IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *D.J.W. v. Biswal,*
2023 BCSC 148

Date: 20230201
Docket: M190623
Registry: Vancouver

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Between:

D.J.W., by his litigation guardian D.P.W.

Plaintiff

And

Amitabh Biswal

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff:	N.J. Hartney C. McIvor
Counsel for the Defendant:	L. Chow S.B. Stewart
Place and Dates of Trial:	Vancouver, B.C. March 28-31, April 1, 4-6, 13 and May 18-20, 2022
Place and Date of Judgment:	Vancouver, B.C. February 1, 2023

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Introduction

[1] The plaintiff was 12 years old and about to complete grade 7 when he was injured in a motor vehicle collision on June 16, 2017 (the "MVA"). He was a passenger in a vehicle driven by his mother, which was rear-ended while stopped in traffic. At the time of trial, he was 17 years old and about to graduate from high school.

[2] Liability has been admitted on behalf of the defendant. The primary focus of the trial was to determine the nature of the injuries caused by the MVA and to assess damages. This raised questions of the extent to which the plaintiff suffered a concussion or brain injury in the MVA, whether he has consistently experienced headaches arising from the MVA, and whether mental health issues that have become acute in recent years are causally related to the MVA. The parties also disagree as to the extent to which the plaintiff continues to experience neck, back and shoulder pain caused by the MVA.

Facts

The Plaintiff's Background

[3] The plaintiff was born in 2004 and grew up in Surrey, British Columbia.

[4] During his elementary school years, the plaintiff was heavily involved in sports, including soccer and hockey. When he was in grade 6, rock climbing became his favourite sport. He also played tennis from time to time with his father. In the summer of 2016, he took a series of swimming lessons and passed a number of the Red Cross levels.

[5] The plaintiff's father was at all material times a sheet metal worker and foreman. His mother worked in the retail sector prior to the plaintiff's birth, but since then has not been employed outside of the home. The plaintiff has one brother, nine years older. In the years immediately prior to and since the MVA, the brother had a mostly rocky relationship with his parents, and little to do with the plaintiff.

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[6] The plaintiff experienced night terrors for about two years when he was aged six to eight. The night terrors resolved by age eight, and his doctors believed that he had most likely "grown out of it".

[7] In May 2012, when the plaintiff was seven years old, he sustained two concussions in the same hockey game. Some nine days later, he had another minor head injury when some PVC pipe was knocked over and hit him in the head. The plaintiff was referred to Dr. Korn, a pediatrician with a special interest in concussion treatment. On May 25, 2012, Dr. Korn wrote that the plaintiff was back to normal, with no further headache or dizziness. Dr. Korn recommended a graded return to sports. The plaintiff's report card indicated that he missed 6.5 days of school in May 2012.

[8] Since May 2012, Dr. Korn has seen the plaintiff fairly regularly, although the plaintiff has continued to have a family doctor of record, Dr. Kason, to whom Dr. Korn reports. The record at trial included a series of letters from Dr. Korn, reporting to Dr. Kason on many of the plaintiff's appointments, and provided a detailed record of his various reported symptoms and treatments over the past decade. For some visits, the records take the form of more traditional clinical notes.

[9] On January 18, 2013, the plaintiff saw Dr. Korn who reported in a letter to Dr. Kason that the plaintiff "had a very mild head injury while skating yesterday. There has been no suggestion that he has had a concussion again. His examination today was entirely normal."

[10] In about grade 4 or 5, the plaintiff began to experience issues with bullying by older children. Bullying issues became concerns from time to time over the next several years.

[11] The plaintiff's parents separated from about April to August of 2014. The plaintiff commented that his parents began to get along much better at that time and that "we were learning to become a family again".

[12] A series of notes and letters from Dr. Korn beginning in the summer of 2014 indicate that, for a period of time, the plaintiff's mother raised concerns with him that various symptoms might be indicators that the plaintiff had inflammatory bowel disease ("IBD"), which his older brother had been diagnosed with and hospitalized for a couple of years earlier. Dr. Korn's clinical notes for January 26, 2015, state "Normal exam. Probable anxiety. Mother still concerned about IBD (because of brother)."

[13] The plaintiff's brother moved out of the family home in about April 2015. He was about 20 years old at the time, while the plaintiff was 10.

