IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heyran v. 0668403 B.C. Ltd.,*
2024 BCSC 1110

Date: 20240626
Docket: M193642
Registry: Vancouver

Between:

Saeid Bayazi Heyran

Plaintiff

And

0668403 B.C. Ltd., Reaghan Brooke Chadwick, John Doe, Jane Doe, and John Doe Corporation

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiff:	H. Faramarzi
Counsel for the Defendants, 0668403 B.C. Ltd. and Reaghan Chadwick:	L. Kohlruss D. Kang K. Burns, Articled Student
Place and Date of Trial:	Vancouver, B.C. April 29-30, 2024 and May 1-3, 6-10, 2024
Place and Date of Judgment:	Vancouver, B.C. June 26, 2024

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I. INTRODUCTION

[1] The plaintiff seeks compensation for injuries sustained in an accident that occurred on January 28, 2019 (the “Accident”). Liability is admitted.

II. FACTUAL BACKGROUND

A. The Plaintiff

[2] The plaintiff was born in Iran on June 23, 1968. The plaintiff comes from a family of political activists. The plaintiff and his family were members of Koomeleh, a human rights group involved in organizing protests against the government of Iran.

[3] After the plaintiff completed grade 5, the Iranian government bombed his village. The plaintiff could not continue his education, so he started farming with his father.

[4] In 1987, the Iranian government sentenced the plaintiff to 13 months in jail due to his political activities.

[5] On March 21, 1991, the plaintiff married his wife. They have two children: Majid, born in 1994, and Fardin, born in 1999.

[6] In 1992, the plaintiff moved to a new city. He continued to farm and opened a store selling farming equipment. He also did about six months of bus driving.

[7] In 2008, Iranian police shot the plaintiff in the left leg as part of an attempted arrest. As a result of the gunshot, the plaintiff underwent surgery, and doctors placed platinum hardware in his leg. He now has a limp because one leg is shorter than the other.

[8] In October 2009, the plaintiff escaped to Turkey. He applied for refugee status through the United Nations Refugee Program. On May 31, 2011, the plaintiff and his family were approved for entry into Canada.

[9] Given the plaintiff’s leg problems, limited education, and poor English language skills, his ability to work was restricted. From 2012 to 2013, he worked in

Stepho's Greek Restaurant, performing late-night cleaning and security. The available evidence suggests that the plaintiff failed to declare these earnings to the tax authorities.

[10] The plaintiff applied for provincial government disability benefits in 2012 based on the residual effects of his gunshot injury. His application was approved, and he was designated as a "Person with Disability" ("PWD") by the BC government. That designation remains in place to this day.

[11] From 2013 to 2015, the plaintiff worked for Noura Construction as a general labourer. Again, it appears that the plaintiff failed to report these earnings to the tax authorities. He also worked at a blueberry farm in Pitt Meadows, earning about $12,000 annually, evidence that he did not provide on discovery according to the transcript. The plaintiff insisted that he did provide this detail, and he could not understand why it was not written down. He admits to not reporting his income from these positions to the tax authorities, but claims he was ignorant of how tax filing worked in Canada. He only learned of his mistake in 2015, but did not correct his returns because he says he needed all the money he had earned.

[12] In September 2015, the plaintiff sought to upgrade his qualifications in order to help him find a better job. Specifically, the plaintiff applied for employment assistance from the BC government through its contractor, Back in Motion Rehab Inc., doing business as Avia Employment Services ("Avia"). This program is designed to help individuals find employment that matches their abilities. His case manager, Ms. Soudabeh Rafiei, testified at trial. She was able to speak Farsi with the plaintiff. She confirmed that the two questionnaires in Avia's file (the "Questionnaires") would have been completed by her or another caseworker based on information provided by the plaintiff. There were certain unexplained non-material errors or inconsistencies between the two questionnaires. Ms. Rafiei confirmed that most of the handwriting on the plaintiff's application form (the "Application") was not

hers.[1] It would typically be the client who completes the Application. The plaintiff's evidence on this point varied wildly but landed at the following point: he only wrote and signed his name and nothing else. The Questionnaires and Application are notable in that they provide the following information:

a) In the Questionnaires, in response to the question, "how much time have you spent in stable work in the past 5 years?", the answer was "less than six months."

b) The Questionnaires state that the plaintiff "could use help": "reading and understanding written information", "explaining and describing things to others", "creating and working with documents", "writing", "organizing information", "using computers for common tasks," and "learning and trying new things."

c) The Questionnaires confirm that the plaintiff has a "physical disability."

d) The Questionnaires state that the reasons he was unemployed were "language, lack of skills";

e) In response to the question, "what do you believe is preventing you from obtaining employment utilizing your existing skills and work experience?", the answer provided was "disability."

a) The Application contains the following statement: "I would remind that I am in disability program because of my hip, that is why this well limits my ability to do most jobs".

[13] With Avia's help, the plaintiff obtained his Class 1 Drivers License in August 2016. It is not clear what the plaintiff did from August 2016 to May 2017 beyond working informally with a friend to gain trucking experience.

[1] Ms. Rafiei confirmed that only the following information from the Avia file (Exhibit 13, Tab 2) was in her writing: the signature and date on page 6, pp. 7–9, 11, 12, 13, the date on page 20, page 43 except "disability", and the 4th paragraph on page 45.

[14] The plaintiff did not obtain paid work as a truck driver until May 2017. Between May and August of that year, he worked as a truck driver for Blue Trans Logistics. His duties included long-haul trips from Vancouver to California, Toronto and Calgary. He earned the following amounts:

Date	Gross Income
May 2017	$2,241.74
June 2017	$3,791.29
July 2017	$5,165.97
August 2017	$470.78

[15] The plaintiff did not enjoy his work with this company, as it kept him away from home for long periods. He quit and began looking for work that would keep him closer to home.

[16] The plaintiff had no explanation for why the records would include a phone log dated August 8, 2017, indicating that the "client stated he has lost his class 1 driving job in the US because of his poor English skills and is looking for a local job in Vancouver so he can study English".

[17] The plaintiff denied receiving phone calls from Avia or the Ministry despite the records showing many such calls.

[18] Between September 2017 and April 2018, the plaintiff worked for Yen Bros. Food Service (2011) Ltd. ("Yen Bros") as a truck driver within a more local territory. His duties included transporting goods to restaurants and unloading those goods at the restaurants. He earned the following amounts, including overtime:

Period ending	Gross Income
September 30, 2017	$569.50
October 28, 2017	$3,542.38
November 25, 2017	$4,199.00
December 23, 2017	$3,810.13
January 20, 2018	$3,636.32
February 17, 2018	$4,863.62
March 17, 2018	$4,983.17

[19] From September to December 2017, the plaintiff worked 133 overtime hours, and from January to March 2018, he worked 166 overtime hours.

[20] The plaintiff claimed employment earnings of $24,188 in 2017, along with $24,039 in social assistance payments.

