the Accident, was a capable and independent-minded person who made significant life decisions on his own. These included his choice to leave his home province of Quebec at the relatively young age of 19, to establish himself in Whistler without any apparent connections or support network, and to wisely

manage his earnings so as to purchase a home. He had been buying Autoplan policies since 2006, consistently declining Excess UMP coverage each time. Taking these individual factors into account as part of the modified objective test, as I must, I am not persuaded that a reasonable person in Mr. Carriere de Davide's circumstances who shared his particular concerns and considerations would have deviated from a longstanding practice of settling for Basic UMP by choosing Excess UMP instead if only an insurance broker had recommended that they do so.

[131] As such, I conclude that neither Ms. Ouellette's conduct of the May 19, 2016 insurance transaction generally nor her specific conduct of it in relation to UMP coverage was a cause of Mr. Carriere de Davide's losses following the Accident. This element of Mr. Carriere de Davide's negligence claim is not established either.

E) Conclusion on Liability

[132] In sum, I find that Mr. Carriere de Davide has not demonstrated, on a balance of probabilities, that two of the required four elements for a negligence claim are present in this case. First, Westland did not breach its duty of care to Mr. Carriere de Davide. Second, Westland did not cause, in fact or in law, Mr. Carriere de Davide's losses.

[133] These findings are disjunctive. Therefore, either one necessarily means that Mr. Carriere de Davide's claim in negligence against Westland must be dismissed.

V. ANALYSIS: DAMAGES

[134] In light of my conclusion that Westland is not liable in negligence, it is not strictly necessary for me to assess and quantify Mr. Carriere de Davide's damages arising from the Accident. I will nevertheless do so given that the parties presented considerable evidence and full argument on this issue, and in case I am later found to have been mistaken in my liability determination.

A) General (Non-Pecuniary) Damages

Legal Principles

[135] The legal principles applicable to assessing non-pecuniary damages designed to compensate a plaintiff for the pain and suffering and loss of enjoyment of life caused by a defendant tortfeasor are well established. In *Stapley v. Hejslet,* 2006 BCCA 34 at para. 46, a non-exhaustive list of these factors was set out. It includes: (1) the age of the plaintiff; (2) the nature of their injury; (3) the severity and duration of their pain; (4) the extent of their disability and emotional suffering; (5) the depth of impairment of their life, relationships, and abilities; and (6) the magnitude to which their lifestyle has been lost.

[136] There is an upper limit for non-pecuniary damages, however. It was originally set at $100,000 in 1978 by the Supreme Court of Canada in a trilogy of cases that included *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 SCR 229. More recent jurisprudence has adjusted this amount for inflation, and it is generally accepted that the cap is now over $400,000: *Alvarado v. KCP Heavy Industries Co. Ltd.,* 2022 1621 at para. 14; and *Ward v. Thomas,* 2022 BCSC 1147 at para. 40. That said, upper limit awards are only awarded in cases involving extremely severe injury and where maximum solace must be recognized: *Sahota v. Slupskyy,* 2019 BCSC 2215 at para. 113.

Plaintiff's Position on Non-Pecuniary Damages

[137] Counsel for the Plaintiff submit that this is an exceptional case that would warrant an upper limit non-pecuniary damages award given the devastating impact that Mr. Carriere de Davide's severe traumatic brain injury has had on his life.

[138] In support of this assertion, they rely on *Spehar v. Beazley,* 2002 BCSC 1104; aff'd 2004 BCCA 290. In this case, a 16-year-old plaintiff suffered a severe traumatic brain injury that affected her executive functions, memory, temper, emotions, and personality. Ms. Spehar was awarded non-pecuniary damages at the upper limit (then valued at $280,000).

[139] Accordingly, counsel for the Plaintiff submitted that Mr. Carriere de Davide's pain and suffering would have entitled him to an upper limit non-pecuniary damages award fixed at $439,000. This is the amount considered to be the current inflation-adjusted upper limit for such damages as found by Justice Tucker in the recent case of *Somers v. MacLellan,* 2023 BCSC 1449 at para. 389.