[14] The plaintiff attended a birthday party at a rock climbing facility while he was in grade 6. He enjoyed it, and began to participate in rock climbing regularly. He moved up the various levels of difficulty quickly, and attended his first tournament only five months after he began.

[15] The plaintiff saw Dr. Korn on December 5, 2015, at which time he was in the midst of his grade six year. Dr. Korn's notes reflect that the plaintiff had a previous history of night terrors, which had resolved by age 8. The notes described a recent new sleeping behaviour, in which the plaintiff woke up, shaking or trembling, exactly one hour each night after falling asleep – he would be unable to talk, feeling his heart beating out of his chest, wanting to run, and requiring calming. It described stressors as being significant both at home and at school:

a) He would not go to school,

b) He had been bullied by older children, including being beaten up on the first day of school by older children, with teachers not being helpful,

c) A grandfather had recently died, and

d) His brother (then aged 20) "had to move out in April (behavioural changes that were dangerous to family)".

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Under the heading “Plan”, the notes comment “sleep hygiene, melatonin”, and that the plaintiff would be referred to the mental health team in North Delta.

[16] The plaintiff’s mother recalled the melatonin helped resolve the night-time waking issues.

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[17] Over the course of the Christmas break, the plaintiff played in a hockey tournament. He saw Dr. Korn on January 4, 2016, who noted that the plaintiff had “sustained a head injury (previous concussion)”, was “feeling fine”, and had a “headache briefly”. The notes also record that the plaintiff’s sleep was better, the melatonin “seems to be working”, that the panic attacks are better at night, but that the plaintiff was having “some episodes of panic during day”. There was also a note that the bullying issue at the school “has been addressed” and that the plaintiff was returning to school that day.

[18] There was a further bullying incident at school later that month, in which the plaintiff was physically injured. When not satisfied with the school’s initial response, the plaintiff’s mother reported the incident to police and the school liaison officer became involved.

[19] At a February 5, 2016, appointment with Dr. Korn, it was noted that the plaintiff had not attended school since the assault. Other medical notes from that time period indicate that the plaintiff was also suffering from a fever that lasted for several weeks.

[20] The plaintiff saw Dr. Korn on April 13, 2016, who noted that the fever had settled. He also noted that the plaintiff was “having some panic attacks during day”. The plaintiff returned to school later that month.

[21] The plaintiff’s father recalled that the plaintiff was away from school for this period of time (February to April 2016) both because nothing was being done about the bullying, and because he had a long-lasting fever.

[22] The plaintiff’s grade 6 report card noted that:

> Although completion of normal requirements was not possible … due to illness related absences, a sufficient level of performance had been attained to warrant, consistent with the best interests of the student, the granting of standing for core subjects this term. This decision was not reached easily, it required multiple meetings with school administration and a school based team meeting in which all of the work [the plaintiff had] completed with assistance at home, the inconstancies of classroom based work and at school assessment and [the plaintiff's] absences were taken into careful consideration. Through extensive support at home, [the plaintiff] was able to complete all work from term two by the beginning of June.

[23] When the plaintiff advanced to grade 7, those involved in bullying him had moved on to high school. The plaintiff did not play hockey in grade 7. Neither the plaintiff nor his parents could recall why. He did play soccer and continued his involvement with rock climbing.

[24] The plaintiff saw Dr. Korn again on November 25, 2016, with complaints of abdominal pain. Dr. Korn referred him to a pediatric gastroenterologist, and commented in his letter to Dr. Kason that "I think his abdominal pain is likely functional in origin but his mother is very concerned that he may have IBD". With respect to this, Dr. Korn explained that he had assumed the plaintiff had irritable bowel syndrome ("IBS") and not IBD, but because of the family history he made the referral to the gastroenterologist.

[25] The letter included the following:

> Mother is feeling increasingly isolated. She and [the father] remain together after a separation last year, but are struggling.
>
> Mother has asked if [the plaintiff] could see a psychologist, and I strongly support this. I provided the name of Dr. Barbara Rosen, who I have worked with at BC Children's Hospital in the past, and now has a private practice in the Surrey area. I have provided Dr. Rosen's name. I have also indicated to [the mother] that I would be very happy to talk to Dr. Rosen at any time.
>
> I have also told [the plaintiff] that I am here to talk to him, and if there are any issues that are concerning him, he is welcome to come back to see me at any time. I have arranged to see him in late December to see how the family is doing.

