

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arora v. Chou*,
2024 BCSC 2271

Date: 20241213
Docket: M201968
Registry: Vancouver

Between:

Jastej Arora

Plaintiff

And

**Jeff Tze-Jeh Chou, Shou-Hsing Chou, Jian Xing Wang,
Honda Canada Finance Inc. and Ecomcreator Enterprises Ltd.**

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.
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I. Introduction

[1] On March 8, 2018, the plaintiff, Jastej Arora was involved in a motor vehicle accident in which he was rear-ended by the vehicle driven by Jeff Tze-Jeg Chou and owned by Shou-Hsing Chou. Those defendants admit that they are liable for the accident.

[2] The sole issue to be determined at this trial is the quantum of damages to which Mr. Arora may be entitled.

II. Background

A. Pre-Accident Background

[3] At the time of the accident, Mr. Arora was 18 years old. He was 24 years old at the time of trial.

[4] With the exception of two periods post-accident in which he resided in Medicine Hat, Alberta and Penticton, B.C. for work, he has always resided with his mother, father, and younger brother. They currently reside in Delta, B.C.

[5] Mr. Arora has been physically active since his childhood, enjoying activities such as swimming, rugby, weightlifting, running and longboarding (similar to skateboarding). He played competitive basketball in grade 8 or 9 and continued to play recreationally with friends and his brother. He worked out at the gym 6 to 7 times a week. At the time of the accident, he was training for a powerlifting competition and was in the final stages of qualifying to become a lifeguard.

[6] When living at home, Mr. Arora and his brother assisted their parents with household chores such as sweeping, mopping, vacuuming, doing the dishes, shoveling snow, and keeping the house and their own rooms tidy. Mr. Arora did his own laundry. He also went grocery shopping twice a month and was responsible for loading and unloading heavy groceries. He used to cook for himself, as well as for the family on special occasions. Mr. Arora was able to perform all these chores without any issues or limitations.

[7] Prior to graduating from high school, Mr. Arora obtained a part-time job in retail sales. After graduating high school in June 2017, he attended Langara College, while continuing his part-time work. In February 2018, he started a car detailing business with two partners. In addition to his responsibilities for marketing and sales, he would also assist his two business partners with the physical detailing work.

B. The Accident

[8] On March 8, 2018, Mr. Arora was going home after his evening classes at Langara. He was driving on the highway at about 85-90 km/hour when the car in front of him slammed on its brakes and came to a full stop. Mr. Arora was able to stop without colliding with the vehicle in front of him. However, the vehicle behind him rear-ended the left side of Mr. Arora’s vehicle, propelling his vehicle into the car in front.

[9] At the moment of impact, his hands were on the steering wheel and his right foot on the brake. He saw the vehicle behind him in the rear view mirror prior to impact. Mr. Arora described the impact as a “jolt”, that caused his knee to hit the dashboard, his neck to tense up, and his head to hit the headrest.

[10] He was able to exit his vehicle and exchange information with the other drivers. His vehicle was towed from the scene and was deemed a total loss.

C. Post-Accident Injuries and Treatment

[11] Mr. Arora described being “in shock” initially after the accident. As soon as he got home, he felt his right knee swelling up and his upper, middle, and low back were “extremely sore”. He felt very lethargic and tried to lie down but could not sleep due to stiffness and pain. The day after the accident, he described feeling stiff like a 2 x 4 board.

[12] Mr. Arora visited a walk-in clinic and reported back pain, right knee pain, dizziness, and nausea. He also said he reported neck pain. In the weeks following the accident, he started feeling a lot more pain in his lower back and buttocks

shooting down the right leg, and to his foot, all of which made it difficult to function. He experienced stiffness and “shooting pain” when his feet hit the ground after getting out of bed. He testified that the stiffness in the back and neck would also initiate migraines and headaches that travelled to the front of his head.

[13] At some point, he began experiencing neck and shoulder pain. A year or so after the accident, he noticed symptoms in his left leg. The left leg symptoms have increased over time, and he attributes them to compensating for his right leg.

[14] In addition to the physical pain, Mr. Arora developed some driving anxiety in the aftermath of the accident. That condition has gotten better over time.

[15] Currently, Mr. Arora continues to report neck pain and stiffness every morning that generally improves over the course of the day. If the neck pain does not subside, it develops into a headache. He gets headaches once a week, which causes nausea and dizziness. Overall, however, his neck, shoulder and right arm symptoms, have improved since the accident.

[16] On the other hand, his lower back pain has gotten worse and he has ongoing right knee pain. The back pain radiates to both legs (but primarily the right) and includes the sensation of “pins and needles”. He describes the right knee pain as a stabbing pain. Collectively, those conditions have resulted in him walking in a stooped position and with a limp favouring his right leg. He has fallen going down the stairs when his knee gave out.

[17] Since the accident, Mr. Arora has attempted various means by which to find relief for his injuries including physiotherapy, massage, acupuncture, active rehabilitation, kinesiology, and various medications, all on the advice of Dr. Nayer, his family physician.

[18] While Mr. Arora noticed an improvement from his pain after attempting physiotherapy, active rehabilitation, and kinesiology, he found that it was only temporary. He has since discontinued those forms of treatment. However, he

continued to do the exercises and stretches recommended by the physiotherapist and kinesiologist at home and at the gym. They continue to provide temporary relief.

[19] In addition, Mr. Arora has had steroid injections in his right knee, trigger point injections in his lower back, and has consulted with a naturopath. None of those have provided any pain relief.

[20] In September 2022, Mr. Arora was referred to Dr. Bond, an orthopedic surgeon. They discussed treatment options which he understood to include disc surgery or injections, depending on the MRI results. Over a year later, Mr. Arora had not heard back about obtaining an MRI so he arranged to have one done privately in late 2023. He has expressed some interest in receiving back surgery, as long as the likelihood of success is over 55%.

[21] Mr. Arora currently takes medication daily, both to relieve the pain symptoms (Naproxen and Ibuprofen) and for sleep (Gabapentin). He also consumes edibles once or twice a week to assist with sleep.

[22] Generally, Mr. Arora's overall mood is much lower as none of the treatments are helping with his pain, and he feels depressed. He feels demotivated because he cannot meet the goals he previously had set for himself at the gym. He misses the "old me".

D. Post-Accident Events

[23] As described in more detail later in these reasons, after the accident, Mr. Arora immersed himself in the automobile sales and financing industry. In doing so, took two positions outside of the Lower Mainland; one in Medicine Hat, Alberta from July 2021 to July 2022 and the other in Penticton, B.C. from December 2022 to July 2023.

[24] While in Penticton, he met his girlfriend, Phoenix Curtis. Since moving back to the Lower Mainland in July 2023, he and Ms. Curtis see each other once or twice a month. They communicate daily through FaceTime.

[25] In January 2024, Ms. Curtis opened a piercing studio in Penticton for which Mr. Arora is responsible for online marketing and certain financial aspects. Mr. Arora, together with his mother, father, and brother, travelled to Penticton to assist in the physical set up of that business.

III. Credibility and Reliability

[26] In assessing credibility, I rely on the principles as set out in the often-cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. Specifically, as noted at para. 186 of *Bradshaw*:

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... 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.

[27] In this case, the defendants do not assert that Mr. Arora attempted to deceive the Court or consciously exaggerated his symptoms for his benefit in this litigation. That he suffers from the pain of which he complains is not largely in dispute. Nonetheless, the defendants say that there are inconsistencies in his evidence, both with respect to causation and the impact of those injuries, that warrant approaching his evidence with a degree of caution.

[28] As described in more detail below, Dr. Fadi Tarazi's attribution of Mr. Arora's neck pain to the accident is based primarily on the temporal link between the accident and the commencement of those symptoms. However, as the defendants note, Mr. Arora's account of when he first felt neck pain differed between the experts; neither of those reports was consistent with the medical records.