Defendant's Position on Non-Pecuniary Damages

[140] Counsel for the Defendant do not dispute that Mr. Carriere de Davide's injuries are significant and have had a substantial impact on his life. However, they say that it is also the case that Mr. Carriere de Davide has made a remarkable recovery from his injuries and retains a good degree of cognitive and physical function. They note that he continues to live independently in Whistler, spends time outdoors, and can see his family regularly. As such, they disagree with counsel for the Plaintiff that this is a case that would warrant an upper limit non-pecuniary damages award.

[141] Instead, counsel for the Defendant suggest that the following three personal injury cases in which non-pecuniary damages were assessed at an amount below the upper limit provide better guidance for determining such an award for Mr. Carriere de Davide:

- *Claiter v. Rose,* 2003 BCSC 50: $175,000 award ($264,166.67 adjusted for inflation);
- *Yick v. Johnson,* 2012 BCSC 1485: $250,000 award ($325,795 adjusted for inflation); and
- *O'Connell v. Yung,* 2010 BCSC 1764; aff'd 2012 BCCA 57: $275,000 award ($372,861 adjusted for inflation).

[142] The Defendant says that when these decisions are reviewed, the situation of the plaintiff in *Yick* is the most comparable to that of Mr. Carriere de Davide. Accordingly the Defendant submits that an appropriate inflation-adjusted non-pecuniary damage award for Mr. Carriere de Davide would be $325,000.

Analysis of Non-Pecuniary Damages

[143] The Accident experienced by Mr. Carriere de Davide was a serious one, causing him significant physical and psychological injuries. A simple comparison of Mr. Carriere de Davide's life before and after its occurrence leaves no doubt that its impact on him has been substantial. Through his hard work, grit, and determination, he had established an enviable lifestyle in Whistler that afforded him ample recreation, socialization, and work that he enjoyed. This lifestyle is no more.

[144] As such, I have no hesitation in concluding that Mr. Carriere de Davide has experienced a relatively large non-pecuniary loss as a result of the Accident. In my view, however, this is not a case of a "severe" or "devastating" injury that rises to the level that warrants an upper limit award. Mr. Carriere de Davide still lives and functions relatively independently at his home in Whistler. He can manage his finances with some help from his father. While his social circle is not what it once was, he still has regular, if occasional, contact with his family and some friends. Commendably, he has also developed and practises some positive coping mechanisms for his situation, such as living in the present, minimizing his alcohol consumption, and regularly walking outdoors.

[145] Accordingly, when examining comparator jurisprudence for guidance in setting general damages, I agree with counsel for the Defendant that Mr. Carriere de Davide's situation is more comparable to that of Ms. Yick than it is to that of Ms. Spehar. Ms. Yick's brain injury caused her permanent and profound cognitive impairment and a complete loss of income earning capacity. It resulted in personality and behavioural changes which led to a significantly more solitary existence than she had previously. However, Ms. Yick was able to prepare simple meals, handle her own personal care, and travel. The same could not be said of Ms. Spehar, whose impairment and inability to care for herself was much more severe, requiring that a committee be appointed to manage her affairs.

[146] I therefore find that an appropriate award for Mr. Carriere de Davide's non-pecuniary damages would be the inflation-adjusted equivalent of what was awarded

to Ms. Yick in her case, as proposed by counsel for the Defendant. That amount is $325,000.

B) Past Loss of Earning Capacity

Legal Principles

[147] The legal principles that apply to the calculation of damages in relation to an injured plaintiff's past loss of income from the time of the accident to the time of trial are also well established. Such calculations are challenging because they necessarily involve a consideration of hypothetical events in order to answer a speculative question, namely, what income would the plaintiff have earned but for the injuries that resulted from the accident? The burden of proof to demonstrate these hypothetical events lies on the plaintiff, but the standard of proof is the real and substantial possibility threshold rather than the more onerous balance of probabilities standard: *Grewal v. Naumann,* 2017 BCCA 158 at paras. 48 and 49; *Dunbar v. Mendez,* 2016 BCCA 211 at para. 21; *Perren v. Lalari,* 2010 BCCA 140 at para. 30; and *Rousta v. MacKay,* 2018 BCCA 29 at para. 17.

