IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rickards v. Turre,*
2023 BCSC 439

Date: 20230324
Docket: M214172
Registry: New Westminster

Between:

Austin Rickards

Plaintiff

And:

Satinder Turre

Defendant

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for Plaintiff:	C. Dyson M. Habib
Counsel for Defendant:	R.S. Atwal S. Aulakh, Articled Student
Place and Dates of Trial:	New Westminster, B.C. November 21-25, 2022
Place and Date of Judgment:	New Westminster, B.C. March 24, 2023

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INTRODUCTION

[1] The plaintiff Austin Rickards seeks damages for injuries he suffered as a pedestrian when he was struck by a motor vehicle driven by the defendant Satinder Turre. Liability for the accident is in issue.

[2] Mr. Rickards was 12 years old at the time of the accident, and is 23 now. His main injury was a lateral tibial plateau fracture of the left leg. The plateau is the top of the tibia, and forms part of the bottom of the knee. Mr. Rickards claims three sequelae from the fracture: chronic knee pain with certain activities; depression and anxiety; and weight gain. The defendant does not dispute the immediate effects of the fracture, but alleges that the sequelae claimed were not caused by the accident, but by other pre- and post-accident conditions and events. Further, that Mr. Rickards has failed to mitigate his damages.

LIABILITY FOR THE ACCIDENT

[3] The accident took place in the late morning of December 22, 2011, at the intersection of 116th St. and 80th Ave. in Delta, B.C. The intersection is controlled by vehicle traffic lights and pedestrian activated lights. The day was clear. The accident occurred as Mr. Rickards was walking north across 80th Ave. in the marked crosswalk on the east side of the intersection. Mr. Turre was travelling in his vehicle south on 116th St., and attempted to make a left turn eastward onto 80th Ave., when his vehicle struck Mr. Rickards.

[4] Mr. Rickards testified that when he got to the intersection, he pushed both pedestrian crossing buttons to go either north or west. He was stopped there for a number of seconds. The pedestrian light for northbound signaled he could cross. He looked both ways, and walked four or five steps and was still in the eastbound lane of 80th Ave. when he was hit. He did not see the car before then. He fell onto the hood of the car as it stopped and then he rolled onto the street.

[5] Mr. Turre is now 36. He testified that he was waiting at the intersection about 10 seconds. There were two cars in front of him waiting to make left turns. The light

turned green, those cars turned, and then he waited for a car proceeding north to pass. He proceeded to make his left turn. He saw Mr. Rickards when he was about five feet in front of his car. Mr. Rickards was not running. The middle hood of his car struck Mr. Rickards. He was able to apply his brakes slightly before impact.

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[6] Users of a highway have a common law duty to exercise due care for others and themselves in all of the circumstances. The statutory provisions of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*], are not a complete code: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21. The *MVA* supplements the common law duty to exercise due care: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 21, citing *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194 (C.A.).

[7] Sections 127(1) and 132(1) of the *MVA* provide:

> 127(1) When a green light alone is exhibited at an intersection by a traffic control signal,
>
> (a) the driver of a vehicle facing the green light
>
> …
>
> (ii) must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited, and…
>
> 132(1) When the word "walk" or an outline of a walking person is exhibited at an intersection by a pedestrian traffic control signal, a pedestrian may proceed across the roadway in the direction of the signal in a marked or unmarked crosswalk and has the right of way over all vehicles in the intersection or any adjacent crosswalk.

[8] Both parties referred to sections 179 and 181 of the *MVA*. Section 179 provides that a pedestrian “must not leave a curb or other place of safety” and enter the path of a vehicle where it “is so close it is impracticable for the driver to yield the right of way”. Section 181 provides that the driver must observe proper precaution on observing a child on a highway.

[9] A pedestrian who has the right of way is entitled to assume that a motorist will obey the law and yield the right of way until the pedestrian knows or ought to have, that the motorist is not going to grant the right of way, in which case, the pedestrian’s obligation is to avoid injury to himself or herself, supersedes any right to exercise the

right of way: *Feng v. Graham* 1988, 25 B.C.L.R (2d) 116, 1988 CanLII 3044 (C.A.) at para. 10; *Suedat v. Kara*, 2014 BCSC 1837 at paras. 16–18.

[10] I accept Mr. Rickards' evidence that he entered a marked crosswalk on a walk signal and that he was walking. He had the statutory right of way. I find that Mr. Turre failed to drive with the care required. Mr. Rickards was there to be seen. Mr. Turre failed to see Mr. Rickards in time to yield to him. I find that Mr. Turre breached the standard of care required of him, and caused the accident.

[11] There was no reason for Mr. Rickards to have suspected that Mr. Turre would not yield the right of way. Had Mr. Rickards seen Mr. Turre's car, he would have seen it stopped or slowed at the intersection to let the northbound vehicle pass. There is no evidence that Mr. Rickards left the curb and walked into the path of the car that was so close it was impracticable for Mr. Turre to yield the right of way. I find that Mr. Rickards was not contributorily negligent. Mr. Turre is 100% responsible for the accident.

CAUSATION AND DAMAGES

Mr. Rickards' Evidence

Pre-accident

[12] Mr. Rickards' parents separated when he was about six years old. He and his younger brother lived half time with each parent. His parents' separation was "toxic" and remained so for years, both before and after the accident.

[13] He was diagnosed with attention deficit disorder ("ADD") at age seven. At age nine he was prescribed a drug called Concerta for the ADD, and a couple of months after this, he developed mood swings and anger and started to harm himself by hitting his head on the wall and choking himself. This lasted until shortly after he stopped taking Concerta about a year later, and then resolved at age 10. In the year before the accident, his mood was good and he felt no depression or anxiety.

[14] He was regularly bullied at school from Grade 5 to Grade 9. Mr. Rickards testified that it did not affect him much. He was also regularly bullied in his father's

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home by his brother and father. This started from the time his brother was very young and continued for years after the accident. This made Mr. Rickards sad, but he still loved his brother and father, and he knew they loved him. Mr. Rickards coped by being with friends, focusing on school, and playing games at home. He also square danced once per week, an activity which he loved.

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[15] Mr. Rickards testified that prior to the accident he was a "little overweight, but healthy". He did not have a problem with binge eating.

Post-accident

Physical Injuries

[16] After the accident he was taken to hospital where he was x-rayed and discharged. The pain at his left knee was excruciating for the first day or two. His leg was wrapped in a tensor bandage and he was told not to walk on it. He had pain on his left shin which did not last long, but there is a numb patch about six inches in diameter, which has persisted. Despite that it is numb, if he hits his shin on something, it is painful. He had cuts on his elbows which took about two weeks to heal. He has a one-inch scar on his left elbow. He had right leg pain that resolved. The remaining events and pain, discussed below, all refer to the left knee.

[17] Mr. Rickards described a slow incomplete recovery. By the end of two weeks he had a knee brace and could weight bear without crutches. For about two weeks, he needed assistance to get in and out of the bathtub shower, dressed, in and out of a car, and to climb stairs. He wore a knee brace for some months. Initially he had a constant dull knee pain that would flare with climbing stairs and overuse. By the end of 2012, the pain was no longer constant, but he got pain climbing stairs, lifting more than 20 pounds, and with prolonged walking and crouching. The pain was sharp from the back to front of his knee with use. With repetitive use this became a dull ache that lasted until he could sit down and recover. Some activities, such as physical education, were limited because of the pain. He had to stop square dancing, but rejoined it in the autumn for the 2012/2013 season. The dancing caused knee pain, so he stopped after the season ended. This was a difficult

decision because he liked to dance with friends. There was an improvement, but not resolution, of his symptoms in 2014 and 2015 which Mr. Rickards attributes to not doing activities that caused pain. Since 2015 there has not been any improvement.

[18] In the autumn of 2016, Mr. Rickards and his mother started going to a gym. Mr. Rickards was becoming increasingly heavier and he needed to lose weight. In January 2017, his mother hired a personal trainer to help him. After this, Mr. Rickards and his mother attended the gym regularly until the summer of 2017. Mr. Rickards lost 45 pounds. The workouts caused knee pain by the end of the session. In mid-2017, his mother stopped going to the gym, so Mr. Rickards did too.

[19] Mr. Rickards graduated high school in 2017. In the fall, he started a two-year film acting diploma program at New Image College. He graduated in September 2019. He had a one-day acting role in a full-length movie in Grade 12. Since then, he has tried to get an acting job. He has an agent but has not yet received a role, other than in October 2021, he was an actor in a haunted house in the evenings.

