IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nguyen v. Elberg,*
2025 BCSC 144

Date: 20250130
Docket: M214479
Registry: Vancouver

Between:

Michael Nguyen

Plaintiff

And

Larissa Rayne Elberg and Enterprise Rent-A-Car Canada Company/ La Compagnie De Location D'Autos Enterprise Canada

Defendants

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

Counsel for Plaintiff:	M. Huot A. Estey S. Mahal, Articled Student
Counsel for Defendants:	I. Whitaker T. Chang
Place and Date of Trial:	Vancouver, B.C. September 3-6, 9 and 12, 2024
Place and Date of Judgment:	Vancouver, B.C. January 30, 2025

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INTRODUCTION

[1] This action arises out of a motor vehicle accident that occurred in Richmond on October 28, 2019 (the "Accident"). The plaintiff was driving his sister to the airport when the defendant, Ms. Elberg, failed to stop at a red light and collided with the plaintiff's vehicle as it passed through the intersection on a green light.

[2] The defendants admit liability and acknowledge that the Accident caused the plaintiff to sustain psychological and physical injuries that remain symptomatic, require further care and treatment, and have caused some past and future loss of income. The primary issues are whether the plaintiff failed to mitigate his non-pecuniary losses by not pursuing certain courses of treatment for his injuries, the plaintiff's prognosis, the extent of the plaintiff's loss of earning capacity, and his future care needs.

INJURIES AND CAUSATION

[3] At the time of the Accident, the plaintiff was 31 years old and in good health. He was a physically active person with a busy social life, regularly participating in activities with friends and colleagues. He was passionate about fitness and enjoyed hiking, dancing, recreational sports, and weight training. He liked cooking, baking, and exploring new restaurants with friends. He actively participated in usual domestic chores and home maintenance tasks, helping his parents, with whom he lived, as much as he could. He felt like he was in a very good place in his life—he enjoyed work, he had a lot of great friends and fulfilling hobbies, and he felt strong, healthy, and confident about his appearance.

[4] The Accident was relatively serious. The impact caused the plaintiff's vehicle to flip over and land on its roof in a neighbouring yard, with the plaintiff suspended upside down in his seat with his seatbelt on. A bystander helped the plaintiff and his sister climb out of the rear window of their car. An ambulance arrived and took the plaintiff to the hospital, where he remembers feeling in shock and having pain in his arm, lower back, and upper back. He was discharged from hospital that same night.

[5] In the weeks following the Accident the plaintiff's pain increased. He developed headaches and experienced dizziness and noise and light sensitivity. He had nightmares, trouble sleeping, and was anxious and depressed. He struggled with concentration, memory, and multi-tasking. He was unable to exercise and experienced noticeable changes in his body composition as a result. He felt that his symptoms started to plateau despite treatment.

[6] There is no dispute that the plaintiff's accident injuries remain symptomatic today. He has chronic daily back and neck pain and various psychological symptoms. He is no longer able to exercise or participate in recreational activities in the way he did prior to the Accident. He has regular headaches and some cognitive difficulties related to concentration and memory.

[7] In addition to the plaintiff, I heard testimony from the plaintiff's partner, his brother, and two friends. The plaintiff's brother and two friends described striking changes in the plaintiff's personality following the Accident. Before the Accident, he was vibrant, energetic, funny, and animated; now, he is muted and reserved. The plaintiff's partner, who met the plaintiff after the Accident, became emotional when describing his observations of the plaintiff's physical and psychological limitations.

Credibility and reliability

[8] The defendants do not question the credibility of the plaintiff, and do not raise any serious issue with the reliability of his evidence. That said, in chronic pain cases, the court must always be concerned with the reality of the plaintiff's complaints and must carefully assess the evidence of injury where, as here, the medical evidence is reliant on the plaintiff's self-report: *Gee v. Bock*, 2019 BCSC 1348 at para. 36; *Harry v. Powar*, 2018 BCSC 845 at para. 63.

[9] I have considered the principles relevant to assessing credibility that are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.) and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185–187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392. I find that the plaintiff

presented as genuine in his testimony. He gave straightforward answers and did not appear prone to exaggeration when describing his injuries and their effect on his life; his testimony in that regard was consistent with that of the lay witnesses.

[10] Having considered the totality of the evidence in this case, I have no concern regarding credibility or reliability of the plaintiff's or the lay witnesses' testimony. Any inconsistencies in evidence of the plaintiff's presentation and abilities after the Accident were minor and well within the range of normal and expected individual differences in perception, memory, and descriptive word choice.