[148] Furthermore, it should also be noted that s. 98 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231 provides that a plaintiff is entitled to recover damages for income loss suffered after the accident and prior to the date of trial, but not more than the net income loss they suffered in that period as a result of the accident.

Plaintiff's Position on Past Loss of Earning Capacity

[149] The Plaintiff claims that he would have been entitled to undiscounted past loss of earning capacity damages. This is because he has been totally disabled and has not earned any employment income since the Accident.

[150] Counsel for the Plaintiff suggest that such damages be conservatively estimated at $50,000 per year. This is based on his approximate earnings as a bartender and restaurant manager in the years prior to the Accident, which consisted of a combination of salary and tips.

[151] Accordingly, the Plaintiff says that his estimated gross past wage loss over the approximately seven-year period from the Accident to trial is $350,000. Assuming a 20% average tax rate on this income, the Plaintiff submits that an appropriate damage award for Mr. Carriere de Davide's past loss of earning capacity would be $280,000.

Defendant's Position on Past Loss of Earning Capacity

[152] The Defendant agrees generally with the Plaintiff's position that Mr. Carriere de Davide would be entitled to an award in respect of his past loss of earning capacity calculated by reference to what his earnings likely would have been from the time of the Accident to trial, assuming he would have continued to work in restaurants in Whistler as a bartender and/or a restaurant manager. However, the Defendant's estimate of the amount of those hypothetical earnings is slightly lower than that of the Plaintiff.

[153] Specifically, the Defendant submits that his annual estimated earnings should be $40,000, and that they should be multiplied by 7.25 years to reflect the seven years and three months that passed between the Accident and the hearing. After factoring in a 20% reduction for taxes, the total appropriate past loss of earning capacity award suggested by the Defendant is, therefore, $232,000.

Analysis of Past Loss of Earning Capacity

[154] On my assessment of the evidence presented, I agree with both parties that the Plaintiff has shown that there is a real and substantial possibility that, but for Mr. Carriere de Davide's injuries caused by the Accident, he would have continued to work in restaurants at Whistler until trial, earning amounts similar to what he had been earning previously. I also accept that he did not earn any employment income during this period, and could not have given his impairments caused by the Accident.

[155] With respect to quantifying this head of damages, I prefer and adopt the proposal of counsel for the Defendant which is thorough, cogent, and supported by the evidence. It is as follows:

> (a) Mr. Carriere de Davide's reported employment earnings in 2015 (the last full year before the Accident) were approximately $20,000, the vast majority of which came from salary income;
>
> (b) Mr. Carriere de Davide also earned income from tips prior to the Accident, estimated at around $16,000 annually;
>
> (c) adding the $20,000 salary to $16,000 in gratuities provides for an estimated annual income of $36,000 per year;
>
> (d) there was a possibility that Mr. Carriere de Davide might have been promoted to the role of assistant manager of the Garibaldi Lift Company restaurant when it became available in 2018, a job that paid a salary in the range of $45,000 to the upper $50,000's, plus gratuities of approximately $8,000, or that he might have obtained a similar managerial position at another Whistler restaurant;
>
> (e) this positive contingency must be considered, although it is uncertain that Mr. Carriere de Davide would necessarily have been chosen for these roles or that he would have applied for them, given that he had previously stepped down from a general manager role he had at Buffalo Bills to return to bartending as the hours suited him better;
>
> (f) negative contingencies must be considered too, notably the impact of COVID-19 on the availability of employment income from jobs in the Whistler hospitality industry starting in March 2020 as a result of the pandemic;
>
> (g) accounting for these contingencies, it would be appropriate to use $40,000 per year as a gross estimate of Mr. Carriere de Davide's annual earnings for

the 7.25 year period from the Accident to trial, a slight upward adjustment from his actual earnings in 2015 prior to the Accident of $36,000; and

(h) accordingly, after accounting for income tax at 20%, Mr. Carriere de Davide's estimated net past income loss is $232,000.