[20] Mr. Rickards rejoined square dancing for the 2017/18 season. He missed it. He quit at the end of the season because it caused pain. This made him sad.

[21] Currently, his knee pain is better in the warmer months, and worse in the colder months. He gets knee pain lifting heavy objects, and walking for more than 45 minutes in warm months, and 15-20 minutes in cold months. Walking uphill is worse because it puts more pressure on his knee. He gets the same sharp pain from back to front. If he walks too long, that pain stays for the duration of the walk, and when he stops becomes a dull ache. Climbing stairs causes the sharp pain about half way up the stairs, but it will only last for a minute. Standing for 30 minutes without rest causes pain. In the last three months, he has had knee pain at least two times per week. He still gets a dull ache, lasting a few hours, one to two times per week.

[22] Mr. Rickards has not exercised at a gym since the summer of 2017. He has no plans to return because of the pain and his work schedule. He walks with friends one to two times per week for 45 minutes to two hours, and occasionally swims. He

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was taught exercises to build up muscles, but he does not do them. Mr. Rickards agreed he has never been prescribed pain medication for his knee.

Employment

[23] Starting at age 16, Mr. Rickards had a number of part-time jobs while he attended high school and college. All of these except one caused knee pain. These were as a sunflower harvester (summer 2015), janitor (summer 2016), painting company salesman and painter (summer of 2017, which he quit two weeks early because his employer would not accommodate him to not climb ladders), and bussing at Las Margaritas Restaurant (for eight months starting in October 2017). He quit Las Margaritas because of the pain and soon after obtained a job at the Lucky Horse Chinese Restaurant serving customers and occasionally driving. This is easier work. Mr. Rickards continues to date to work one shift per week at Lucky Horse. Mr. Rickards next worked as a driver moving rental vehicles (June to December 2018), and then as a sales clerk (summer 2019) which did not cause pain as it was mostly behind a desk. Mr. Rickards was let go from this job because the sales were done on a computer system he was "not keen on working" and had difficulty learning.

[24] Since September 2019, Mr. Rickards has been employed full time as a parts delivery driver at Lordco, an auto parts company. Once a day he has difficulty lifting heavy objects. If no one is present to help, he does it himself, and then takes a minute or two to recover from the sharp pain in his knee. At the start of his shift he does not have knee pain, but if he does enough during the day, his knee will remain sore after work for a few hours. Sometimes he is anxious driving.

[25] Mr. Rickards plans to continue with his position at Lordco if he does not get roles as an actor. He has not applied for any other position at Lordco because many involve computer skills and he does not feel he has those skills at this time. He agreed he has used computers his whole life "to the extent [he] can". He uses apps on his phone, and types and edits videos on his computer. He had classes in high school and college which required computer use. He has not taken any computer

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training and “feels it would be very difficult” for him to learn. He does not have the “time or assets to do that” right now.

Psychiatric Conditions

[26] Mr. Rickards testified that he has had depression and anxiety since the accident. It has fluctuated, but it has never gone away. About two weeks following the accident he was feeling very sad, and it became constant. He attributes this to not being able to do activities. He sat at home with depressing thoughts that he was missing out, that people would judge him for being hit by a car, and perceive him as lazy. About a year after the accident, the severity eased, but it never resolved. He attributes the improvement to being able to do more activities.

[27] The bullying at school and home continued after the accident. The bullying from his brother became worse. His brother bullied him about his weight and his sexuality. Mr. Rickards came out as bisexual on his 16th birthday. This did not affect his mood, but his brother’s conduct toward him did.

[28] Before he started attending the gym in 2016-2017, he had more instances of depressive episodes on top of his baseline depression. He had thoughts of self-harm and suicide. In the spring of 2018, he and his then girlfriend of three months broke up. This caused Mr. Rickards sadness for about two months.

[29] In 2019, Mr. Rickards decided he needed to get help. In April 2019, he spoke to a GP, Dr. Arshad, and subsequently attended six free sessions with a counsellor. In October 2019, he attended a psychiatrist, Dr. Jabbar. In direct examination, when asked if there were any particular stressors in the one year prior to seeing Dr. Jabbar, Mr. Rickards said he was stressed by the pain at the painting job and Las Margaritas and, as he was starting post-secondary, about what he was going to do after. I note that he worked at the painting job more than two years before, and had stopped working at Las Margaritas in the spring of 2018.

[30] The history recorded by Dr. Arshad, in April 2019, includes:

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> Concerned about mood issues, dxed with anxiety and depression in childhood. Never got treated.
>
> Restarted having symptoms again 6 months ago. Reports feeling low and anxious, not suicidal.
>
> …
>
> Says he was bullied in school that continued til age 16, also says his younger brother harasses him often.

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[31] In cross-examination, Mr. Rickards said he was never diagnosed with anxiety and depression in childhood or prior to attending Dr. Arshad. He agreed he told Dr. Arshad that for six months he had mood issues, but denied that there was any time prior where he did not have depressive symptoms. He agreed that he told Dr. Arshad that he was bullied in school and his brother harassed him often. Dr. Arshad prescribed an anti-depressant. Mr. Rickards denied he did not take the medication as prescribed. It did not help much.

[32] Dr. Jabbar's detailed consultation report includes:

> History of Presenting Complaint:
>
> Austin reports that he has suffered from anxiety and depression intermittently since age 10. At age 7 he was diagnosed with ADD. Apparently this was around the time when his parents were splitting up and he began to experience mood swings, rage, depression and anxiety and prescribed Concerta which he took for 1-2 years. He said that he felt this was the wrong medication and he had marked worsening of mood swings as well as self-harm thoughts where he was banging his head or choking himself. Austin reported that he felt quite depressed in high school, especially during the time of graduation. However, for the last two years, especially around age 16, when there lots of difficult psychosocial stressors happening at home and school and he became more depressed. In Grade 12 he lost around 40 lbs of weight due to his self-restricting of food as a way of coping.
>
> … He reported eating an excessive amount of carbs, mainly as a comfort food, as well as feeling lazy to cook for himself. He also has been working on a part time job at a Chinese restaurant and says that he also eats take-aways from there. In the last two years he has gained 85 lbs of weight.
>
> Past Psychiatric History:
>
> As noted above. Diagnosis of ADD at age 7. Treatment with Concerta which he did not tolerate well. Multiple psychosocial stressors and subsequent mood lability in the context of parents divorce. He has had previously harmed himself by banging his head or choking himself as a youth, especially when he was under stress.

[33] In cross-examination, Mr. Rickards agreed he told Dr. Jabbar the above history, with the following exceptions. He denied that he reported that he suffered from anxiety and depression intermittently since age 10. He said he reported that he was “very happy” at the time, and that he took Concerta which caused him to have symptoms, and when he stopped taking Concerta, he was happy again. He denied multiple psychosocial stressors in the context of his parents’ divorce. He agreed he was more depressed in high school around age 16, but denied there were multiple psychosocial stressors at home and school. However, he agreed he told Dr. Jabbar about his parents’ “toxic relationship” and that they still do not get along, the difficult relationship with his brother, his weight gain, coming out at age 16, and his break-up with his girlfriend, and may have told Dr. Jabbar about his debts.

[34] With respect to the accident, Dr. Jabbar reported:

> Of note, he has been involved in 2-3 motor vehicle accidents. Apparently at age 12 he was involved a motor vehicle accident when he was hit by a car and this resulted in knee injury. Austin reports that he still experiences memories and reminders of the accident at age 12 although infrequently. No history of head injury.

[35] Mr. Rickards agreed he gave this history to Dr. Jabbar regarding the accident and that it was true and what he felt at the time.

[36] Dr. Jabbar diagnosed:

> 1. This is a 20-year-old gentleman, who presents with a history of major depressive disorder (current episode, moderate depressive) and anxiety spectrum symptoms since age 10, with a recent worsening of his mood symptoms in the last few months. He seemed to have initial response to Citalopram but unfortunately discontinued it and this resulted in some decompensation in his mood.
>
> There is also a history of being involved in a motor vehicle accident at age 12 and subsequent some PTSD symptoms, No history of head injury.

[37] Mr. Rickards agreed that Dr. Jabbar prescribed a different antidepressant, and recommended healthy eating, regular exercise and self-care. She gave Mr. Rickards educational material and recommended cognitive behavioural therapy (“CBT”) and advised him to follow up with mental health services.

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[38] Mr. Rickards does not recall seeing another psychiatrist after the one attendance with Dr. Jabbar. He did not implement Dr. Jabbar's recommendations of healthy eating, diet and exercise. He tried calling several times over the next two to three months to schedule a visit for counselling "but it did not line up with my hours".