Expert evidence

[11] The plaintiff and defendant each tendered evidence from two medical experts: for the plaintiff, Dr. Finlayson, a physiatrist, and Dr. Anderson, a psychiatrist; for the defendants, Dr. Sivananthan, a physiatrist, and Dr. Latimer, a psychiatrist. The plaintiff also tendered expert evidence from an economist, Mr. Pivnenko.

[12] I will address the relevant expert opinion evidence in more detail later in my reasons. However, I will address Dr. Sivananthan's evidence now, as I have decided not to rely on it in this case.

[13] It became obvious during Dr. Sivananthan's testimony that there were issues with his independent medication examination process and resulting expert report. Significantly, his opinion turned in large part on his incorrect understanding that the plaintiff did not receive in-person active rehabilitation treatment. Underlying this was that Dr. Sivananthan did not have accurate or complete knowledge of the plaintiff's treatment history, despite having been provided with relevant clinical records and having interviewed the plaintiff as part of the independent medical examination. When confronted with the fact that the plaintiff had attended six months of in-person active rehabilitation after the Accident before moving to virtual sessions due to the pandemic, Dr. Sivananthan declined to reconsider his opinion and suggested, without foundation, that the plaintiff must not have fully participated in the treatment. His evidence in that regard was not compelling and I do not accept it.

[14] I am particularly concerned by the fact that a substantive paragraph of Dr. Sivananthan's report, under the heading "Conclusions", is virtually identical to his expert report in an unrelated matter. That paragraph includes incorrect information about the plaintiff's treatment history to date. It also states that "the degree of taut bands in his neck and back are beyond what is expected", which is entirely at odds with Dr. Sivananthan's reported finding of "no areas of taut bands" during his physical examination of the plaintiff. Dr. Sivananthan's explanation that the similarities between the two reports are due to "muscle memory" in his dictation is not persuasive and I do not accept it.

[15] In the circumstances, I have significant doubt as to the reliability of Dr. Sivananthan's opinion evidence regarding the plaintiff. The defendants do not suggest that I should prefer Dr. Sivananthan's opinion over that of Dr. Finlayson. Given the above issues, I prefer the evidence of Dr. Finlayson regarding the plaintiff's physical injuries, diagnosis, and prognosis, and I give Dr. Sivananthan's opinion no weight in reaching findings about the plaintiff's injuries and prognosis.

Injuries and prognosis

[16] The parties largely agree on the plaintiff's injuries caused by the Accident. There is no dispute, and I find, that the Accident caused the plaintiff to suffer musculoskeletal injuries to his cervical, thoracic, and lumbar spine, chronic pain, headaches, and fatigue. I find that the plaintiff also suffers from moderate to severe post-traumatic stress disorder ("PTSD") caused by the Accident, a diagnosis that is accepted by the defendants and supported by the expert psychiatric evidence.

[17] There is disagreement about whether the Accident also caused the plaintiff to develop generalized anxiety disorder and major depressive disorder as distinct psychiatric conditions, as diagnosed by Dr. Anderson, or whether the plaintiff's anxiety and depression symptomology is simply part of his PTSD, as opined by Dr. Latimer. I agree with the defendants that for the purpose of assessing damages, those specific additional diagnoses matter less than the plaintiff's relevant ongoing

underlying symptoms, which are not in dispute. I find that the plaintiff experiences ongoing moderate depression and anxiety symptoms caused by the Accident.

[18] Dr. Latimer believes the cognitive difficulties experienced by the plaintiff are most likely related to his PTSD and anxiety and depression symptoms. Dr. Anderson agrees, but adds the plaintiff's pain, insomnia, and fatigue as relevant underlying factors. In any event, they are both of the opinion that the plaintiff's cognitive difficulties are caused by Accident-related factors. I find that but for the Accident, the plaintiff would not have developed the cognitive difficulties he has since experienced.

[19] Determining the plaintiff's prognosis is challenging given the interrelationship between his chronic pain and his psychiatric symptoms. Dr. Finlayson explains that "depression, anxiety, PTSD, and disrupted sleep contribute to chronic pain, and chronic pain contributes to the worsening of the psychiatric symptoms and poor sleep, such that a vicious cycle is created". I accept Dr. Finlayson's opinion that the plaintiff has potential for partial improvement in his neck and back pain with appropriate treatment interventions, but that it is unlikely that he will achieve complete elimination of pain given the length of time that has passed since the Accident. Dr. Finlayson defers to a psychiatrist regarding prognosis for the plaintiff's mental health conditions.

[20] Dr. Anderson believes the plaintiff's psychiatric prognosis is guarded and echoes Dr. Finlayson's comments regarding the interrelated nature of pain and psychiatric symptoms. He opines that the plaintiff's emotional functioning and pain-coping skills may improve with further treatment, but believes it is unlikely that he will return to his pre-Accident level of emotional functioning as long as he has ongoing pain and functional limitations. In Dr. Anderson's opinion, the plaintiff will likely remain emotionally vulnerable with ongoing related cognitive difficulties, with a risk of worsened symptoms if his physical condition deteriorates or if he is exposed to new psychosocial stressors.