[26] When asked about this letter, the mother recalled that at that time her conflict with the father revolved around their older son, who had started working with the father but did not want to have any relationship with her.

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[27] The plaintiff did not see the psychologist recommended by Dr. Korn. The evidence indicated that, from this initial discussion of a psychologist onward, the plaintiff himself was reluctant to submit to mental health treatment, his mother was unwilling to pressure him to do so, and his father left such issues up to the mother.

[28] Although the plaintiff saw Dr. Korn again in December 2016, that visit focused on a cough and fever symptoms, and psychological issues do not appear to have come up.

[29] The plaintiff was seen by a Dr. Leo as well as by Dr. Korn in late February and early March 2017, in connection with a rash and a respiratory tract infection. Dr. Korn noted in his March 4, 2017 letter to Dr. Kason that the plaintiff had not been attending school for some time, and that:

> I emphasized to both [the plaintiff] and his mother that it is essential that he get back to school, as this is going to affect his educational arch. I have told [the plaintiff] that after this weekend, he must really try to be back at school every day.

[30] The plaintiff's grade 7 report card indicated that he had missed a total of 34 days of school over the course of the year, including 11 in February 2017. His achievement marks at the end of the school year included a B in French and A's in all of his other subjects. His teacher described him as "a conscientious student who works hard to complete all assignments".

The MVA

[31] On June 16, 2017, the plaintiff was in a vehicle with his mother driving south on Scott Road on the way to school. The car in front of them, without putting on its turn signal, slowed down abruptly in order to turn into a gas station. The mother braked to avoid rear-ending the vehicle in front of her, and her vehicle was subsequently struck from behind by a vehicle driven by the defendant. The plaintiff had his head turned to the left as he was talking to his mother. He immediately screamed out to his mother that his neck hurt. They pulled into the gas station and waited for the ambulance. The mother also called the father, who immediately left work and drove to the gas station to assist.

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[32] When the ambulance arrived, the paramedics proposed taking the plaintiff to Surrey Memorial Hospital. The mother had concerns about that hospital as a relative had a bad experience there, and insisted that they would take the plaintiff to BC Children's Hospital in Vancouver instead.

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[33] The mother was able to drive her vehicle back to the family home. They then got into the father's car and drove to Vancouver where the plaintiff was seen at the emergency room at BC Children's Hospital. Staff there took x-rays of his cervical spine, which showed nothing of concern. The emergency room record form reflects the plaintiff complaining of a throbbing headache in the back of his head. It notes, by the heading "Final Dx", two items: "1. Concussion" and "2. Motor Vehicle Collision". The discharge form notes that the plaintiff was to:

> – return to normal activity and school according to concussion guidelines
> – see Dr. Korn tomorrow as scheduled to review concussion management.

[34] After the plaintiff had been seen at BC Children's Hospital, the father drove the mother to the emergency department at Vancouver General Hospital. The mother's injuries from the collision are the subject matter of a separate proceeding.

Events After the MVA

Summer 2017

[35] The plaintiff was seen by Dr. Korn on June 21, 2017. Dr. Korn wrote a reporting letter, noting that the plaintiff had sustained "what appears to be a whiplash injury", and that he "complains still of neck pain and back pain". Dr. Korn reported that on examination the plaintiff "looked reasonably well", that examination of his neck "revealed some tightness of sternocleidomastoid muscles", and that there was good range of motion of the neck.

[36] Dr. Korn referred the plaintiff to the Kids Physio Group ("KPG") in Surrey, and encouraged the plaintiff to get out and keep walking, and maintain his normal activity. He noted that the plaintiff wanted to return to rock climbing, and that

Dr. Korn thought he would be able to do this “in the next two or three weeks if he is feeling better”.

[37] Dr. Korn was asked on cross-examination to confirm that, in this letter, he had not referenced a concussion. He confirmed that there was no specific reference in the letter to concussion, but noted that concussion and whiplash are very highly associated.

