IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harris v. Anderson-Wulff,* 2025 BCSC 85

Date: 20250121
Docket: M201136
Registry: Vancouver

Between:

Cameron Harris

Plaintiff

And

Vida Anderson-Wulff and Abigail Owen

Defendants

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Hallen V.L. Sewell
Counsel for the Defendants:	A. Booth K. Koltunska
Place and Date of Trial:	Vancouver, B.C. June 17-21, 24-29, July 2, 4-5, 2024
Place and Date of Judgment:	Vancouver, B.C. January 21, 2025

Table of Contents

INTRODUCTION

[1] On March 31, 2018, the plaintiff Dr. Cameron Harris was a passenger in a vehicle that was rear-ended by the vehicle owned and driven by the defendant Vida Anderson-Wulff ("the Accident"). At the time, Dr. Harris was a dentistry student. He became a dentist in 2020. He alleges that the injuries he sustained from the Accident negatively impacted his life and caused him to incur losses in his dental practice.

[2] The plaintiff seeks damages in the range of $1.6M to $2.9M consisting of non-pecuniary damages, loss of past and future earning capacity, in-trust claim, loss of housekeeping capacity, cost of future care, and special damages.

[3] The defendant Ms. Andersen-Wulff admits liability for the Accident but disputes all aspects of the plaintiff's claim for damages. She argues that the plaintiff's evidence is neither credible nor reliable, and should be rejected. She submits that no damages should be awarded.

[4] The claim against the defendant Abigail Owen, the driver and owner of the vehicle that the plaintiff was in, was previously discontinued. Hence, any reference to "the defendant" within these reasons pertain to the defendant Andersen-Wulff.

[5] After considering the totality of the evidence, the applicable legal principles and the parties' submissions, I have concluded that the plaintiff has proven his claim and I have assessed damages in the total amount of $1,475,169.17, consisting of the following:

a. $130,000 in non-pecuniary damages;

b. $15,000 in past loss of income earning capacity;

c. $1,290,000 in future loss of income earning capacity;

d. $30,000 in costs of future care;

e. $2,000 in in-trust claim; and

f. $8,169.17 in special damages.

THE EVIDENCE

The Plaintiff

[6] Dr. Harris is 31 years old. He holds a Bachelor of Science with Honours from University of Victoria and a Doctor of Dental Medicine from the University of British Columbia ("UBC"). He resides in Victoria with his fiancée Dr. Stephanie Bortolussi, who is also a dentist. Together, they own and operate View Royal Dental Clinic in Victoria.

Pre-accident life

[7] Dr. Harris grew up in Victoria with his parents and two older siblings. Dr. Harris testified that he had an active childhood. He played a number of sports. He also cycled and hiked. His "true passion" however, was golf, which he started playing at age seven. He quickly excelled in the sport and he became a "scratch golfer", i.e. someone who can consistently shoot par for the course, at 13 years old. He played competitively when he was in high school. He stopped competing after high school in order to focus on his post-secondary studies.

[8] During his post-secondary years in Victoria, he played golf two to three times a week, cycled twice a week, and hiked once a month. He regularly enjoyed these activities with his childhood friend Taran Bhangu. They typically went for 50 to 75-kilometer rides.

[9] In 2016, Dr. Harris moved to Vancouver to study dentistry at UBC. Before the Accident, he traveled to Victoria almost every weekend. He continued to golf, cycle, and hike with Mr. Bhangu. He estimated that during his first two years in UBC before the Accident, he played one to two rounds of golf per week, cycled twice a week, and hiked once a month.

[10] Dr. Harris testified that he was extremely healthy before the Accident. Although he had minor injuries in the past, he had completely recovered from them and did not experience any lingering issues or physical limitations.

[11] The past injuries consisted of a fractured thumb sustained from a fall during a ski trip when he was 12 years old, a knee injury from basketball in 2010, and soft tissue injuries to his neck and back from a car accident in 2011, when Dr. Harris was 18 years old.

[12] With respect to the 2011 injury, Dr. Harris testified that his symptoms fully resolved after 2 to 3 weeks of treatment and he was back at his job at Thrifty Foods in Victoria, carrying crates of milk and eggs weighing 20 to 50 lbs, within a month after the Accident with no issues.

[13] While attending UBC, Dr. Harris resided on campus on his own. He testified that before the Accident, he had no difficulty performing chores such as laundry, cleaning, and grocery shopping.

The Accident

[14] On March 31, 2018, Dr. Harris was with his then-girlfriend Ms. Owen in Victoria. Ms. Owen drove her Honda Civic and Dr. Harris was in the front passenger seat of the car. They both wore seatbelts.

[15] While they were stopped at a red light at the intersection of Bay and Douglas Streets, he heard Ms. Owen gasp. He looked to his left, heard a crunch, and felt a sudden impact. He put his hands out to brace himself. He did not recall if the seat belt had locked. He testified that his memory of the Accident and how he felt immediately after was foggy.

Symptoms and treatment

[16] Dr. Harris went to the hospital on the day of the Accident. He testified that he had numbness in his left hand. The wait time at the hospital was long and he was advised to go to a walk-in clinic instead.

[17] He went to a walk-in clinic the following day. He testified that he had pain and tightness in his neck, shoulders, and back. He also had hip tightness and a significant headache. There was still numbness in his left hand. He also noticed that

he had chipped his front and lateral teeth. The doctor at the walk-in clinic recommended further evaluation.

[18] When he was back in Vancouver the following week, Dr. Harris saw Dr. Sarah Ng at UBC Health Services. They discussed the numbness in his left fingers and problems with his back when sitting for long periods of time. Dr. Ng recommended X-rays of his cervical spine (C-spine) and wrist. She also prescribed anti-inflammatory medication and a splint for his left hand, which he wore for two weeks. The results of the X-rays were normal.

[19] When the symptoms in his left hand did not improve, Dr. Harris saw Dr. Fisher, a specialist in sports medicine. Dr. Fisher ordered an MRI of the C-spine. The result with respect to any C-spine soft tissue injuries was normal.

[20] In early 2019, Dr. Harris saw Dr. Lee, a physiatrist. Dr. Lee recommended a nerve conduction test and dry needling to try to address the continuing numbness in the 3rd and 4th fingers of Dr. Harris's left hand. Dr. Harris testified that the dry needling relieved some of tension in his left forearm but there was no change to the numbness in his left fingers.

[21] As suggested by his doctors, Dr. Harris attended massage therapy, chiropractic treatment, and physiotherapy to address his problems with sitting for long periods. He estimated that since the Accident, he had seen a massage therapist about 50 to 60 times, a chiropractor about 100 times, and a physiotherapist about 150 times.

[22] Dr. Harris also testified that he experienced low mood and anxiety over his symptoms and from not receiving satisfactory medical answers. He attended counselling with respect to these issues.

Post-accident life, work and activities

[23] Dr. Harris testified that for the first six to eight months after accident, he experienced intense neck pain daily. There was some improvement after that. At the

time of the trial, Dr. Harris experienced “flare-ups” about once a month. In addition, he has limited range of motion in his neck.

[24] For the first six to eight months after the Accident, Dr. Harris experienced pain, tightness and limited range of motion in his back. There was improvement after that. At the time of the trial, he experienced flare-ups approximately once a month. He continues to experience back pain when he is seated for 45 to 60 minutes although his tolerance increases when he can get up and stretch.

[25] Dr. Harris experienced a similar pattern with respect to his left shoulder pain. At the time of the trial, he had shoulder pain roughly once every couple of months.

[26] For the first three to four months after the Accident, Dr. Harris experienced sporadic headaches that lasted a few hours. After that, the frequency tapered off to about once a month. He took Advil and hot baths to manage his headaches. At the time of the trial, he experienced headaches roughly once a month.

[27] Dr. Harris continued to experience pain, discomfort, and numbness in the 3rd and 4th fingers of his left hand.

[28] With respect to his chipped teeth, Dr. Harris stated that although he has had the chips repaired, the fillings have to be regularly replaced over time.

[29] With respect to recreational activities, Dr. Harris has not played golf again since the Accident because of discomfort with the twisting motion.

[30] With respect to cycling, Dr. Harris started to ride an indoor stationary bike a few months after the Accident. He later returned to outdoor cycling. He only rides for about 20 to 30 kilometers. He stated that he could push himself to go further but not without pain.

[31] Dr. Harris has resumed hiking but he no longer goes on rigorous hikes, for the same reason.

[32] Dr. Harris testified that he experiences difficulty with household chores that require bending such as doing laundry and gardening, and with lifting heavy things.

While attending UBC dentistry program

[33] Dr. Harris was halfway through second year of dentistry when the Accident occurred. He testified that his symptoms made studying extremely challenging.

[34] Dr. Harris described himself as left-hand dominant. He uses his left hand for anything that requires precision such as writing or throwing. In dentistry, he uses his left hand to operate dental instruments. Dr. Harris testified that he had difficulty doing his UBC clinical work as the pressure of holding dental instruments in his left hand caused pain and discomfort on his hand and fingers. He managed this by taking breaks and analgesics. He also relied on Dr. Bortolussi, a friend and fellow dentistry student at the time, for assistance.

Career in dentistry

[35] After graduating from UBC and obtaining his dental licence in June 2020, Dr. Harris worked at Douglas Park Dental Clinic in Langley.

[36] In February 2021, Dr. Harris and Dr. Bortolussi incorporated their dental practice under the name “Dr. C. Harris and Dr. S. Bortolussi Inc.” (the “Corporation”), and they began to work together at the Lillooet Dental Centre, in Lillooet (“Lillooet”).

[37] In May 2022, the Corporation purchased the dental practice of Dr. David Thom, a retiring dentist in Victoria, for $985,000. Dr. Harris and Dr. Bortolussi named the new clinic “View Royal Dental Clinic” (“View Royal”). Between June 2022 and March 2023, there was a transition period in which Dr. Harris worked alternating weeks with Dr. Thom at the clinic in Victoria. Dr. Harris worked in Lillooet on the weeks he was not in Victoria.

[38] In March 2023, Dr. Harris stopped working in Lillooet and commenced working full-time at View Royal. Dr. Bortolussi joined him later in 2023.

Impact of symptoms on dentistry practice

[39] Dr. Harris testified that he experiences pain and discomfort in the 3rd and 4th fingers of his left hand when operating a dental drill. In addition, he experiences discomfort from sitting for long periods while performing dentistry.