[21] Dr. Latimer's prognosis is also guarded, given the length of time since the Accident and the plaintiff's resistance to pharmacotherapy. However, he believes that there is a possibility for improvement with effective treatment. In his opinion, the plaintiff will likely benefit from continued psychotherapy and medications. While Dr. Latimer states in his report that the plaintiff could have "substantial improvement" with appropriate therapy, he clarified in cross-examination that the probability of improvement is not high.

[22] The defendants acknowledge that the plaintiff's prognosis is guarded, but emphasize that "guarded" does not mean "poor" prognosis. While the plaintiff continues to have physical and psychological symptoms, his condition has improved since the Accident. The defendants argue that the plaintiff's condition will likely continue to improve, and his current condition therefore does not reflect what his ultimate level of function will be.

[23] The plaintiff was involved in a subsequent minor car accident in 2022 or 2023, as a passenger in his mother's vehicle. The defendants also urge certain findings related to this accident that are favourable to the plaintiff's prognosis—namely, that the plaintiff's lack of exacerbated anxiety and depressive symptoms after that accident is a positive sign for his future durability and function. However, on the very limited evidence before me, I am unable to make any findings about the impact of this subsequent accident on the plaintiff's prognosis.

[24] Based on the evidence of Dr. Finlayson, Dr. Anderson, and Dr. Latimer, as well as the plaintiff's evidence, I accept that the plaintiff has not likely yet reached his ultimate level of recovery. The plaintiff is motivated to improve his condition, has been diligent throughout in following physical treatment recommendations, has responded positively to his more recent psychological therapy, and is considering pharmacologic treatment for his psychological symptoms.

[25] However, as stated above, I accept Dr. Finlayson's opinion that the plaintiff is unlikely to ever return to a pain-free status. The interrelated nature of his pain and his psychiatric symptoms makes it unlikely that he will ever fully recover

from his psychiatric injuries. I find that the plaintiff will continue to suffer from chronic pain and some degree of emotional and associated cognitive impairment on a permanent basis as a result of the Accident. That said, while I accept the plaintiff's injuries are permanent—he will not return to his pre-accident condition—I find that with appropriate treatment, he will achieve some further improvement in his pain symptoms and an improved level of emotional functioning.

ASSESSMENT OF DAMAGES

Mitigation

[26] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. To establish that a plaintiff has failed to do so, the defendant has the burden of proving two elements: (1) the plaintiff acted unreasonably in not taking the steps that the defendant says ought to have been taken; and (2) the extent to which the plaintiff's loss would have been reduced had they acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[27] The defendants argue that the plaintiff's award for non-pecuniary damages should be reduced by 25% because he failed to mitigate his damages in three ways, each of which is addressed in turn below: by not attending counselling from early 2021 to fall 2023; by not taking medication for his depression; and by not doing in-person active rehabilitation in 2021.

Counselling – 2021 to 2023

[28] The plaintiff has received psychological treatment intermittently since the Accident. He finds this treatment to be beneficial in terms of improving his psychological symptoms.

[29] The plaintiff initially saw Dr. Joy for psychological treatment. Unfortunately, Dr. Joy experienced health issues in late 2020 and was unable to continue seeing the plaintiff. In February 2021, Dr. Joy recommended that the plaintiff see Dr. Le Page, Dr. Buch, or Dr. Bannerman for psychological treatment. The plaintiff's occupational therapist, Pamela Russell, was also encouraging the plaintiff to

continue treatment with someone new. In a March 2021 email, Ms. Russell advised the plaintiff that seeing a new psychologist was one of the most important things he could do for himself. She provided the plaintiff with various names, including Dr. uch and Dr. LePage. Dr. LePage indicated that she had availability in two months.

[30] With Ms. Russell's support, the plaintiff arranged an initial phone meeting with Dr. Buch in April 2021, but did not feel a rapport with him and therefore decided not to see him again. The plaintiff and Ms. Russell reached out to other psychologists in 2021, but did not hear back from anyone. The plaintiff did not receive psychological treatment in 2021 or 2022. He did not see Dr. LePage in 2021, even though she had availability.

[31] The plaintiff ultimately reached out to Dr. LePage in 2023, using the information Ms. Russell had provided in 2021. The plaintiff has received psychological treatment from Dr. LePage since September 2023, and he finds it helpful. I find, as a matter of inference, that it is probable the plaintiff would have had a similar experience had he started treatment with Dr. LePage when she first had availability in 2021.