[38] The plaintiff was initially assessed by Ms. Van Stolk, a physiotherapist at KPG, on July 4, 2017. The notes of that assessment indicate she understood the plaintiff had been diagnosed with concussion and whiplash by Dr. Korn and referred to KPG for treatment. The notes reflect that the plaintiff complained of neck, back and shoulder pain which have not improved since the MVA, and that the plaintiff had a headache almost every single day since the MVA. With respect to severity, the plaintiff stated that the headache severity had been 5 out of 6 over the previous two days, although at the time of the assessment it was rated as 0/10. The treatment goals included working to restore pain-free cervical spine range of motion and visual retraining for concussion management.

[39] The KPG clinical notes from July 11, 2017, indicate the plaintiff reported having had a very bad headache the day before, but that on the day of treatment his headaches were 2/10 during stationary bike work. They noted his tolerance to neck and shoulder movements was improving, but he still had low endurance, limited neck range of motion due to pain, and headaches as a result of the cumulative effect of physical and cognitive demands.

[40] The plaintiff’s evidence was that he did not do much during the first few weeks of summer 2017, then as he got bored he began playing video games like Minecraft and Call of Duty. At the time, his parents were quite strict about limiting him to two hours of video games, and he would take breaks during the two hours. He also had occasional outings with his family, including going swimming. This differed from previous summers when he had done soccer or hockey camps and spent time with friends.

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[41] The KPG clinical notes of July 25, 2017, indicate the plaintiff reported that he wakes up daily with a headache that subsides within about 10 minutes, then gets two to three headaches during the day, which last approximately 10 minutes. The headaches come on mainly with watching television.

[42] The plaintiff saw Dr. Korn again on July 26, 2017, at which time the plaintiff reported he was still having some headaches. Dr. Korn's note reflects a further discussion of seeing Dr. Rosen for counselling.

[43] On about July 29, 2017, the plaintiff and his family went to Castle Fun Park in Abbotsford, along with members of their extended family. He played some pinball and was a passenger with his father on a go-kart. They were at the park for about three hours.

[44] The KPG notes for August 1, 2017, indicate that the plaintiff had a big weekend and "is paying for it". The plaintiff reported at the time he was still having three to five headaches a day, but was not experiencing one at the time of treatment. He also reported that the eye exercises he was asked to do made him sick.

[45] The plaintiff's evidence at trial was that he had suffered from consistent low-grade headaches from the time of the MVA through to trial. He was asked about various KPG notes indicating that he was not suffering from headaches at the times of treatment. He gave two explanations. First, he said that in his mind he distinguished the steady low-grade headache, which was there all the time and he saw as just a concussion symptom, from the acute headaches he got a few times a day. In addition, he recalled that at one of his early treatments with KPG, he mentioned the low-grade headache and was told he would have to wait to begin his treatment. He stopped talking about the low-grade headaches because he was keen to undergo his treatment each session rather than to sit around and wait.

[46] The mother's evidence was that the plaintiff "turned quiet" after the MVA, and that he wouldn't talk as much to her – other than to complain.

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[47] The KPG notes for August 10, 2017, indicate that the plaintiff was very sore after two days of fishing with his father in Squamish. He also reported at the time he had approximately five to six headaches per day, but that he was not experiencing a headache at the time of treatment.

Grade 8

[48] The plaintiff's new school year began on September 5, 2017. This was his first year at a new school, as he was moving to high school to begin grade 8. The KPG notes for September 7, 2017, indicate that the plaintiff had been getting headaches at school regularly. In subsequent appointments, the plaintiff reported that the headaches at school were becoming less frequent but were still happening.

[49] Ms. Van Stolk arranged to speak with the guidance counsellor at the plaintiff's school and advised them of the potential for the plaintiff to need periodic breaks and more time to complete assignments. She also advised them about the fact that the plaintiff had been referred for psychological counselling, which had not yet occurred.

[50] The plaintiff saw Dr. Korn on December 1, 2017. In his reporting letter, Dr. Korn noted:

> Since his concussion in June of this year, he has had constant headaches. He generally is not feeling that well. … He is being bullied at school.
>
> His mother is struggling currently with a variety of somatic complaints. She recently was at S. Pauls' Hospital and underwent a head CT scan for spear headache. I suspect this impacting [the plaintiff]
>
> He appears to be doing reasonably well at school. He remains active in sports.
>
> …
>
> [The plaintiff] continues to have a number of somatic complaints, and likely has some degree of prolonged concussion symptoms.
>
> I have recommended three meals and two snacks a day, with protein at all meals. He should drink at least 1.5 L of fluids per day. He needs to optimize his sleep and nine and a half to 10 hours per night.
>
> We discussed specifically headache management. I have asked [the plaintiff] to avoid triggers. He will start on riboflavin, 200 mg twice daily, and co-enzyme Q10, 100 mg once daily. We discussed the benefits of mindfulness and biofeedback, and I have provided a number of websites including "Head