[40] In order to manage these issues, Dr. Harris stated that he has had to structure his working day in a way that gives himself needed breaks from sitting and drilling. He does this in the following ways: (i) by lengthening appointment times in order to accommodate breaks, (ii) by "decoupling" multiple procedure appointments to single appointments, and (iii) by doing hygiene work.

[41] He explained that billings in dentistry are based on procedures in accordance with the provincial dental fee guide, not on the time spent performing the work. Therefore, generally speaking, more time spent on procedures results in decreased billings.

[42] Dr. Harris testified that their clinic accepts three types of appointments: single procedure appointments, multi-procedure appointments, and hygiene appointments.

[43] Single procedure appointments are about 30 to 60 minutes long and generate approximately $500 an hour in billings. Multi-procedure appointments are about 90 minutes to two hours long and generate approximately $800 up to $2000 an hour in billings. Hygiene appointments are 60 minutes in length and bill at $200 to $250.

[44] Dr. Harris explained that multi-procedure appointments generate higher billings than single procedure appointments because they avoid the inefficiencies of cleaning and preparing the room between single procedure appointments. Therefore, when he "decouples" multi-procedure appointments into single procedure appointments to introduce breaks, the effect is a reduction in billings.

[45] Similarly, while doing hygiene work gives Dr. Harris a break from using a dental drill, he bills less for doing hygiene work instead of dental work. He demonstrated in court the difference in how he holds and uses a dental drill versus a

cavitron, the ultrasonic cleaning device used in hygiene work. Primarily, the use of his left fourth finger as a “fulcrum” on adjacent teeth to stabilize the drill and obtain the necessary precision, causes him pain and discomfort. He does not experience the same difficulty with a cavitron as it is a much safer instrument that is held with a light grip without pressure to the third finger, and he does not need to use his fourth finger as a fulcrum.

[46] Dr. Harris can use a dental drill continuously for 10 to 15 minutes before the onset of pain and discomfort. After the first 10 to 15 minutes, he would adjust his arm and raise his elbow in what is known in dentistry as “chicken-winging” to decrease the pressure on his fingers, however this in turn causes pain and tightness in his left shoulder and forearm. Dr. Harris estimates that he can use a dental drill continuously for 45 to 60 minutes while “chicken-winging”.

[47] Dr. Harris testified that not all multi-procedure appointments can be “decoupled”. When his patients require multi-procedure appointments that he cannot take, he would send those patients to Dr. Bortolussi. Depending on her availability, she may or may not be able to take those appointments.

[48] At View Royal, Dr. Harris typically works Mondays to Thursdays from 8 a.m. to 5 p.m. with a 45-minute lunch break for a total of 8.25 hours each day, and 9 a.m. to 5 p.m. on Fridays. He generally does administrative work on Fridays.

[49] Dr. Harris estimates that on average, he is losing between one to three hours of dental billing hours each day from introducing breaks into longer appointments, decoupling multi-procedure appointments, and replacing dental appointments with hygiene appointments.

Financial Statements

[50] Based on the financial statements of the Corporation, its revenue from professional fees during the periods were as follows:

- From February 9, 2021 to January 31, 2022: $514,630 (Lillooet)

- February 1, 2022 to May 4, 2022: $185,574 (Lillooet)
- May 5, 2022 to March 31, 2023: $1,381,090 (Lillooet and View Royal)

[51] Dr. Harris testified that he and Dr. Bortolussi each own 50% of the Corporation.

[52] In the first quarter of 2024, Dr. Harris generated $225,208.12 in billings and Dr. Bortolussi generated $192,502.97 in billings at View Royal.

Taran Bhangu

[53] Taran Bhangu is 30 years old and a resident of Victoria. He works for the provincial government as a policy analyst.

[54] Mr. Bhangu has known Dr. Harris since they were 12 years old and they have since been close friends. In their teens, they worked together at Thrifty Foods in Victoria. He testified that he recalled seeing Dr. Harris back at work carrying heavy milk crates a few weeks after the 2011 motor vehicle accident.

[55] Mr. Bhangu described Dr. Harris before the Accident as vibrant, energetic, physically fit, tenacious and hardworking. They often played golf, cycled and hiked.

[56] After the Accident, Mr. Bhangu observed Dr. Harris touching his left shoulder and elbow in apparent pain. He also observed Dr. Harris doing stretches and appearing to have discomfort during their FaceTime calls.

[57] Mr. Bhangu testified that they have not played golf again since the Accident. In 2024 up until trial, they had only gone on two bike rides and they were much shorter rides than before. In addition, he observed Dr. Harris shifting around in apparent discomfort.

Michelle Marie Harris

[58] Michelle Marie Harris is the plaintiff's mother. She and the plaintiff's father are retired. Prior to retirement, she worked for the Ministry of Defence, and her husband was a vehicle technician in the Armed Forces.

[59] Ms. Harris described the plaintiff as a personable, confident, kind, and well-rounded individual who was interested in sports at an early age. She recalled a time when there was a question as to whether the plaintiff would become a professional golfer.

[60] Ms. Harris testified that after the Accident, the frequency of the plaintiff's visits to Victoria dropped dramatically. When he did visit, Ms. Harris described his movements as slow and said he appeared to be uncomfortable. For example, he couldn't remain seated at the dinner table and would get up and wander around during meal times. She said that he appeared frustrated, anxious, and sad.

[61] Ms. Harris also observed the plaintiff taking over-the-counter pain medication such as Tylenol and Advil. She stated that this was uncharacteristic of him as he used to refuse to take medication for pain relief. Further, she observed him to be constantly stretching and taking long hot showers.

[62] In cross-examination, Ms. Harris agreed that she wants to support her son, however she stated that she would not do so blindly.

Dr. Stephanie Bortolussi

[63] Dr. Stephanie Bortolussi is the plaintiff's fiancée. They met in 2017 while attending UBC for dentistry. They began dating in the fall of 2019.

[64] Dr. Bortolussi graduated from dentistry in 2019. Later that year, she began working as a dentist in Coquitlam. In February 2021, she worked with Dr. Harris in Lillooet. In 2022, they purchased Dr. Thom's dental practice in Victoria, however, Dr. Bortolussi stayed in Lillooet until 2023. She commenced working in View Royal in the fall of 2023.

[65] Dr. Bortolussi described Dr. Harris before the Accident as a "happy-go-lucky guy", positive, outgoing, social, and athletic. She stated that when they were students at UBC, it was not uncommon for them to study together for four or so hours in the "Commons" area after school. Based on her observations, he did not

have difficulty sitting for long periods. When she attended his apartment, she observed that it was tidy and clean.

[66] Dr. Bortolussi testified that she received a message from Dr. Harris the day following the Accident when he returned from Victoria. He asked her to help him carry his golf clubs and textbooks from his car to his apartment. He appeared to be sore. She noticed that he had chipped teeth.

[67] That weekend, she described his mood to be low. He did not have a lot of energy and did not want to socialize. She stated that this was uncharacteristic of him.

[68] She testified that after the Accident, Dr. Harris spent less time studying in the "Commons". He appeared to be uncomfortable, took breaks when studying, and stopped attending social events. She observed his apartment to be messy, with dirty laundry and dishes lying around. She helped him with household chores and grocery shopping.

[69] She observed that he started doing yoga and video-guided stretches. She saw him taking pain medication, something that she had not previously seen him do.

[70] These observations continued after they moved in together in 2020. In addition, she observed that he took long showers and he had difficulty sitting through a long movie.

[71] At home, Dr. Bortolussi is responsible for household chores as she has a high standard for cleanliness and Dr. Harris has difficulty performing certain tasks, although Dr. Harris is responsible for cooking. They have hired a gardener.

[72] At the dental clinic, Dr. Bortolussi stated that she has observed Dr. Harris putting dental instruments in strange positions to avoid twisting. She has also observed him "chicken-winging", and taking breaks while treating patients.

[73] She testified that he broke multi-procedure appointments down to single appointments, and referred some long multi-procedure appointments to her. She stated that she can do multi-procedure appointments that are four to six hours long.

[74] Dr. Bortolussi testified that she was the highest billing dentist at Lillooet Dental Centre and Dr. Harris was the second highest.

[75] Dr. Bortolussi's working hours at View Royal are Tuesdays to Fridays from 9 a.m. to 5 p.m. with a 45-minute lunch break for a total of 7.25 clinical hours per day. She explained that in order to maximize procedure hours, it is necessary for appointment times to overlap because of the inevitable set up and tear down time between appointments. Therefore, double bookings are common.

[76] During the first quarter of 2024, she calculated her billings to be approximately $530 per hour, and Dr. Harris' billings to be approximately $520 per hour. However, Dr. Bortolussi stated that her billings for March 2024 are not representative of her typical productivity because she did not have an assistant for a portion of that month and therefore she could not perform dental procedures. She testified that she took on hygiene work instead of doing nothing. She estimated that her per hour billing based on her typical production would be $40 to $50 an hour more.

Cheryl Black – Occupational Therapist

[77] Cheryl Black testified as an expert in occupational therapy and in conducting functional capacity and workplace evaluations. She has been an occupational therapist since 1994.

[78] Ms. Black assessed Dr. Harris with respect to functional or workplace capacity on February 1, 2024. The assessment involved a series of tests conducted over a period of 7 hours and included dental work simulation testing. Her expert report dated February 28, 2024 was entered as an exhibit at trial.

[79] Based on the test results, Ms. Black stated that Dr. Harris demonstrated “pain limited tolerance for sustained task intensive sitting or sitting with mild neck flexion with concurrent bilateral reaching and fine dexterity functions below shoulder level”. She explained that he was able to complete short intervals of such activity but his ability to do so for prolonged sustained periods was limited by reports and observations of neck/upper back and upper trapezius pain increase. His tolerance for repetitive outer range reaching with his left arm was limited to a few seconds at a time due to reported left shoulder region pain and his tolerance for stooping was limited to a few minutes at a time due to reported low back pain increase. Ms. Black observed pain mannerisms consistent with Dr. Harris’ pain reports.

[80] With respect to dexterity function, Ms. Black stated that Dr. Harris was able to effectively perform both fine and medium dexterity functions however he reported pain with pressure from small instruments similar to dental tools against the third and fourth fingers of his left hand. While he was able to modify his pinch grip to limit or avoid such pressure, this limited his stability with simulated drill use. It also resulted in the need to abduct his dominant left arm in order to access surfaces that would otherwise be accessible by pivoting the dental drill on the fourth (fulcrum) finger of his left hand. Brief duration left arm abduction resulted in reports and observations of left shoulder pain.