[32] The plaintiff's psychological symptoms were significantly impacting his life from 2021 to 2023. I agree with the defendants that it was not reasonable for the plaintiff to delay psychological treatment in that period. She was available in 2021, and I find there is no reasonable explanation for why the plaintiff did not pursue treatment with her at that time—especially considering the recommendations he had received. The plaintiff suffered increased emotional distress during the period of delay, in that earlier treatment would have resulted in earlier improvement in the plaintiff's psychiatric symptoms to the same degree he has experienced since resuming treatment in 2023. His delay has postponed the trajectory for his continued recovery by two years.

Medication

[33] The plaintiff was prescribed Amitriptyline by his family doctor to help with sleep, but has never been prescribed medication to address his depression. He did not like taking Amitriptyline due to the side effects; it made him feel emotionally

numb, gave him brain fog, and left him feeling disinterested in certain things. He was worried that if he took another anti-depressant, he would lose what little moments of joy he had left in his life.

[34] After the Accident, the plaintiff's family doctor recommended that he take anti-anxiety or anti-depressant medication, but did not prescribe anything. The defendants note that Ms. Russell also recommended anti-depressants; however, Ms. Russell is not a doctor, and the plaintiff cannot be expected to have taken medical advice from her.

[35] The plaintiff prefers not to take medication. He has concerns about side-effects, as well as any unintended or unforeseen effects. He had a negative experience with the side-effects of Amitriptyline, which made him hesitant to take mood-altering medication.

[36] The plaintiff has more recently discussed medication with Dr. LePage and is willing to consider anti-depressants. He is more receptive to the idea now, because Dr. LePage took some time to explain the details of a course of anti-depressant medication to him, including available precautions and her ability to work together with his family doctor decide on a good course of medication. The plaintiff's evidence is that he has not yet made a final decision about medication, but is warming to the idea of it.

[37] The defendants say that Dr. Anderson and Dr. Latimer are each of the view that the plaintiff would have benefited from anti-depressants. Those opinions are relevant only to the question of whether the plaintiff's loss would have been reduced had he taken medication. They are not relevant to whether the plaintiff acted unreasonably in not taking anti-depressants, as the plaintiff did not have the benefit of their advice at the material time.

[38] I find that the defendants have not established that the plaintiff acted unreasonably in not taking anti-depressant medication. Dr. Latimer testified that the plaintiff has not had the benefit of proper education about anti-depressant medications. In his view, the plaintiff's decision was based on inaccurate assumptions about the medications. The defendants have not proven on a balance

of probabilities that there were steps the plaintiff should have taken, but did not, to remedy this.

[39] Dr. Latimer also testified that it was “very unfortunate” that the plaintiff’s family doctor continued to prescribe Amitriptyline, as there is very poor evidence for its use in the plaintiff’s circumstances. This is something the plaintiff could not have been expected to know without the benefit of medical advice. Dr. Latimer agreed that the plaintiff is at the mercy of his family physician and treating psychologist in terms of their recommendations for medication.

[40] I find that the evidence does not establish that plaintiff acted unreasonably in not pursuing pharmacological treatment for his psychiatric symptoms.

In-person active rehabilitation

[41] The plaintiff attended many in-person active rehabilitation sessions up until March 2020, at which point Covid restrictions meant his treatment moved to virtual appointments. The defendants do not take issue with the plaintiff only attending virtual sessions in 2020, but say he should have attended in-person active rehabilitation in 2021.

[42] Evidence of the plaintiff’s treating kinesiologist, Ms. Hinton, first suggesting a return to in-person sessions is in April 2021, when she proposed meeting outdoors for a session. The plaintiff declined because he wanted to keep his social circle small for Covid-related reasons, including that his elderly grandmother had moved into his home and he was concerned about her wellbeing. The plaintiff’s evidence is that he was very cognizant of Covid-related health precautions and was concerned about the increased risk of serious complications or death from Covid for someone his grandmother’s age.

[43] In July 2021, Ms. Russell recommended the plaintiff see Ms. Hinton at least once per week in person. Thereafter, Ms. Hinton continued to ask the plaintiff to meet in person, and offered to take various precautionary measures to reduce the risk of Covid transmission. The plaintiff continued to decline to meet in person in 2021, preferring virtual sessions.

[44] I find it was reasonable for the plaintiff to decline in-person sessions in 2021. I accept that he was very cautious about the risks posed by Covid. The reasonableness of his degree of caution cannot be judged in hindsight, but must be assessed based on the information available to him at the time. I find it was reasonable throughout 2021, given the still developing state of public knowledge about Covid and its transmission and the plaintiff's own personal circumstances, for the plaintiff to decide that in-person active rehabilitation sessions, even outdoors, posed too great a health risk to him and his family. Dr. Finlayson's testimony that in-person kinesiology is ideal and optimal, and that it was reasonable for Ms. Russell and Ms. Hinton to recommend in-person treatment in 2021, is not of assistance in determining the reasonableness of the plaintiff's decision to continue only with virtual treatment.