[39] Mr. Rickards was off work from Lordco for four months in 2021 after he was reprimanded for being tardy and "not getting certain jobs done". His depression and anxiety immediately got worse, and he took a medical leave. After two months, his depression returned to its baseline level, and there has been no change since. He was tardy because of his depression. He was having a hard time getting out of bed on time. Mr. Rickards subsequently transferred to another location of Lordco, and is not tardy there, but is still depressed.

[40] In August 2022, Mr. Rickards became engaged to be married. His mood improved for about two weeks. Mr. Rickards owes money to family members and has student loans, but he makes enough money to pay his debts.

[41] At present, Mr. Rickards feels depressed and anxious. He spends a "great deal of time, almost daily" thinking negative thoughts about himself, and cancelling plans with friends. He is currently taking an anti-depressant, Bupropion and another drug, Naltrexone (to curb appetite). They improve his mood, but do not cure it. He has not had any change in his ADD since before the accident.

[42] Mr. Rickards also described anxiety specifically with respect to traffic. He was initially anxious as a pedestrian in busy traffic. He is now anxious driving if something unexpected happens. This happens once every two days, lasting five to 10 minutes, but it does not affect his ability to drive, and he intends to continue his job as a full-time driver.

Weight

[43] Mr. Rickards testified that starting in Grade 8, he ate large amounts of food, past the point of being full, and at multiple meals per day. It continues to the present. Over the years he has been advised by many doctors to diet and exercise. He has

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tried on multiple occasions with little success. When he exercised in 2017 he lost some weight, but gained it back. He has thought of restarting a gym regime but has no present plans to do so.

Recreation/Living Situation

[44] Mr. Rickards currently lives in a two-level townhouse with his mother and fiancé. All three share household chores. Mr. Rickards does the laundry, vacuuming, sweeping, maintenance of the patio, and tidying of his room. He walks their dog occasionally. Doing this for more than 15 minutes causes knee pain. Raking and bending down to bag leaves causes knee pain.

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Ms. Jackie Storms' Evidence

[45] Ms. Storms is Mr. Rickards' mother. Since Mr. Rickards was in pre-school, teachers had asked for him to be assessed. After a long period of assessments, Mr. Rickards was diagnosed with ADD at age 10. Prior to the diagnosis, he was happy and outgoing, but could not concentrate. In early 2010, Mr. Rickards was prescribed Concerta for the ADD. The dosage was increased, and then he started hitting himself, and saying that he hated himself and wanted to die, that no one liked him, and he didn't want to go to school. Ms. Storms was advised to taper off and stop the Concerta. That took about six months. After Mr. Rickards was off the Concerta, he went back to his usual happy self, and was active, and had a paper route and did chores. He was put on a different drug, Vyvanse, for the ADD.

[46] For the first month after the accident, she helped Mr. Rickards dress, bathe, get in and out of the car, and go up and down stairs. He eventually started to do all the things he did before the accident. She took him to follow-up appointments, initially about a once a week and decreasing in frequency over time. There is a claim for the time she had to take off of work for this. She also took him to 25 to 30 physiotherapy appointments in the evenings.

[47] Ms. Storms testified that Mr. Rickards' brother "was quite resentful and started treating [Mr. Rickards] pretty badly" she thinks because he thought too much attention was being paid to Mr. Rickards. It was really hard for her to parent. She

said, "That led to counselling for us all." She got counselling as a single parent. She got sibling counselling for both of the children. The three of them got family counselling so she could learn how to make the children like each other. There was "two years full counselling" with her children, and she had counselling for longer after that. She agreed that prior to the accident, Mr. Rickards was being bullied and that Mr. Rickards was upset and cried about this.

[48] After the accident, Mr. Rickards became "pretty quiet". When she drove with him, he was anxious. He did not want to go out anymore, was sad, and kept to himself. He maintained one friend from before the accident. He could not do the things he did before. He began crying two or three times per week. It became serious when he was in Grade 9 or 10. She tried to get him to do things, but he would say he did not want to. He was struggling and there was a bully at school. As the years have passed, he is still sad and cries. She said he "just keeps struggling … with liking himself". His mood got worse for a period starting in the fall of 2018 and then he started living solely with her. After that, his mood seemed not as bad, but then in 2019 or 2020 it got bad again. He didn't want to get out of bed or go to work, or he would come home from work and go to bed. She can tell just by looking at his face how he is feeling, and "90% of the time it is not a good day". She talks to him, and they try to find comfort in their faith. Occasionally she still has to encourage him to get up in the morning. He is up five minutes before he needs to leave, and his self-care is not good. He is not motivated to do things.

[49] Prior to the accident, she did not have any concerns about his weight. Mr. Rickards was always "a little bit bigger" and "at the top of the chart". He was at the "95th or 105th percentile", but no doctor had told her that he should "be on a program". She agreed that the diet in her ex-husband's house was a source of disagreement, and her ex-husband is obese.

[50] After the accident Mr. Rickards gained weight, but it was slow in the first couple of years. Because she saw him every day, she did not notice it that much. When Mr. Rickards was about 14, she thought something had to be done.

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Mr. Rickards was out of breath walking, and going up stairs. She took him to a doctor and he was 100 pounds heavier than he had been three years earlier. His weight kept increasing. In 2016, Ms. Storms invited Mr. Rickards to join her at a gym because he was gaining weight rapidly. Mr. Rickards did not go consistently. He was struggling to use the equipment, so in January 2017, she hired a personal trainer for him. Mr. Rickards did not like going, but she pushed him to go. They went regularly until she was injured in mid-2017. Mr. Rickards has kept gaining weight. They curtail things they do together because of his weight. He is out of breath climbing stairs. He can only walk one and a half blocks. He has trouble getting in and out of a car.

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[51] She has assisted him because of his knee pain. When he was working at Las Margaritas, she picked him up from the bus stop because he was too sore to walk home. She will get him an ice pack or help him up the stairs. She parks in visitor parking so he can park in the carport space. She sometimes helps him with chores. She does not drive with him often, but has noticed that he is "overly cautious".

Ms. Roberta Bradbeer's Evidence

[52] From 2006 to 2014, Ms. Bradbeer and her family were the neighbours of Ms. Storms, and her two sons. Their families were "very close". She described Mr. Rickards before the accident as a "great kid to have in the house". He was there once every one to two weeks. He was polite, helpful, energetic, and laughed and talked a lot. She observed Mr. Rickards and his brother playing in their front yard with other children. After the accident, Mr. Rickards did not socialize as much and there was not as much boisterous interaction. He seemed to be by himself a lot and didn't seem as happy. He was "definitely slower" and sometimes she saw him limping. Mr. Rickards had "always been a robust boy", but after the accident, he started putting on weight. She noticed this in the summer of 2012.

Mr. Christopher Bott's Evidence

[53] The defendant called Mr. Bott, who is Mr. Rickards' former manager at Lordco. After Mr. Rickards was hired, Lordco did a review which was promising, other than Mr. Rickards was tardy almost every day, and he would "just stop for

lunch whenever he wanted”. Customers complained about delivery times. Mr. Bott had many conversations with Mr. Rickards and finally had to reprimand him. Mr. Rickards had a variety of excuses for being late. Mr. Rickards took a four-month medical leave of absence. Mr. Bott said Lordco has never laid off an employee, and he tries to help them by accommodating their needs.

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Expert Evidence

Dr. Rui Zhang

[54] Dr. Zhang is a physiatrist and was qualified as an expert in that area. She assessed Mr. Rickards on one occasion on February 26, 2021 at the request of Mr. Rickards’ counsel, and provided a report of the same date.

[55] Dr. Zhang’s diagnoses were: a history of a left tibial plateau fracture and a grade 2, left medial collateral ligament (“MCL”) strain; left knee post-traumatic osteoarthritis causing pain; left patellofemoral pain syndrome (pain around the knee cap); an organized hematoma and sensory nerve damage in an area on the shin; and mild driving anxiety. These were all caused or contributed to by the accident.

[56] Because of the fracture, Mr. Rickards is at increased risk of developing osteoarthritis in the knee. Obesity is also risk factor for osteoarthritis in major weight bearing joints. Although Mr. Rickards has pre-existing risk factors for osteoarthritis and patellofemoral pain syndrome (obesity, and flat feet which change the dynamics of the knee), the accident “significantly contributed” to the development of these conditions. The accident also probably contributed to the development of his morbid obesity because of his inability to engage in more physical activity. Binge eating behaviour and genetic factors also likely contributed to his obesity.