[29] Specifically, Mr. Arora told Dr. Tarazi that he started feeling neck pain two days after the accident. He told Dr. Rickards he felt those effects within an hour of the accident. More significantly, the defendants say that there is no express record

of neck pain in any of the clinical records until May 1, 2018, almost two months after the accident. In other words, the most significant inconsistencies flow from what is, or what is not, found in the medical records.

[30] That was the case in *Edmondson v. Payer*, 2011 BCSC 118 [*Edmondson*]. As the Court notes in *Edmondson* at para. 32, clinical records are usually not, and not intended to be, a verbatim record of everything that was said, but rather are “usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements”. That reality makes relying on clinical records to assess credibility problematic. That applies, as well, to what might be missing in the records. As the Court noted in *Edmondson*:

[36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor’s notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

[Added emphasis.]

[31] In my view, that same consideration applies in this case.

[32] I accept that, by itself, extreme neck stiffness would likely warrant a report to a physician. However, immediately after the accident, Mr. Arora was also suffering from an “extremely sore” back and right knee pain. At the time, the back pain was not limited to the lower back, but was described as extending to his mid and upper back as well. Given the other serious complaints, it is not necessarily surprising that the specific complaint of neck stiffness may have gone unreported.

[33] In fact, on March 9, 2018 (the day after the accident), Dr. Gill recorded that Mr. Arora experienced pain at the extremes of his otherwise full range of neck motion and complained of “upper back” pain. While that note does directly align with the significant neck pain Mr. Arora now reports, it is an indication that he did have signs of neck pain early on. It is not outside the realm of possibility that the reference to “upper back” pain referred to neck pain.

[34] Other evidence indicates that the medical practitioners may not have recorded what was expressly told to them. For example, the physiotherapist started treatment for neck pain before her first written record of neck pain on May 1, 2018. That, in my view, is some indication that Mr. Arora may have reported neck pain before that complaint was expressly noted in the records.

[35] The above are two examples of the problems of relying on clinical records to assess credibility. On the basis of the whole of the evidence, I am unable to conclude that the inconsistencies in the record regarding Mr. Arora's complaints of neck pain are an indication that he is not credible.

[36] I come to the same conclusion with respect to other inconsistencies with respect to the extent of his injuries. They include the extent to which he wears socks (Mr. Arora said he cannot bend to put on socks; his brother testified that he did wear socks); his ability to withstand driving (Mr. Arora testified that he had to take breaks every half hour; his cousin testified that they would take drives around the Lower Mainland lasting between 20 minutes to an hour); his capacity to take walks (Mr. Arora testified that he could not walk more than 15 to 20 minutes at a time; his friend said that they take walks lasting 45 minutes to an hour); and his ability to walk downstairs (Mr. Arora testified that he falls on stairs regularly; his brother said that he "stumbles" on stairs).

[37] The defendants point to those examples as an indication that his function is better than he realizes. That may well be the case. Indeed, that conclusion appears to be supported by an assessment conducted by Edgar Emnancen, the occupational therapist who assessed Mr. Arora's capacity.

[38] While I accept that conclusion, I am not satisfied that any of the inconsistencies were of such magnitude as to seriously question Mr. Arora's credibility. Moreover, even discounting Mr. Arora's evidence, the evidence is still indicative of a significantly reduced capacity than before the accident. It does not diminish the irrefutable conclusion that he has suffered substantial impairment.

[39] Notwithstanding the inconsistencies that did exist, I am satisfied that Mr. Arora attempted to present his evidence in a truthful and forthright manner and that he did so to the best of his ability.

[40] I accept Mr. Arora's evidence as credible.

IV. Injuries

[41] Mr. Arora has alleged that as a result of the accident, he has sustained injuries to his low back, legs, right knee, and neck, with associated pain to his right shoulder and headache. Three experts gave evidence in respect of those injuries. Dr. Tarazi, an orthopaedic surgeon and Dr. Navraj Heran, a neurosurgeon, gave evidence on behalf of Mr. Arora. Dr. Robin Rickards, also an orthopaedic surgeon gave evidence on behalf of the defendants.

[42] The experts generally agree that Mr. Arora suffered from low back pain with radicular symptoms extending to his legs and right knee pain; they disagree about the cause of the neck pain. In addition, while the causal link between the right knee pain and the accident is not disputed, the experts do not agree on the mechanics of that injury.

[43] I discuss each of those injuries below.

A. Low Back/Right Leg Pain

1. Diagnosis

[44] There is no dispute that as a result of the accident, Mr. Arora sustained myofascial injuries and mechanical low back pain arising from a herniated disc and disc protrusions. There is no evidence to refute the assertion that the disc bulge also causes "pins and needles" sensation and pain down his legs and, in particular, his right leg.

[45] Given the five and half years that had elapsed since the accident to the date of his assessment, Dr. Heran is of the view his issues will continue to the future,

putting Mr. Arora at an increased risk of exacerbation and aggravation of all symptoms and accelerated arthritis.

[46] Dr. Tarazi's prognosis is similar. Also referring to the the passage of five years from the date of the accident, he is of the view that the myofascial injury to the lower back is now "chronic". He does not foresee any significant improvement in that pain.

[47] There being no evidence to the contrary, I find that Mr. Arora has suffered, and continues to suffer, from low back pain and associated leg pain as a result of the herniated disc and disc protrusions. Those injuries are attributable to the accident. I also find that he is at an increased risk of exacerbation and aggravation of all symptoms and accelerated arthritis.

2. Treatment and Prognosis

[48] There is a minor dispute regarding the efficacy of nerve blocks as a diagnostic or therapeutic measure for leg pain. While there is also some dispute about the specifics of the procedure, there is no significant dispute among any of the experts that discectomy surgery is likely to result in improvement to Mr. Arora's back pain and possibly the radicular symptoms extending to his legs.

[49] In that regard, Dr. Heran opines:

Typically, with his clinical presentation and the imaging that I have seen to date, the likelihood of him being markedly better is anywhere between 70% to 85%. He will never likely be completely pain free given the duration of time that he has had symptoms already. There is significant potential for moderate-to-marked improvement with rhizotomies after successful blocks.

[50] Dr. Tarazi was also relatively optimistic about the prospect of improvement following surgery, noting that patients report improvement in their pain with day-to-day activities.

[51] However, Dr. Heran and Dr. Tarazi agree that, even if successful, the surgery will not result in total recovery. Dr. Heran opines that the surgery could result in a 70% reduction in pain. He also notes that there is a 15 – 30% chance that the

benefit may be less than 70%, including a 5% chance of no benefit or worsened pain.

[52] Dr. Tarazi more specifically notes that patients who undergo successful surgery still have residual pain with heavy lifting, repetitive/sustained bending and any significant strenuous activities. His opinion regarding the possibility of a negative outcome is slightly more cautious than that of Dr. Heran. He estimates that the likelihood, i.e., a reduction in function following surgery, is 2-10%.

[53] Both doctors agree that Mr. Arora will continue to experience chronic and myofascial pain in his back, despite the likelihood of improvement after the surgery.

[54] The potential surgery is not without risks, including infections, blood clots, and pulmonary embolisms. Dr. Tarazi estimated that the overall risk of those and other occurrences is between 2 – 10%. Other risks specific to the discectomy include the risk of neurovascular injury or paralysis, both of which are less than 1%.

[55] Given his wait list, surgery with Dr. Heran will mean that it will probably be five years before Mr. Arora can undergo surgery. Other surgeons may be available before then. Dr. Heran suggested that in the meantime, nerve blocks could be used for a therapeutic purpose to alleviate some of the symptoms related to the disc issues.