[21] The plaintiff says he voluntarily quit his position at Yen Bros in March 2018 because he wanted to buy his own truck. However:

a) He almost immediately left Canada to visit relatives in Turkey for over seven weeks; and

b) He says he could not make the necessary connection with a trucking company to allow him to purchase a truck with confidence that he would earn enough income to cover the monthly payments on a truck purchase.

[22] His reason for quitting Yen Bros is also somewhat confusing as a result of a May 7, 2018 note in the Avia records in which it is stated that, during a phone call with the plaintiff, he suggested he had quit due to health problems. The phone note states:

> CM called client and client stated; due to clients physical disability and the pressure of that job client quit the job in February. …

His response to this contradiction was typical: the Avia staffer must have incorrectly recorded the note because the phone call never happened.

[23] Irrespective of the reason he left the Yen Bros position, the plaintiff remained unemployed from March 2018 through to the Accident in January 2019.

[24] The plaintiff claimed just $14,507 in employment income in 2018, along with the ongoing $29,058 in social assistance payments.

[25] The plaintiff was involved in some small-scale farming in 2017 and 2018. He rented a small plot on a friend's farm for beekeeping and planting vegetables. His earnings from the sale of honey and pumpkins were as follows:

2017	Sale of honey: $8,300 Sale of pumpkins: $3,900 **Total: $12,200**
2018	Sale of honey: $7,900 Sale of pumpkins: $3,650 **Total: $11,550**

[26] Once again, the plaintiff did not declare this income on his income tax return. He claims that he mistakenly understood that farming income was exempt from taxation.

[27] On May 14, 2018, the plaintiff attended a chiropractor and advised that he did not get enough sleep at night and did not wake up feeling rested. He was sleeping only 3-4 hours per night. The plaintiff agreed that he said this but stated that these periods of poor sleep only lasted a week or ten days at a time.

[28] On May 22, 2018, the plaintiff attended Eagle Ridge Hospital ("Eagle Ridge"), complaining of another instance of the recurrent foot infection secondary to his bullet wound trauma. The infection lasted about four months.

[29] On October 5, 2018, Dr. Darius Viskontas of the Fraser Orthopaedic Institute advised that the plaintiff had left hip and groin pain, including pain radiating to his leg, which was causing him difficulty walking. He was described as having a

"malunited left petrochanteric femoral fracture and posttraumatic osteoarthritis". Surgery was recommended.

[30] On December 5, 2018, a cardiologist reported that "His stress today showed that he was not able to augment his heart rate with exercise", so the recommended surgery had to be postponed. Although the records note that the plaintiff was "quite healthy and active", the physician raised the potential that a pacemaker may be required.

[31] The plaintiff was a long-term two-pack-a-day smoker prior to the Accident. He only quit eight months ago.

B. The Accident: January 28, 2019

[32] At about 2:45 p.m., the plaintiff was driving westbound down the inside of two lanes on Kingsway Avenue in Port Coquitlam. The defendant, Reaghan Chadwick, exited the parking lot of a store and then crossed in front of the plaintiff's vehicle. The defendant was intending to make a left turn eastbound. The defendant did not leave enough time to clear the lanes, causing the plaintiff's vehicle to strike the defendants' vehicle's driver's side. Liability is admitted. Both cars were written off.

[33] On impact, the plaintiff testified that his head went forward and back, but he never lost consciousness. That said, both he and his son, Majid, described him as being initially disoriented. However, the plaintiff had quite a good recall of most of the Accident details, including the following:

a) He got out of his car and sat on the sidewalk;

b) Shop owners came to help the other driver;

c) His vehicle was pushed out of the street;

d) He checked up on the other driver, who was crying;

e) People helped move the other driver's car out of the street;

f) He called his son and gave him directions to the Accident site;

g) Someone tried to speak to him, but he indicated to them that he could not speak English; he told them to wait until his son arrived;

h) After his son arrived, he exchanged documents with the defendant, and his son called ICBC; and

i) His son took him to Eagle Ridge Hospital.

[34] At Eagle Ridge, the plaintiff complained of neck and shoulder pain, as well as having a headache and being dizzy. The records note a lack of any nausea or vomiting, and he was released the same day.

C. Post-Accident

[35] The plaintiff asserts that he developed the following conditions as a result of the Accident:

a) pain in all areas of his back, but in particular the lower back;

b) neck pain;

c) headaches;

d) nausea/vomiting;

e) pain in his left shoulder, radiating to his arm, hand, wrist and fingers;

f) numbness in the pinky finger of his left hand;

g) pain radiating to both knees and legs;

h) numbness in his right thigh;

i) sleep loss; and

j) sensitivity to light, sounds and smells.

[36] There were reports of dizziness, headaches and hip pain in the records from January 28 to February 10, 2019. However, the defendants note that there have been virtually no reports of such problems since that time. The plaintiff suggested that he did continually report these other issues to his general practitioner, so the doctor must have failed to record them.

[37] The plaintiff's evidence concerning his leg and hip problems before the Accident was quite confusing. On February 19, 2019, the plaintiff complained to his general practitioner, Dr. Behzad Ansari, about left leg pain, but it was said to be due to vascular disease. The plaintiff stated at trial that he began developing right leg problems roughly six to seven months after the Accident. This contrasts with the plaintiff's discovery evidence, which asserted that his post-accident issues were with his left leg. On August 2, 2019, the plaintiff attended Eagle Ridge complaining about chronic pain in his left ankle, but this was said to be the result of his prior bullet wound.

[38] Studies of his spine in 2019 revealed degenerative changes that the experts agreed must have started to develop before the Accident.

[39] The plaintiff started receiving physiotherapy from Harmony Physiotherapy ("Harmony") in February 2019. A December 5, 2019 note states that the plaintiff was "trying to apply for a new job". The plaintiff denied saying this. Further, notwithstanding what is stated in the records, he similarly denied communicating to Harmony that he:

a) "started working part-time as a delivery driver" as of July 9, 2020;

b) was "doing PT 2-3 hr/day delivery" as of February 25, 2021;

c) was "just able to manage half of his shifts as a delivery driver" as of April 8, 2021;

d) was doing "not as much" working hours as of October 21, 2021;

e) "started for 2-3 hr driving" as of March 13, 2023; or

f) was “working this past week for only 2 days for only 4 hours in total” as of April 17, 2023.

[40] The plaintiff accepted that he made very short-term efforts to work as a delivery driver in 2020 and again as an Uber Eats driver in 2022. However, he states that these efforts were unsuccessful given his back pain and short-term memory loss.

[41] The plaintiff has made no other efforts to find work since the Accident.

[42] The plaintiff attempted facet joint injections in or about January 2022, but they provided little long-term relief.

[43] On June 6, 2022, the plaintiff attended Eagle Ridge due to a fall in which he struck his head after an episode of dizziness. It was determined that he was suffering from syncope. There was a note that the plaintiff was not suffering from dizziness, neck or back pain at that time. Once again, the plaintiff denies the accuracy of this note.