[156] I therefore find that an appropriate award to compensate Mr. Carriere de Davide for his past loss of earning capacity would be $232,000.

C) Loss of Future Earning Capacity

Legal Principles

[157] Assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 32:

> … An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. …

[158] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva,* 2021 BCCA 228; *Rab v. Prescott,* 2021 BCCA 345; and *Lo v. Vos,* 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

1) Is there a potential future event that could lead to a loss of earning capacity?

2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

3) If there is such a possibility, what is its value?

[159] Valuation of the loss can be done using either the “earnings approach” or the “capital asset approach”: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 7; *Perren v. Lalari,* 2010 BCCA 140 at paras. 11–12. The earnings approach involves a calculation of the present value of a plaintiff’s annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela,* 2014 BCCA 48. The capital asset approach involves consideration of a person’s lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski,* 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren* at para. 33), and damages are assessed, not calculated (*Rosvold v. Dunlop,* 2001 BCCA 1 at para. 18).

Plaintiff’s Position on Loss of Future Earning Capacity

[160] Counsel for the Plaintiff effectively submits that this is a case in which the first two steps of the *Rab* analysis are easily satisfied given that the Accident clearly caused significant and lasting injuries leaving Mr. Carriere de Davide unable to work at the time of trial and for the foreseeable future.

[161] As for the valuation of this loss of earning capacity, counsel for the Plaintiff proposes that the earnings approach be used with one of two hypothetical scenarios.

[162] The first is that Mr. Carriere de Davide would have progressed to an assistant general manager role in a Whistler restaurant. Current compensation packages for such positions range from a base annual salary of $55,000 to $65,000, plus tips of $8,000 to $10,000. As such, $70,000 per year in total compensation is an acceptable rough estimate of what an assistant general manager would earn at present.

[163] The second is that Mr. Carriere de Davide would have advanced to a general manager role in a Whistler restaurant. These positions now pay $75,000 to $90,000 in annual salary, plus a 10 to 12% bonus, and tips of between $5,000 to $8,000. Therefore, the total compensation package for a general manager would be around $100,000 per year.

[164] With respect to the duration of these hypothetical earnings, counsel for the Plaintiff note that Mr. Carriere de Davide was 39 years old at the time of trial, and could be expected to retire when he turns either 65 or 70 years old. The Civil Jury Instructions present value multiplier for the former situation (i.e., retirement at age 65) is 21.4. For the latter situation (i.e., retirement at age 70), it is 24.6.

[165] Accordingly, counsel for the Plaintiff suggests four possible assessments for Mr. Carriere de Davide's loss of future earning capacity:

	Position	**Retirement**	**Loss of Future Earnings**
1	Assistant general manager	Age 65	$1,498,000
2	Assistant general manager	Age 70	$1,722,000
3	General manager	Age 65	$2,140,000
4	General manager	Age 70	$2,460,000

[166] Counsel for the Plaintiff effectively submit that the third of these four scenarios is the most likely one, and that the applicable positive and negative contingencies largely off-set each other. Therefore, they propose that Mr. Carriere de Davide's likely future loss of earning capacity award would have been $2,140,000.

Defendant's Position on Loss of Future Earning Capacity

[167] Counsel for the Defendant do not dispute that Mr. Carriere de Davide lacks the capacity to sustain competitive employment in the future and has suffered a pecuniary loss as a result of the Accident. They also agree that the earnings approach should be used to quantify the value of that loss.

[168] With respect to the basis of this quantification, counsel for the Defendant further agrees with the Plaintiff that two valid hypothetical employment possibilities for Mr. Carriere de Davide would have been obtaining assistant general manager and general manager positions at Whistler restaurants. However, counsel for the Defendants say that he may also have remained a bartender, or sought employment elsewhere, obtaining remuneration that could have been higher or lower. In addition to considering these potential career trajectories, counsel for the Defendant urge the Court to consider contingencies, and to effect a 20% deduction because no economic evidence was led to account for risk and choice contingencies that might affect the Plaintiff's future stream of income.