[81] Ms. Black stated that in trials involving fine dexterity activity while sitting in a posture that was intended to mirror the physical demands of performing dental procedures, Dr. Harris required symptom management breaks from one to two minutes in duration up to approximately 13 minutes at a time.

[82] In Ms. Black’s opinion, Dr. Harris experiences an increase in pain when performing dental procedures, and his need for symptom management by taking breaks to vary his posture and stretch more likely than not negatively affects his efficiency and productivity at work. It is also her opinion that due to his pain response to the physical demands of his clinical work, Dr. Harris is not able to tolerate performing a full day of longer duration procedures.

[83] She further opined that if Mr. Harris' activities outside of work become more demanding and/or if his pain flare ups increase in duration or frequency, he may no longer be able to tolerate full time work hours, even with the current modifications to his clinical schedule.

[84] Ms. Black is of the view that Dr. Harris would benefit from seeing a certified hand therapist for assessment of his hand and upper extremity function, and from participation in an active rehabilitation program aimed at strengthening his core and shoulder region musculature.

Dr. Manu Mehdiratta – Neurologist

[85] Dr. Mehdiratta testified as an expert in neurology, including diagnosing neurological disorders. He has been a neurologist for over 20 years. His expert report dated November 27, 2023 was entered as an exhibit at trial.

[86] Based on his virtual examination of Dr. Harris on September 5, 2023 and extensive review of his documented medical history, Dr. Mehdiratta opined that Dr. Harris sustained a mild traumatic brain injury and cerebral concussion from the Accident. In addition, Dr. Harris likely sustained a left cervical radiculopathy or brachial plexus lesion contributing to the symptoms experienced in his left hand.

[87] Dr. Mehdiratta opined that based on a balance of medical probabilities, Dr. Harris's symptoms resulted from injuries sustained in the Accident. This opinion was based on the following factors: (i) the temporal proximity of the onset of symptoms to the Accident; (ii) that the mechanism of the collision was consistent with post-concussive and cervical radiculopathy-type symptoms; (iii) the existence of persistent and longstanding concussive symptoms post-collision was not unusual; and (iv) no pre-existing conditions had been identified that have led or contributed to the present symptoms.

[88] Dr. Mehdiratta stated that the plaintiff's prognosis is poor given the severity and duration of symptoms. He explained that patients who experience symptoms for

more than 1.5 years are more likely than not to have permanent post-concussion symptoms after a mild traumatic brain injury.

[89] Dr. Mehdiratta recommended that Dr. Harris undergo: (i) a neuropsychiatric assessment; (ii) a sleep study; (iii) an occupational therapy assessment; and (iv) concussion rehabilitation. In addition, he recommended that a review of a previous MRI of Dr. Harris's C-spine and brachial plexus be conducted by a neuroradiologist.

Darren Benning - Economist

[90] Darren Benning testified as an expert in economics with respect to past and future income loss calculations and net present value calculations.

[91] In performing these calculations, Mr. Benning assumed the following average hourly rates for dental and hygiene procedures:

(i) $533 per hour for dental procedures lasting 30 to 60 minutes billed at $300 to $500 [i.e. $800 / 1.5 hours];

(ii) $800 per hour for dental procedures lasting 90 to 120 minutes billed at $800 to $2000 [i.e. $2,800 / 3.5 hours];

(iii) $225 / hour for hygiene work.

[92] With respect to past income loss, assuming that Dr. Harris worked 45 minutes less in dentistry work each day in order to manage his symptoms, Mr. Benning calculated the net of tax income loss for the period of January 1, 2023 to the trial date as $45,834. This calculation assumes that Dr. Harris worked 4 days a week, 48 weeks a year, with a 10% reduction to account for variable cost of medical supplies.

[93] Assuming that Dr. Harris replaced 2.5 hours of the shorter dental procedures with hygiene work, Mr. Benning calculated the net of tax income loss for the same period to be $88,274.

[94] Assuming that Dr. Harris replaced 2.5 hours of the longer dental procedures with hygiene work, Mr. Benning calculated the net of tax income loss for the same period to be $169,757.

[95] With respect to future income loss, using an economic multiplier of 24.322 that accounts for labour market contingencies and premature death to calculate the net present value of assumed income capacity loss from the date of trial to age 65, Mr. Benning arrived at the following amounts:

a. Assuming a loss of 45 minutes per day in dentistry billings: $1,641,735;

b. Assuming the replacement of 2.5 hours of shorter dental procedures with hygiene work: $3,161,860;

c. Assuming the replacement of 2.5 hours of longer dental procedures with hygiene work: $6,080,500.

Credibility and reliability

Law

[96] The credibility and reliability of the evidence tendered by the plaintiff are central issues in this case. I am guided by the following principles in conducting this assessment.

[97] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392, 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 (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). 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 (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). 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 (*Farnya* at para. 356).

[98] Credibility and reliability are not the same thing. Reliability analysis "is concerned with the accuracy of a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue": *Ford v. Lin*, 2022 BCCA 179 at para. 104; see also *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, [2015] S.C.C.A. No. 374.

[99] There is a need to carefully scrutinize the evidence in cases where the plaintiff's claim depends on their subjective reports of pain. Recently, in *McGlue v. Girvan*, 2024 BCCA 208, the Court of Appeal discussed the proper approach:

> [48] The approach taken by the judge, in my view, was appropriate. In *Mariano v. Campbell,* 2010 BCCA 410 at para. 40, Justice Groberman cited *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131, 1993 CanLII 2465 (B.C.C.A.) for the "correct approach" to cases such as the present:
>
> With respect to the evidence required in order to meet the onus lying on a plaintiff in such cases, Chief Justice McEachern (then sitting as a trial judge) in *Price v. Kostryba* (1982), 1982 CanLII 36 (BC SC), 70 B.C.L.R. 397 (S.C.), repeating his observations in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.), put it thus [p. 399]:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrong-doer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence – which could be just his own evidence if the surrounding circumstances are consistent – that his complaints of pain are true reflections of a continuing injury.
>
> So there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[100] If a plaintiff's account of their change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49–50.

[101] Assessing credibility may not be a purely intellectual exercise and may involve factors that are difficult to verbalize. A court may accept all, some or none of a witness's evidence: *R. v. R.E.M.*, 2008 SCC 51 at paras. 49, 65.

The plaintiff's credibility and reliability

[102] Dr. Harris testified over four days at trial and was cross-examined at length. My assessment of his credibility is mixed. I generally find his evidence to be credible, with some exceptions. In general, I accept his evidence regarding the injuries that he sustained from the Accident and the symptoms that he experienced since the Accident, as well as their impact on his life and work. However, I do not accept all of his evidence. I have specifically referenced the evidence that I do not accept in the course of these reasons.

[103] The defendant argues that Dr. Harris was not a credible witness because his evidence was internally and externally inconsistent. Specifically, she points to alleged contradictions between his evidence at trial and examinations for discovery particularly on income loss, as well as between his trial evidence and contents of clinical records. In addition, she submits that Dr. Harris was defensive, evasive, longwinded and argumentative during cross-examination.

[104] In my view, the most significant of these issues relate to Dr. Harris's evidence on income loss. In particular, during his examinations for discovery, when asked about his past and future income loss claim, Dr. Harris did not refer to losses associated to taking breaks while performing dental procedures, decoupling multi-procedures, or doing hygiene work.

[105] When cross-examined on this issue at trial, Dr. Harris explained that at the time of discovery, he understood some of the questions to be about physically missing time at work and he responded accordingly. Further, he explained that as a new business owner, he did not appreciate until later the nuances of losing income from decoupling procedures or doing hygiene work.

[106] I accept Dr. Harris's explanation. In my view, his professed understanding of some of the questions asked during discovery, particularly in respect of past income loss, is understandable in light of the way in which the questions were framed. For example, Dr. Harris was initially asked about whether he missed time from work in Langley due to his post-accident symptoms. He responded that he took time off to attend physiotherapy and other medical appointments. He was also asked the same question in respect of Lillooet. He was then asked whether the "factual basis" of his income loss claim was solely the time that he missed work in Langley. After some back and forth regarding whether the question included future loss of income, Dr. Harris agreed that "technically" the entire basis of his past income loss claim was based solely on the time he missed from work in Langley.

[107] Similarly, with respect to future loss of income, Dr. Harris was also asked to state the "factual basis" of his claim.

[108] I agree with the plaintiff's counsel that a number of questions asked of Dr. Harris during discovery tended to be of a legal nature. In my view, asking the plaintiff to state or delineate the "factual basis" for his claim is one example. Dr. Harris has no legal training and could not be presumed to know or fully appreciate what could or could not – in law – constitute a "factual basis" for a claim related to loss of income. In the circumstances, I do not interpret his answers to these questions as precluding other forms or sources of income loss.

[109] Finally, as I will later explain in more detail, Dr. Harris's explanation that he did not, at discovery, appreciate that he had incurred income loss from taking breaks during dental procedures, decoupling multi-procedures, and performing hygiene work, is consistent with my conclusion that his income loss at the time was relatively minimal, and therefore may not be readily apparent.

[110] I will now address the defendant's argument that Dr. Harris was not a credible or reliable witness because his evidence regarding his post-accident symptoms is contradicted by his previous reports to Jennifer Gonsalves, a physiotherapist that he saw on numerous occasions between May 2018 and January 2021. In support of her

argument, the defendant relies on a filed agreed statement of facts in which the statements made by the plaintiff to Ms. Gonsalves, based on the notes of Ms. Gonsalves respecting each visit, were admitted.

[111] For example, with respect to the plaintiff's headaches, the defendant submits that although Dr. Harris reported having headaches during his first four visits in May 2018, he did not mention headaches again during his next eight visits. On August 16, 20 and 23, 2018, Dr. Harris reported "no headaches". On September 20, 2018, he reported neck tension and headaches with prolonged sitting as a dental student. He did not report having headaches again for the next two years and four months and specifically reported "no headaches" on six separate occasions in 2019 and 2020. In addition, the defendant says that at no time did Dr. Harris report light sensitivity, memory loss, difficulty concentrating, fogginess, difficulty focusing, mood issues or difficulties with housekeeping tasks.