[44] The plaintiff was in two subsequent motor vehicle accidents in November 2022, but there is no evidence that these aggravated his injuries.

[45] ICBC retained an investigator, Shane Fredericks, who testified at trial. He performed substantial surveillance from June 17, 2023, up to trial. He presented a video of the plaintiff carrying and loading several long large logs into his vehicle on March 13, 2024. He also trailed the plaintiff to his farm plot on several occasions and observed him being able to drive for 1.5 hours on another occasion.

[46] Since the Accident, the plaintiff has complained quite consistently of chronic back pain, as well as making periodic complaints of neck pain and pain radiating into his legs. The plaintiff’s chief complaint at present is his low back pain. He takes certain medications. He has at least one headache every day. Every few days, he has more than one headache per day.

[47] In terms of changes to his lifestyle following the Accident, the plaintiff says that he cannot do the walking, biking, farming, hiking and weight training that he did before the Accident. He is also unable to provide the same level of help with housework. His sleep is disrupted. His son, Majid, corroborated these complaints and testified that the plaintiff's mood and function has worsened.

III. EXPERT EVIDENCE

[48] The following opinion evidence was made available to the Court.

A. Dr. Trent Faraday, General Practitioner

[49] Dr. Faraday is a general practitioner whose practice focuses on musculoskeletal issues. He saw the plaintiff on one occasion at his lawyer's request and was asked to prepare a medical-legal report.

[50] Dr. Faraday found tenderness on palpation to the plaintiff's neck and shoulders and reduced range of motion.

[51] Dr. Faraday diagnosed the following conditions:

a) Musculoligamentous injuries to the neck, with on-going pain symptoms;

b) Musculoligamentous injuries to the upper back, with on-going pain symptoms;

c) Aggravation of previously asymptomatic, pre-existing lumbar spine degenerative condition, with on-going mechanical low back pain;

d) Cervicogenic headaches, with on-going pain symptoms; and

e) Anxiety symptoms, with on-going pain symptoms.

[52] In terms of the plaintiff's prognosis, Dr. Faraday opined that his pain is likely to be persistent. He concluded that the plaintiff is now unable to work as a truck driver. However, he found that he would have the capacity to do part-time sedentary work if he were not facing the challenge of limited education and English skills.

[53] In terms of the plaintiff's future care needs, he recommended the following:

a) vocational rehabilitation to determine realistic vocational options and potential education upgrading and re-training;

b) a medication regimen;

c) at least eight counselling sessions;

d) four visits of passive treatment when and if he suffers flare-ups; and

e) assistance with housework.

[54] The weight of Dr. Faraday's report is reduced because of the following concerns:

a) Dr. Faraday was unaware when he wrote his report that the plaintiff was off work for nine months before the Accident. Instead, based on information provided by the plaintiff, he assumed that he was working up to the day of the Accident. This error was avoidable, as Dr. Faraday had the employment records. However, he did not review them. He agreed that his prognosis may have changed had he been aware of this information;

b) He was not aware that the plaintiff had been accepted as a PWD by the provincial government prior to the Accident and that he maintained that status up to the date of the Accident;

c) He conceded that his diagnosis of cervicogenic headaches was technically improper and suggested that the more appropriate diagnosis was "persistent headache attributed to whiplash". Concerning his new headache diagnosis, Dr. Faraday testified that these headaches would start from the neck. However, the plaintiff indicated that in fact his headaches begin from the top of his head down; and

d) He accepted that there was little documentation showing that the plaintiff reported problems other than the back and neck problems after the first month post-Accident.

B. Dr. Manu Mehdiratta, Neurologist

[55] Dr. Mehdiratta performed an in-person evaluation of the plaintiff for medical-legal purposes at the plaintiff's request. He diagnosed the following conditions:

a) Mild Traumatic Brain Injury ("MTBI");

b) Post-Concussion Syndrome;

c) Chronic Migraines;

d) Post-Traumatic Vision Syndrome;

e) Post-Traumatic Headaches;

f) Right Lumbar Radiculopathy Symptoms with Bowel Incontinence, as well as Erectile Dysfunction; and

g) Left Ulnar Neuropathy.

[56] Dr. Mehdiratta clarified in his oral testimony that he was not purporting to formally diagnose bowel incontinence or erectile dysfunction.

[57] He concluded as follows:

> [The plaintiff] has not successfully returned to full-time work since the accident, and realistically, I do not believe that he is competitively employable in the workforce given his current presentation as a direct result of the injuries sustained in the indexed collision. His difficulties arise out of his problems with neck pain, upper back pain, lower back pain, headaches, dizziness, and ringing in the ears…
>
> From a similar perspective, Mr. Heyran has had difficulties in and around the home. Prior to the collision, he was independent and able to complete all household activities. Since the collision, he has not been able to participate in completing household tasks. The exertional demands for these tasks, I believe, are outside of his current capacities and would likely lead to further exacerbation of his symptomatology. I, therefore, consider Mr. Heyran to be disabled, particularly as it relates to completing housekeeping and home

> maintenance tasks, as a direct result of the neurological injuries sustained in the indexed collision.
>
> With respect to causation, it is my opinion that Mr. Heyran's collision-related impairments are directly related to the indexed collision. Mr. Heyran was free of his current spectrum of symptoms prior to the collision…
>
> Prognosis is considered to be poor, given that it has been over 4 years since the time of the accident.

[58] Dr. Mehdiratta recommended a neuropsychiatric assessment, a sleep study, an occupational therapy assessment, Botox injections, concussion rehabilitation, a chronic pain evaluation, a neurosurgical evaluation and EMG/NSC of his left hand and right leg.

[59] Dr. Mehdiratta's report suffered from flaws similar to those of Dr. Faraday. Specifically:

a) He was also unaware that the plaintiff had not worked for nine months before the Accident. Based on the plaintiff's reporting, he understood that his period of unemployment was much shorter;

b) He accepted that the plaintiff had missing memories of the Accident details, even though the plaintiff was able to recount this history in some detail at trial;

c) He accepted the plaintiff's reports of bowel incontinence and erectile dysfunction, even though these symptoms were never mentioned to any other healthcare practitioner, according to the records;

d) He reported, without comment, the plaintiff's advice to him that a CT scan was completed at the time of the Accident and that he was diagnosed with a concussion, even though that was clearly incorrect from records he had in his possession;

e) In relation to his diagnosis of brain injury and concussion symptoms, he agreed that nausea, ringing in the ears, blurry vision and slurred speech were not noted in the records.

f) More generally, he showed little interest in cross-checking the plaintiff's self-reports against the records. He repeatedly suggested that his approach is to accept what the patient tells him.

g) The concerns raised by his reliance on the plaintiff's self-reporting are magnified in light of my credibility concerns regarding the plaintiff's evidence generally, as noted below: *Ahmadi v. West,* 2014 BCSC 2050 at para. 26; *Eaton v. Riddell*, 2020 BCSC 734 at para. 69. This is not the first time that the weight attributed to Dr. Mehdiratta's opinions have been reduced based on similar concerns: see *Lamont v. Prat*, 2021 BCSC 1294 paras.109-111 and *Lo v. Hughes*, 2020 BCSC 840 at paras. 154, 170, 217-220.