[45] I acknowledge that the plaintiff was meeting people in person for employment-related reasons in late 2021 and he attended training at Herschel in person in early 2022, despite online attendance being an available option. I consider it reasonable that the plaintiff would prioritize in-person attendance for employment matters over active rehabilitation, given the negative impact of his injuries on his career at that point and his pre-existing knowledge of and familiarity with physical movement and exercise.

[46] In any event, I am not satisfied that the defendants have proven the extent to which plaintiff's loss would have been reduced had he agreed to in-person sessions.

[47] To the extent Dr. Sivananthan opines on the impact of the plaintiff's return to in-person active rehabilitation, I place no weight on his evidence for the reasons given above. Ms. Hinton testified that, had she met the plaintiff in person, she would have been able to watch his gait and give him some hands-on assistance, which could have potentially been helpful. The fact that in-person active rehabilitation could potentially have helped does not meet the threshold for reducing an award for failure to mitigate: *Gregory* at para. 58. Similarly, Dr. Finlayson's testimony that in-person treatment is ideal and was a reasonable recommendation does not meet the threshold: *Gregory* at para. 58.

Conclusion — mitigation

[48] Given the above findings, I conclude a small reduction to the plaintiff's non-pecuniary damages award is warranted to account only for his failure to see a psychologist or counsellor 2021 to 2023, and specifically for the corresponding delay in improvement to his psychiatric symptoms and postponed delay of his recovery in that regard. The period of delay, during which the plaintiff suffered to an unnecessarily high degree, is relatively short as compared to the total time period that non-pecuniary damages are meant to provide compensation for. In the circumstances, I conclude that a 5% reduction to the plaintiff's non-pecuniary damages award is appropriate.

Non-pecuniary damages

[49] The purpose of non-pecuniary damages is to compensate the plaintiff to the date of trial and into the future for pain, suffering, loss of enjoyment of life, and loss of amenities. Comparable cases are helpful, but each case depends on its own unique facts. In assessing the plaintiff's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45–46, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100.

[50] The plaintiff was 31 years old, healthy, and active before the Accident, with a busy and personally fulfilling social and recreational life. His chronic pain and psychiatric symptoms have resulted in a drastic lifestyle change. The plaintiff is unable to participate in the hobbies and recreational activities that he previously enjoyed. He was proud of his physique and fitness level before the Accident; now, his body is deconditioned and his physical activity is restricted to walking and light yoga. His relationships with family, friends, and his partner have been negatively impacted to a significant degree by his change in personality. He can no longer be the fun uncle to his brother's children. He is less able to contribute toward domestic and home maintenance tasks, both for himself and in support of his parents. He has been forced to reconsider his life and career goals.

[51] While I have found that the plaintiff will more likely than not experience improvement in his symptoms, he will suffer from some degree of chronic pain and psychological impairment for the rest of his life and is unlikely to ever return to his pre-Accident condition and lifestyle.

[52] The plaintiff says the appropriate quantum for non-pecuniary damages is $250,000 and relies on the following cases: *Steinlauf v. Deol,* 2021 BCSC 1118; *Moen v. Grantham*, 2024 BCSC 937; *Gabor v. Boilard*, 2015 BCSC 1724; and *Bhatti v. Ethier*, 2018 BCSC 1779.

[53] The defendants rely on the following cases and propose an award of $140,000 (before any reduction for failure to mitigate): *Leung v. Draper*, 2020 BCSC 219; *Resendiz v. D'Alessandro*, 2017 BCSC 1274; *Parhar v. Clarke*, 2017 BCSC 550; and *S.Y.L. v. C.M.S.*, 2022 BCSC 572.

[54] I find that the circumstances in the cases relied on by the plaintiff are not entirely comparable to his situation. The degree of injury, impairment, and life impact on the plaintiffs in those cases are somewhat more significant. However, the plaintiffs' circumstances in the cases relied on by the defendants are overall less severe than those of the plaintiff in this case. Taking into consideration all of the plaintiff's circumstances, and in particular his relatively young age, the chronic and permanent nature of his condition, the complexity of his inter-related chronic pain and psychiatric diagnoses, and the extent to which his life has been altered, and allowing for some further improvement in his symptoms before they plateau, I find that $200,000 for non-pecuniary damages is a fair and reasonable award.

[55] The plaintiff's total non-pecuniary damages award, in light of his failure to mitigate by seeking earlier treatment for his psychiatric injuries, is $190,000 ($200,000 reduced by 5%).