B. Right Knee Pain

[56] There is no dispute among the experts that Mr. Arora has suffered, and continues to suffer, from right knee pain due to the accident. Despite that common acceptance, the experts disagree about the specific source of the right knee pain.

[57] Dr. Tarazi writes:

The subject accident has caused a severe right knee contusion. As his right knee collided with the dashboard around the keyhole, there were significant forces transmitted across the articular surfaces of the knee. This has resulted in pain anteriorly which has radiated to the medial and lateral side.

[58] He opines that Mr. Arora's knee pain is related to the contusion and patellofemoral pain, called "patellofemoral syndrome".

[59] In reaching that conclusion, he also considers, and eliminates, a lateral meniscus tear with cysts that had been identified on an MRI scan as a possible source of the pain. Dr. Tarazi says that tears in the anterior horn (the location of Mr. Arora's tear) are generally not painful. In addition, given the time it would have taken for the cyst to develop, he concludes that the tear and cysts likely predated the accident but were asymptomatic.

[60] As arthroscopic surgery for a meniscal tear will not address patellofemoral syndrome, he is of the view that Mr. Arora will continue to have pain despite any surgery.

[61] Given what Dr. Tarazi sees as the source of the knee pain (i.e., patellofemoral syndrome), he recommends that Mr. Arora focus on rehabilitation. With further conservative therapy and the passage of time, Dr. Tarazi foresees some further improvement in his right knee pain and function, but that it is very unlikely to fully resolve and that he will most likely be left with ongoing pain which will be aggravated by squatting, kneeling, heavy lifting, prolonged standing and stairs. He describes the functional limitations related to the knee as "permanent".

[62] Moreover, given the effect on the patellofemoral joint articular surfaces, Dr. Tarazi posits that Mr. Arora is at an increased risk of developing osteoarthritis of his right knee joint. In respect of that possibility, Dr. Tarazi opines:

...If he were to develop such osteoarthritis, it would occur over a period of 10-20 years. It would be associated with increasing pain, stiffness and functional disability. Once the osteoarthritis becomes severe enough and disabling, then knee replacement surgery would be warranted. ... Mr. Arora's future risk of developing osteoarthritis severe enough to warrant knee replacement surgery is about 5-10%.

[63] Dr. Rickards, on the other hand, opines that Mr. Arora's knee pain does emanate from the tear of the lateral meniscus. He concludes that arthroscopy of the right knee and lateral cyst excision will resolve the pain with no permanent

difficulties. In his view, after a course of physiotherapy for muscle strengthening, Mr. Arora can expect full recovery approximately six months post-recovery.

[64] Dr. Rickards rejects patellofemoral syndrome as the cause of the knee pain noting, in particular, that the diagnosis is inconsistent with his negative finding on the “patellar grind test”, which involves grinding the kneecap into the femoral base. He explained that if no pain is elicited on that test, the patient cannot be said to have patellofemoral syndrome.

[65] Having considered the experts’ opinions, I accept Dr. Tarazi’s opinion in respect of this injury.

[66] First, Dr. Rickards’ opinion is largely based on the absence of pain in the patellar region during his physical examination. However, while it does not appear that other physicians conducted the patellar grind test referred to by Dr. Rickards, examinations conducted by Dr. Lee, a knee surgeon who saw Mr. Arora on Dr. Nayar’s referral, and Dr. Tarazi revealed pain in that localized area. Dr. Lee’s notes reveal that the majority of Mr. Arora’s pain was under the patella and in the popliteal area. His examination confirmed moderate tenderness on the patella and minimal tenderness in the lateral joint line.

[67] Similarly, medical notes recorded the day after the accident indicate that Mr. Arora’s right knee was tender over the “upper aspect patella”.

[68] Collectively, those examinations are indicative of an injury to the patella. I accept those observations, which occurred over various points in time, including at the time of the accident, over the singular examination conducted by Dr. Rickards on the date of his assessment.

[69] Second, although Dr. Rickards identified a number of possible sources for the anterior knee pain he found on examination, he conceded that the patellofemoral injury was one possible source. In other words, other than his negative finding on the patellar grind test, he was unable to eliminate a patellofemoral injury as a possible diagnosis.

[70] By contrast, given the time over which Dr. Tarazi opines the tear and cysts develop, he is of the view those conditions likely predated the accident but were asymptomatic. In other words, he does eliminate the meniscal tear as a possible cause of the knee pain. Notably, Dr. Rickards does not address that observation, leaving it unrefuted.

[71] Finally, it is also noteworthy that Dr. Lee performed a hyaluronic acid injection to the knee for therapeutic and diagnostic purposes. Dr. Rickards agreed that if the knee pain was purely due to a meniscal tear and cyst, the injection might provide temporary relief. The fact that it did not would suggest that there was an additional injury to the knee beyond the tear and cyst. In Mr. Arora's case, the injection did not provide any sustained relief.

[72] Based on all of the above, I am satisfied that Dr. Tarazi's finding of patellofemoral syndrome, and related treatment and prognostic implications, should be preferred over Dr. Rickards' opinion.

[73] In addition, given my conclusion regarding the source of the knee pain, I also accept Dr. Tarazi's view of the future condition, being the "increased risk of developing posttraumatic osteoarthritis of his right knee joint". If that condition does develop, it would occur over a period of 10 – 20 years and would be associated with increasing pain, stiffness, and functional disability. Dr. Tarazi estimates that the risk of developing osteoarthritis severe enough to warrant knee replacement surgery is about 5 – 10%.

C. Neck, Right Shoulder, and Arm Pain

1. *Diagnosis and Causation*

[74] Drs. Heran and Tarazi agree that Mr. Arora sustained ongoing myofascial injuries to the neck, including neck pain and stiffness. They report that those injuries were caused by the accident.

[75] In addition, both refer to myofascial soft tissue injuries to the right shoulder, upper arm and "upper torso". Being unable to identify any pre-accident conditions

that could have caused, contributed, or predisposed Mr. Arora to those injuries, Dr. Tarazi opines they were caused by the accident.

[76] Dr. Rickards concedes that Mr. Arora suffers from neck and right shoulder pain. He also concedes that those injuries are consistent with the mechanism of the accident. However, regarding the cause of those symptoms, he writes:

The timing of the onset of neck symptoms, headaches as well as right shoulder symptoms is unclear. Neck pain was first noted during an office visit [with Dr. Nayar] dated April 25, 2018 with symptoms referred to the left shoulder, rather than the right shoulder.

These clinical records do not suggest that these symptoms are associated with injury sustained in the [accident].

[77] In short, in Dr. Rickard's view, the absence of any recorded report of neck pain, together with limited objective findings of neck pain, until almost two months after the accident is enough to break the temporal connection required to link the accident to that pain.

[78] On cross-examination, Dr. Tarazi agreed that the longer the time between a trauma and the onset of neck pain, the less likely that the neck pain could be attributed to the trauma. However, he disagreed that the month that had passed between the accident and the first report of neck pain in Mr. Arora's case meant that it was "not probable" that they were related. He testified that other factors would have to be considered, including the possibility that a person may not report the more minor or other significant complaints, or that the pain was masked by other, more severe pain. Indeed, Dr. Tarazi appears to accept Mr. Arora's report that he experienced neck pain two days after the accident. As set out in the "Credibility and Reliability" section, I do as well.

[79] Moreover, as also previously noted, Dr. Gill's clinical notes made the day after the accident record subjective complaints of "upper back" pain and objective findings of pain at the extremes of Mr. Arora's otherwise full range of motion. While Dr. Rickards did not concede that the reference to "upper back" could include neck pain,

he did agree that the report of neck pain at the extremes of his range of motion could affect his view of causation.