C. Dr. Vance Makin, Neurologist

[60] Dr. Makin assessed the plaintiff at the defendant's request. Most notably, he found insufficient support for Dr. Mehdiratta's diagnosis of mild brain injury and post-concussion syndrome. He noticed no evidence of inattention or lack of concentration during his examination.

[61] Dr. Makin found no evidence of neurological impairment in the plaintiff's lower limbs that would explain his reports.

[62] Dr. Makin did find non-organic signs on testing. The plaintiff reported pain on certain manoeuvres that should not have been able to elicit pain.

[63] Dr. Makin agreed that there was a left ulnar neuropathy. However, he could not find a causal link with the Accident. There were two potential causes: (1) the Accident or (2) a chronic low-grade extrinsic nerve compression. He opined that the latter explanation was more likely to be correct and that the lesion would likely recover if adjustments were made to his observed practice of leaning on his elbow.

[64] Dr. Makin's evidence also suffers from certain difficulties:

a) He took the unusual position that there are many errors to be found in the general medical literature, suggesting that his views may fall outside the mainstream;

b) He argued (overly) aggressively that dizziness, headaches and sensitivity to light could not be viewed as symptoms of a concussion.

D. Christiane Clark, Economist

[65] Ms. Clark prepared income loss calculations based on the earnings of an average BC truck driver with a high school diploma. She controlled the results to comport with the facts of this case by factoring in his age, experience and his earnings from when he was working full-time.

[66] At trial, she accepted that her estimates could reasonably be adjusted downward because the plaintiff had only a Grade 5 education rather than the high school diploma assumed in her calculations. This change in assumptions yielded the following adjusted guidance:

	Past With "Risk and Choice" Contingencies	**Past With "Risk Only" Contingencies**	**To Age 65 with "Risk and Choice" Contingencies**	**To Age 65 with "Risk" Contingencies**	**To Age 70 with "Risk and Choice" Contingencies**	**To Age 70 with "Risk" Contingencies**
Past Wage Loss (net of Income Tax)	$168,249	$210,897	n/a	n/a	n/a	n/a
Future Wage Loss	n/a	n/a	$285,039	$470,302	$344,238	$657,269

[67] Ms. Clark's "Risk Only" figures involved a complex (and not entirely transparent) analysis whereby Statistics Canada survey information was reviewed in an effort to remove the effect of individuals who voluntarily chose to work part-time or not enter the workforce.

[68] Ms. Clark did not take issue with the concept that there were further aspects of the plaintiff's personal characteristics that may justify additional negative contingencies, such as the fact that:

a) The plaintiff has language limitations;

b) The plaintiff did not have a history of working full-time for an entire year in Canada; and

c) The plaintiff was not working at the time of the Accident.

E. Thomas Steigervald, Economist

[69] The defendants retained Mr. Steigervald. He reviewed Ms. Clark's work and provided some basic income multipliers. After learning that Ms. Clark had agreed to adjust her figures to accommodate the plaintiff's limited education, he did not take particular issue with her calculations.

IV. CREDIBILITY AND RELIABILITY

[70] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, the Court summarized the test for assessing a witness' credibility as follows:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> [Emphasis added; citations omitted.]

[71] Reliability concerns the accuracy of the witness's testimony and involves concepts such as the ability to accurately observe, recall and recount the events at issue. A credible witness may be unreliable: *Celones v. Chandra*, 2023 BCSC 38 at para. 112.

[72] I have concerns about the plaintiff's credibility in this case.

[73] To begin, in seeking to avoid the implications of what was recorded regarding his injuries and work history in an array of documents and transcripts, the plaintiff repeatedly suggested that a long list of individuals must have failed to correctly record or translate the information he provided, including:

a) his son, Fardin;

b) his physiotherapist;

c) his general practitioner;

d) one or more Avia caseworkers;

e) the expert physicians; and

f) the court reporter or translator at his examination for discovery.

[74] The likelihood that all of these individuals would record information incorrectly, when none of them had any apparent reason to do so, is extremely low. It is more likely that the plaintiff was attempting to avoid unhelpful recorded information by making improper allegations of transcription or translation incompetence. This inconsistency with the records undermines his credibility*:* *Panganiban v. Sovdat*, 2023 BCSC 650 at para. 155; *Loft v. Nat*, 2013 BCSC 1568 at para. 51, rev'd in part on costs 2014 BCCA 108.

[75] The plaintiff's denial of receiving calls from Avia is also problematic given the number of business records of such calls, even accepting that his sons may have managed the incoming calls on occasion.

[76] The plaintiff further harmed his credibility and reliability through his variable answers to the questions about the authorship of the Avia Questionnaires and Application. The plaintiff initially testified that he only completed Section A of the Application himself. But his story then migrated. He switched course and said that it was possible that he authored other sections. He then reversed course again and suggested that he only wrote his name and did not even complete the balance of

Section A. Ms. Rafiei testified that she only completed limited sections of the Application. His son, Majid, also denied authoring any of the sections. I note that the Application's answers use the first-person singular, suggesting that they were written by the plaintiff (or at least that the information was coming directly from the plaintiff). A high-level review of the handwriting suggests that the same individual completed Section A and the other sections (beyond those that Ms. Rafiei agreed she authored). I note that a court can engage in a basic level of handwriting review without expert assistance: *R. v. Megill*, 2021 ONCA 253 at paras. 84-87; *R. v Hunking*, 2016 ONSC 1749 at paras. 17-19; *Levington v. Benson*, 2022 BCSC 2171 at paras. 52-55.

[77] Next, the plaintiff's failure to pay taxes on several income sources is also problematic, although admittedly not determinative on the question of credibility: *Jajcaj v. Bevans,* 2021 BCSC 834 at para. 30, 145-146; *Peter v. Beveridge*, 2020 BCSC 750 at para. 27; *Doberstein v. Zhao*, 2020 BCSC 1788 at paras. 83, 90-91, *Smith v. Law*, 2021 BCSC 1789 at para. 15; *Wong v. Hemmings*, 2012 BCSC 907 at para. 104. I simply do not believe his alleged understanding that these sources were not subject to taxation. In *Wong*, the Court noted that a witness who has been dishonest in the past is not necessarily untrustworthy. But the Court qualified this by saying:

> [104] … In some cases, particularly when combined with other factors, the persistent failure of a witness to declare all sources of income on their tax return will result in an adverse finding with respect to the credibility of that witness: see *Rhodes v. Biggar*, 2010 BCSC 762 at paras. 59-63; *Vardabasso v. Sundholm-Millar*, [1994] B.C.J. No. 408 at paras. 38-46.