[169] All that said, counsel for the Defendant ultimately suggest that the Court conduct its assessment by using a hypothetical annual earning figure of $60,000, reflecting the approximate current base salary of an assistant manager at the Garibaldi Lift Company restaurant in Whistler, and assume that the 39-year old Mr. Carriere de Davide would continue to work until age 65. While counsel for the Defendant accept that the ordinarily applicable present value multiplier for this situation is 21.4, they say that it should be reduced by 20% for general contingencies to 17.12.

[170] The total loss of future earning capacity award suggested by the Defendant is therefore $60,000 X 17.12, or $1,027,200.

Analysis of Loss of Future Earning Capacity

[171] I agree with the parties that the first two elements of the *Rab* test are met in this case. Paraphrasing *Rab* at para. 29, the factual and expert medical evidence before the Court establishes that the Accident caused significant and lasting injury that has left Mr. Carriere de Davide unable to work at the time of trial and for the foreseeable future. The only issue is the third element of the *Rab* test: valuation.

[172] I also agree with the parties that this is a case in which the earnings approach should be used for the valuation, one that entails a calculation of the present value

of Mr. Carriere de Davide's annual loss of income over the remaining years of employment he would have had but for the Accident.

[173] With respect to assessing that annual loss, I find that it can be done most appropriately by reference to the hypothesis that Mr. Carriere de Davide would have become an assistant general manager at a Whistler restaurant, and not a general manager.

[174] I base this primarily on Mr. Wilson's testimony, who was Mr. Carriere de Davide's former manager at the Garibaldi Lift Company. Mr. Wilson opined that Mr. Carriere de Davide was suited for such a role and that it would have been a natural progression for him. On the other hand, Mr. Wilson hesitated when asked about whether Mr. Carriere de Davide could have become a general manager, replying simply that he would hope so. Furthermore, I have some doubt that Mr. Carriere de Davide would have been interested in taking on the added responsibility of a general manager position, having previously done this job at Buffalo Bills before choosing to return to his former job as a bartender. In sum, while I accept that there is a real and substantial possibility that Mr. Carriere de Davide would have been an assistant general manager but for the Accident, I am not prepared to find that the same can be said in relation to a general manager position.

[175] I also agree with counsel for the Plaintiff that $70,000 per year reflects an acceptable estimate of the annual earnings of an assistant general manager, as testified to by Mr. Wilson. As for the estimated duration of Mr. Carriere de Davide's earnings, I find that he would most likely have worked to the ordinary retirement age of 65. There is no persuasive indication in the evidence that Mr. Carriere de Davide might have been inclined to work beyond that.

[176] As such, my hypothetical earnings approach calculation will employ an annual income figure of $70,000 and a present value multiplier of 21.4. I do not agree with counsel for the Defendant's suggestion that a 20% deduction should be made because no expert economic evidence was led in respect of contingencies. While they suggested that this ought to be done on the basis of the 1997 decision of our

Court of Appeal in *York v. Johnston* (1997), 37 BCLR (3d) 235, 1997 CanLII 4043 (BCCA), it is not apparent to me this remains good law further to the *Rab* trilogy of cases. It also seems to me that, as both parties suggest, the general positive and negative contingencies applicable to Mr. Carriere de Davide set each other off in this case.

[177] Accordingly, I conclude that an appropriate amount that would compensate Mr. Carriere de Davide for his future loss of earning capacity is $1,498,000.

D) Cost of Future Care

Legal Principles

[178] A clear summary of the principles applicable to the assessment of cost of future care claims can be found in Justice Adair's judgment in *Golkar-Karimabadi v. Bush,* 2021 BCSC 990 at para. 107:

> An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

Plaintiff's Position on Cost of Future Care

[179] Counsel for the Plaintiff submit that Mr. Carriere De Davide would likely have been entitled to a cost of future care award of $529,907. This assertion is based on claims in relation to: (1) one-time expenses; (2) ongoing expenses; and (3) a contingency in relation to the possibility that Mr. Carriere de Davide may develop dementia.