[80] On this analysis, I have also considered that other than the accident, there is no other explanation for the neck pain that was documented on May 1, 2024. As Drs. Tarazi and Rickards agree, that it would be unusual for a man of Mr. Arora's age to spontaneously develop lasting neck pain in the absence of trauma. Other than the accident, neither were able to identify any other events that could have caused those injuries.

[81] Despite the gaps in the clinical records, there being no other cause, I am satisfied that the accident was the cause of the neck pain and associated right shoulder pain.

2. Treatment and Prognosis

[82] Given the length of time for which it has persisted, Dr. Tarazi opines that Mr. Arora's neck pain is chronic and that there is "very little chance of further improvement". Nonetheless, he recommends an exercise program and muscle strengthening as well as medication for pain.

[83] His prognosis for Mr. Arora's right shoulder/arm pain is better. Dr. Tarazi opines that the injury will likely improve further with further conservative therapy and with the passage of time. He is unlikely to have any long-term disabling shoulder or arm pain because of the subject accident.

[84] Dr. Rickards' prognosis is more optimistic. Like Dr. Tarazi, he too recommends "noninterventional treatment include a muscular strengthening program", but adds that an injection of a combination of local freezing and steroid is a first line of treatment. He notes that "[i]f this [the injection] resolves symptoms, no further investigation or treatment would be required". He does not provide any estimate of the possibility that the injection will resolve symptoms.

[85] Given this ongoing, albeit improved, neck pain, I am satisfied that Mr. Arora's neck pain is permanent.

V. Damages

A. Non-Pecuniary Damages

[86] As outlined in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal ref'd [2006] S.C.C.A. No. 100, in assessing non-pecuniary damages, courts must consider the effect of the injuries on the plaintiff's particular circumstances, using factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle.

[87] In this case, I have found that, as a result of the accident, Mr. Arora has sustained myofascial injuries to the back, a herniated disc and disc protrusions resulting in lower back and leg pain (primarily to the right side), a right knee injury, and neck pain which radiates down to his shoulder and arm.

[88] Fortunately, it is likely that with strengthening, the shoulder and arm pain in the neck will resolve. While the related neck pain injury is permanent, Mr. Arora has had some improvement. More problematic are the more significant back, leg, and right knee injuries. While there is some prospect of improvement of all of those injuries – the knee with rehabilitation and the back and leg through surgery - none will fully resolve. Indeed, in the worst case scenario, there is a chance, however limited, that the surgery may not result in any improvement or worse, decreased function. He has an increased risk of arthritis in his back and knee. In the event myofascial injury to the back has plateaued, he will have to avoid heavy lifting, repetitive or sustained bending, and any significant strenuous activities.

[89] Simply put, in the best-case scenario, although improved, Mr. Arora will be left with permanent ongoing pain and impaired function.

[90] Given the anticipated wait for the discectomy, it will be another five years before Mr. Arora can even hope to have that limited improvement in his back pain. Having sustained the injuries when he was 18 years old, Mr. Arora will have suffered

from the worst of the pain of those injuries for 10 years in the prime of his life. That is a significant factor on this analysis.

[91] Despite his injuries, Mr. Arora has been able to continue to work, albeit with pain and having to employ pain management strategies. While he has been able to substantially mitigate his past wage loss, I accept that his work function has been affected to date and possibly into the future. The fact that he was just at the beginning of his career after the accident exacerbates the effects of his injuries.

[92] I also accept that the accident-related injuries have affected him socially, recreationally, and at home. Prior to the accident, Mr. Arora was a healthy, active young man. He exercised daily at the gym and pool, played sports, enjoyed outdoor activities with friends and his brother, and was able to help his family at home.

[93] Since the accident, he has had to give up powerlifting and swimming, two activities that featured prominently in his daily routine, and he no longer plays sports. He is no longer able to help out at home, and instead relies on his family members to assist him with heavy lifting and other physical tasks. Other than seeing his girlfriend, his life is essentially limited to working and resting at home. While I accept that the situation may improve as the pain and functionality improve, he will never fully recover to the condition he was on the day the accident occurred. Again, his young age exacerbates the impact and duration of his condition.

[94] For the most part, the cases referred to by the parties to guide the assessment of non-pecuniary damages involve physically active young plaintiffs who suffered from chronic pain, including back pain, however with various impacts on work, recreational activities, and home.

[95] Mr. Arora refers to five decisions in which the Court awarded non-pecuniary damages ranging from approximately \$120,000 to \$225,00 (adjusted to 2024 dollars). While the injuries in those cases were quite similar to the ones sustained by Mr. Arora, the injuries appear to have had a more significant impact than in the case at bar. For example, in *Gark v. Lauzon*, 2023 BCSC 1930, the Court described the

injuries affected the 45-year-old plaintiff's ability to work and resulted in a significant past wage loss claim. On the other hand, unlike Mr. Arora, she was able to manage her household chores with assistance. In *Carmichael v. Kwon*, 2016, BCSC 265, the 27-year-old plaintiff was unable to work for 14 months after the accident. Finally, like Mr. Arora, the 31-year-old plaintiff in *Bouchard v. Brown Bros.*, 2011 BCSC 762 was no longer physically active and was no longer capable of performing heavy physical tasks. However, he had to rely on a cane and was only capable of walking short distances. The plaintiffs in those cases were awarded approximately \$225,000, \$220,000, and \$215,000 (adjusted to 2024 dollars), respectively.

[96] The defendants rely on cases in which the Court awarded non-pecuniary damages ranging from approximately \$105,000 to \$150,000 (all adjusted to 2024 dollars). In three of those cases, *Holt v. McLatchy*, 2022 BCSC 1421, *Winick v. Goddard*, 2020 BCSC 4, and *Jarrett v. Wold* 2021 BCSC 302, the plaintiffs were able to continue their work despite their injuries, albeit with difficulty and, in some cases, with accommodation from their employer. The plaintiffs in those cases were awarded approximately \$140,000, \$130,000, and \$105,000, respectively (adjusted to 2024 dollars).

[97] By referencing cases in which plaintiffs did not miss work as a result of the injuries, I do not intend to suggest that the injuries are minimal or have had no effect on Mr. Arora in the workplace. I accept that they have. I also accept that Mr. Arora should not be penalized for working through the pain and discomfort. The capacity to work, despite his pain, is just one factor that I have considered on this assessment.

[98] Despite the similarities in the ways I have set out above, none of the cases relied on by either party directly mirrors Mr. Arora's circumstances. Based on my findings and review of the case law referred by both parties, in my view, an award of \$185,000 for non-pecuniary damages is appropriate.

B. Past Loss of Earning Capacity

1. Relevant Facts and Evidence

Employment Background

[99] Prior to the accident, Mr. Arora was in the final stage of obtaining his lifeguard certification, but had been unable to beat the qualifying time required to pass the endurance requirements. However, after some previous attempts, he was able to meet the qualifying time in his training sessions. He intended to re-take the course in May 2018, two months after the accident.

[100] In the two years prior to the accident, Mr. Arora had part-time jobs working in various retail sales, also while attending college. He had also co-started his own car detailing company.

[101] In October 2017, Mr. Arora began work as a sales associate for Aldo Group, where he was working at the time of the accident. He did not return to that position and was off work altogether for approximately four to five months after the accident.

[102] In August 2018, he commenced working part-time for Arogill Auto Group, an automotive company owned by his father, where he immersed himself in learning the basics of the trade and business of auto sales and financing. After leaving that position in January 2019, he worked part-time as a sales consultant for Bell Mobility until returning to automobile sales and financing on a full-time basis in May 2019, when he secured an internship at Cowell Volkswagen.