[57] Dr. Zhang was cross-examined that the imaging of the knee did not show any osteoarthritis. I note here that the imaging she reviewed was from January 2012, less than a month following the accident. Dr. Zhang disagreed that there needed to be x-ray evidence of osteoarthritis before a diagnosis could be made, stating it is

"not the most important piece of information". At an early stage, osteoarthritis may not be seen on imaging. Mr. Rickards likely has early osteoarthritis.

[58] Dr. Zhang opined that complete resolution of Mr. Rickards' symptoms is unlikely although it is possible to reduce the severity of his current symptoms if he receives and participates in treatment with ongoing self-management. Given his body habitus, there is also a significant chance that his left knee pain may continue getting worse over time since it is a major weight-bearing joint.

[59] Dr. Zhang made a number of recommendations to improve Mr. Rickards' condition. These include weight loss, exercise, and CBT.

Dr. Paul Devlin

[60] Dr. Devlin is a psychiatrist and was qualified as an expert in that area. He assessed Mr. Rickards on one occasion on January 12, 2022 at the request of Mr. Rickards' counsel, and provided a report dated August 20, 2022.

[61] Dr. Devlin opined that Mr. Rickards suffers from major depression and somatic symptom disorder, both "directly caused" by the accident. He opined that Mr. Rickards' prognosis was poor, but that CBT would be "extremely useful".

[62] With respect to the major depression, Dr. Devlin opined that it was "secondary to a major underlying cause, which in this case is chronic pain" and, "I conclude this because there were no such injuries prior to the index motor vehicle accident".

[63] With respect to the somatic symptom disorder (the criteria of which includes excessive thoughts or behaviours related to somatic symptoms, in this case the chronic pain), Dr. Devlin opined:

> I believe that Mr. Rickards' pain, although variable, <u>is mostly of moderate intensity and can be more severe on occasion, leading to considerable lack of capability to do even basic things</u> and certainly leading to a significant impairment in his ability to plan activities, including anything physical. …
>
> <u>Headaches are also a significant problem</u>.
>
> [Emphasis added.]

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[64] Dr. Devlin opined that Mr. Rickards' current treatment for depression was "clearly deficient". Mr. Rickards' previous attempts at using antidepressants had failed. Mr. Rickards told him that he only took the anti-depressant for 15 to 20 days because he had suicidal ideation when he took it. Dr. Devlin recommended another antidepressant. As Mr. Rickards was also "drastically deconditioned", he recommended treatment by a kinesiologist, 20 to 30 sessions of CBT, and attendance at a pain clinic.

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[65] With respect to his earlier life, Dr. Devlin reported that:

> Mr. Rickards was apparently diagnosed earlier in his life with attention-deficit/hyperactivity disorder (ADHD) and was put on naltrexone and bupropion, medications to control his binge eating and depression. Mr. Rickards was previously on Concerta at the age of 10 and then on Vyvanse for approximately five years off and on until the age of 15. At that point he was tapered off, and "I did okay".
>
> …
>
> I note a mental health assessment at the age of 20 on October 8, 2019, by the psychiatrist Dr. Jabbar. Dr. Jabbar noted an ADHD diagnosis from the age of 7 and depression and anxiety "ever since," which was worsened by the index motor vehicle accident. Dr. Jabbar also noted the separation of Mr. Rickards' parents and the development of self-harming thoughts when he was placed on an antidepressant.
>
> [Emphasis added.]

[66] I note that this history is not supported by the evidence. The Pharmanet records do not show that Mr. Rickards filled a prescription for naltrexone (to control eating), or bupropion (an antidepressant) when he was diagnosed with ADD. More importantly, Dr. Jabbar did not state that Mr. Rickards' depression "was worsened by the index motor vehicle accident". Dr. Jabbar noted depression and anxiety worsening with Concerta (which Dr. Devlin stated was a stimulant) prescribed for ADD. Dr. Jabbar diagnosed a history of major depressive disorder and anxiety spectrum symptoms since age 10, with a recent worsening of his mood symptoms in the last few months.

[67] Dr. Devlin said he had no reason to disagree with Dr. Jabbar's report that Mr. Rickards' reported depression and anxiety since prior to the accident. Dr. Devlin

acknowledged that Dr. Jabbar's consultation report contained a history which detailed other stressors in Mr. Rickards' life. When asked if there was a reason why those stressors were not included in his report, Dr. Devlin stated that he was "focusing primarily on the accident, and what that caused in terms of emotional disturbance".

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[68] Dr. Devlin said that Mr. Rickards' living circumstances at the time of the accident, with two feuding parents who had a toxic relationship, would have influenced how Mr. Rickards' reacted to the accident. Another factor is that Mr. Rickards was given "an antidepressant", and although rare, children have developed suicidal ideation from antidepressants, which Mr. Rickards apparently did, and which resulted in the discontinuance of the medication. There is no evidence Mr. Rickards was prescribed an antidepressant prior to the accident.

[69] Dr. Devlin agreed that in between the accident and Dr. Jabbar's assessment eight years later, it is likely there were multiple other "perpetuating factors". This included the problems in Mr. Rickards' family life, binge eating and poor diet, weight gain of 200 pounds, and bullying if it happened. Mr. Rickards did not tell Dr. Devlin about being bullied at home, although Mr. Rickards "alluded" to be bullying at school. Financial stress, coming out as bisexual at age 16, and a break up with a girlfriend, could also cause stress. Mr. Rickards did not tell him about these. Dr. Devlin said "all these other factors are unquestionably compounding components, but the initial problem I believe was caused by the accident".

[70] When put to Dr. Devlin that low confidence and self-esteem, were pre-existing the accident, Dr. Devlin stated:

> I can't say that. I think it was much worsened by accident. <u>I think he was relatively healthy up until the time of the accident</u>. Then the problems with his knee, pain, lack of orthopaedic resolution of that problem, he appears frankly to have slipped between the cracks at that point. He has gone on for a number of years dealing with the pain, lack of motivation, no energy, dietary problems, binge eating, ADD, dealing with a difficult brother, perhaps a difficult father, and a toxic parental relationship - <u>that is a lot of stress</u>.
>
> [Emphasis added.]

[71] Dr. Devlin agreed there is nothing in his report describing Mr. Rickards' emotional or mental state immediately prior to the accident. When it was put to him that in order to conclude that the accident caused or was the onset of the depression, he would have to know Mr. Rickards' baseline immediately prior to the accident, Dr. Devlin stated:

> It's a point - but the point is he was 11 when this happened, his parents broke up when he was 6, it was a very unsettled time where he went from home to home, money was tight, and its not hard to imagine that there was a significant degree of emotional stress during that period of time.

[72] Dr. Devlin stated in his report that Mr. Rickards estimated his weight to be 400 pounds and that he had gained about 200 pounds, that he is "quite anxious" when driving, and he is now only a "part-time weekend driver". Mr. Rickards did not tell him he was a full-time delivery driver, and that he also was employed as a transport driver in a previous job.

[73] In his report, Dr. Devlin also stated that:

> Mr. Rickards has been on his own, having moved in with his grandparents at the age of 15 and out of their household since the age of 17. He completed grade 12. He initially left school and attended Sprott Shaw College and is now working at an online job.

Dr. Devlin said that if he was told that none of the above was true, it would not affect his diagnosis. He thought the acting course Mr. Rickards took was short, and not two years. He agreed that Dr. Jabbar's report gives a different history, but he said he had not read Dr. Jabbar's report at the time he interviewed Mr. Rickards.

Dr. Simon Horlick

[74] Dr. Horlick is an orthopaedic surgeon and was qualified as an expert in that area. His practice focuses on lower limb injuries with emphasis on knees. He assessed Mr. Rickards on one occasion on August 12, 2022 at the request of defence counsel, and provided a report of the same date.

[75] Dr. Horlick opined that the accident caused the lateral tibial plateau fracture and MCL sprain in the left knee, and the areas of contusion and abrasion that have

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resolved. There was a residual area of altered sensation of about two to three centimetres circumference on the shin.

[76] Dr. Horlick described his examination of the knee which he summarized as “devoid of any measures of physical impairment”. The patella tracked centrally through full range of motion. There was no crepitus which could be indicative of osteoarthritis. He agreed that his physical examination, which took about 15 minutes, was not intended to replicate conditions of employment or stamina. He did not find signs Mr. Rickards was exaggerating his symptoms. If Mr. Rickards had told him he had difficulties going up stairs, it possibly could be significant.