[180] The one-time expenses claimed by the Plaintiff are set out in Mr. Corcoran's cost of future care report. They are the following:

Item	Cost	Amount Claimed
Psychological counselling – contingency over lifespan	$5,400 to $5,640	$5,520 (midpoint)
Repeat neuropsychological testing	$3,700 to $4,500	$4,100 (midpoint)
Physiotherapy	$630 to $1,344	$987 (midpoint)
Dietician service	$350 to $625	$487 (midpoint)
Contingency for care aide services – total hip replacement	$3,133 to $4,177	$3,655 (midpoint)
Home elevator or stair glide	$13,500 to $45,000	$29,250 (midpoint)
Bathroom modifications	$7,000	$7,000
Power mobility – scooter	$4,300	$4,300
Adaptive kitchen aids	$500	$500
TOTAL		$55,799

[181] The Plaintiff's claimed ongoing expenses are also set out in Mr. Corcoran's cost of future care report, from which an annual cost is drawn. Counsel for the Plaintiff propose that it would be appropriate to assume that they will be required until Mr. Carriere de Davide turns 80 years old. The applicable multiplier for obtaining the present value is therefore 27.8. The table below provides a break-down of the ongoing items claimed and their present value:

Item	Annual Cost	Present Value Claimed
Occupational therapy and case management	$2,840	$78,952
Supervised exercise/kinesiology	$7,040 to $7,920 (midpoint of $7,480)	$207,944
Deep cleaning home service	$1,680 to $2,184 (midpoint of $1,932)	$53,709
Handyman service	$780 to $1,200 (midpoint of $990)	$27,522
TOTAL		$368,127

[182] The Plaintiff also posits that he would have successfully made a contingency claim in respect of care that might be required should Mr. Carriere de Davide develop dementia of the Alzheimer's type. It is based primarily on Dr. Cameron's medical opinion evidence to the effect that Mr. Carriere de Davide's risk of suffering

from such dementia is around four times higher than that of a person who does not have a severe brain injury. It is also argued that Mr. Carriere de Davide is at a greater risk of falling. Counsel for the Plaintiff propose that a 25% contingent award is warranted, calculated by reference to the total of the one-time expenses and the ongoing expenses. If fully accepted, that total would be $423,926 ($55,799 plus $368,127), and 25% of this amount is $105,981.

[183] Accordingly, counsel for the Plaintiff ultimately submitted that a fair and reasonable cost of future care award for Mr. Carriere de Davide would be $529,907 ($55,799 plus $368,127 plus $105,981).

Defendant's Position on Cost of Future Care

[184] The Defendant accepts most of the Plaintiff's proposed cost of future care items with some exceptions, although it takes issue with many of the amounts claimed. Counsel for the Defendant prepared a table that sets out the amounts of the Plaintiff's claim which the Defendant submits are acceptable, as follows:

Item	**Cost (one-time or annual, as the case may be)**	**Multiplier**	**Claimed Amount Accepted by Defendant**
Psychological counselling	$5,400 to $5,640	N/A	$5,400 to $5,640
Repeat neuropsychological testing	$3,700 to $4,500	N/A	$3,700 to $4,500
Occupational therapy and case management	$2,840	7.0	$19,880
Physiotherapy	$630 to $1,344	7.0	$4,410 to $9,408
Supervised exercise/kinesiology	$960 to $1,080	7.0	$6,720 to $7,560
Dietician service	$350 to $625	N/A	$350 to $625
Contingency for care aide services – total hip replacement	$3,133 to $4,177	N/A	$3,133 to $4,177
Stair glide	$13,500 to $15,000	0.66	$8,910 to $9,900
Stair glide maintenance	$200 to $300	9.703	$1,940.60 to $2,910.90
Transfer bath bench	$500	0.66	$330

Power mobility – scooter	$4,300	0.66	$2,838
Scooter maintenance & battery replacement	$200	9.703	$1,940.60
Sparc disability parking pass	$26	9.33	$242.58
Home-style hospital bed	$3,500	2.80	$9,800
Bed maintenance	$200	27.995	$5,599
Adaptive kitchen aids	$500	N/A	$500
Deep cleaning service	$1,881.60 to $2,446.08	13.0	$24,460.80 to $31,799.04
Handyman service	$873.60 to $1,344.00	13.0	$11,358.60 to $17,472.00
Basic car maintenance	$250	26.0	$6,500
TOTAL ACCEPTABLE CLAIM			$118,011.40 to $141,622.10

[185] Counsel for the Defendant dispute five aspects of counsel for the Plaintiff's assertions regarding Mr. Carriere de Davide's hypothetical cost of future care claim.