[103] In August 2019, Mr. Arora started working for Open Road Auto Group in Richmond as a financial services manager. Although he found his injuries made sitting at that desk job difficult, Mr. Arora testified that he was able to find excuses to stand up and walk around as a way to alleviate the pain from the accident-related injuries. He left that position on March 31, 2021 for reasons he concedes were unrelated to the accident.

[104] In July 2021, Mr. Arora took a one-year contract position working as a sales manager at a Nissan car dealership in Medicine Hat, Alberta. That job included

spending a lot of on his feet greeting clients and assessing vehicles for their trade-in values, the latter of which required a full physical inspection, including bending down to get into vehicles, stooping to inspect tires, and bending to inspect other parts of the vehicle. Mr. Arora testified that his physical limitations made both aspects of the job very difficult. He described laying in his car during breaks as a way to deal with the pain.

[105] In July or August 2022, Mr. Arora returned to British Columbia from Alberta to spend time with his family. He started to look for employment about a month after he returned. Although he had some interviews, he said that those interviews would end shortly after he mentioned his injuries or his physical discomfort became apparent. Nonetheless, he eventually obtained employment as a financial services manager at Penticton Hyundai in Penticton, British Columbia. That job required sitting for 1 ½ to 2 hours at a time, which he said his injuries made impossible for him to do. Like he did at Open Road, Mr. Arora was able to manage those limitations by making excuses to stand up.

[106] Mr. Arora left that position in June 2023, and returned to the lower mainland where he had been employed as a financial services manager at White Rock Honda since July 2023.

Current Employment (White Rock Honda)

[107] Alison Tillman is the general manager at White Rock Honda and has supervised Mr. Arora since he started working there. She explained:

- a) The sales department at White Rock Honda has sales consultants, sales managers, financial services managers, and a general sales manager;
- b) An employee in sales will start as a sales consultant, and then might be promoted to sales manager or financial services manager, the latter two of which are considered lateral positions;
- c) Of those lateral positions, sales managers are expected to be on their feet more often as they are expected to meet each customer, appraise

vehicles, do test drives, conduct lot walks twice a day, as well as their desk work;

- d) The general sales manager is the next step up from a sales manager. Among other skills, they generally need 2 to 5 years of experience in the sales manager role before being considered for the position. General sales managers generally earn between \$165,000 to \$195,000 per year; and
- e) Next in the hierarchy is the general manager position. To achieve this position, a candidate will generally need at least two years of experience as a general sales manager and have an understanding of the parts and service side of operations. Depending on the size of the dealership, a general manager can earn between \$225,000 and \$350,000 a year.

[108] Ms. Tilman noted Mr. Arora's physical injuries soon after she hired him. Given those injuries, she testified that he may have difficulty with some of the responsibilities of a sales manager. She cited appraising cars, which sometimes requires one to get under the car and lift the hood, and getting out of his desk to greet customers, as two examples that might impact his performance.

[109] Nonetheless, Ms. Tilman confirmed that given his motivation and intellect, she sees growth in his role at the dealership. At the time of trial, Mr. Arora had just been offered, and accepted an offer, as the sales manager at South Side Nissan, another dealership within the ownership group. Ms. Tilman fully endorsed that move.

Expert Evidence

[110] Edgar Emnancen, an occupational therapist, performed a functional capacity evaluation of Mr. Arora on October 20, 2023, and prepared a report dated November 16, 2023. Based on the functional findings of this evaluation, Mr. Emnancen opines that Mr. Arora is best suited for sedentary level work that is in sitting, with opportunities to stand and stretch at his discretion. Specifically, regarding the financial manager role, Mr. Emnancen states:

... Mr. Arora will likely be able to continue working in his current position as a finance manager on a full-time basis. However, he will likely continue to experience a level of neck, right shoulder, low back and knee pain from the right side reaching, sitting, and standing demands of this work. To manage his symptoms and maintain his productivity, he will need to continue taking postural breaks to stretch and relieve his symptoms as he currently reports doing, particularly for his low back and lower extremities.

[111] Without those breaks, Mr. Emnancen is of the view that Mr. Arora's ability to work on a full-time basis will likely be compromised.

[112] Dr. Heran and Dr. Tarazi came to the same opinion regarding Mr. Arora's ability to continue in the finance manager role. Like Mr. Emnancen, Dr. Tarazi also identifies limitations in his ability to find work outside of the car dealership. He explains:

If Mr. Arora ever decided to change careers altogether, he would be limited in his choice of future careers because of the musculoskeletal injuries sustained in the subject accident. He is not suited to take on any jobs that involve heavy lifting, repetitive/sustained bending, squatting, kneeling, stairs climbing ladders or any significant overhead work. His competitiveness in the workforce will be negatively impacted by the musculoskeletal injuries sustained in the subject accident on a permanent basis.

[113] None of the experts provided any opinion specifically regarding the sales manager role he currently has.

2. Legal Framework

[114] A claim for what is often described as past wage loss is really a claim for past loss of earning capacity. Compensation for past loss of earning capacity is determined based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, [2003] 2 S.C.R. 477, 2003 S.C.C. 53 (CanLII) at para. 49.

[115] The burden of proof of actual past events is a balance of probabilities. However, an assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. They will be taken into

consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

3. *Discussion and Analysis*

March 8, 2018 (date of accident) to August 2018 (post-accident return to work)

[116] After the accident, Mr. Arora was off work until August 2018. The defendants concede that he should be compensated for the work that he missed in those four to five months (approximately 16 to 20 weeks).

[117] As noted, prior to the accident, Mr. Arora had started a car detailing business. However, he did not receive any significant compensation for that work and his involvement did not change following the accident. He does not make any claim for any losses associated with that business.

[118] In addition, he had been working for the Aldo Group. Presumably, had it not been for the accident, he would have continued to do so. In the 19 weeks period he had worked there prior to the accident, he earned \$3,818.76, rounded to \$4,000. In my view, that amount represents the best estimate of the amount Mr. Arora would have earned in the 16 to 20 weeks after the accident.

Lifeguarding (August 2018) to mid-2019 (commencement of internship at Cowell VW)

[119] In addition to his work for the Aldo Group, Mr. Arora asserts that had it not been for the accident, he also would have earned \$23 an hour as a lifeguard. He argues he would have worked as a lifeguard from the time he returned to work in August 2018 until May 2019, when he commenced his internship.

[120] Despite not succeeding in the past, given his determination and the fact that he was able to obtain the qualifying time in his practice sessions, I am satisfied that there is a real and substantial possibility that he would have qualified as a lifeguard. However, a number of other factors make his earning potential less than certain.

They include the availability of positions, both generally and in his area, whether he would be able to obtain full-time hours, and the number of hours he would be able to work as a lifeguard while working at Arogill Auto learning the auto trade. Any past wage loss claim must take those negative contingencies into account.

[121] If Mr. Arora worked as a full-time lifeguard (40 hours per week) for 10 months, earning \$23/hour, he would have earned \$39,867 $[(52 \text{ weeks} \div 12 \text{ months}) \times 10] \times 40 \text{ hours/week} \times \$23/\text{hour}$. Taking $\frac{1}{2}$ of that amount to account for the numerous contingencies amounts to a gross wage loss of \$19,933, rounded to \$20,000.

***July 30, 2022 (return from Medicine Hat) to December 4, 2022
(commencement of employment at Penticton Hyundai)***

[122] Mr. Arora concedes that he voluntarily took about a month off work after his return to the Lower Mainland at the end of July 2022. He does not make any past wage loss claim for that month.

[123] However, he argues that his inability to find work for an additional three months after he commenced looking was attributable in part to potential employers' concern about his injuries. He seeks past wage loss of one or two months' income for those potential lost employment opportunities.