[112] I do not accept the defendant's assertion that Ms. Gonsalves's records contradict the plaintiff's evidence at the trial. I do not find that they undermine the plaintiff's credibility and reliability. I say this for a number of reasons. First, there is insufficient context with respect to the circumstances surrounding the plaintiff's statements to Ms. Gonsalves. For example, were they in response to specific questions posed? If so what were those questions? Without the necessary context to enable the Court to properly interpret the plaintiff's statements, I give them little weight.

[113] Second, assuming that the records of Ms. Gonsalves contained contradictory evidence as alleged, they were not put to Dr. Harris at the trial, contrary to the principle in *Browne v. Dunn* (1893), 1893 CanLII 65 (FOREP), 6 R. 67 (U.K.H.L). This trite principle suggests that if counsel is going to impugn the credibility of a witness by later calling contradictory evidence, the witness should be given the chance to address the contradictory evidence. This is an additional reason based upon which I assign little weight to the plaintiff's statements to Ms. Gonsalves.

[114] Third, with respect to the example regarding the plaintiff's headaches, just because the plaintiff indicated that he did not have a headache on certain days and times, or did not mention headaches or other symptoms like light sensitivity does not render the evidence "contradictory". I note the qualifications on the use of clinical records identified by Justice N. Smith, particularly that "inconsistencies are almost inevitable" in clinical records made over a lengthy period of time, and that "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": *Edmondson v. Payer*, 2011 BCSC 118 at paras. 34–36, aff'd 2012 BCCA 114. Dr. Harris did not testify that he had a headache at all times, and his failure to mention certain symptoms, in these circumstances, is not evidence of absence of those symptoms. Further, given that the appointments related to physiotherapy, it would not be surprising, in my view, if the topic of some of these symptoms simply did not come up in discussion.

[115] To be clear, I also reject similar arguments advanced by the defendant with respect to the mention or non-mention of other symptoms.

[116] Further, I consider the number of times that the plaintiff went to see Ms. Gonsalves for physiotherapy (48 times between May 2018 and January 2021 by my count) to be of *some* corroboration of the plaintiff's evidence with respect to his post-accident symptoms.

[117] I do not suggest that Dr. Harris was a perfect witness. At times during his evidence, especially in cross-examination, I found him to be defensive. At various times it appeared that he was anticipating where the questions were going and trying to address what he perceived to be potential issues or weaknesses in his evidence. Dr. Harris was also argumentative at times, as the defendant submitted. However, in my view, this was to some degree in response to the nature of the cross-examination.

[118] Overall, despite these frailties, I generally find the plaintiff's evidence to be credible and reliable. I find that his evidence is also largely corroborated by the

evidence of Ms. Harris, Mr. Bhangu, Dr. Bortolussi, and the expert evidence of Ms. Black and Dr. Mehdiratta.

Lay witnesses

[119] The defendant submits that Ms. Harris, Mr. Bhangu, and Dr. Bortolussi are not objective witnesses because of their close relationship with the plaintiff. In particular, she submits that Dr. Bortolussi has demonstrated a willingness to manufacture records to assist the plaintiff, therefore her credibility is highly suspect. This allegation is in reference to: (1) clinical records retroactively created by Dr. Bortolussi on March 25, 2023 with respect to the repair of the plaintiff's chipped teeth in June 2021 and August 2022 respectively, and (2) Dr. Bortolussi's evidence that on occasion, she had billed her work on the plaintiff's patients under his name as a "courtesy". The defendant alleges that Dr. Bortolussi has engaged in fraudulent conduct in respect of these incidents.

[120] With respect to the delay in creating records on her work on the plaintiff's teeth, Dr. Bortolussi testified that since she did not bill for this work, therefore creating the records was not a priority. She added that she was probably feeling tired that day from having to work late. She also testified that it was not unusual for her to create a patient chart for a dental appointment retroactively. When it was suggested to her that she was prompted to do so by the March 2023 examination for discovery, Dr. Bortolussi responded that she did not remember the discoveries and she was just trying to be accurate in creating the records. She added that she believed she had done additional work on the plaintiff's chipped teeth that she had not included in the records.

[121] I will first address the defendant's submissions regarding Ms. Harris and Mr. Bhangu. In my view, both testified in a clear and forthright manner, and I have no difficulty finding that their evidence was credible and reliable despite their close relationship with the plaintiff. I accept their evidence.

[122] My assessment of Dr. Bortolussi is more nuanced. While I do not agree with the defendant's submission that she committed fraud or demonstrated a willingness to manufacture evidence, I nevertheless have concerns regarding the credibility and reliability of her evidence and I approach it with caution. Ultimately, I accept parts of her evidence but not all of it. Where I have not accepted her evidence, I have expressly stated so within these reasons.

[123] I am not persuaded that the delayed creation of dental records nor the "courtesy" billing in the plaintiff's name were conducted for a nefarious purpose, and I do not find that these incidents significantly undermined Dr. Bortolussi's credibility.

[124] I say this for the following reasons: (i) I accept Dr. Bortolussi's evidence that she did not bill for repairing the plaintiff's chipped teeth and therefore creating a record for it was not a priority; (ii) There is no evidence before me that creating dental records retroactively in this type of a situation constitutes a marked departure from the general practice of dentistry; (iii) Even if Dr. Bortolussi was in some way prompted by the examination for discovery to retroactively create dental records concerning the repair of the plaintiff's teeth, it does not necessarily mean that the contents of the records were false. To be clear, I believe the plaintiff's evidence that he sustained chipped teeth from the Accident and I also believe that Dr. Bortolussi performed repairs on those teeth; (iv) Lastly, the plaintiff's chipped teeth do not play a significant part in his claim.

[125] What causes me to have concerns with Dr. Bortolussi's evidence are my observations that she was at times argumentative, evasive, unresponsive, and defensive in her testimony, particularly in cross-examination. At times, Dr. Bortolussi appeared to be determined to address certain issues or topics that she perceived to be important regardless of the questions asked. One such example was Dr. Bortolussi's insistence in discussing her productivity versus the plaintiff's productivity when the questioning was about their respective earnings.

[126] At times, Dr. Bortolussi was also reluctant to agree to suggestions that were obvious where she perceived that a concession was not in her or the plaintiff's

interest. I also found that Dr. Bortolussi tended to engage in speculation in order to explain perceived inconsistencies or gaps in the evidence.

[127] To be clear, I do not find that Dr. Bortolussi had an intention to mislead. However, I find that aspects of her evidence lacked objectivity. While I do not give weight to some parts of her evidence, I generally accept her evidence with respect to her observations of the plaintiff before and after the Accident, including observations of him in his dentistry practice. In my view, these observations are generally consistent with the evidence of Ms. Harris, Mr. Bhangu, Ms. Black and the plaintiff.

Expert witnesses

Dr. Mehdiratta

[128] The defendant argues that Dr. Mehdiratta's evidence is not credible and reliable. She submits that:

- the factual bases for Dr. Mehdiratta's opinion had not been proven;
- Dr. Mehdiratta's report contained insufficient detail to support his conclusions;
- the analysis in the report was superficial; and
- certain conclusions in the report were inconsistent with the plaintiff's statements to Ms. Gonsalves.

[129] In addition, the defendant continues to rely on the arguments advanced in the *voir dire* respecting the admissibility of Dr. Mehdiratta's expert report in support of her position that it should be accorded no weight. Those arguments include:

- that Dr. Mehdiratta was not an impartial witness;
- that he cherry-picked information from the plaintiff's clinical records to include in his report;
- that Dr. Mehdiratta's qualifications to opine in the area of sensory cervical radiculopathy were not contained in his report;
- that Dr. Mehdiratta went beyond the scope of his expertise in commenting on the forces involved in the motor vehicle collision, and in relation to neck and back pain;
- that Dr. Mehdiratta used a template in creating his report; and
- that he was assisted by two other individuals whose qualifications were unknown; namely the creator of the said template, and the nurse

> who entered preliminary data obtained from the plaintiff into the template.

[130] Dr. Mehdiratta was cross-examined extensively during the trial. I found him to be a knowledgeable, articulate, and patient witness. He had conducted an extensive review of the clinical records provided to him to determine the plaintiff's medical history. I am satisfied that his evidence is credible and reliable. While I do not attach equal weight to all of his opinions, I generally accept them. In particular, I accept his opinion regarding causation.

[131] In my view, the facts upon which Dr. Mehdiratta's opinions were based are generally consistent with the plaintiff's evidence. The defendant's arguments to the contrary largely rely on an extreme parsing of the expert report, the clinical records reviewed by Dr. Mehdiratta, and the trial evidence. This approach ignores the evidence as a whole.

[132] In addition, despite acknowledging that the plaintiff's statements to Ms. Gonsalves are not admissible for their truth, in arguing that Dr. Mehdiratta's conclusions are inconsistent with these statements, the defendant appears to rely on them precisely for this purpose. In any event, as I have previously stated, I assign little weight to the plaintiff's statements to Ms. Gonsalves.

[133] Further, I do not give weight to the defendant's criticisms that the analysis in Dr. Mehdiratta's report is superficial and lacking in detail. I am satisfied with the degree of analysis and detail in the report. Moreover, there is no other expert evidence before me that says otherwise.

[134] I have considered the defendant's additional arguments previously advanced at the *voir dire*. None of these arguments cause a legitimate concern in my mind regarding the credibility and reliability of Dr. Mehdiratta's evidence. I had previously addressed these arguments in my oral ruling on July 2, 2024. I will not repeat those reasons here.

Ms. Black

[135] The defendant submits that Ms. Black's evidence is not reliable and should not be given weight. Her main arguments are:

- that Ms. Black's opinion was based entirely on the plaintiff's subjective reporting;
- that it was based on a single point in time;
- that her findings with respect to the plaintiff's limitations are not consistent with the plaintiff's evidence including his work schedule; and
- that the simulations she conducted were flawed.

[136] I find Ms. Black's evidence to be credible and reliable. Although I do not attach equal weight to all of her opinions, I generally accept her opinion regarding the plaintiff's functional limitations.

[137] Contrary to the defendant's assertion, Ms. Black's opinion was not entirely based on the plaintiff's subjective reporting. It was also based on Ms. Black's own observations of the plaintiff. Although she only met the plaintiff once, her evaluation of his functional capacity was based on a series of tests conducted over seven hours, including simulated dentistry work. That said, I take the defendant's point that the assessment was done at a single point in time and I consider it in the weight that I attach to Ms. Black's opinions.