[78] In *Rhodes v. Biggar*, 2010 BCSC 762, the Court stated:

> [61] Her concealment of income is another indicator of a troubling attitude to the truth. While concealing income from the tax authorities may be more common than we care to admit, in my view it is an indicator of a willingness to deceive that undermines the reliability of any controversial evidence provided by the plaintiff. Such an action is not honest and costs those Canadians who declare all the income they receive and pay the taxes they owe, more than they should have to pay.

[79] In *Kelley v. The Queen*, [1998] 3 C.T.C. 2479, 1998 CanLII 527 (T.C.C.), the Court addressed this issue as follows:

> [56] … When a taxpayer lies to the taxing authority during the assessment or objection level, the taxpayer's credibility at trial may be suspect as well: *Huzan v. M.N.R.*, 91 DTC 1257 at 1262-1263.

[80] Finally, in *K.M. v. J.B.*, 2013 BCSC 2041, the Court held:

> [37] … She says he has misrepresented his income on tax returns for many years which should be a factor in assessing his credibility…
>
> ...
>
> [63] … The respondent was a poor witness on two significant issues. He did not admit to his lax attitude to access visits which I described above and he denied obvious problems with his income and tax reporting. My overall impression is that he is easygoing and fun loving but does not live up to his responsibilities in at least two significant areas: his access responsibilities and the reporting and accounting of his income. While the latter issue is not directly related to parenting, it does impact on his overall credibility and is significant in relation to determination of child support. ...

[81] Dr. Makin's finding that the plaintiff exhibited evidence of non-organic pain responses on relevant testing adds another element of concern.

[82] The final factor undercutting the plaintiff's credibility is that the plaintiff's expressed physical difficulties were somewhat undercut by surveillance video showing him loading several large logs into a truck with no apparent discomfort beyond his pre-existing limp.

[83] While no single one of these various issues may have been enough to damage the plaintiff's credibility, their cumulative effect is a concern. Accordingly, I place a reduced weight on the plaintiff's evidence unless corroborated by objective information or other credible witnesses.

[84] In terms of the other lay witnesses, I accept that the plaintiff's son, Majid, was generally credible. However, his evidence had a limited scope and was given in a rote way. Furthermore, it was clear that his evidence was understandably, perhaps

even unconsciously, shaded in his father's favour: *Smith v. Basker*, 2019 BCSC 1459 [*Basker*] at para. 95; *R. v. T.W.*, 2020 ONSC 5056 at para. 86.

[85] I find that Ms. Rafiei was credible and reliable. Although the plaintiff attempted to suggest something nefarious was going on at Avia that undermined Ms. Rafiei's credibility, I do not accept this suggestion. I could derive no reason why Ms. Rafiei would not be truthful.

V. DAMAGES

A. Causation of Injuries

[86] The defendants did not contest that the plaintiff suffered at least some injury as a result of the Accident. The question is their extent. While credibility impacts the damages in this case, credibility does not undermine causation in its totality here: *McGlue v. Girvan*, 2024 BCCA 208 at paras. 51-52.

B. Non-Pecuniary Damages

i. Generally

[87] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured, in part, against awards made in comparable cases. That said, other cases serve only as a rough guide. Each case still depends on its facts: *Trites* at para. 189.

[88] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;

> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[89] The “thin skull” rule provides that defendants must take their victims as they find them. In contrast, the “crumbling skull” rule provides that defendants are not required to compensate a plaintiff for the consequences of a pre-existing condition that the plaintiff would have experienced regardless of the defendant’s negligence: *Dornan v. Silva*, 2021 BCCA 228 at para. 40; *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 34-35.

[90] As many of the plaintiff’s complaints were subjective, the plaintiff relies on *Rabiee v. Rendleman*, 2015 BCSC 595, where the Court held:

> [64] The defendants emphasize that Ms. Rabiee’s injuries were very mild and that there is little “objective” evidence of her injuries. They rely on *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.) where McEachern C.J. quoted his own words in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.) that “the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery” and that no one can expect citizens to be responsible for compensating a plaintiff “in the absence of convincing evidence.”
>
> [65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff’s subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is “objective” or “subjective”. In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: “It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages.”

ii. Authorities

[91] The plaintiff proposed an award of $200,000 for non-pecuniary damages, relying on the following authorities:

a) *Antignani v. Heaney*, 2022 BCSC 228: Non-pecuniary damages were assessed at $200,0000 for a 43-year-old male supermarket bakery manager who sustained an MTBI, post-whiplash headache disorder, post-concussive symptoms, and chronic neck, back, and shoulder injuries. There was no suggestion of any pre-accident health issues, and there was no concern about the plaintiff's credibility.

b) *Thiessen v. Kepfer*, 2023 BCSC 1593: The plaintiff suffered seriously debilitating injuries as a result of the accident that would likely be permanent and which rendered her competitively unemployable. She suffered chronic pain in her head, neck and shoulders. She was transformed from a social, energetic and independent person into someone who suffered from chronic pain, emotional distress and significant functional limitations concerning the normal activities of daily living. The Court awarded $200,000.

c) *Fletcher v. Biu*, 2020 BCSC 1304: The Court assessed non-pecuniary damages at $200,000. Ms. Fletcher was a 32-year-old occupational therapist. She suffered soft tissue injuries and developed depression, PTSD and anxiety. While her PTSD and depression had remitted by the time of trial, her chronic pain and anxiety remained. She suffered a "profound, progressive traumatic spinal injury". Her condition was expected to deteriorate at an accelerated pace. No treatment was expected to offer improvement. She had lost confidence and her ability to participate in sports.

d) *Gabor v. Boilard*, 2015 BCSC 1724: This case involved a 29-year-old plaintiff who suffered a constellation of injuries, including an MTBI, soft tissue injuries, chronic pain, cognitive deficits, and an Adjustment Disorder

with symptoms of depression and anxiety. Many of her injuries were expected to be permanent. $200,000 was awarded.

e) *Sirna v. Smolinski*, 2007 BCSC 967: The 25-year-old plaintiff suffered an MTBI, leaving her with permanent cognitive deficits. She suffered soft tissue injuries, which continued without much resolution, and an impaired sense of smell. The plaintiff was unable to work for more than one year after the accident and was not expected to be able to work either in her chosen field or full-time due to cognitive limitations and fatigue. She also suffered from reactive depression. Non-pecuniary damages of $200,000 were awarded.

f) *Valand v. Campbell*, 2021 BCSC 439: The plaintiff, a community health care worker, suffered injuries that became chronic and brought on an anxiety disorder. The Court found that he was no longer competitively employable. The Court awarded $190,000 in non-pecuniary damages.