[124] Despite his assertions, there is no evidence of a job offer being withdrawn or withheld due to his injuries. In fact, there is no evidence of the specifics of any interviews he may have had. The paucity of evidence in this regard makes this claim speculative.

[125] Moreover, while I accept that but for the accident-related injuries, Mr. Arora could have worked as a lifeguard during this period of unemployment. I am unable to conclude that he would have. By August 2022, it was clear that Mr. Arora had established automotive sales and finance as his career path. He was focussed on pursuing that career. To work as a lifeguard in this period, not only would he have had to secure that work, he would have to obtain a job with enough flexibility to ensure that he was available to pursue and attend interviews for jobs in his chosen

field. There is no evidence to support the assertion that any lifeguard positions (if any) were available on those terms. It is speculative.

[126] No past wage loss claim is awarded for this period.

4. Summary of Past Wage Loss

[127] I find that Mr. Arora has suffered a total gross past income loss of \$24,000 (\$4,000 + \$ 20,000).

[128] However, an award for that past wage loss is limited to the person's net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98. Deducting 20% for taxes and EI premiums results in a net past wage loss of \$19,200 (\$24,000 x 80%), rounded to \$20,000. I award that amount for past wage loss.

C. Future Loss of Earning Capacity

1. Legal Framework

[129] It has long been established that to prove entitlement for a loss of earning capacity, a plaintiff must demonstrate both (a) an impairment to their earning capacity, and (b) that there is a "real and substantial possibility", and not "mere speculation", that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 11, 31–32 [*Perren*].

[130] In the trilogy of *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345 [*Rab*], and *Lo v. Vos*, 2021 BCCA 421 [*Lo*], the Court of Appeal re-stated the approach to assessing claims for loss of future earning capacity by setting out a three-step analysis. In *Rattan v. Li*, 2022 BCSC 648 at para. 148, Justice Horsman, then of this Court, summarized that analysis as follows:

- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?;
- (2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?; and,
- (3) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[131] As the final step of the analysis, the court must consider whether the award of damages is “reasonable and fair”: *Lo* at para. 117.

2. Discussion and Analysis

[132] On this analysis, I will consider each of the steps set out in *Rab* and *Lo* in turn.

Step 1: Is there an impairment of earning capacity?

[133] As the Court of Appeal noted in *Rab*, this question is an evidentiary one: does the evidence disclose a potential future event that could lead to a loss of capacity? The Court cites chronic injury as an example of evidence that can satisfy this step of the analysis: para. 47.

[134] In this case, given the duration of Mr. Arora’s low back and right knee pain, Drs. Heran and Tarazi have concluded those injuries are chronic. Both doctors are of the view that some level of pain will persist even with surgical intervention. As Mr. Arora testified, that pain has already impacted his ability to perform his duties as a finance manager and, even more so, as a sales manager. The prospect of arthritis developing adds to that impairment.

[135] Moreover, as the Court noted in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, there are, broadly, two types of cases involving loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff’s injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident.

[136] This case falls into the latter category. With respect to that category, the *Brown* factors, as outlined in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) come into play: *Ploskon-Ciesla* at para. 12. Those factors include whether:

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

Ploskon-Ciesla at para. 13, citing *Brown* at para. 8.

[137] In this case, Mr. Arora's continued employment as a finance manager in the automotive sales and finance industry demonstrates that he has not been rendered less capable overall of earning income from all types of employment. However, as Mr. Emnancen, Dr. Heran, and Dr. Tarazi agree, he is limited in his choices if he decides to change careers as he is now not suited for any jobs that involve certain physical tasks.

[138] I find that the chronic nature of Mr. Arora's injuries, the potential development of arthritis, and the fact that he has been rendered less capable of earning income from all types of employment amount to an impairment of earning capacity.

Step 2: Is there a real and substantial possibility that the impairment of earning capacity will cause a pecuniary loss?

[139] On this analysis, it is significant that apart from the four months immediately after the accident, Mr. Arora has not missed any significant amount of work as a result of the accident-related injuries. In fact, he has recently accepted a position as a sales manager, putting him in line for further promotions in his chosen field.

[140] However, given the more physically demanding work required of a sales manager, relative to that of a finance manager, it is unclear that Mr. Arora will be able to meet the demands of that role. In fact, although he completed his one-year contract as a sales manager in Medicine Hat, I accept that his injuries affected his ability to do so.

[141] If Mr. Arora's chronic pain makes him less productive as a sales manager, he may be less able to earn the commissions he could earn absent the accident-related injuries or meet sales targets. That, in turn, may affect his chance for promotion to general sales manager and the higher income that role attracts.

[142] Given its hypothetical nature, the standard of proof at this second stage is a "real and substantial possibility". This standard of proof is "a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Ploskon-Ciesla* at para. 15, citing *Gao* at para 34. On the basis of the above, I am satisfied that the possibility that Mr. Arora's continuing pain will limit his ability to function as a sales manager, thereby causing a pecuniary loss, is more than speculation. The possibility is real and substantial.

Step 3: What is the value of the possible future loss, including the relative likelihood of the pecuniary loss occurring?

[143] Where an award is warranted, there are two possible approaches to assessing loss of future earning capacity: the "earnings approach" and the "capital asset approach": *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133 citing *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) and *Perren* at paras. 11-12.

[144] The earnings approach will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[145] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to themselves as a person capable of earning income in a competitive labour market: *Perren* at paras. 11-12; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56.

[146] The assessment of the loss, or diminishment, of a capital asset, was expressly considered by the Court of Appeal in *Rab*. Acknowledging that there are different ways to assess that loss, it concluded that where a plaintiff continues to earn income at or close to their pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future, the "rough and ready estimate" approach set out in *Pallos v. ICBC*, 100 B.C.L.R. (2d) 260, 1995 CanLII 287, will be appropriate: *Rab* at paras 66-72.

[147] In *Pallos*, the Court of Appeal endorsed an award of two years of income to compensate the plaintiff for loss of future earning capacity.

[148] In assessing a proper award, the potential of any loss must be assessed based on its relative likelihood. On that assessment, specific to this case, the following factors diminish the possibility of any significant further loss:

- a) Mr. Arora has worked full-time as both a sales manager (Medicine Hat) and as a finance manager (Open Road Auto Group, Penticton Hyundai, and White Rock Honda) since May 2019;
- b) Although Mr. Arora and Ms. Tilman testified that the sales manager role is more physically demanding than a finance manager, the evidence does not suggest that it falls within the category of employment from which Mr. Emnancen opines he is now precluded;
- c) Even knowing of his injuries, Ms. Tilman endorsed his role as sales manager and characterized Mr. Arora as a valued employee whose intelligence and motivation could shorten the time period considered typical in advancing through the employment ranks;
- d) A promotion from sales manager in 2 to 5 years will limit Mr. Arora's time in the more physical demanding role of sales manager; and
- e) The discectomy is likely to markedly improve his function and ability to perform the more demanding sales manager job.

[149] On the other hand, other factors support the possibility of an increased future loss:

- a) Despite its likelihood of success, the discectomy will not result in 100% improvement; Mr. Arora will continue to experience pain not only in his back and legs, but in his right knee as well;
- b) The 2-10% risk that the discectomy may result in no or decreased function, together with the risks of surgery generally,
- c) While Mr. Arora has been able to walk through the accident related pain, his capacity to do so may diminish as he ages; and
- d) Given his young age, any ongoing loss of capacity will affect him for a longer period of time; the income differentials between a sales manager and general sales manager and general manager exacerbates the potential losses.