[138] The defendant submits that since the plaintiff testified that he could perform up to 45 to 60 minutes of continuous drilling, this is inconsistent with Ms. Black's findings that the plaintiff experienced difficulty after: (i) 15 minutes of sustained reaching below shoulder level; (ii) 30 minutes of sustained upright sitting; (iii) 10 minutes of sustained task intensive sitting posture; and (iv) more than a few minutes of use of left fourth finger.

[139] I do not agree that Ms. Black's findings are inconsistent with the plaintiff's evidence. In my view, Ms. Black's findings corroborate the plaintiff's evidence including that he experiences pain and discomfort in his left fingers when operating a dental drill, and discomfort in his neck and back from long periods of sitting while performing dental work.

[140] That the plaintiff's pain tolerance during his work may be greater than during the functional capacity evaluation does not undermine Ms. Black's findings. Ms. Black testified that she would not be surprised if the plaintiff pushed himself to do more in his dentistry practice. This is consistent with my own assessment of the plaintiff based on his evidence.

[141] Further, the plaintiff testified that he starts to feel pain in his left fingers after the first 10 to 15 minutes of using a dental drill. After that, he starts to "chicken-wing" which then causes pain in his shoulder and forearm. Therefore, although he testified that he could use a dental drill continuously for 45 to 60 minutes, it is clear that he could only do so *with* pain and discomfort.

[142] Finally, I do not accept the defendant's argument that the simulations conducted by Ms. Black were flawed. In my view, the description of the simulations was generally consistent with the plaintiff's evidence as to how he performs his work.

Mr. Benning

[143] There was no challenge to Mr. Benning's credibility and reliability as a witness. I accept his evidence with respect to income loss calculations and net present value calculations.

Adverse Inference

[144] The defendant urges the Court to make an adverse inference based on the plaintiff's failure to call certain medical doctors that treated him and his UBC professors as witnesses at the trial. The defendant submits that she was not in a position to call these witnesses herself because: (i) medical doctors could not discuss the plaintiff's injuries with defence counsel due to a duty of confidentiality, and (ii) UBC professors were bound by a similar duty of confidentiality with respect to students.

[145] In response, the plaintiff submits that the witnesses were equally available to the defence. Relying on *Swirski v. Hachey*, 132 D.L.R. (4th) 122, 1995 CanLII 617 (B.C.S.C.), the plaintiff submits that doctor-patient confidentiality does not apply to

the plaintiff's treating doctors concerning information relevant to the plaintiff's claim. In addition, there is a process that defendant's counsel could have availed of to interview these doctors.

Law

[146] The Court of Appeal set out the law on adverse inferences in *Thomasson v. Moeller*, 2016 BCCA 14:

> [35] The law relevant to adverse inferences was helpfully summarized in *Zawadski v. Calimoso*, 2011 BCSC 45, where Mr. Justice Voith stated:
>
> > [149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994), 1994 CanLII 978 (ON CA), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287.

Discussion

[147] For the reasons that follow, I decline to draw an adverse inference.

[148] In my view, the witnesses were equally available to the defence. I am not persuaded that doctor-patient confidentiality prevented the defence from calling the medical witnesses. As this Court held in *Swirski*, in this province, the commencement of an action for damages for injury is a waiver of doctor-patient confidentiality in respect of medical matters relevant to the issues raised in the action. Such waiver constitutes an implied authorization to physicians for release of such information for the purpose of litigation: *Swirski* at para. 42; *Edwards v. Parkinson's Heating,* 2018 BCSC 593 at paras. 59–60.

[149] The process for interviewing practitioners as set out in *Swirski* puts both plaintiff and defendant on a similar footing with respect to medical information about the plaintiff: *Constantinescu v. Van Ryk*, 2021 BCSC 18 at para. 60. This is in addition to the exchange of information and provision of clinical records through the document discovery process: *Buksh v. Miles*, 2008 BCCA 318 at para. 33.

[150] With respect to UBC professors, I was not provided with authority for the proposition that they were also bound by a duty of confidentiality. In any event, to the extent that the defence submits that the plaintiff's professors would have had an opportunity to observe him at UBC, I have difficulty with the proposition that physical observations of the plaintiff in a public setting would be covered by any duty of confidentiality.

[151] In addition, given the lack of specificity as to the identity of particular witnesses, I am unable to assess and therefore I am not satisfied that there is a *prima facie* case that these unidentified witnesses would have important evidence to give.

[152] The defendant advised that they had subpoenaed two of the plaintiff's treating doctors, Dr. Shtybel and Dr. Wee. However, they did not call them. Based on the plaintiff's evidence, he saw Dr. Shtybel once in 2023. According to the plaintiff, Dr. Shtybel did not make a positive diagnosis. He recommended an MRI. This was the extent of his dealings with Dr. Shtybel. With respect to Dr. Wee, the plaintiff agreed that he saw her three times in 2019.

[153] This is the totality of the plaintiff's evidence about these witnesses. I am uncertain as to who else the defendant asserts ought to have been called by the plaintiff, although a number of other doctors were mentioned during the plaintiff's evidence.

[154] Considering all of the circumstances, including the lack of specificity with respect to the identity of witnesses and their alleged evidence, limited evidence as to the plaintiff's dealings with the two that were mentioned by name, and the availability of the witnesses to the defence, in my view, this is not an appropriate case in which to make an adverse inference.

Causation

Law

[155] A plaintiff must establish on a balance of probabilities that the defendant's negligence caused an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[156] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; *Zenone v. Knight*, 2024 BCCA 200 at para. 55. In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test: *Clements v. Clements,* 2012 SCC 32 at para. 46.

[157] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58:

> 78 … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey.*

[158] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the "thin skull" rule). A defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes: *Dornan v. Silva*, 2021 BCCA 228 at para. 41. However, the defendant need not compensate the

plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the "crumbling skull" rule): *Athey* at paras. 32–35.

Position of the parties

[159] The plaintiff submits that the evidence has established on a balance of probabilities that the Accident caused the plaintiff's injuries.

[160] The defendant submits that the only evidence on causation is Dr. Mehdiratta's evidence which should not be given any weight. In addition, the court must exercise caution when inferring causation from a temporal sequence.

Findings of fact

[161] I make the following findings of fact on causation:

a. On March 31, 2018, the plaintiff was in the front passenger seat of a vehicle that was rear-ended by the defendant;

b. The plaintiff was looking to his left towards the driver when the sudden impact occurred;

c. The plaintiff put his hands out to brace himself. Although he did not recall if his hands hit anything, I infer from the circumstances that they came in contact with the dashboard of the car upon impact;

d. I also infer from the evidence that the plaintiff's head hit the head rest of his seat upon impact;

e. The plaintiff's memory of the Accident including how he felt immediately after is "foggy";

f. Very soon after the Accident, the plaintiff experienced symptoms that include pain and numbness in his left hand and fingers, headaches, pain and tightness in his neck, left shoulder and back;

g. He did not have these symptoms prior to the Accident;

h. The pain and numbness in his left fingers have not improved since the Accident;

i. There has been some improvement with respect to the headaches, back pain, neck pain and shoulder pain. However, they have not completely resolved; and

j. Before the Accident, the plaintiff was a healthy young man who did not have a pre-existing medical condition.

Discussion

[162] Dr. Mehdiratta opined that the plaintiff sustained a mild traumatic brain injury and cerebral concussion from the Accident. In addition, he likely sustained a left cervical radiculopathy or brachial plexus lesion contributing to the symptoms experienced in his left hand. Dr. Mehdiratta explained that a radiculopathy pertains to damage to a sensory nerve root.

[163] According to Dr. Mehdiratta, the plaintiff's lack of memory of some events immediately before or after the injury, fogginess and headaches support a concussion diagnosis.

[164] In addition, he opined that based on a balance of medical probabilities, the Accident caused a sufficient force with which to cause a mild traumatic brain injury through axonal disruption. He stated that the sheer force with which the brain moves within the skull during an acceleration-deceleration injury can cause axonal dysfunction and resultant concussive symptoms even in the absence of direct contact injury. He testified that it does not take much force for this to happen.

[165] Dr. Mehdiratta also testified that the rotational impact of the plaintiff's head being turned to the left when his head went backwards and hit the headrest was a factor that he considered in assessing the plaintiff's injuries. In Dr. Mehdiratta's opinion, the plaintiff's neck pain and numbness of the left fingers are consistent with a neurological injury related to the Accident.

[166] The defendant argues that the plaintiff's hands were on his lap when the Accident occurred and they did not strike anything inside the vehicle. She submits therefore that the Accident could not have caused an injury to the plaintiff's left fingers. However, as I had previously mentioned, the plaintiff testified that he put his

hands out to brace himself at the moment of impact. I accept this evidence and I infer from the circumstances that the plaintiff's hands did come into contact with the dashboard of the vehicle.

[167] The defendant also submits that Dr. Mehdiratta only "suspected" either a sensory cervical radiculopathy or brachial plexus lesion. I gather that the defendant suggests that this is a lesser legal standard than required to prove causation.

[168] This submission is in reference to the following sentence in the expert report: "[g]iven the associated left sided neck pain, I would *suspect* that he has a sensory cervical radiculopathy caused by the Accident, but an MRI of the brachial plexus is pending to rule out a brachial plexus lesion" (emphasis added).

[169] In my view, the expert report must be read as a whole. When the above statement is read in the context of the entire report, Dr. Mehdiratta's opinion is (as stated in the summary portion of his report) that the plaintiff likely sustained either a left cervical radiculopathy or a brachial plexus lesion from the Accident. His *viva voce* evidence was that in order to rule out a brachial plexus lesion, the plaintiff's existing MRI of his brachial plexus must be reviewed by a neuroradiologist, which had not been undertaken.

[170] In my view, the use of the word "suspect" in the report merely reflects the *medical* uncertainty arising from having two potential diagnoses, pending steps to rule out one of them. It does not relate to Dr. Mehdiratta's opinion as to whether either diagnosis was caused by the Accident. Further, causation need not be determined by scientific precision: *Athey* at paras. 13–17.

[171] In any event, the *legal* issue of causation is for the Court to determine based on the totality of the evidence, including the uncontradicted opinion of Dr. Mehdiratta, which I accept.