[186] The first relates to paramedical therapies, such as supervised exercise/kinesiology, occupational therapy and case management, and physiotherapy. The Defendant notes that Mr. Carriere de Davide has not engaged in these therapies since the start of the COVID-19 pandemic, and says that any award in this respect should be discounted by 75% to reflect the real and substantial possibility that Mr. Carriere de Davide will not pursue them in the future. Furthermore, Dr. Hirsch has opined that Mr. Carriere de Davide was unlikely to make any further significant functional gains and that it would be appropriate for the Plaintiff to taper and eventually discontinue his kinesiology and physiotherapy treatments. In the same vein, the Defendant also urges the Court to prefer Ms. Smith's recommendation that 12 sessions of kinesiology per year would be appropriate over Mr. Corcoran's burdensome recommendation of 88 sessions.

[187] Second, the Defendant submits that the Plaintiff has not established a sufficient evidentiary foundation for a contingency to be awarded for dementia care, urging the Court to reject Dr. Cameron's evidence that Mr. Carriere de Davide is at increased risk of developing dementia of the Alzheimer's type.

[188] Third, the Defendant notes that Mr. Corcoran recommended that provision be made for the purchase of either a home elevator or stair glide unit to address the possibility that Mr. Carriere de Davide will develop degenerative changes in his right hip. The Defendant urges the Court to find that acquiring a stair glide unit would be more appropriate, as recommended by Ms. Smith, particularly since Mr. Carriere de Davide's stair climbing capacity would be expected to improve following the hip replacement surgery he is expected to eventually require.

[189] Fourth, the Defendant also urges the Court to prefer Ms. Smith's recommendation that a transfer bath bench be purchased to address Mr. Carriere de Davide's risk of falling rather than the expensive bathroom renovation recommendation made by Mr. Corcoran. The Defendant submits in particular that since both options would achieve the same objective, there is no medical justification for the additional cost associated with installing a walk-in/roll-in shower.

[190] Fifth, while the Defendant accepts that there should be a cost of future care award in relation to the deep cleaning and handyman service recommended by Mr. Corcoran, the Defendant submits that there is a real and substantial possibility that they will not need to be purchased. This is particularly the case since Mr. Carriere de Davide's tenants have been providing many of these services and may do so in the future. Accordingly, the Defendant proposes that a 50% contingency reduction be made.

[191] In sum, counsel for the Defendant submit that an appropriate award for Mr. Carriere de Davide's cost of future care would be $130,000, which is the mid-point of the "total acceptable claim" range of $118,011.40 to $141,622.10 set out in the table at paragraph 184 above.

Analysis of Cost of Future Care

[192] On my review of the evidence and the submissions of counsel, I am in general agreement with the Defendant's position on the extent to which the Plaintiff's hypothetical cost of future care claim warrants being accepted. In particular, I find that $130,000 represents a suitable base amount for calculating its value.

[193] However, I do not agree with the Defendant's counsel's objection to the Plaintiff's counsel's reasonable position that a contingency amount would be warranted to account for the possibility that Mr. Carriere de Davide may require future care for dementia of the Alzheimer's type. In particular, I accept the expert medical evidence of Dr. Cameron with respect to the increased risk that Mr. Carriere de Davide faces in this regard. In my view, a 25% contingency amount calculated on top of the $130,000 base cost of future care award would be appropriate, as proposed by counsel for the Plaintiff.

[194] I therefore conclude that an appropriate amount that would compensate Mr. Carriere de Davide for his cost of future care is $162,500.