[92] The defendants proposed an award of $50,000-$70,000 relying on the following authorities, among others:

a) *Djukic v. Geirsdottir*, 2022 BCSC 1026: The plaintiff was awarded $75,000 as a result of three motor vehicle accidents. Justice Lamb found the plaintiff suffered soft tissue injuries to her neck and back, as well as cervicogenic headaches. The plaintiff's social activities were restricted. The plaintiff could continue to work, but she did so with ongoing discomfort.

b) *McLean v. Redenbach*, 2023 BCSC 8: The Court awarded $60,000 to a plaintiff who was 47 years old at the time of trial. Chief Justice Hinkson (as he then was) found the plaintiff had ongoing neck pain and headaches, emotional suffering, and was more limited in her massage work, volunteer work, household activities and social life due to a motor vehicle accident. Her right arm laceration and lower back and hip symptoms had resolved.

The Court found the plaintiff was a crumbling skull litigant as it related to her headaches and soreness in her neck, shoulders, arms, hands and wrists. She continued to participate in many of her pre-accident recreational activities and volunteer work, but at a reduced level. The lay witnesses gave evidence that the plaintiff had a far less energetic and cheerful disposition and no longer engaged in all her pre-accident recreational activities.

c) *Carleton v. Warner*, 2020 BCSC 436: The Court awarded $60,000 to the plaintiff who suffered from chronic myofascial pain in the cervical, thoracic and lumbar spine areas. Her condition only somewhat limited her work capacity and pre-accident social and recreational activities. The Court found that her pain would likely continue indefinitely to some extent. The plaintiff was involved in a subsequent motor vehicle accident where she temporarily exacerbated certain injuries and also suffered discrete strain injuries.

d) *Grewal v. Chandi*, 2021 BCSC 1200: The Court awarded $56,000 after a 20% deduction for pre-existing pain. The plaintiff had longstanding, unresolved injuries and pain in her neck, shoulder and arm, headaches and frustration from ongoing pain. The accident aggravated her pre-existing symptoms and caused lower back pain. The plaintiff was found to be unreliable.

e) *Shehzeda v. Shahzeda*, 2021 BCSC 659: The Court awarded $40,000 to a 66-year-old plaintiff with a Grade 5 education. His English was limited. He had a sporadic work history. Since his return to British Columbia in 2002, the plaintiff had worked for about 1 to 2 years as a farm assistant. Before his accident, he was not working because of a medical condition, and he was relying on social assistance. Justice Fitzpatrick noted a discrepancy between his work history and the plaintiff's claims that he was healthy. The Court concluded that, as a result of the accident, Mr.

Shehzeda sustained injuries that resulted in an aggravation of his pre-existing injuries to his neck, left shoulder and lower back and that Mr. Shehzeda's hip was injured or aggravated in the accident, causing soft tissue injuries and ongoing pain. He was able to continue to travel, bike and cook after the accident.

[93] I also rely on the following authorities:

a) *Joly v. Norman*, 2023 BCSC 970: The Court awarded $120,000 to a 43-year-old plaintiff. At the time of the accident, she was off work due to sleep, anxiety and mood issues. After the accident, the plaintiff suffered from chronic pain and headaches due to injuries to her neck, back and shoulders. The plaintiff was able to return to work four days a week at a different position. The Court concluded that her prognosis was quite favourable, although there was a substantial possibility that she would not see any improvement.

b) *Basker*: The Court awarded $70,000 (or about $83,000 in today's dollars) in non-pecuniary damages to a 51-year-old plaintiff. The accident caused neck, chest and mid-back pain, as well as a sore nose. A complex pre-accident history impacted her award. At the time of the MVA, the plaintiff had only just returned to work two days earlier after having been off work due to pre-existing osteoporosis-related injuries. The Court had concerns about the plaintiff's credibility. The Court stated: "while there are some portions of the plaintiff's evidence that I accept, in particular, her symptoms immediately following and for the first several months after the MVA, I find that most of her post-MVA physical complaints were embellished for maximum effect at trial": para. 105.

iii. Key Factors and Findings

[94] The following findings and factors are most pertinent to the determination of the appropriate non-pecuniary award in this case:

a) The plaintiff had active pre-existing conditions, including leg and groin pain, foot infections and heart problems. I do not accept that the plaintiff was in perfect health at the time of the Accident. Were that so:

   a. he would (or should) presumably have lost his benefits as a PWD. I note that the requirements for PWD designation under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 are as follows:

> 2 (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that
>
> (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
>
> (b) in the opinion of a prescribed professional
>
> (i) directly and significantly restricts the person's ability to perform daily living activities either
>
> (A) continuously, or
>
> (B) periodically for extended periods, and
>
> (ii) as a result of those restrictions, the person requires help to perform those activities;

   b. he would not have been investigating the potential for surgery to improve his leg difficulties just prior to the Accident.

b) I accept that the plaintiff is suffering from neck and back problems that are causally related to the Accident and which are likely to be permanent.

c) Although the plaintiff had some disk degeneration before the Accident, there is no evidence that this problem was active or was likely to become active in the future.

d) I accept that the plaintiff has suffered from increased headaches as a result of the Accident, but not at the severity level the plaintiff claimed.

e) I accept that the plaintiff suffered from dizziness in the month following the Accident. However, I see insufficient evidence that this problem continued to be a material issue after the first month.

f) I do not accept that the plaintiff suffered an MTBI as a result of the Accident. The plaintiff accepts that he did not lose consciousness, a critical factor in any such diagnosis. The plaintiff had a good recall of the Accident. Although Dr. Mehdiratta diagnosed an MTBI, his report was flawed because the plaintiff's evidence at trial varied from what Dr. Mehdiratta assumed to be true. I accept that the plaintiff has suffered some mild confusion and memory difficulties following the Accident, but not at the level or duration claimed. I primarily rely on the son's corroboration of the plaintiff's evidence in this respect. I do not find that the plaintiff suffered from long-term memory problems or confusion that can be causally linked to the Accident. I find that any more recent difficulties in this respect are more likely the result of the plaintiff's fall in June 2022, when he hit his head on the pavement: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 36-37. The plaintiff has not sought any treatment for these alleged difficulties, casting doubt on their severity. Dr. Mehdiratta's more recent findings depend almost exclusively on the plaintiff's reports, which I have found suffer from credibility problems. The plaintiff's performance at trial over two and a half days of testimony did not lead me to believe he had any notable cognitive issues. He did not forget facts any more than one might expect of a man of his age. He did not fatigue. He continued to engage effectively throughout his long period of testimony.

g) I am unable to find that the problems in his legs are causally related to the Accident. I note that:

   a. he complained of hip and leg pain before the Accident;

b. at trial, he asserted that his leg problems came on gradually months after the Accident;

c. his complaints seemed to bounce back and forth between his left and right leg;

d. there was little convincing expert evidence establishing a causal connection to the Accident.

h) I do not accept that his finger numbness is related to the Accident. No expert drew a causal link between this complaint and the Accident.