[172] In my view, the following factors are significant:

a. The plaintiff's symptoms commenced very soon after the Accident;

b. The plaintiff was healthy and did not have a pre-existing medical condition before the Accident;

c. Based on Dr. Mehdiratta's report, the plaintiff's post-accident symptoms are consistent with how the Accident occurred;

d. According to Dr. Mehdiratta, some patients have persistent and longstanding difficulty with concussive symptoms for an extended period of time, post-collision. This should not imply that the symptoms are not real or that they are unrelated to the collision.

Conclusion

[173] I find that that the plaintiff has proven on a balance of probabilities that, but for the defendant's negligence, he would not have sustained the injuries and conditions discussed in Dr. Mehdiratta's report, and he would not have experienced his post-accident symptoms.

DAMAGES

Non-pecuniary damages

Law

[174] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[175] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the 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).

[176] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Position of the parties

[177] The plaintiff submits that a proper award for non-pecuniary damages is $190,000.

[178] The defendant's position is that no damages should be awarded.

Findings of fact

[179] I make the following additional findings of fact:

a. The plaintiff is 31 years old. He was 25 years old at the time of the Accident;

b. He has chronic pain and numbness in his left fingers, and chronic intermittent neck, back and left shoulder pain, as well as headaches, caused by the Accident;

c. His headaches, neck, back and left shoulder pain were most intense in the first six to eight months after the Accident. There was improvement after that, however the plaintiff continues to experience flare-ups;

d. The Accident caused a mild traumatic brain injury, post-concussion syndrome and either a sensory cervical radiculopathy or brachial plexus lesion resulting in the plaintiff's post-accident symptoms;

e. The plaintiff's prognosis is poor and his symptoms are unlikely to improve;

f. The plaintiff requires breaks in his dentistry practice in order to manage his symptoms, resulting in decreased efficiency and productivity;

g. The plaintiff was physically active before the Accident. He regularly played golf; he also cycled and hiked;

h. After the Accident, the plaintiff is no longer able to play golf, a sport that he loved and had excelled in;

i. The plaintiff no longer cycles or hikes to the extent that he did before the Accident;

j. After the Accident, the plaintiff struggles with household chores that require bending and heavy lifting;

k. The plaintiff experiences anxiety related to his symptoms; and

l. The plaintiff has developed a treatment routine that he follows to manage his symptoms.

Discussion

[180] In support of his position, the plaintiff relies on the following cases:

Jafferi v. Hardcastle, 2018 BCSC 486

Mattson v. Spady, 2019 BCSC 1144

Woo v. Khaira, 2024 BCSC 1114

[181] *Jafferi* involved a 54-year old plaintiff who suffered soft tissue injuries including an activation of a pre-existing degenerative disc condition. Mr. Jafferi underwent a neck surgery after his accident. The surgery provided considerable relief but did not eliminate his pain. Mr. Jafferi also experienced fatigue and sleep disruptions from the accident. He had to curtail the work he was doing for his sole proprietorship, and was less able to perform household tasks. This caused strain on his family life as his spouse and children had to assist him at home and with the business. Mr. Jafferi likely required future surgery. He was a healthy and active person before the accident. After the accident, he had ongoing pain, a spinal fusion, and altered mood from the pain. The Court awarded non-pecuniary damages in the amount of $150,000 (or approximately $181,000 after adjustment for inflation).

[182] In *Mattson*, the plaintiff was a 30-year-old kinesiologist at the time of the accident. She suffered severe neck and shoulder pain and headaches that affected her interactions with her young children. She had soft tissue injuries including a scapular injury. Her ability to work was significantly compromised. She was diagnosed with chronic pain and her prognosis for recovery was guarded. She was unable to resume any of the sporting activities she had enjoyed prior to the accident. The Court found that her injuries had a “devastating” impact on the life she knew. The non-pecuniary award was $150,000 (or approximately $178,000 after adjustment for inflation).

[183] In *Woo*, the plaintiff was a 41-year old hairstylist. After the accident, she had to modify her work schedule and avoid all injury-exacerbating activities. The expert evidence established that she would never return to her pre-accident functionality.

[184] The plaintiff:

- experienced daily chronic pain which was not expected to improve;
- spent significant time on treatment to sustain only part-time work;
- was unable to continue the active lifestyle she enjoyed before the accident;
- was dependent upon her partner for most household assistance;
- experienced constant stress about her future and ability to continue to work as a hairstylist;

- suffered from a loss of self-identity, self-worth, self-confidence and hope for the future; and
- was irritable, anxious, depressed and socially withdrawn.

[185] The Court found the plaintiff to be a talented hairstylist who had lost the enjoyment that she got from her life-long chosen career. Further, the accident had a major effect on her physical and psychological health, and had profoundly changed her life: *Woo* at para. 286. The Court awarded $165,000 in non-pecuniary damages.

[186] In my view, while there are similarities between the above cases and the case at bar, the circumstances in *Jafferi*, *Mattson* and *Woo* are more serious in terms of severity of injuries and/or impact on the plaintiff's life.

[187] The following cases, in my view, are closer to the plaintiff's circumstances.

[188] In *Yang v. Lockhart*, 2022 BCSC 32, the plaintiff was a 23-year old SFU student at the time of the accident. Before the accident, she coached basketball, played hockey, ran, hiked, ice skated and did yoga. The accident caused injuries to her neck, shoulders and back that led to myofascial pain syndrome, cervicogenic headaches, migraine headaches, jaw pain, and anxiety. She also had persistent numbness in her fingers. She developed anxiety and depression. She continued to attend SFU without significant disruption and graduated with a degree in psychology. Neither her graduation nor her entry into full-time work was delayed as a result of her injuries. At the time of trial, she was working in an administrative position. She was able to perform her work duties but had to take many breaks throughout the day and compensate with work in the evenings and weekends. She was also less productive at work due to difficulties in concentrating. Her ability to do sports was significantly impacted. She relied significantly on her partner for household chores. She also experienced a decline in her social life and an increase in insecurity due to weight gain from decreased activity. The prognosis for complete resolution of her symptoms was extremely poor. The Court awarded non-pecuniary damages of $140,000 (or approximately $147,000 when adjusted for inflation).

[189] In *Dhanda v. Thind*, 2022 BCSC 1003, a 20-year old plaintiff sustained injuries to her neck, shoulders, back, and left knee. Her knee pain later resolved, but the pain in her neck, shoulders, and back persisted. She also experienced headaches, sleep interruption, dizziness, and sensitivity to light and sound. Despite undergoing treatment and taking medication, her symptoms did not resolve. Her mood was impacted. She was left with ongoing soft tissue pain in her neck and back, headaches, sleep and mood disturbances, and sensitivity to light and sound. She pursued a career as a registered nurse. While she would be able to perform all general work duties, her injuries would likely limit her ability to perform some of the more physical work, and perhaps even some of the more sedentary office work. The Court awarded non-pecuniary damages in the amount of $100,000 (or approximately $105,000 accounting for inflation).

[190] In my assessment, the appropriate award for the plaintiff falls somewhere between the respective awards in *Yang* and *Dhanda*. I consider the following factors to be the most significant: the plaintiff's relatively young age, the duration and severity of his symptoms, the resulting decrease in his efficiency and productivity as a dentist, the impact on his active lifestyle particularly his resulting inability to play golf, a sport that he loved and had excelled in, the anxiety that he experienced over his symptoms, and his poor prognosis.

[191] As the Court did in *Yang*, I also consider the plaintiff's claim for loss of housekeeping capacity within my assessment of non-pecuniary damages.

[192] The law recognizes that in some circumstances, it may be appropriate to augment a non-pecuniary award with an award for loss of housekeeping capacity. In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal provided guidance on whether a discrete award should be made:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are

> typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

See also *Kim v. Lin*, 2018 BCCA 77 at para. 33.

[193] Whether a court chooses a distinct award or one that is included in the general non-pecuniary award, it is important to do so with an eye to the differing rationales behind them: *Kim* at para. 34.

[194] In *Campbell v. Banman*, 2009 BCCA 484 at para. 19, the Court of Appeal referred to its earlier decision in *Ellis v. Star*, 2008 BCCA 164, in support of the proposition that a "relatively minor adjustment of duties within a family will not justify a discreet assessment of damages. There will be applied a robust appreciation of household realities within a family and an understanding of the normal give and take that necessarily is part of family life".

[195] In this case, the plaintiff and Dr. Bortolussi started living together after the Accident, therefore there is no pre-accident division of household responsibilities with which to compare their present circumstances. Dr. Bortolussi performs most of the household chores, however I find that this is in large part not because of the Accident, rather it is because she has high standards particularly in terms of cleanliness. While the plaintiff struggles with certain tasks, there is no suggestion that he is unable to do some routine and necessary household chores. Dr. Bortolussi testified that the plaintiff is responsible for cooking. The plaintiff also testified that he can do light gardening.

[196] As in *Yang*, the circumstances here in my view reflect the "normal give and take" that is necessarily part of family life. The plaintiff's difficulties in performing some household chores are appropriately assessed as loss of amenities that form part of an award for non-pecuniary damages.

Conclusion

[197] After considering the evidence, the parties' submissions, and the applicable law including the amounts awarded in comparable cases, I conclude that $130,000 is a fair and reasonable award for non-pecuniary damages.

Past Loss of Earning Capacity

Law

[198] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[199] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has a discretion to determine what period or periods of time are appropriate for the determination of net income loss: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181–186. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been in had the Accident not occurred: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185–86.

[200] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Dornan* at para. 94.

[201] The court must make an assessment rather than a calculation in assessing damages. Ultimately the court must base its decision on what is reasonable in all the circumstances: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.

Position of the parties

[202] The plaintiff submits that he has suffered past loss of income in the range of $45,834 to $169,757 representing the loss of at least 45 minutes per day, i.e. the difference between 8.25 and 7.5 hours in dental appointments and up to the loss of one multi-procedure per day for the period of January 1, 2023 to the trial date, using Mr. Benning's calculations. The plaintiff is not claiming a loss in relation to the period of June 2020 to December 31, 2022.

[203] The defendant submits that the underlying assumptions in Mr. Benning's report have not been proven. She mainly argues that the plaintiff did not incur a past loss of income because:

a. based on the plaintiff's appointment list (exhibit 11), he continued to work 8.25 hours and many appointments were double-booked;

b. the plaintiff billed more than Dr. Bortolussi in the first quarter of 2024 (i.e. $225,208.12 vs. $192,502.97) as shown in production analysis reports for View Royal (exhibits 12 and 13); and

c. there is no income loss from focusing on single procedure appointments as opposed to multi-procedure appointments as the average billable rates are the same.