[77] Dr. Horlick opined that on the basis of the history he obtained and his physical examination, Mr. Rickards does not have any findings suggestive of “significant sequelae” from the accident, however to “absolutely rule out the possibility of post-traumatic osteoarthritis”, Mr. Rickards needs to have appropriate x-rays of the left knee with comparison views to the right knee. There is no other way to state “with certainty” whether he has post-traumatic osteoarthritis. I note the x-rays provided to Dr. Horlick were the same as those provided to Dr. Zhang, being from January 2012.

[78] He expects imaging will be normal. If so, Mr. Rickards’ prognosis is highly favorable, and there are no vocational or recreational restrictions, now or in the future. Should there be some evidence of post-traumatic arthritis, then other measures and recommendations will be required. Possible treatments could be injections, or surgery, including knee replacement, which likely would be successful.

[79] Dr. Horlick agreed that one of the potential complications of a tibial plateau fracture is osteoarthritis. There is a possibility that Mr. Rickards already has post-traumatic osteoarthritis in the left knee, and if he does not, there is a risk it could develop in the future. However, at 10 years post-accident if there is no objective evidence of osteoarthritis then the risk is no different than if he never had a fracture. He disagreed that if Mr. Rickards has had chronic pain for more than 10 years, he is unlikely to recover. He agreed that chronic pain and depressed mood can amplify each other.

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[80] Mr. Rickards weighed 395 pounds. It is "imperative" that Mr. Rickards lose weight. Mr. Rickards' weight puts him at increased risk for development of osteoarthritis in all his major weight-bearing joints, independently of any trauma sustained from the accident. Mr. Rickards' morbid obesity is likely contributing to some of his intermittent knee complaints.

[81] Dr. Horlick recommended the assistance of a dietician, a psychologist, a physiotherapist who can instruct him on appropriate low-impact exercises to improve overall fitness, and a kinesiologist so he can be instructed on effective weight training and cardiovascular exercises that he can do on this own.

Dr. Eugene Okorie

[82] Dr. Okorie is a psychiatrist and was qualified as an expert in that area. He did not assess Mr. Rickards but conducted a review of medical records, and at the request of defence counsel provided a report dated September 28, 2022, responding to Dr. Devlin's report.

[83] Dr. Okorie agreed with Dr. Devlin's opinion that Mr. Rickards' ongoing symptoms satisfy the diagnostic criteria for a major depressive disorder.

[84] Mr. Rickards' self-reported history and medical records show that he had depression and anxiety before and after the accident. Dr. Jabbar's consultation report indicates that Mr. Rickards developed months-long worsening of depression. As this history does not suggest that Mr. Rickards had remained depressed since the accident, he disagrees with Dr. Devlin that Mr. Rickards' current depressive episode can be attributed to the accident. Potential causes for the current depressive episode include financial stress, unhappiness with his career, morbid obesity and related binge eating, sedentary lifestyle, and possible sleep apnea. Dr. Okorie agrees that the accident is one contributing cause of Mr. Rickards' depression, but it is not the only cause.

[85] Dr. Okorie disagrees with Dr. Devlin's diagnosis of somatic symptom disorder. He states that Dr. Devlin "seemed to suggest that chronic left knee pain, a medical

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condition is synonymous with somatic symptom disorder, which is a psychological disorder”. To have this disorder, a patient would need to have excessive preoccupation about the seriousness of their condition (in this case pain), persistently high anxiety about their pain, or devotion of excessive time and energy to their pain, disproportionate in relation to the trigger. Dr. Devlin did not establish in his report that Mr. Rickards had that level of disordered relationship. Neither Dr. Zhang nor Dr. Horlick characterized Mr. Rickards’ pain complaints or related functional limitations as excessive or unreasonable. Anxiety by itself is not abnormal.

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[86] Dr. Okorie agrees with Dr. Devlin’s recommendations of an anti-depressant, CBT, and a multidisciplinary pain clinic referral. As obesity affects Mr. Rickards’ physical and mental health, he agreed with Dr. Horlick that Mr. Rickards would benefit from a multi-disciplinary weight management program. Some of those clinics are publicly funded, and other are private. Mr. Rickards has not received optimal treatments for his mood and weight issues and these treatment recommendations are likely to help him. He disagrees with Dr. Devlin that Mr. Rickards’ prognosis for improvement is poor.

[87] He agreed chronic pain can trigger depression and anxiety, and depression and anxiety can enhance chronic pain. If a person has an episode of depression or anxiety, that person is at increased risk and more vulnerable to developing depression or anxiety in the future. Weight gain could be a symptom of depression.

[88] Dr. Okorie agreed his review was limited by the information he was given. To obtain the most accurate psychiatric assessment, it is best to interview the patient.

Causation and Assessment of Damages Principles

[89] A plaintiff bears the burden of establishing causation on a balance of probabilities. That is, a defendant’s tortious conduct in whole or in part, caused the accident, and the injuries the plaintiff suffered in the accident caused or contributed to the loss for which the damages are claimed: *Smith v. Knudsen*, 2004 BCCA 613 at para. 26; *Grewal v. Naumann*, 2017 BCCA 158 at para. 45.

[90] The basic test for causation is the “but for” test: *Clements v. Clements*, 2012 SCC 32. A plaintiff must establish that but for the defendant’s tortious act, the injury would not have occurred. A plaintiff is not required to establish that the defendant’s tortious act was the sole cause of the injuries so long as it is part of the cause beyond *de minimus*: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at paras. 13–17, 1996 CanLII 183.

[91] The basic principle of assessment of damages is that a plaintiff is entitled to be put in the position he or she would have been in had the tortious act not taken place: *Athey* at para. 32.

[77] In *Blackwater v. Plint*, 2005 SCC 58, the Court discussed the difference between causation and the assessment of damages in tort:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether “but for” the defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities. 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*. …

[92] Tortfeasors must take a plaintiff as he or she is, even if the injuries are more severe than would otherwise be expected because of a pre-existing condition (the “thin skull” rule). But tortfeasors are not responsible for the consequences of a pre-existing condition that the plaintiff would have experienced in any event (the “crumbling skull” rule): *Athey* at paras. 34–35; *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 24–28; *Dornan v. Silva*, 2021 BCCA 228 at para. 44.

[93] If there is a “measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award”: *Athey* at para. 35. Such a situation necessarily concerns a hypothetical event, which will be

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taken into consideration in the assessment of damages, as long as it is real and substantial possibility and not mere speculation: *Dornan* at para. 63.

Findings of Fact

[94] In assessing the credibility and reliability of evidence, I am guided by the factors and approach in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296, leave to appeal to the SCC ref'd, 35006 (7 March 2013). This includes: the ability and opportunity of a witness to observe events; whether the witness' evidence is consistent or inconsistent with other independent evidence; whether the witness changes his or her evidence or has said something different on a previous occasion; whether the evidence seems reasonable or unlikely; any motive to shade evidence or lie; and demeanor. Ultimately, the Court considers whether the "evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time".

[95] I generally accept Mr. Rickards' and Ms. Storms' evidence as to Mr. Rickards' current physical and mental state. Mr. Rickards did not appear to exaggerate his current condition, and no expert suggested that there were signs that he was doing so. Nor did I form any impression from his testimony that he was unduly focused on his knee pain. Ms. Storms' heartache and concern for her son's condition, particularly his mental health and weight, was sincere and palpable.

[96] However, as I will discuss below, I have less confidence in the reliability of Mr. Rickards' and Ms. Storms' evidence regarding Mr. Rickards' emotional state and weight before the accident, and Mr. Rickards' attribution of most if not all, of his subsequent psychiatric condition and weight gain to the accident.

[97] I accept Ms. Bradbeer's evidence to the extent she observed Mr. Rickards, but in my view, she had limited knowledge of what was taking place in Mr. Rickards' life. She did not indicate that she had any awareness that Mr. Rickards suffered bullying, of his diagnosis of ADD, or of the events surrounding the Concerta.

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[98] I turn first to the physical injuries. I find that the accident caused Mr. Rickards to suffer the fracture, an MCL injury which has healed, some scrapes and bruises to his elbows and shins, and a small residual area of numbness on his shin which is painful if bumped. Mr. Rickards now has chronic intermittent left knee pain with ascending stairs, lifting heavy items, crouching, and prolonged standing or walking.