Past and future loss of earning capacity

[56] The same test applies to the assessment of both past and future loss of earning capacity; the plaintiff must establish a real and substantial possibility of loss

of earning capacity: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 46, 48. Compensation is for the lost capacity, not the actual loss of income: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19. The defendants accept there has been some degree of past loss of capacity, but not to the extent alleged by the plaintiff. The defendants also concede there is a real and substantial possibility of future loss of capacity; as such, the only issue is valuing that possible loss: *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421.

[57] Assessing the plaintiff's loss of earning capacity involves comparing the plaintiff's hypothetical career path absent the Accident with his actual and prospective career path with the Accident. The following facts are relevant to this analysis and established by the evidence.

[58] As a child, the plaintiff spent a lot of time working on his father's commercial fishing vessel. He worked at the Steveston Harbour Authority ("SHA") the summer after graduating from high school, before starting studies at the University of British Columbia, Faculty of Science that fall. The plaintiff continued to work at SHA as a part-time operations patrol officer throughout university. He graduated with a Bachelor of Science degree in Earth and Ocean Sciences in 2011. His job at SHA then became full-time and he continued to work there until 2017, when he was passed over for a supervisor position. At that time, the plaintiff decided to take some time off work to travel and contemplate next steps in his career.

[59] The plaintiff liked working in the fishing industry and thought his skills would be transferable to a position with the Vancouver Port Authority, or as a fisheries officer with the federal government. He looked into the job requirements for a fisheries officer, but did not pursue it any further because a friend approached him about a job opportunity in operations at The Lazy Gourmet catering company. The plaintiff was curious to learn more about the food industry; he joined The Lazy Gourmet as an operations dispatcher and planned to take two years to learn as much as he could. At the time of the Accident, the plaintiff was still employed in that role and considering his future career path.

[60] The plaintiff never returned to his job at The Lazy Gourmet after the Accident. It was a physical, fast-paced job, and his post-accident physical injuries and cognitive symptoms meant he was no longer capable of doing it. He was off work until January 2022, when he started an entry level position as an accounts receivable coordinator for Herschel Supply Co. Canada. He has done well in the role and received a positive performance review and wage increase in 2023. He has a flexible work environment that accommodates his physical restrictions. He enjoys the job and has not looked elsewhere for different employment.

[61] The plaintiff says that absent the Accident, he had no limits on his capacity to work and was poised to pursue a career in any number of fields. He emphasizes that the Accident occurred at a time in his working life when he was still building his career. Instead, his injuries took him out of the workforce for two years, and when he returned to work, it was to an entry-level administrative job that pays less on an inflation-adjusted basis than what he earned before the Accident, even with the significant raise he received in 2023.

[62] While the impact of Covid on the catering industry in 2020 may well have led him to move on to different employment, the plaintiff says his past and future income would have gradually increased annually in whatever job he moved to. He says there is a real and substantial possibility that he would have either continued at The Lazy Gourmet with promotions and pay increases, or, if he changed jobs, kept pace with the average earnings of a person with education and work experience comparable to his.

[63] The plaintiff says his injuries mean that physical jobs are no longer available to him and sedentary jobs will be less lucrative because he cannot pursue the education or work to the degree required for promotion. He says he is more vulnerable to injury and aggravations of his depression and anxiety that will impact his employment capacity. The plaintiff says these limitations mean his current annual income is anywhere from $23,000 to $59,000 less than it should be. He emphasizes that the difference in income over the course of his working career is substantial,

and submits that $100,000 is a fair assessment of his past loss of earning capacity and $900,000 is a conservative award for his future loss of capacity.

[64] The defendants say that the plaintiff's analysis bears no relationship to the reality of the plaintiff's pre-Accident employment history and his likely without-Accident employment future. They emphasize that the plaintiff's earnings have historically been lower than average for someone similarly situated. The defendants argue that the plaintiff is currently where he would have been in his career, earnings-wise, absent the Accident.

[65] I accept the plaintiff's evidence that while he enjoyed working as an operations dispatcher at The Lazy Gourmet, he viewed the position as a stepping stone in his career and did not plan to remain in it indefinitely. While he was happy at The Lazy Gourmet and was not actively engaged in a job search at the time of the Accident, he wanted to eventually increase his responsibilities and income, whether that was at The Lazy Gourmet or with another employer.

[66] However, while the plaintiff knew that he wanted to move into a higher paying role, he had no established plan of how he might accomplish that at the time of the Accident, and had taken no concrete steps in that regard. Applying the real and substantial possibility standard, I find that had the Accident not occurred, the plaintiff would have still been employed in his existing role at The Lazy Gourmet until March 2020, continuing to contemplate his career options.