Discussion

[204] I am satisfied that the plaintiff's injuries caused a decrease in his efficiency and productivity as a dentist and that there is a real and substantial possibility of a resulting pecuniary loss. However, in relation to the period of January 1, 2023 to the trial date, I assess this loss to be relatively modest.

[205] Since billings in dentistry are based on a flat fee depending on the type of procedure regardless of length of appointment, I find that in taking breaks for symptom relief, the resulting inefficiency and corresponding decrease in the

plaintiff's productivity caused him to suffer a pecuniary disadvantage that is compensable through an award of damages for loss of earning capacity: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 30, citing *Ibbitson v. Cooper*, 2012 BCCA 249 at paras. 20–21.

[206] I assess the plaintiff's past loss of income earning capacity to be modest because I find that, for the time period from January 2023 to the trial date, a significant portion of his work did not require him to use his left hand in a way that caused him difficulty. I make this finding based on the plaintiff's evidence and his appointment list. The plaintiff testified that certain types of appointments such as specific examinations, some restorations, and hygiene appointments gave him a break from using a dental drill, or from using it to a degree that caused him problems. Based on the plaintiff's appointment list, he undertook these appointments regularly, at times one after another in a single day.

[207] I do not accept the plaintiff's evidence which suggested that he scheduled these appointments, particularly the hygiene appointments, solely to manage his symptoms. Rather, I find that as a relatively new business, the plaintiff's dental clinic generally accepted the work that was available in order to build the business and generate revenue.

[208] For example, the plaintiff conceded in cross-examination that hygiene appointments were sometimes scheduled to fill the gaps created by last minute cancellations.

[209] Further, Dr. Bortolussi also performed hygiene work. Although she testified that this was largely confined to March 2024 when her dental assistant was absent on certain days, the evidence demonstrates that Dr. Bortolussi performed more hygiene work than that. Based on her production analysis report for the first quarter of 2024, she billed approximately $25,000 in hygiene work. While the plaintiff billed more – approximately $37,000 for the same period – it is clear that they both performed a significant amount of hygiene work. I find that this is in large part

attributable to the necessity and desire to accept the work that was available as a new dental practice.

[210] Although these types of appointments also gave the plaintiff a break from the activities that triggered his symptoms, I find that, to a significant extent, he undertook these appointments for business reasons, and that he would have done so in any event of the Accident. Therefore, while I accept that the plaintiff's symptoms caused him to be less efficient and productive as a dentist, I find that the resulting loss during the period of January 2023 to the trial date is relatively minimal.

[211] Before I move on to the assessment of damages, I will briefly address the defendant's arguments. In my view, the defendant's arguments unduly focus on actual lost income and fail to recognize that it is the loss of earning capacity that is compensable: *Ibbitson* at para.19. Evidence supporting such loss can take different forms. In *Ibbitson*, the plaintiff who worked in the forest industry maintained his pre-accident level of income by working longer hours. The Court concluded that this translated to a pecuniary disadvantage that was compensable through an award of damages for loss of earning capacity: *Ibbitson* at paras. 20–21; *Lamarque* at para. 30.

[212] Similarly, in this case, the additional time that it took the plaintiff to complete certain dental procedures due to his need to take breaks translates to a compensable pecuniary disadvantage, due to the methods of billing in dentistry.

[213] I assess the plaintiff's loss for the period of January 1, 2023 to the trial date, to be the equivalent of approximately 15 minutes per day. Using Mr. Benning's calculations based on an hourly billing rate of $533 for short or single procedure dental appointments, multiplied by 264 working days (176 days in 2023 and 88 days in 2024 based on 4 days per week, except for 8 weeks when the clinic was closed for renovations in 2023 and one week off during the holiday season), less 10% for cost of medical supplies and 53.5% income tax, the resulting amount is $14,722, as calculated below:

$533 / hour x 0.25 x 264 days = $35,178

$35,178 – 10% = $31,660.20 (after deduction of cost of supplies)

$31,660.20 – 53.5% = $14,721.99 (after tax amount)

[214] I award $15,000 for past loss of income earning capacity.

Loss of Future Earning Capacity

Law

[215] The central task before the court in considering damages for loss of future earning capacity is to compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Rab v. Prescott*, 2021 BCCA 345 at para. 65. A plaintiff is not entitled to an award for loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 14.

[216] The Court of Appeal issued a trilogy of decisions in 2021 regarding the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan*; *Rab*; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the Court identified a three-step process for assessing damages:

> [47] … a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in [*Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in [*Dornan v. Silva*, 2021 BCCA 228] at paras 93–95.

[217] At the first step, there are, broadly, two types of cases involving the 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

for the foreseeable future; and (2) less straightforward cases, for example, those in which a plaintiff's injuries have led to continuing deficits or exposed them to future problems, but the plaintiff's income at trial is similar to what it was at the time of the accident: *Rab* at paras. 29–30. In the former set of cases, the first and second step of the analysis may well be foregone conclusions: *Ploskon-Ciesla* at para. 11. However, it will be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, and the court may make allowance for positive and negative contingencies: *Rab* at para. 29; *Ploskon-Ciesla* at para. 11.

[218] The second step of the analysis requires the plaintiff to prove there is a real and substantial possibility that the future event in question will give rise to pecuniary loss. Here, after determining that the plaintiff may suffer a loss of capacity, the court evaluates the likelihood that it will affect the plaintiff's ability to earn income. The 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": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Ploskon-Ciesla* at para. 15.

[219] At the third step – the valuation stage – there are two possible approaches to assessing loss of future earning capacity, being the earnings approach and the capital asset approach: *Davies* at para. 28; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable: *Lamarque* at para. 38; *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.

[220] The approach taken to the assessment of loss must be based on the evidence: *Rab* at para. 75. The ultimate award is a matter of judgment as opposed to purely mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The assessment includes consideration of general contingencies as well as any specific contingencies relied on by the plaintiff or defendant: see *Hartman v. MMS Homes Ltd*., 2023 BCCA 400 at para. 71 citing *Graham v. Rourke*, (1990), 74 D.L.R.

(4th) 1, 1990 CanLII 7005 (Ont. C.A.). Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence establishing them as realistic possibilities: *Dornan* at paras. 92–95. To the extent possible, the plaintiff should be put in the position he or 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.

[221] The earnings approach involves a form of math-oriented methodology that can include: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or, ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 46 (C.A); *Ng v. Corness*, 2023 BCCA 185 at para. 18; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[222] The capital asset approach involves consideration of the factors described in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), including 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 himself as a person capable of earning income in a competitive labour market: see also *Ploskon-Ciesla* at para. 13. Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Dornan* at paras. 151, 158; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

Position of the parties

[223] The plaintiff submits that the evidence demonstrates that the first two steps of the *Rab* test have been met. The plaintiff's ongoing functional and vocational limitations are confirmed in the opinions of Ms. Black and Dr. Mehdiratta. The evidence shows that the plaintiff is missing dental procedures and replacing them with hygiene appointments, which results in pecuniary loss.

[224] With respect to the third step in *Rab*, the plaintiff submits that the earnings approach is appropriate. He seeks an award in the range of $53,222 to $100,000 per year for future loss of income earning capacity. The low end of the range represents one hour of single procedure appointment being replaced with a hygiene appointment per day, using Mr. Benning's calculations.

[225] Using the Mr. Benning's economic multiplier of 24.322, the net present value of the plaintiff's loss until the retirement age of 65 would be in the range of $1,294,465 to $2,432,200.

[226] The defendant makes the same arguments as I had outlined in my discussion of past loss of income earning capacity. She submits that no damages should be awarded.

Discussion

[227] As discussed in the immediately preceding section, I am satisfied that the plaintiff's injuries caused a decrease in his efficiency and productivity as a dentist and that there is a real and substantial possibility of a resulting pecuniary loss. Therefore, I conclude that the first two steps in *Rab* have been met.

[228] In respect of the third step, I agree with the plaintiff that the earnings approach is appropriate in the circumstances, as the evidence permits a reasonable estimation of the plaintiff's loss. I assess the plaintiff's future loss of income earning capacity to be more than his past loss. In my view, as the plaintiff's business grows and becomes more established, the plaintiff will have the opportunity to do a greater diversity of procedures and less hygiene work. Therefore, the likelihood that the plaintiff would need to structure his working days in ways that allow him to take sufficient breaks to manage his symptoms increases. I accept that these measures include decoupling some multi-procedure dental appointments into single procedure appointments, incorporating breaks into some multi-procedure dental appointments, and foregoing some single procedure dental appointments in favour of hygiene appointments.

[229] In my view, the plaintiff's submission of a loss of one hour of single procedure appointment replaced by a hygiene appointment is a fair and reasonable assessment of the plaintiff's future loss. Based on the evidence, this translates to $277.20 per day after deducting 10% for cost of medical supplies, or $53,222 per year based on 4 days a week and 48 weeks a year:

> $533 (average hourly rate for short or single procedure dental appointments) – $225 (average hourly rate for hygiene work) = $308 / day
>
> $308 – 10% = $277.20 / day
>
> $277.2 x 192 days = $53,222 / year

[230] Using Mr. Benning's economic multiplier of 24.322 which accounts for labour market contingencies and premature death to calculate the net present value of this loss from the date of trial to the plaintiff's anticipated retirement at age 65, the resulting amount is $1,294,465.

Contingencies

[231] I have considered whether to reduce the award to account for a negative contingency that the plaintiff's left-hand symptoms may improve from seeing a certified hand therapist as recommended by Ms. Black. While in my view there is a real and substantial possibility that his symptoms may improve, I find that this is just as likely as not. Therefore, I make no adjustment to the award.

[232] I have also considered Ms. Black's opinion that if the plaintiff's activities outside of work become more demanding or if his flare-ups increase in duration or frequency, he may not be able to tolerate full-time work hours. In my view, there is little basis for this opinion in the evidence. I do not find that this is a real and substantial possibility.

Conclusion

[233] With respect to the plaintiff's claim for loss of future earning capacity, I assess a fair and reasonable award to be in the amount of $1,290,000.