[99] Dr. Zhang and Dr. Horlick differ on whether Mr. Rickards presently has osteo-arthritis in the left knee, but both agree he is at increased risk because of the fracture and his weight. Dr. Zhang states that x-rays are not required to diagnose osteoarthritis; whereas Dr. Horlick states that they are. Unfortunately, neither physician had current imaging. Dr. Horlick opines that a diagnosis cannot be made "with certainty" unless there are x-rays. Mr. Rickards is not required to prove osteoarthritis with certainty, but on a balance of probabilities. Dr. Horlick acknowledged the possibility that Mr. Rickards does have osteoarthritis already. I conclude he thought there was sufficient possibility of it being present to indicate that imaging should be done. Dr. Zhang also opined that an element of Mr. Rickards' pain is from patellofemoral pain syndrome. Dr. Horlick did not express disagreement with this diagnosis. I have also considered that despite the other potential contributing causes of Mr. Rickards' left knee pain (obesity and flat feet), Mr. Rickards did not report ongoing symptoms in his right knee, yet his right knee would be equally affected by those factors.

[100] I conclude that on a balance of probabilities, that Mr. Rickards' does have early osteoarthritis and patellofemoral pain syndrome caused by injuries in the accident. There is a real and substantial possibility that the pain may become worse in the future, particularly if he does not lose weight. I also find that if the accident had not occurred, there is a very likely real and substantial possibility that Mr. Rickards would not have had knee pain until now, but there would have been a lesser, but still real and substantial possibility of him developing osteoarthritis in his knees in the future because of his weight.

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[101] I turn next to psychiatric injuries. Mr. Rickards and Ms. Storms described a serious psychiatric disturbance temporally related to the Concerta prior to the accident, and both acknowledged significant stressors in Mr. Rickards' life before and after the accident. However, both said Mr. Rickards was happy in the year prior to the accident, and Mr. Rickards attributed his subsequent psychiatric condition to the accident.

[102] Ms. Storms only once implied a causal connection between the accident and any emotional disturbance. It speaks to the concerns regarding the reliability of her evidence regarding Mr. Rickards' pre-accident condition, and also shows the difficult circumstances in the home. Ms. Storms stated that because she had to assist Mr. Rickards after the accident, she thinks that led her other son to resent Mr. Rickards, and the whole family had to go to counselling for two full years. That is completely at odds with Mr. Rickards' evidence which was of long-standing bullying by his brother prior to the accident. This was a leg fracture. It did not require prolonged or excessive care from Ms. Storms. I accept there was counselling, but clearly there were issues in the homes that had been present for years prior to the accident. Ms. Storms' may have perceived some causal link, but I do not accept it as consistent with the probabilities of the situation, and it points to the unlikelihood that Mr. Rickards was happy prior to the accident.

[103] Turning to Mr. Rickards' evidence, he did not testify at all about the counselling Ms. Storms said took place for two years, which is concerning. More importantly, in the only two clinical records in evidence, Mr. Rickards made statements to two treating physicians (Dr. Arshad and Dr. Jabbar) which are inconsistent in material ways with his evidence at trial. In *Edmondson v. Payer*, 2011 BCSC 118 at paras. 29–36, the Court warned that caution must be exercised when reviewing clinical records as they are subjective notes recording what the declarant is saying, and are not intended to be verbatim indications of what was said. I have reviewed the records with that caution in mind.

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[104] Mr. Rickards denied that he told Dr. Jabbar that he had intermittent depression and anxiety since age 10. He said he told her that he was "very happy" before the accident. He agreed he reported multiple stressors that were in existence before and after the accident. However, in testimony he minimized their effect. Mr. Rickards testified very specifically that the onset of the depression was two weeks following the accident, and its subsequent severity related to his inability to do activities. However, what he reported to Dr. Jabbar was that he had a knee injury and some infrequent memories and reminders of the accident.

[105] It is not in dispute that Mr. Rickards suffered a serious psychiatric disturbance lasting for at least some months, during the time he was prescribed Concerta. I accept that he improved after the Concerta was discontinued. However, I do not accept as reliable his evidence that he was "very happy" prior to the accident, and to the effect that all of the other stressors in his life were minimally affecting him. Dr. Devlin and Dr. Okorie opined that these were significant stressors, and as Dr. Devlin opined, "its not hard to imagine that there was a significant degree of emotional stress during that period of time". Dr. Okorie opined Mr. Rickards' self-reported history and medical records show that he had depression and anxiety before the accident. I conclude that Mr. Rickards' pre-accident condition was that he had suffered an episode of depression around the time of the Concerta, he continued to have at least intermittent depressive and anxious feelings, was subject to significant stressors which were contributing to his condition (and which continued after the accident and worsened), and that he was not generally "happy". Further, while I accept Mr. Rickards' evidence that the accident contributed to his depression and anxiety, I do not accept his evidence to the effect that it was the main cause.

[106] Turning to the expert evidence on causation, I do not accept Dr. Devlin's opinion in his written report that Mr. Rickards' depression was "directly caused" by the accident and that the depression is "secondary to a major underlying cause" being the chronic pain. Nor do I accept that Mr. Rickards suffers from somatic symptom disorder. Dr. Devlin's opinion was undermined considerably in cross-examination. Dr. Devlin's written report is based on assumed facts and a history that

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are not consistent with the evidence at trial and the facts I find. However, as I will discuss, there are parts of Dr. Devlin's testimony which I do accept.

[107] Dr. Devlin stated in his report that Mr. Rickards had chronic pain even at rest, worse with exertion, mostly moderate to severe, and which prevented him from doing "even basic things". He referred to headaches being a problem. This was not Mr. Rickards' evidence at trial. Dr. Devlin did not explain how Mr. Rickards had a disproportionate or excessive focus on his pain. I did not have any sense of that from Mr. Rickards' testimony. Neither Dr. Zhang nor Dr. Horlick suggested that Mr. Rickards was exaggerating his complaints, or that there was not an actual or possible physical basis for them. I have found that there is a physical basis, being early osteoarthritis and patellofemoral pain syndrome.

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[108] Dr. Devlin misinterpreted Dr. Jabbar as stating that the accident worsened the depression and anxiety. Dr. Jabbar did not say that. Dr. Devlin's written report appears to have given no weight to, or at least does not explain, how he resolved Mr. Rickards' history to Dr. Jabbar or Dr. Arshad. Dr. Devlin assumed Mr. Rickards was healthy before the accident. Dr. Devlin's written report does not discuss the other significant stressors in Mr. Rickards' life. Dr. Devlin said he did not get that history from Mr. Rickards, but he did have Dr. Jabbar's report, which he read after he interviewed Mr. Rickards. He did not qualify his opinion until cross-examination, when he agreed there were multiple other stressors both before and after the accident that were contributing. However, he still maintained that the accident was the primary cause of the depression. The evidence I have accepted does not support that.

[109] I also do not accept Dr. Okorie's opinion that because Mr. Rickards reported an exacerbation of his depressive symptoms for the months preceding his attendance with Dr. Jabbar, that his current episode of depression is not causally related to the accident. Dr. Jabbar's report does not indicate any clear break, but intermittent depression and anxiety since age 10, and a worsening of symptoms in

the six months prior to seeing her. The assumption underlying this opinion of Dr. Okorie is not supported by the evidence at trial.

[110] I accept both Dr. Devlin’s opinion (in testimony) and Dr. Okorie’s opinion that there were multiple stressors in Mr. Rickards’ life before and after the accident and that these contributed to his depression and anxiety. These include: his parents’ toxic separation which continued for years; the continued bullying at home and school for years; the traumatic events of the Concerta reaction; his diet and pre-existing weight problems and possible eating disorder; the accident including the chronic pain and decreased ability to do some activities; his coming out at age 16; and the break-up with a girlfriend, although I accept Mr. Rickard’s evidence that the latter was not that traumatic. I further accept Dr. Devlin’s and Dr. Okorie’s opinions that a previous episode of depression and anxiety creates an increased risk of episodes in the future and of greater susceptibility to stressors.

[111] Considering all of the above, I find that Mr. Rickards has not proved on a balance of probabilities that the accident was the primary cause of his depression and anxiety symptoms nor that it was likely that he would not have suffered from depression and anxiety absent the accident. However, he has proved that the accident was a small contributing cause. I find that there is a real and substantial possibility that the accident injuries will continue to do so in the future. I find that if the accident had not occurred, there was a measurable risk (a very likely real and substantial possibility of about 80%), that Mr. Rickards’ would have suffered from depression and anxiety symptoms after to the present and in the future.

[112] I turn next to Mr. Rickards’ weight. There is no contemporaneous record documenting Mr. Rickards’ weight at the time of the accident, but doing the math from various reports of his weight in evidence, I conclude that it was about 200 pounds. I find that Mr. Rickards and Ms. Storms minimized his weight at that time. The fact that Ms. Storms said he was at the “95th or 105th percentile” leads me to conclude that Mr. Rickards’ weight was the subject of discussion with a doctor or at least her own research at the time. There was no evidence that Mr. Rickards was unusually tall for a 12-year old. He is five feet, 10 inches as an adult and reported

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that he stopped growing at age 18. I conclude if Mr. Rickards was at the "top of the charts", he was significantly overweight. Mr. Rickards is about 400 pounds now.