[67] There is no evidence before me as to whether the plaintiff's specific role at The Lazy Gourmet was impacted by the pandemic, and, if it was, for how long. However, there is evidence of the general negative impact of Covid on the food service industry and I find there is a real and substantial possibility the plaintiff would have lost his job in March 2020, at least temporarily, due to the pandemic. I do not accept the plaintiff's suggestion that this would have prompted him to immediately make a career move. He liked working at The Lazy Gourmet and he had contemplated advancing his career there. There was initially no reason to think that the pandemic would last as long as it did.

[68] As Covid restrictions stretched from weeks into months, I accept that the plaintiff may well have been prompted to more seriously consider his future career, especially if The Lazy Gourmet had laid him off. However, the evidence does not establish a real and substantial possibility that he would have been able to successfully make a career change at that time. There is no evidence about the types of jobs that might have been available to the plaintiff, or even the state of the job market more generally, after March 2020. I also find that the plaintiff's very cautious approach to Covid risk exposure would have negatively impacted any motivation to embark on a new job search in 2020 and 2021.

[69] I am satisfied there is a real and substantial possibility that by late 2021, the plaintiff either would have returned to full-time work at The Lazy Gourmet, or would have found a new job that aligned with his education, work experience, and interests. Thereafter, I find he likely would have had a renewed focus on advancing to a position of increased responsibility and income—by then, he was in a serious long-term romantic relationship and was more seriously contemplating his future with his partner, including their financial goals. I accept that he had the necessary skill, ability, and work ethic to eventually advance to higher paying positions, whether he remained at The Lazy Gourmet or changed jobs.

[70] However, I consider the plaintiff's position about how quickly his career would have progressed to be unrealistically optimistic. He could not have expected to immediately be in the same position as his peers when his career progression and salary up to that point had not kept pace with theirs.

[71] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. In the circumstances and considering my findings, I prefer the defendants' approach to quantifying the plaintiff's past loss, with two qualifications. I determine it is appropriate to use with-inflation numbers, and I consider their proposed 50% reduction to account for negative contingencies in the period March 2020 to December 2021 to be too high. While I consider it appropriate

to apply a negative contingency to allow for the possibility of pandemic-related unemployment, I must also consider positive contingencies, such as the possibility that the plaintiff would have remained employed at The Lazy Gourmet, or that unemployment would have forced a job search and resulted in the plaintiff finding a new, higher-paying job in that period. I consider 25% to be a more appropriate reduction for the period in question.

[72] With those two qualifications, adopting the defendants' valuation methodology, I determine that $34,000 is a fair and reasonable assessment of the plaintiff's past loss of income earning capacity.

[73] Turning to the plaintiff's future loss of capacity, the parties propose the capital asset approach. I agree that is the appropriate method for valuing the plaintiff's loss, given the uncertainty regarding his career at the time of Accident. The plaintiff proposes an assessment that is grounded in evidence about his current employment position and salary. I agree this is the best approach given the factual and mathematical anchors available to me in the evidence: see *Palolos v. Cinnamon-Lopez,* 2016 BCSC 81 at para. 133, citing *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37.

[74] I find that, without the Accident, the plaintiff would have had the capacity to earn at least the average income of someone with his education in the occupational category he is working in now. I accept that the plaintiff's injuries will have a permanent negative impact on his earning potential. However, given my findings regarding his prognosis, I find that he will have the motivation and capacity to advance to some degree at his current workplace or in a comparable sedentary job as his condition improves, although not to his full without-Accident potential.

[75] The plaintiff emphasizes that he currently earns just 62% of the average income of an accounting clerk his age with a bachelor's degree. I do not find this helpful in establishing a baseline for his expected future loss, because the evidence does not reveal whether the plaintiff's lower salary is unique to him, or whether all employees in his workplace are paid below market.

[76] That said, I do consider the present value of a percentage loss per year, applied against the plaintiff's expected annual income, to be a useful method for assigning a dollar value to the plaintiff's loss of capacity to earn income in this case: see *Deegan v. L'Heureux,* 2023 BCCA 159 at para. 84, citing *Pallos v. Insurance Company of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 43. I find that with the plaintiff's expected improvement but permanent impairment, 75% of full without-Accident capacity is a reasonable estimate of his future earning potential as an accounting clerk. Relying on the opinion evidence of Mr. Pivnenko and assuming the plaintiff will work at 75% earning capacity as an accounting clerk, the present value of his loss of future earnings and non-wage benefits is $590,500.

[77] I consider it appropriate to reduce that figure by 25% to account for the plaintiff's well-established pre-Accident history of earning less than the average income for someone of his educational background. However, I decline to make a further downward adjustment for other contingencies identified by the defendants, as I consider them to be offset. In particular, while it is possible that the plaintiff might ultimately be able to work to 100% capacity despite his chronic conditions, he might also not improve to the extent expected, and the cumulative impact of his chronic injuries over the years might ultimately require a reduction to part-time work or early retirement.