Costs of Future Care

Law

[234] The plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the Accident had not occurred. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the available medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.); *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43.

[235] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and, (2) the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92, citing *Paur v. Province Health Care,* 2017 BCCA 161 at para. 109. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[236] An award of damages for costs of future care is partly prediction and prophecy: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58. In *Pang v. Nowakowski*, 2021 BCCA 478 at para. 57, Justice Voith identified three additional considerations of which the court must be satisfied in this analysis: first, that the plaintiff would, in fact, make use of the particular care item; second, that 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, third, that there is no significant overlap in the various care items sought.

[237] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Paur* at para. 109.

[238] 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* at para. 253.

[239] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang* at para. 58.

Discussion

[240] The plaintiff submits that the evidence supports a claim of $32,371.07 in costs of future care. This claim relates to costs related to concussion rehabilitation, hand therapy, kinesiology, physiotherapy, and counselling.

Concussion rehabilitation

[241] Dr. Mehdiratta recommended that the plaintiff undergo 12 to 24 sessions of concussion rehabilitation. The plaintiff claims the cost of 18 sessions. Using the ICBC Fee Guide for Healthcare Physicians ("Fee Guide") amount of $145 per session, the plaintiff claims a total of $2,610.

[242] I find this amount to be medically necessary and reasonable.

Certified hand therapist

[243] Ms. Black recommended that the plaintiff see a certified hand therapist for assessment and treatment of his left hand. Using the Fee Guide amount of $145 per session, the plaintiff claims $2,610 for 18 sessions.

[244] At the time of trial, the plaintiff had not been assessed by a hand therapist and there is no specific evidence as to the required number of treatment sessions.

Despite the lack of medical evidence, I am satisfied that seeing a certified hand therapist would likely benefit the plaintiff and that the amount claimed is reasonable.

Kinesiology

[245] Ms. Black also recommended that the plaintiff undergo an active rehabilitation program aimed at strengthening his core and shoulder region musculature. The plaintiff claims $4,784 representing one year of weekly visits to a kinesiologist at $92 per visit according to the Fee Guide.

[246] I find that the plaintiff would likely benefit from such a program, however I am not persuaded that he is likely to attend every week for a whole year. I find the amount of $2,392 representing weekly visits for a period of six months to be reasonable.

Physiotherapy

[247] The plaintiff submits that the evidence shows that he attended physiotherapy as needed to manage flareups of his symptoms. He submits that his claim for the cost of six sessions per year during his lifetime is reasonable. Using the Fee Guide amount of $93 per session, the resulting amount per year is $558. Using the *B.C. Civil Jury Instructions* multiplier of 31.0521 for a 49-year treatment period, the present value of the plaintiff's claim for physiotherapy sessions is $17,327.07.

[248] Although the plaintiff did not tender medical evidence to show that continuing physiotherapy would be necessary to manage his symptoms, the evidence establishes that he had attended physiotherapy sessions many times since the Accident and I accept the plaintiff's evidence that he benefited from them. I also accept that the plaintiff has chronic pain and that physiotherapy will continue to be of benefit to him. I find the proposed amount to be reasonable.

Counselling

[249] The plaintiff claims monthly counselling sessions for three years at the Fee Guide amount of $140 per visit for a total of $5,040.

[250] I am satisfied that this amount is necessary and reasonable.

Conclusion

[251] I award the plaintiff $30,000 in costs for future care.

In-Trust Claim

Law

[252] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, Justice D. Smith (as she then was) summarized the relevant principles to be applied in assessing an "in trust" claim as follows:

> [180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:
>
> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

Position of the parties

[253] The plaintiff seeks $10,000 as an in-trust claim for contributions that Dr. Bortolussi has made to the plaintiff's care after the Accident. He submits that Dr. Bortolussi began providing assistance to the plaintiff when they were merely friends and that her contributions went over and above what could be expected in a

friendship. Further, in the years in which the plaintiff and Dr. Bortolussi cohabited, she has continued to perform more than her fair share of household chores.

[254] The defendant submits that there is no basis for an in-trust claim as Dr. Bortolussi did not go above and beyond what was expected of a family member. Further, the defendant submits that the assistance provided must be for the plaintiff's care as a result of the plaintiff's injuries.

Discussion

[255] With respect to the period of time in which the plaintiff and Dr. Bortolussi were friends, the evidence is that after the Accident, Dr. Bortolussi assisted the plaintiff with tasks like grocery shopping and doing laundry consistently for a period of 3 to 6 months because the plaintiff was unable to perform these tasks due to his injuries. I accept that the plaintiff required assistance with such tasks on account of his injuries from the Accident. I also accept that in performing these tasks, Dr. Bortolussi went over and beyond what would ordinarily be expected in a friendship.

[256] Although there were no specific details in the evidence as to how much time Dr. Bortolussi spent on these tasks, I find that the evidence is sufficient for me to roughly quantify her contribution to the plaintiff's care during this time. Considering the nature of the tasks, I assess that Dr. Bortolussi spent approximately two hours a week performing these tasks for the plaintiff for a period of six months. Using the plaintiff's estimate of $30 per hour for housekeeping services (which I find to be a reasonable estimate), the approximate amount of Dr. Bortolussi's contribution is $1,440 ($60/ week x 24 weeks).

[257] With respect to the period of time during which the plaintiff and Dr. Bortolussi lived together, in my view, the evidence does not establish that Dr. Bortolussi's contributions went over and above what is expected from a family member, particularly in light of my previous findings regarding the plaintiff's ability to perform some household chores and the division of responsibilities between them. I decline to make an award for in-trust claim on this basis.

Conclusion

[258] In the circumstances, I award $2,000 for the plaintiff's in-trust claim.

Special Damages

Law

[259] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she 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 v. Bartsch*, 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.).

Position of the parties

[260] The plaintiff claims $8,169.17 in special damages for various expenses including for physiotherapy, massage therapy, chiropractic treatments, a prescription for anti-inflammatory cream, a heating pad, and a private MRI.

[261] The defendant says that if the Court is satisfied on a balance of probabilities that the plaintiff sustained the alleged injuries as a result of the Accident, then she agrees to an award of $7,149.17. The defendant disputes the amount of $1,020 representing the cost of a private MRI on the basis that it was not a reasonable expense as the plaintiff could have waited to have an MRI in the public health care system.

Discussion

[262] The plaintiff testified that Dr. Fisher recommended an MRI of his C-spine in an effort to diagnose the cause of the numbness in his left hand. Two weeks later, in June 2018, the plaintiff chose to receive the MRI at a private clinic.

[263] The plaintiff explained that he had previously waited 10 months in 2010 to have an MRI in the public health care system. He did not want to have to wait that

long again as he was feeling much anxiety about the numbness in his left hand, the cause of which remained a mystery despite having consulted a number of doctors.

[264] In my view, the uncertainty of the diagnosis and the importance of the plaintiff's left hand to his chosen profession created a degree of urgency in seeking an MRI. In the circumstances, I am satisfied that the cost of the private MRI is a reasonably necessary expense flowing from the Accident: *Roy-Noel v. Buckle*, 2024 BCSC 752 at paras. 145–146.

Conclusion

[265] I award $8,169.17 in special damages.

Duty to Mitigate

Law

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

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

[268] *Chiu v. Chiu,* 2002 BCCA 618 sets out the test for failure to mitigate by not pursuing recommended treatment:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably…

[269] A defendant bears the onus of proving both branches of the test on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 55 and 61.

Discussion

[270] The defendant submits that that plaintiff failed to mitigate his past income loss by failing to hire a dental assistant or to spread his work over five days. She relies on Mr. Benning's evidence during cross examination that hiring a dental assistant could lead to a reduction in the plaintiff's income loss. The defendant alleges that the plaintiff "could have reduced his losses by 32-46% or even up to 100% had the plaintiff hired a dental associate and performed hygiene appointments himself" (emphasis in the original).

[271] Further, the defendant submits that the failure of the plaintiff to spread his dental work across a five-day work week in order to incorporate more breaks between procedures instead of forcing himself to work a four-day work week and leaving the fifth day for administrative tasks, is unreasonable.

[272] I find that the defendant has not met the burden of proving on a balance of probabilities that the plaintiff acted unreasonably, or the extent to which the defendant's proposed measures would have reduced the plaintiff's loss. In my view, the measures proposed by the defendant are overly simplistic and fail to consider the overall circumstances.

[273] Hiring a dental associate is a significant endeavour and the decision as to whether to do so necessarily involves a consideration of many factors. The plaintiff testified that he did not consider hiring a dental associate to be all that profitable considering the associate's share in the billings and the related increase in overhead expenses. Dr. Bortolussi also testified that they were not in a position to hire an associate. She testified that they did not have the resources to hire and train an associate, and she did not want to deal with that "headache". She testified that she was focused on their plans to get married and to start a family.

[274] In my view, a determination of what is reasonable must take all of the circumstances into account including that the plaintiff and Dr. Bortolussi were in the early years of operating a dental clinic and that they had other priorities in their business and personal lives. In light of their respective evidence, I do not consider the plaintiff's alleged failure to hire a dental associate to be unreasonable.

[275] In any event, the defendant has not adduced detailed or persuasive evidence of the extent to which she alleges the plaintiff would have alleviated his losses by hiring an associate. I do not consider Mr. Benning's brief and general evidence on this point to be sufficient for the defendant to meet its burden of proof.

[276] I also reject the defendant's submission that the plaintiff's failure to spread his dentistry work over five days is unreasonable. It is not unreasonable for the plaintiff to dedicate a full day to focus on administrative tasks rather than doing a combination of dentistry work and administrative work each day of the week. As the plaintiff testified, this arrangement also allowed him to reduce his overhead by not requiring a dental assistant on Fridays.

Conclusion

[277] The defendant has not proven on a balance of probabilities that the plaintiff failed to mitigate his loss. There will be no reduction to the plaintiff's award for past loss of earning capacity on this basis.

SUMMARY AND DISPOSITION

[278] In summary, I have awarded the plaintiff the following:

d. $130,000 in non-pecuniary damages;

e. $15,000 in past loss of income earning capacity;

f. $1,290,000 in future loss of income earning capacity;

g. $30,000 in costs of future care;

h. $2,000 in in-trust claim; and

i. $8,169.17 in special damages.

[279] The total amount of damages is $1,475,169.17.

[280] The plaintiff is entitled to costs at Scale B.

“Laurie J.”