[113] I find that the accident injuries were a small contributing cause, and which likely exacerbated the severity of his pre-existing weight issues in a small way due to the limits on his exercise because of the chronic intermittent knee pain and the accident's contribution to his psychiatric condition. I find that there is a real and substantial possibility that the accident injuries will continue to contribute in the future. I find that if the accident had not occurred, there was a measurable risk (a very likely real and substantial possibility of about 90%), that Mr. Rickards would have continued to be overweight to the present and into the future.

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<u>Mitigation of Damages</u>

[114] A plaintiff has a duty to mitigate damages. A plaintiff can only claim damages in respect of losses that he or she could not have avoided by taking reasonable measures, including undergoing treatment to alleviate or cure the injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. A defendant has the burden of establishing that a plaintiff acted unreasonably in not following a certain course of conduct, and that damages would have been reduced if the plaintiff followed that course: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The burden is on a balance of probabilities: *Huag v. Funk*, 2023 BCCA 110 at paras. 72–76. It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

[115] The defendant submits that Mr. Rickards has failed to mitigate and seeks a 25% reduction in damages. The defendant argues that: based on the receipts which have been produced, Mr. Rickards only attended two physiotherapy sessions in the first four years after the accident, and less than twenty sessions in total; he failed to follow his physiotherapist's advice to do home exercises; and he failed to follow the advice of multiple physicians to lose weight and exercise.

[116] I find that the defendant has not established that Mr. Rickards failed to mitigate. Ms. Storms' evidence, which I accept on this point, is that she did take him

to more physiotherapy sessions, but she did not have the receipts for all of them. These were sessions more than 10 years ago. More importantly, there is no evidence from any expert that further physiotherapy would have prevented the osteoarthritis or knee pain, and if so, what amount of physiotherapy would have prevented it.

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[117] I further find that in the circumstances of this case, that the defendant has not established that Mr. Rickards has failed to mitigate by failing to diet and exercise. By all expert opinions, losing weight and exercise will help Mr. Rickards. It will reduce the risk of worsening osteoarthritis and may improve his mental health. However, I do not find Mr. Rickards has acted unreasonably. Mr. Rickards was only 12, and living in difficult family circumstances. At that age, he likely had little control over the meals served in the family homes, and the arranging of physiotherapy or an exercise program. Ms. Storms agreed that the diet in his father's home was a source of disagreement. Mr. Rickards was also dealing with multiple other stressors. That is a lot for a 12-year-old, and it is not reasonable to expect him to overcome all of this and embark on this difficult task on his own. As a teenager, he did accept help from his mother and lose weight when they attended a gym, but that did not last because of unrelated events. It is significant that Mr. Rickards needed the guiding hand and encouragement of his mother to achieve weight loss and fitness, and I find that is likely because of his mental health struggles. Since then, the evidence indicates that Mr. Rickards has been worse mentally, and I do not find it is reasonable to expect someone in that position, with a major depressive disorder, to have the ability to embark upon and consistently follow a program that will be difficult even with assistance. Mr. Rickards testified that he has tried to diet and exercise multiple times, but has failed. Mr. Rickards needs structured professional help to get onto a diet and exercise program.

Non-pecuniary Damages

[118] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The amount does not depend solely upon the seriousness of the injury, but upon the Court's assessment

of loss and its ability to provide solace and ameliorate the condition of the plaintiff in his or her particular circumstances. While awards in other cases provide guidance, each case must be determined on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. A list of factors to consider in determining awards is set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. Those include the: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.

[119] Mr. Rickards seeks general damages in the amount of $160,000. The defendant submits that non-pecuniary damages should be $75,000 to $90,000.

[120] Counsel referred to the following cases: *Madill v. Gill*, 2021 BCSC 1991 ($125,000); *Kingston v. Mann*, 2020 BCSC 1889 ($225,000); *Bernatchez v. Chisolm*, 2022 BCSC 105 ($110,000); *Cook v. Symons*, 2014 BCSC 1781 ($140,000, about $175,000 in today's dollars); *Manky v. Scheepers*, 2017 BCSC 1870 ($125,000, about $148,000 in today's dollars); *Mesbah v. Piche*, 2021 BCSC 1310 ($125,000); *O'Mara v. Insurance Corporation of British Columbia*, 2019 BCSC 2222 ($185,000); *Lanthier v. Ritchey*, 2019 BCSC 2022 ($120,000); *Rutkowski v. Nadarajah*, 2020 BCSC 583 ($80,000); *Sohal v. Singh*, 2017 BCSC 734 ($80,000, about $95,000 in today dollars); and *Birmingham v. Meunier*, 2021 BCSC 796 ($100,000). All of these involved knee and other injuries to varying degree. Most involved individuals who were much older than Mr. Rickards was at the time of his injuries.

[121] In *Madill*, *Kingston, and O'Mara,* the plaintiffs suffered more significant losses. *Bernatchez* concerns factually similar surrounding circumstances (young plaintiff, driver/warehouseman, weight gain), but a more serious fracture requiring surgery, and constant chronic pain which resulted him being on long term disability. *Cook* involved a ligament injury that required three surgeries and which caused a major depression and weight gain. *Manky* involved a fracture requiring surgery, a hip injury, and constant pain. *Mesbah* involved a ligament tear that would likely require surgery, other soft tissue injuries, chronic pain in the low back and knee, and

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moderate anxiety and depression. *Lanthier* involved a meniscal tear and chondral injury requiring two surgeries, and remaining chronic pain. *Rutkowski* involved a ligament tear and the plaintiff underwent surgery but it was abandoned as a result of osteoarthritis. The plaintiff had previously undergone surgery to that knee. *Sohal* involved a patellar fracture resulting in knee pain with prolonged activity. *Birmingham* involved a ligament injury and pain with prolonged activity, and which prevented the plaintiff's previous lifestyle of walking several hours a day.

[122] While the case authorities are helpful as a guide, each case must be assessed on its own facts. I have detailed Mr. Rickards' injuries above. He was very young at the time of the accident, and will have this pain likely for the rest of his life. There is a significant risk of worsening of his early osteoarthritis unless he loses weight, not an easy task particularly with his psychiatric problems. The physical injuries have exacerbated his psychiatric problems and weight. He was not able to continue with square dancing which he loved, and other activities. I assess non-pecuniary damages as $110,000.

Loss of Earning Capacity

[123] In assessing damages, past events must be proven on a balance of probabilities: *Athey* at para. 28. However, the test to be applied for assessing damages for both past and future hypothetical events is whether there is a real and substantial possibility, not speculation, of an event leading to a loss. The plaintiff is not required to establish these hypothetical events on a balance of probabilities. The events are given weight according to their relative likelihood: *Athey* at para. 27; *Rousta v. MacKay*, 2018 BCCA 29 at paras. 13–17.

[124] A loss of earning capacity may be quantified either on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach may be more useful when the loss is more easily measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to his or her former employment, but has still established a loss of capacity.

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[125] While the assessment is not a mathematical exercise, economic or statistical evidence if available, may be a useful tool as a starting point, and in assessing what is fair and reasonable: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. At the end of the analysis, the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

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[126] In keeping with the principle that the plaintiff is to be put in the position he or she would have been in absent the tortious conduct, damages for loss of earning capacity are to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 28–30.

[127] In *Rab v. Prescott*, 2021 BCCA 345, the Court set out the three-step process for assessing loss of earning capacity:

> [47] From these cases, 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*). 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* at paras 93–95.

[128] As further explained in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 11–12, in cases where the plaintiff's injuries have led to a continuing deficit, but the plaintiff is earning a similar income at trial to what was earned pre-accident, the first and second steps become more important. In that situation, the factors in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.), are helpful in assessing whether there has been an impairment of the capital asset; in other words, a potential event that satisfies step one in *Rab*. As set out in para. 8 of *Brown*, those factors include whether:

> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

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

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[129] For past loss of capacity, Mr. Rickards claims $8,475.20, based on:

a) four months missed from Lordco in 2021. Mr. Rickards was working 40 hours per week and was earning $14.60 per hour. His wages net of tax for this time are $7,475.20; and

b) an additional $1,000 for having to quit two weeks early from his painting job in the summer of 2017 because of knee pain, and for the time after he quit Las Margaritas because of knee pain and his switch to Lucky Horse.