E) In-Trust Claim

Legal Principles

[195] In *Popove v. Attisha,* 2019 BCSC 1587 at paras. 57 to 59, Justice Burke summarized the principles that apply to determining whether a plaintiff is entitled to succeed on an in-trust claim made for care provided by a close family member:

> [57] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the Court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise been incurred: *Star v. Ellis*, 2008 BCCA 164 at para. 17.
>
> [58] The law of in-trust claims is governed by the principles set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 (B.C.S.C.) at para. 180, aff'd 2004 BCCA 124, where the Court identified the following relevant factors:
>
> > [180] …
> >
> > a. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
> >
> > b. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
> >
> > c. the maximum value of such services is the cost of obtaining the services outside the family;

> d. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> e. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality, and nature of those services; and,
>
> f. the family members providing the services need not forgo other income and there need not be payment for the services rendered.
>
> [59] Cases in which awards have been made for in-trust services involve care provided to seriously injured plaintiffs or support services beyond what might normally be expected in a familial relationship. In assessing the appropriateness of an in-trust claim, standard compassion and care of relatives are not to be compensated. The compensation is for the extra services provided by the family member at a reasonable cost.

Plaintiff's Position on In-Trust Claim

[196] The Plaintiff submits that this is a case in which an in-trust claim could justifiably be made in relation to services provided to Mr. Carriere de Davide by his father, Silvio de Davide.

[197] Counsel for the Plaintiff notes in particular that immediately after the Accident took place, Silvio de Davide temporarily left Quebec in order to be by his son's side in Vancouver for six months as he recovered in hospital. While there, Silvio de Davide worked with his son on basic exercises, got his son to leave the hospital room, spoke to his son as the latter was regaining the ability to converse, and assisted his son with the move back home to Whistler. Over the seven years that have passed since, Silvio de Davide has also overseen his son's finances and planned his son's trips to Quebec and Ontario for family visits.

[198] Counsel for the Plaintiff submit that an appropriate in-trust award would be $20,000. They did not, however, offer any specific justification for quantifying such an award in this particular amount.

Defendant's Position on In-Trust Claim

[199] The Defendant does not agree with the Plaintiff that an in-trust award would be warranted in this case. Counsel for the Defendant submit that there is no evidence that the support Silvio de Davide provided was necessary for his son's

care. As such, an in-trust award cannot be justified. Even if one were to have been ordered, it would have been merely nominal in nature.

Analysis of In-Trust Claim

[200] In my view, the evidence does not establish, on a balance of probabilities, a justification for an in-trust award in respect of what Silvio de Davide did for his son following the Accident. While Silvio de Davide's presence and help were undoubtedly beneficial and comforting, there is no evidence that they actually replaced medical or other services that were necessary for his son's care. The same can be said about the subsequent assistance he provided with respect to his son's finances and travel planning. I also find that this was not over and above what might be expected in a family relationship between a father and son. Furthermore, no reasonable basis has been suggested for quantifying the value of Silvio de Davide's efforts.

[201] Accordingly, I conclude that Mr. Carriere de Davide would not have received an in-trust award had one been sought in a hypothetical personal injury action founded upon the evidence before this Court.

F) Conclusion on Damages

[202] Had I been required to quantify the personal injury damages award Mr. Carriere de Davide would have been entitled to receive further to the Accident (i.e. his "PI Damages"), I would have done so as follows:

• Non-pecuniary damages:	$325,000
• Past loss of earning capacity:	$232,000
• Future loss of earning capacity:	$1,498,000
• Cost of future care:	$162,500
TOTAL:	$2,217,500

[203] The total amount of Mr. Carriere de Davide's PI Damages is therefore in excess of $2,000,000. Had I found Westland to be liable, Mr. Carriere de Davide's

Broker Negligence Damages award would therefore have been $1,000,000, representing the difference between his insurance coverage under Basic UMP as compared to what it would have been under Excess UMP.

VI. DISPOSITION

[204] Mr. Carriere de Davide's action is dismissed.

[205] Unless there are matters of which I am unaware, Westland is entitled to its costs of this proceeding at Scale B. If the parties cannot agree on the specifics of a costs order, they may contact Supreme Court scheduling within 30 days to arrange a hearing before me on this issue.

"Brongers J."