[78] In the result, I find that $443,000 is a reasonable and fair award to compensate the plaintiff for his future loss of earning capacity. It appropriately reflects his permanent loss of capacity to earn income over the many years remaining until he turns 65, both in his current field and as an employee more generally.

Cost of future care

[79] The test for assessing future care costs is whether the costs are reasonable and whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62, citing *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (B.C.S.C.), aff'd 49 B.C.L.R. (2d) 99, 1987 Carswell BC 450 (B.C.C.A.). The award

should reflect a reasonable expectation of what is required to put a plaintiff in the position they would have been in but for the accident. The assessment is an objective one, based on the evidence, and must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[80] The plaintiff seeks future care costs of $100,000 (present value) over his lifetime, consisting of cognitive behavioural therapy ("CBT"), active rehabilitation sessions with a kinesiologist, and medication costs. The defendants do not take issue with the medical necessity of the plaintiff receiving these treatments, but dispute the extent claimed.

[81] Dr. Anderson recommends the plaintiff attend 25 to 30 CBT sessions before reassessing the need for further treatment. In his opinion, the plaintiff may require long-term supportive therapy of eight to twelve sessions a year, depending on his response to the initial series of sessions. Dr. Latimer agrees that CBT is indicated, but does not opine on the frequency or duration of treatment. Given the uncertainty around the need for long-term therapy, the evidence does not establish that CBT will be medically necessary over the plaintiff's lifetime. I consider the defendant's proposal for 30 initial sessions, followed by annual sessions for a further ten years, to be reasonable. While the defendants suggest eight sessions a year will be required, I consider it appropriate to use the midpoint of the range suggested by Dr. Anderson. I therefore award the plaintiff $25,340 for CBT therapy, consisting of 30 initial CBT sessions ($6,570) and the present value of a further ten annual sessions for ten years commencing in 2026, using the multipliers provided by Mr. Pivnenko, rounded up to the nearest $10 ($18,770).

[82] Turning to active rehabilitation, the defendants' proposal that this treatment be limited to 26 sessions has no basis in the medical evidence. I accept Dr. Finlayson's opinion that the plaintiff requires weekly active rehabilitation sessions for six months, followed by eight to ten maintenance sessions with a kinesiologist annually for the foreseeable future. While the plaintiff has a good grasp of how to exercise on his own, Dr. Finlayson opines that he requires regular ongoing

maintenance sessions to ensure his exercise program progresses appropriately and to help him maintain adherence. While Dr. Finlayson does not suggest an end date, I consider it reasonable to assume treatment will not be required past the usual expected age of retirement. I award the plaintiff $18,610 for active rehabilitation treatment, consisting of weekly sessions for six months ($2,310) and the present value of nine sessions per year commencing in 2026 and ending at age 65, using the multipliers provided by Mr. Pivnenko, rounded up to the nearest $10 ($16,300).

[83] Finally, the plaintiff claims $200 per year over his life expectancy for each of the medications he currently takes: naproxen, amitriptyline, and cyclobenzaprine. He seeks $18,000 as the present value of this claim. The difficulty with the plaintiff's position is that the evidence does not establish that his current dosage of medication is medically necessary or recommended over his lifetime. As the plaintiff's symptoms improve with treatment, his need for pain medication should decrease. However, the defendants' submission that the plaintiff only requires four years of pain medication also has no basis in the evidence, and is not reasonable given the chronic and permanent nature of his injuries. In the circumstances and making the best assessment I can given the state of the evidence, I consider $5,000 a fair and reasonable allowance for the plaintiff's future medication costs.

[84] To summarize, I award the plaintiff $48,950 for cost of future care, consisting of: cognitive behavioral therapy ($25,340); active rehabilitation ($18,610); and medication costs ($5,000).

Special damages

[85] The defendants agree to pay the plaintiff's claimed special damages. I therefore award special damages in the amount of $845, as sought by the plaintiff.

SUMMARY

[86] In summary, I assess and award the plaintiff's damages as follows:

Non-pecuniary damages (*$200,000, reduced by 5%*)	$190,000.00
Past loss of income	$34,000.00
Loss of future earning capacity	$443,000.00
Cost of future care	$48,950.00
Special damages (*by agreement*)	$845.00

[87] As the successful party, the plaintiff is presumptively entitled to his costs from the defendants, at Scale B. If any party seeks an alternative costs order, they have leave to request a further hearing before me within 30 days of the date of this judgment. In those circumstances, each party must provide a written argument to the other parties and to the Court at least seven days before the hearing date.

"Ramsay J."