[130] For future loss of earning capacity, Mr. Rickards claims approximately $215,750 assessed on a capital asset basis as follows: Mr. Rickards' average full-year full-time earnings in the last two years is $34,802. The present value multiplier to age 65 at the prescribed discount rate is 30.9941. The resulting present value of that stream of income is $1,078,657. To this figure, Mr. Rickards applies an estimated 20% loss of capacity, with a resulting total of approximately $215,750.

[131] In arriving at the 20%, Mr. Rickards submits the following should be considered: (1) he has had to quit two jobs (painting and Las Margaritas) because of knee pain; (2) there is a possibility of his knee injury worsening due to osteoarthritis to the point where he would have to take the time off work or stop working; (3) he is less valuable to himself because he cannot do heavier and more strenuous work because of his knee injury; (4) his limitations may result in a higher likelihood of unemployment should he lose his current position at Lordco; (5) he does not have much advanced education for non-manual work, his computer skills are poor, and he was fired from his sales clerk job which involved using a computer; (6) he has chronic pain together with serious psychiatric injuries; and (7) the psychiatric injuries

have resulted in him being reprimanded, a four-month leave from work, and there is a risk for the same in the future.

[132] The defendant submits that Mr. Rickards has not established any loss. The evidence of any injury is entirely subjective and if there is a risk of osteoarthritis, the risk is not caused by the accident. However, if the Court finds the accident caused an increased risk for arthritis, the considerations in *Brown* have not been met and Mr. Rickards has not established a real and substantial possibility of a future event leading to a pecuniary loss. The evidence does not establish Mr. Rickards has suffered an ongoing impairment to his ability to earn income. His employment activities have not been interrupted. He has continued to work full-time and has held two jobs since September 2019. He has not taken time off of work due to knee pain. There is no difference in Mr. Rickards' working life than if the accident had not occurred. In the alternative, if the Court finds there is a loss, it should be based on a capital asset approach and Mr. Rickards should be awarded the equivalent of one year of earnings, which is approximately $34,000.

[133] My findings of fact discussed above, are inconsistent with much of the basis of the defendant's argument, and I therefore do not accede to it.

[134] With respect to past loss, I find that Mr. Rickards' tardiness at work was the result of his depression at the time. Given my findings, I award Mr. Rickards 20% of the lost time from Lordco. The loss from the painting job and Las Margaritas is attributable to the knee pain, and I accept this claim. The resulting total is $3,495.

[135] With respect to future loss, I find that Mr. Rickards has established potential future events that could lead to a loss of capacity, and that there is a real and substantial possibility that these events will lead to pecuniary loss. I find Mr. Rickards meets all four criteria in *Brown*. In my view, the most significant risk to his employability in the future is the chronic intermittent pain and osteoarthritis in the context of his weight. If the osteoarthritis increases, and I find there is a real and substantial possibility of that happening, Mr. Rickards will become more disabled from doing physical work, he will likely have greater pain that could possibly lead to

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time lost from work, and this could potentially further exacerbate his psychiatric conditions and weight gain. Mr. Rickards already has had to quit two jobs, albeit entry level, because of his knee symptoms. He has been able to work at his current job without any evidence of loss of time because of pain (as opposed to depression to which the accident was also a small exacerbating factor), but he is given assistance when he asks. That may not always be available. His weight, to which the accident is again a small exacerbating factor, may limit his ability to do physical work.

[136] On the positive side, I find that if Mr. Rickards engages in CBT, and follows an exercise and diet with resultant weight loss, the risk of the above negative events will decrease. Mr. Rickards could also obtain skills for less physically demanding jobs. I do not accept that he is incapable of learning computer skills. He is pleasant and appears of good intelligence, and in the one sedentary job he had, he said he was "not keen" on learning the computer system which likely affected his motivation to learn it. He has been able to work on computers all his life.

[137] The defendant is only responsible for the loss he caused. Mr. Rickards' proposal of 20% loss of capacity is based the accident contributing more to Mr. Rickards' current condition than I have found. The calculation by Mr. Rickards also does not take into account any labour market contingencies such as unrelated early retirement or unemployment. I assess the loss of capacity to be about 15%, and I have applied a small deduction for labour market contingencies. I assess future loss of capacity at $140,000.

<u>Cost of Future Care</u>

[138] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The Court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 64–72.

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The standard of proof for assessing cost of future care is real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

[139] The defendant argues that if it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Rozylo*, 2012 BCCA 351 at para. 28. I have had the benefit of observing Mr. Rickards. He is sincere about his present condition, and recognizes his difficulties. I find that Mr. Rickards does want help and will participate in a rehabilitation program if he is first provided with some psychological counselling and the appropriate supports.

[140] I find the following recommendations of the experts to be reasonable and necessary to maintain and improve Mr. Rickards' health arising as a result of the accident injuries. There was no evidence to support the cost of all the items, so amounts can not be awarded for all items, but counsel advised they may be otherwise addressed.

1. Psychological counselling. The defendants agree to an award of $6,000 for this.

2. A knee brace for walking prolonged distances. There is no evidence of the cost.

3. An exercise and weight loss program to decrease the risk of osteoarthritis. Dr. Zhang recommended the assistance of a kinesiologist for a six to eight-week program of active rehabilitation, after which Mr. Rickards would continue on his own. Dr. Horlick also recommended a kinesiologist and a physiotherapist. There is evidence of the cost of a physiotherapist in the receipts which Ms. Storms paid. I award three sessions per week for eight weeks at $45 per session plus tax, for a total of $1,210. A dietitian was also recommended but there is no evidence of the cost.

4. Consideration of work duty modification to reduce exacerbation of knee pain, and in connection with this possibly an occupational therapist consultation for that purpose. There is no evidence of the cost.
5. Intermittent use of anti-inflammatories for knee pain. There is no evidence of the cost or how much Mr. Rickards was using.
6. Attendance at a multi-disciplinary pain clinic. There are both publicly funded and private clinics. There was no evidence of the private cost.

[141] Adding the above, the total award under this head is $7,210.

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Special Damages/In Trust Claim

[142] Mr. Rickards has combined these two different claims as they both relate to costs paid for, or services provided by, his mother.

[143] Claims for special damages must be reasonable, and when incurred in relation to treatment to promote a plaintiff's health, must be medically justified: *Redl v. Sellin*, 2013 BCSC 581 at para. 55.

[144] Services provided by family members have economic value for which a plaintiff may claim even where those services are provided gratuitously. The Court must consider the nature of the services and whether they would have been provided in any event. Only those services which go above and beyond the usual give and take between family members will be compensable: *Dykeman v. Porohowski*, 2010 BCCA 36 at paras. 28–30.

[145] In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, the Court summarized the principles in assessing this head of damage:

> (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.

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[146] Mr. Rickards claims $7,131.94 as follows:

a) physiotherapy: $1,030. This comprises $630 in receipts plus another $400 claimed for sessions attended but for which a receipt was not obtained or kept;

b) personal trainer: $225;

c) gym membership fees: $390.94;

d) time missed from work to take Mr. Rickards to appointments at $23 per hour (Ms. Storms' wage at the time), a total of 152 hours: $3,496; and

e) "the efforts of Ms. Storms in pushing and supervising Mr. Rickards to attend a gym" in 2016/17: $2,000.

[147] The defendants agree only to the $630.

[148] I accept all of these expenses and reasonable and necessary except the claim for $2,000. I accept Ms. Storms' evidence that there are some missing receipts for physiotherapy. The personal training and gym membership were incurred in 2016/17 to help Mr. Rickards lose weight, and were reasonable and necessary to reduce the risk of osteoarthritis. I accept Ms. Storms' evidence regarding the time she took off work and her wage to bring her child to physician appointments and physiotherapy for his injuries, which was necessary and reasonable. Even though I find that Ms. Storms' efforts were instrumental in having Mr. Rickards attend the

gym, I do not award the $2,000 as I do not find these went “above and beyond” and she was attending the gym in any event and benefitted from it herself. The amount awarded under this head is $5,132.

ORDERS

[149] Mr. Rickards will have judgment against the defendants as follows:

a)	Non-pecuniary damages:	$110,000
b)	Past loss of earning capacity:	$3,495
c)	Future loss of earning capacity:	$140,000
d)	Cost of future care:	$7,210
e)	Special damages:	$5,132
	Total	$265,837

[150] Unless there are settlement offers or other matters of which I am unaware, Mr. Rickards will have his costs of this action at Scale B. If the parties need to address costs, they may make arrangements through Supreme Court Scheduling to speak to the matter.

“Norell J.”

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