i) While I accept that the plaintiff struck his elbow in the Accident, I have not found sufficient evidence to allow for a conclusion that any ongoing ulnar elbow problems are causally related to the Accident. Dr. Makin provided the most comprehensive analysis in this regard, and he found two likely causes. Dr. Makin concluded that the non-accident-related explanation was more likely. I agree.

j) I accept that the plaintiff suffered an emotional impact as a result of the Accident and that he is not as outgoing as he was previously. However, there was an insufficient basis to support a formal diagnosis of an anxiety disorder.

k) I do not accept that there were any light, noise or smell sensitivities caused by the Accident. There is little evidence regarding this issue in the records. Dr. Faraday did not opine that there was a causal connection. Dr. Mehdiratta's finding was based almost exclusively on the plaintiff's questionable self-reporting.

l) The plaintiff's ability to perform work has been impacted, but the plaintiff can still perform sedentary work.

m) I agree that the plaintiff's quality of life has been impacted by the Accident, but only moderately. There is limited evidence that he was particularly active even before the Accident.

iv. Determination of Non-Pecuniary Damages

[95] In light of these findings, I conclude that there should be an award of **$130,000** for non-pecuniary damages. I find that *Joly* is the closest parallel given the substantial pre-accident history of health problems and the chronic pain suffered post-accident. I accept that the plaintiff's injuries here were more serious than those sustained in *Joly* but, on the other side of the ledger, there are credibility concerns at play in this case that were not a factor in *Joly*.

C. Past Loss of Income

[96] This Court discussed the principles applicable to loss of income earning capacity claims in *Engelhart v. Day*, 2022 BCSC 224:

> [113] The steps for performing an assessment of past and future earning capacity are laid out in *Grewal v. Naumann*, 2017 BCCA 158. While Justice Goepel dissented in the outcome, the majority agreed with his summary of the applicable principles (see para. 66):
>
> > [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
> >
> > [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
>
> [114] The legal principles relevant to determining loss of earning capacity were also summarized by Justice Voith (as he then was) in *Pololos* at para. 133:

> a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd*., 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
>
> b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
>
> c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
>
> d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
>
> e) 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;
>
> f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
>
> g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[97] In *Jajcaj*, Justice Ball summarised the proper approach to assessing loss of both past and future earnings capacity:

> [190] The value of the loss of income, either past or future, is the difference between what the earnings would have been and what they are or will be, as a result of the tort: *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at paras. 29–30. That assessment is based on either the earnings approach or the capital asset approach, and must be based on the evidence. The plaintiff must demonstrate that there is a real and substantial possibility, beyond mere speculation, that the loss has occurred or will occur in the future. It is a matter of assessment and not mathematical calculation: *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–16; *Shongu v. Jing*, 2016 BCSC 901 at paras. 186–187. The overall fairness and reasonableness of the award must be considered: *Kuskis v. Hon Tin*, 2008 BCSC 862 at paras. 153–154.

[98] In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, the Court identified the two valuation methods available in relation to past wage loss:

> [16] … depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[99] I accept that there is a real and substantial possibility that the plaintiff would have been able to earn more income in the years following the Accident were it not for the Accident. He was qualified to work as a trucker before the Accident and had been able to obtain some work in that field. The plaintiff now suffers from back pain that will make it very difficult to ever pursue a position in that field.

[100] The plaintiff seeks an award of $252,072 for past loss of driving income. He also proposes an additional $115,500 award for loss of farming income, which was not differentiated between past and future loss of opportunity. The plaintiff accepted that the Court may find it necessary to apply additional negative contingencies to reflect the plaintiff's unique presentation. For example, the plaintiff has some residual capacity to work, at least in farming. The plaintiff suggested that his residual capacity would not yield more than about $10,000 per year.

[101] The defendants suggest that no award should be made for past loss of income in light of the following:

a) The plaintiff had no established work history before the Accident;

b) The plaintiff was a PWD before the Accident;

c) The evidence suggests that the plaintiff has been earning undisclosed income from Uber driving since the Accident;

d) No award should be made for farming income loss, given the plaintiff's failure to report such income before the Accident. Furthermore, any farming loss claim should be considered with a high degree of suspicion in light of the inability to produce any records supporting that income before or since the Accident. The evidence suggests he has sufficient capacity to earn some farming income in any event.

e) The plaintiff's medical reports supporting his wage loss claim suffer from the fact that they were dependent on the plaintiff's flawed credibility.

[102] Given that the plaintiff was not working at the time of the Accident, I find that a capital asset approach is a more appropriate methodology. However, it is still appropriate to ensure that any such assessment is supported by as much mathematical precision as possible.

[103] As noted above, Ms. Clark provided a net past wage loss estimate of $168,249 when applying the average "risk and choice" labour market contingencies to a similarly experienced driver's average salary. I find that using both the "risk and choice" deductions is appropriate, as I have no reason to believe that this plaintiff was more resilient or engaged than the average truck driver. Indeed, I find that he was less resilient.

[104] I find that a reasonable approach would be to start with Ms. Clark's $168,249 figure, scale it up to $200,000 to account for the plaintiff's lost past farming capacity[2], and then scale the amount back downward to account for the following elements unique to the plaintiff:

[2] The plaintiff reported earning $11,550 in gross farming income in 2018, the year prior to the Accident. It has now been five years since the Accident. There is evidence that the plaintiff has been able to do some farming work since the Accident. There is also the need to ensure that any income loss is net, notwithstanding that the plaintiff failed to report his farming income in the past. In all the circumstances, a roughly $30,000 enhancement to the calculated net driving income loss is reasonable.

a) The plaintiff's pre-existing leg problems;

b) The plaintiff's pre-existing heart condition;

c) The plaintiff's many years as a heavy smoker;

d) The plaintiff's low educational level;

e) The plaintiff's poor English skills;

f) The plaintiff's spotty earnings history. Specifically, I conclude that the plaintiff had a higher-than-average tendency to "choose" not to work. For example, the plaintiff chose to quit both of his driver positions and take a 7-week overseas holiday;

g) Acknowledged by Dr. Faraday, the plaintiff's residual capacity to work – a capacity the plaintiff has done little to test; and

h) The likelihood that the plaintiff has earned some driving income since the Accident that was not reported to the tax authorities or the Court.

[105] I find that these concerns collectively support a negative contingency of 50%. Applying a 50% reduction to the $200,000 derived above yields a past loss award of $100,000.[3]

D. Future Loss of Earning Capacity

[106] The Court of Appeal released three decisions in 2021 addressing the proper approach to a claim for loss of future earning capacity: *Dornan*; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. In *Dornan* at para. 156, Justice Grauer cited para. 32 of *Gregory v. Insurance Corporation of British Columbia*, 2011

[3] I note that the defendants did not seek to argue that the plaintiff's social assistance benefits should be deducted from any award for past or future income loss. This was a reasonable concession. It is correct that social assistance benefits are generally treated as a form of wage replacement: *M.B. v. British Columbia*, 2003 SCC 53 at paras. 26, 39. As such, social assistance payments are typically deducted from past and future income loss awards: *Bennett v. Lopez*, 2023 BCSC 1812 at para. 176; *Ma v. Haniak*, 2017 BCSC 549 at para. 353; *Shongu v. Jing*, 2016 BCSC 901 at para. 198; *Sidhu v. Hiebert*, 2022 BCSC 1024 at paras. 760-765. However, in the present case, the same benefits were paid both before and after the Accident.