[150] In light of those factors, the relative likelihood of the possibility that chronic pain will lead to a future pecuniary loss is low; however, it is not nonexistent or even minimal. On the other hand, however minimal, the possibility of loss is offset by the fact that, given his young age, any loss that he may incur may occur over a relatively long period of time and at a significant income differential. I have also considered that Mr. Arora's annual income of approximately \$140,000¹ is less than it would be if he had been further along in his career.

[151] When weighing the above contingencies and factors, in my view, an award of two years income is appropriate. Using the extrapolated \$140,000 he earned in 2023 results in an award of \$280,000.

Step 4: is the award of damages fair and reasonable?

[152] The above assessment takes into account both the positive and negative contingencies regarding the possibility that Mr. Arora's injuries may affect his

¹ Mr. Arora earned \$63,805 in the 5 ½ months he worked at White Rock Honda in 2023. Extrapolating that income over a year results in an annual income of \$139,212.

employment opportunities and income earning potential in the future. However, it also takes into account Mr. Arora's young age and the fact that even a minimal annual loss, when occurred over a number of years, could amount to a substantial loss over his working life.

[153] I consider that outcome to be fair and reasonable in the circumstances.

D. Loss of Housekeeping Capacity

1. Legal Framework

[154] It is well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss: *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34.

[155] It is also well established that gratuitous housekeeping services provided by family members will not preclude an award for the loss of housekeeping capacity: *Dykeman v. Porohowski*, 2010 BCCA 36 at para. 28.

[156] Where an award is warranted, loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited in, but not unable to do, household tasks or where only a “minor adjustment of duties within the family” is required: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 45. On the other hand, where a plaintiff has suffered a true loss of capacity, that loss may be compensated by a pecuniary damages award. A pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *McKee v. Hicks*, 2023 BCCA 109 at para.112; *Kim* at paras. 33–34.

[157] Whichever approach a court takes, the award must be reasonable and justified on the specifics of the case and the evidence regarding the plaintiff's incapacity: *Lin* at paras. 33–37.

2. Discussion and Analysis

[158] Mr. Arora's claim for loss of housekeeping capacity is limited to past loss (he claims housekeeping and lawn care services as future cost items).

[159] Prior to the accident, Mr. Arora and his brother shared responsibility for daily household chores such as sweeping, vacuuming, mopping, kitchen clean-up, and shovelling, as well as for his own room and laundry. In addition, he did a lot of cooking, both for himself and for the family on special occasions and helped with bulk grocery shopping at Costco a couple of times a month.

[160] With the exception of some light sweeping, he has been mostly unable to continue doing any of those chores, which he now relies on his brother, mother, and girlfriend to do. During the times that he was not living in the family home, he had to pay for housekeeping services, either by way of increased rent or for housekeeping services.

[161] Dr. Tarazi and Mr. Emnancen's assessments and conclusions confirm that Mr. Arora is limited in the ways he described. On the basis of all of the evidence, I am satisfied that it is appropriate to award a pecuniary amount for Mr. Arora's loss of homemaking capacity.

[162] To assess his past loss, Mr. Arora points to the two hours he paid for housekeeping services every two weeks while living in Penticton. Mr. Emnancen testified that the market rate for housekeeping services is between \$35 to \$55 an hour. Bearing in mind that an award for loss of capacity is generally assessed rather than precisely calculated (*Liu v. Bains*, 2016 BCCA 374), I am satisfied that it is appropriate to use those factors as a rough guide to determine this claim.

[163] Doing so results in a loss of \$12,480 (52 weeks x 6 years x \$40 per week). In allowing this award, I have considered that the family cannot be expected to gratuitously take on an unreasonable burden created by Mr. Arora's injuries. On the other hand, it is also unreasonable to expect the defendants to pay for services that can and should reasonably be taken on by family members. While I am satisfied that

Mr. Arora is entitled to compensation for his loss, the award should be discounted to account for the expectation that his family could have taken on at least a portion of the chores that they did.

[164] Taking into account all of the above, an award of \$10,000 is a fair and reasonable assessment of his past loss of capacity.

E. Cost of Future Care

[165] To be entitled to an award for the cost of future care: (1) there must be a medical justification for the claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 (S.C.) at 84, 1985 CanLII 179, aff'd 49 B.C.L.R. (2d) 99 (C.A.).

[166] The purpose of the award for costs of future care is to restore the injured party to the position they would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Pang v. Nowakowski*, 2021 BCCA 478, at para. 56 [*Pang*], citing *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43 [*Quigley*].

[167] An award for a future care cost must have medical justification and be reasonable, but it is not necessary for a physician to testify to the medical necessity of each individual item of care claimed: *Quigley* at para. 44. As set out in *Pang* at para. 57, the court must also be satisfied that:

- a) the plaintiff would, in fact, make use of the particular care item;
- b) the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and
- c) there is no significant overlap in the various care items being sought.

[168] Because damages for cost of future care are a matter of prediction, once the damages for future care are determined, an adjustment can be made for the

contingency that the future may differ from what the evidence at trial indicates: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[169] Based on the recommendations of Dr. Tarazi and his findings on the functional capacity evaluation, Mr. Emnancen provides his recommendations for Mr. Arora's future care, together with the estimated cost for that care. Peter Sheldon, an economist, provided the present value of those future costs.

[170] I address each of the recommendations below.

Physiotherapy /Kinesiology / Active Rehabilitation

[171] As set out above, all of the medical experts have endorsed physiotherapy, kinesiology, and active rehabilitation as treatment for the accident-related pain. However, other than some minimal temporary relief, Mr. Arora did not find any relief from this treatment modality. Although he continues to do some stretches and exercises at home, Mr. Arora has not attended any formal program since June 2021. With one exception, I cannot conclude that he will engage in physiotherapy or a similar program in the future.

[172] The exception relates to the anticipated discectomy for which Mr. Arora can anticipate having to complete approximately six months of physiotherapy. Using Mr. Emnancen's estimated annual cost of \$4,320, I assess that cost at \$2,160, rounded to \$2,200.

Gym

[173] Dr. Tarazi recommended that Mr. Arora should attend a gym on an ongoing basis to work with proper exercise equipment and for muscle strengthening. Mr. Arora has claimed in excess of \$21,000 for the cost for him to do so until age 70.

[174] However, Mr. Arora testified that the gym was an essential feature of his life prior to the accident. In other words, the argument is easily made that he would have incurred gym expenses whether or not the accident occurred.

[175] However, Mr. Arora argues that he may not have continued using a gym absent the accident. For example, he argues that he may have switched his focus to other commitments, such as children, and had less time for regular gym attendance. While that may be the case, it seems to me that the same factors that would have decreased his gym attendance absent the accident would also affect the likelihood of his attending the gym notwithstanding the accident-related injuries.

[176] No amount is allowed for this claim.

Occupational Therapy

[177] During the functional capacity evaluation, Mr. Emnancen noted that Mr. Arora lost focus when his symptoms increased. Mr. Emnancen was of the view that Mr. Arora would benefit from consultation sessions with an occupational therapist to review pain management strategies and who could assist in addressing any psychological issues affecting his level of functioning. He suggests that Mr. Arora receive up to 12 hours of occupational therapy support, the present value of which is \$1,544, rounded to \$1,500.

[178] Given my conclusion that Mr. Arora's pain will continue to affect him in the workplace, I accept that this is a reasonable expense.

Psychological Assessment and Treatment

[179] Mr. Emnancen recommended that Mr. Arora be assessed by a psychologist to determine if he requires psychological support for injury-related issues that were identified in his assessment. The present value of that estimated cost is \$233, rounded to \$250.

[180] Unfortunately, without that assessment, Mr. Emnancen was not able to provide an estimate of the number of follow-up treatments or counselling sessions that may be required, if any. However, given Dr. Nayer's referral to a psychologist, I accept that he will require some counselling. To ensure that Mr. Arora receives the adequate future care he requires, I award \$1,000 as a nominal amount attributable to this cost.