BCCA 144, where the Court described the proper approach to this head of damage in these terms:

> [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…

[107] In *Rab* at para. 47, Justice Grauer outlined a three-stage framework for assessing a plaintiff's loss of future earning capacity:

a) Stage 1: Does the evidence disclose a potential future event that could lead to a loss of capacity? At this stage, the trial judge considers whether the plaintiff may suffer from ongoing symptoms which could influence their ability to earn income.

b) Stage 2: Does the evidence demonstrate a real and substantial possibility that this potential loss of capacity will cause pecuniary loss?

c) Stage 3: Having established the real and substantial likelihood of pecuniary loss stemming from the plaintiff's loss of capacity, the trial judge must assess the value of that possible future loss. At this stage, the trial judge should determine the relative likelihood of the future loss occurring and whether any contingencies apply. The award should be reduced to account for the relative likelihood that the future event will not occur.

[108] I find that the first two stages set out in *Rab* are satisfied. The evidence establishes that the plaintiff will continue to suffer symptoms from his injuries. I am also satisfied that the evidence demonstrates that this loss of capacity may cause a pecuniary loss in the future, given the effect on his capacity noted by the experts. The question is the appropriate award.

[109] The Court of Appeal outlined the available calculation methods in *McKee v. Hicks*, 2023 BCCA 109 at paras. 80-82. Once again, I find that a capital asset approach is more appropriate given the plaintiff's spotty work history.

[110] The plaintiff proposes that the award for loss of future earning capacity should be $805,932 for the loss of his capacity to act as a truck driver, plus (as noted) an additional award of $115,500 for the (past and future) loss of farming income, less any negative contingencies that the Court deems appropriate.

[111] The defendant suggested that no award should be made for the same reasons expressed above in relation to the past income loss claim.

[112] Applying the average "risk and choice" contingencies, Ms. Clark calculated the net present value of the stream of future average truck driver earnings to age 65 as $285,039. For the same reasons as above, I find these contingencies appropriate. I also find that a calculation to age 65 is appropriate. Given the plaintiff's pre-existing health problems, the prospect of the plaintiff working beyond that age is remote.

[113] Further, I find that an appropriate approach is to:

a) gross the $285,039 driving income loss up to $300,000 to account for the residual limitations in the plaintiff's future farming capacity, and then

b) apply the same 50% negative contingency as was applied to the past income loss.

[114] This yields a future loss of opportunity award of $150,000.

[115] Applying an alternate "*Poulus*" approach as a cross-check on this figure, it represents just over two years' income for the average truck driver (Ms. Clark indicated that average full-time full-year earnings are about $66,776). I find that this is a reasonable reflection of the plaintiff's loss of capacity.

E. Cost of Future Care

[116] In *Peters v. Ortner*, 2013 BCSC 1861, the Court outlined the general principles that should be considered when assessing a plaintiff's cost of future care:

> [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
>
> [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina; Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
>
> [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
>
> [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[117] Medical justification, as opposed to medical necessity, "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035 at para. 151. Reasonableness is assessed in light of whether a reasonably minded person of ample means would incur the expense: *Brewster v. Li*, 2013 BCSC 774 at para. 158.

[118] The assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[119] Justice Adair provided a helpful summary of the principles applicable to assessing cost of future care claims in *Golkar-Karimabadi v. Bush,* 2021 BCSC 990:

> [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.

[120] In *Izony v. Weidlich*, 2006 BCSC 1315, the Court declined to award future care amounts where the evidence was that the plaintiff would not use the services recommended:

> [74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see Courdin at [paragraph] 35), or for items or services that it is unlikely he will use in the future. …

[121] Dr. Faraday and Dr. Mehdiratta's care recommendations are reviewed above. The plaintiff seeks an award of $41,600 under this head of damage based on the following analysis (quoting from the plaintiff's final argument):

Item	**Amount**
Botulinum toxin injections for chronic migraines are recommended, at least 155 units every 3 months (4 times per year) as per the PREEMPT protocol at a cost of $1,300-1,500 per treatment. (Report of Dr. Mehdiratta – Line 945) If we assume the average amount of injection is $1,400, the total costs for the next 5 years is $1,400 x 20 (injections) = $28,000.	$28,000
Pool pass (Dr. Faraday – Line 589) $100 per month for 5 years	$6,000
Naproxen and Gabapentin on a regular basis to help relieve his pain (Dr. Faraday – Line 570)	$3,000
Physiotherapy once per month (Dr. Faraday – Line 575)	$3,600

$100/session for 3 years	
8 sessions of counselling	$1,000
TOTAL	**$41,600**

[122] The defendants argue that no award should be made under this head, given:

a) The lack of any expert functional capacity evaluations;

b) The lack of support for some of the plaintiff's costing more generally;

c) The plaintiff's pre-existing health challenges;

d) The low likelihood that the plaintiff will use many of the care items; and

e) The probability that the plaintiff would have purchased a gym or pool pass in any event.

[123] I find that an award of $20,000 would be more appropriate. Using the plaintiff's $41,600 claim as the starting point, I find that a roughly 50% reduction is appropriate in light of the following:

a) In making his care recommendations, Dr. Faraday underweighted the effect of the plaintiff's pre-accident medical problems;

b) In making his recommendations, Dr. Mehdiratta's opinion was insufficiently skeptical of the plaintiff's self-reporting;

c) I have made findings on causation that negate the basis for certain care items;

d) I do not believe that the plaintiff will use all of the recommended care items, given the lack of treatment he has sought in the past;

e) I expect that the plaintiff would have purchased a community centre pass in any event.

F. Special Damages

[124] The parties agreed that the special damages should be set at $866.

VI. SUMMARY

[125] In summary, damages are assessed as follows:

Non-Pecuniary Damages	$130,000
Past Loss of Income	$100,000
Future Loss of Income Capacity	$150,000
Future Cost of Care	$20,000
Special Damages	$866
TOTAL:	**$400,866 subject to residual adjustments**

VII. TAXES, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[126] I leave it to the parties to consider any residual costs, tax, management fee, gross-up, statutory deductions or interest implications. If they cannot agree on these items, they are at liberty to request a hearing to make further submissions. Further to my decision in *Park v. Shepheard*, 2022 BCSC 2270 at para. 20, I direct that any application by the defendants for statutory deductions should be served within the next 90 days.

"The Honourable Mr. Justice Branch"