[181] The total award for this future cost is \$1,250 ($\$250 + \$1,000$).

Ergonomic Assessment and Equipment

[182] Mr. Emnancen recommended an ergonomic assessment to ensure Mr. Arora has optimal seating at his work desk as well as a contingency for ergonomic equipment that may be recommended. He has claimed \$772 for the assessment and \$3,538 for the equipment contingency, on the basis that it is replaced every 10 years. Both figures are present value figures.

[183] Given the pain he experiences while sitting for long periods at work, these items are reasonable. However, the contingent cost for the equipment should be reduced to account for the likely improvement in his back symptoms after the surgery and for the possibility that his employer may provide the ergonomic equipment. A 50% deduction is warranted to account for those contingencies.

[184] I award \$3,541 [$\$772 + (\$5,538 \times 50\%)$], rounded to \$3,500 for this future cost.

Knee Brace

[185] Mr. Arora claims \$708 as the present value of a knee brace to be replaced every 5 years. As Mr. Arora's knee pain is unlikely to be fully resolved, this is an appropriate future cost item.

Medication

[186] Relying on Dr. Tarazi's recommendation for medication for pain control, Mr. Arora seeks \$17,093 for a lifetime supply of Naproxen, Gabapentin, and Ibuprofen. However, while he continues to take this medication, his treating physician, Dr. Nayar has recommended that he take only one of Naproxen and Ibuprofen, not both. The \$7,092 claim for Ibuprofen is not medically justified.

[187] While Dr. Nayar does endorse Mr. Arora's continued use of Naproxen and Gabapentin, given the prospect of improvement to his condition after the

discectomy, a downward adjustment from the \$10,001 claimed must be made for the contingency that they may not be required as frequently or for the duration claimed.

[188] Taking into account that contingency, I award \$6,000 as the present value for this future cost.

Housekeeping and Lawn and Yard Support

[189] As noted, Dr. Tarazi and Mr. Emnancen’s assessments and conclusions confirm that Mr. Arora will have functional difficulties with housework including cleaning his home and mowing the lawn. Mr. Arora claims approximately \$95,000 and \$40,000 for the future costs for housekeeping and lawn/yard support, respectively, for life. The lawn/yard support cost calculation starts five years from now, the date on which it has been assumed that Mr. Arora may have his own home.

[190] Given my conclusion regarding Mr. Arora’s functional limitation, I accept that some award is justified for this future cost. However, the claim for these costs for life does not take into account various contingencies and factors that suggest a downward adjustment is warranted.

[191] First, there is the likelihood that back surgery will improve his condition. Even if not pain-free, that improvement may well improve his function, allowing him to attend to more of the chores that are now difficult for him. Second, he may own a home with a partner, or even have children, who will be able to assist with some of the chores, thus reducing the amount of work that is required. Third, this is a cost that he might have incurred as he ages or becomes more financially stable regardless of the accident-related injuries. Finally, the cost of lawn/yard support is based on the assumption that he will one day own or rent a home with a yard which may or may not occur.

[192] On the other hand, other contingencies suggest that an upward adjustment may be warranted. Most significantly, the housekeeping costs are based on the cost for a 750 to 800 square foot apartment. Should Mr. Arora live in a home larger than

800 square feet, this cost will be higher. There is also the possibility, however small, of a poor outcome from the back surgery that may reduce his function.

[193] Weighing those contingencies, I am satisfied that it is appropriate to make a net downward adjustment of 40% for this claim. I award \$81,000 for these future costs.

Other Uncosted Future Care Items

[194] In addition to Mr. Emnancen and Dr. Tarazi's recommendations included in Mr. Emnancen's report, Dr. Heran also recommended a dietician and personal trainer and noted that CBD with a THC program should also be considered given Mr. Arora's use of marijuana edibles for pain and sleep management. However, there is no evidence of the cost or duration of the dietician and personal trainer. While there is some cost information regarding the edibles Mr. Arora currently consumes, it is unclear whether the CBD/THC program referred to by Dr. Heran mirrored that self-treatment regime. Notably, Dr. Heran referred to the CBD/THC treatment for consideration; it cannot be said to have been medically recommended.

[195] There is no basis for a future care award for these items.

Summary of Future Care Costs

[196] To summarize, I award future care costs for: physiotherapy (\$2,200), occupational therapy (\$1,500), psychological assessment and counselling (\$1,250), ergonomic assessment and equipment (\$3,500), knee brace (\$700), medication (\$6,000), housekeeping and lawn/yard support (\$81,000), for a total present value cost of \$96,150, rounded to \$100,000.

F. In Trust Claim

[197] Given his physical limitations, Mr. Arora's mother, father, and brother assisted him in his moves to and from Medicine Hat and, later, Penticton. In addition, all of those family members travelled to Penticton to assist Mr. Arora and Ms. Curtis to set up their piercing studio, primarily to do the heavy lifting and moving that Mr. Arora was unable to do. Mr. Arora seeks an in-trust award as compensation to those family

members for the additional work they took on as a result of his impaired capacity: *Bradley v. Bath*, 2010 BCCA 10 at para. 43.

[198] I accept, as Mr. Arora argues, that his family's travel and assistance in setting up the piercing studio went above and beyond the usual "give and take" between family members and were necessitated by his injuries, both criteria required for an in-trust award: *Dykeman* at para. 29.

[199] Unfortunately, there is no direct evidence to quantify that claim. However, while not an entirely direct comparison, I have relied on the \$40 hourly rate used to determine the value of housekeeping services as a rough guide to assess this claim. On the basis of that hourly rate, I am satisfied that a notional amount of \$1,500 per family member is fair compensation for this claim. A total of \$4,500 is allowed for the in-trust claim.

G. Special Damages

[200] An injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* (S.C.) at 78.

[201] The parties have agreed that Mr. Arora has incurred special damages of \$11,356.92, inclusive of amounts that have been paid to the date of trial.

[202] In addition, Mr. Arora testified that he has incurred costs for naturopathy consultation and food, as well as for edibles, to treat the pain caused by the accident-related injuries. However, he limited his claim to \$550, which included the naturopath consultation (\$50) and food (\$500).

[203] Regarding that expense, Mr. Arora testified that he saw the naturopath in an attempt to deal with his pain. As part of the naturopath's recommendation, he

attempted to lose weight and purchased their food. After a few months, he concluded that program was not sustainable for him.

[204] While Dr. Nayar did not recommend that he consult with the naturopath, she said that, generally, she does not dissuade patients from doing so.

[205] While not expressly recommended as a treatment modality, I accept that Mr. Arora's engagement of a naturopath was an honest attempt to relieve the pain caused by the accident-related injuries. But for the accident, he would not have incurred that expense.

[206] In addition to the \$11,356.92 the defendants have agreed to pay, I also award special damages for the cost of the naturopath in the amount of \$550. The total special damages award is \$11,906.92, subject to deductions for amounts that may have already been paid.

VII. Summary of Damages

[207] To summarize, I award damages as follows:

Non-pecuniary damages:	\$185,000
Past loss of earning capacity:	\$20,000
Future loss of earning capacity:	\$ 280,000
Loss of housekeeping capacity:	\$10,000
Cost of future care:	\$100,000
In-trust claim:	\$4,500
Special damages:	\$11,910

[208] This damages award is subject to deductions for amounts that have already been paid and for post-trial deductions subject to s. 83 of the *Insurance (Vehicle) Act*.

IX. Costs

[209] If the parties wish to make submissions on costs, they may do so in writing within 30 days of these reasons.

[210] If I receive no submissions on costs, I award costs to Mr. Arora at Scale B.

“Ahmad J.”