> Space". He might also try yoga. We also discussed the benefits of "ecotherapy".
>
> I think [the plaintiff] would benefit from seeing a counsellor, and I have recommended self-referral to the Child & Youth Mental Health Team in their area. I would be very happy to speak to a counselor there, and I have asked mother or father to present my card to the counselor so that I can have a discussion with them about my concerns relating to [the plaintiff's] emotional well-being. Clearly the bullying is stressful for him, and I suspect there may be other stressors that need to be identified.

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[51] The plaintiff was asked about problems with bullying in grade 8. His comment was that it was less physical in high school, and that it was more a matter of him "overthinking" it.

[52] The KPG notes of December 13, 2017, indicate that Ms. Van Stolk discussed with both the plaintiff and his mother the importance of improving his physical activity levels, which she noted had also been discussed with Dr. Korn. The plaintiff's recollection was that Dr. Korn was saying he was good enough to go back to sports, but that because of his pain levels he didn't feel he was able to return yet.

[53] The KPG notes of January 10, 2018, note the plaintiff reporting that he thinks his headaches are getting a little better, but that he still has several per day at school, and finds note-taking provocative. Several other KPG clinical notes from the first half of 2018 indicate ongoing issues with headaches at school – particularly on the days with more academic courses and note-taking.

[54] KPG notes from the first half of 2018 indicate that the plaintiff began to use the Headspace app, recommended by Dr. Korn.

[55] The plaintiff saw Dr. Korn again on May 30, 2018. Dr. Korn's reporting letter comments:

> He does continue to have persistent symptoms relating to a motor vehicle collision which occurred approximately 11 months ago. He has been seen on a regular basis by physiotherapy in Surrey. It has made some improvement although he says he continues to have back pain and intermittent headaches.
>
> Mother would like to try massage therapy and I think this would be helpful. I strongly recommend that he be seen through the Child & Youth Mental Health Team in their local community. I have been concerned about mood

> dysregulation over the past couple of years, which certainly could have been exacerbated by the motor vehicle collision.
>
> …
>
> He continues to have prolonged concussions symptoms.
>
> I would support physiotherapy. I have again reiterated my strong recommendation to be evaluated by a mental health specialist regarding his chronic pain syndrome.

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[56] That same day, Dr. Korn wrote a letter “To Whom It May Concern”, supporting a request for massage therapy, and advising that he would be happy to speak to an ICBC adjuster if requested.

[57] The plaintiff completed grade 8 at the end of June, 2018. While his grade 7 report card had been almost all A’s, his grade 8 report card included B’s in most courses other than Music (an A) and French (a C+).

[58] The plaintiff saw Dr. Korn again on July 18, 2018, who wrote in his reporting letter that the plaintiff had graduated from grade 8 and was having a good summer, relaxing with family and doing a little fishing and hiking.

[59] The KPG notes over the next two months reflect Ms. Van Stolk following up regularly with the plaintiff’s parents about Dr. Korn’s recommendations of massage therapy, counselling, and a regular physical activity. It appears that no steps were taken. The father’s evidence was he did not recall the recommendation from this time that the plaintiff see a psychologist. The mother recalled the recommendation being made, acknowledged that it was “her job” to deal with the recommendation, but commented that she was really “messed up” at the time and the plaintiff did not want to see a psychologist. Ms. Van Stolk noted on July 27, 2018 that:

> Writer asked Mom if RMT had been sought out for [the plaintiff] yet and she replied no. Mom does not appear to be coping well with her own health …

[60] With respect to massage therapy, the plaintiff said he would have been “for it”, and that at some point he had been asking his mother to set it up for him.

[61] On August 1, 2018, Ms. Van Stolk sent an email to Dr. Korn expressing concerns about the plaintiff:

> I have been seeing D. since his MVA in June of 2017. He has made a lot of progress since this time, but in the last 6 months had plateaued in his recovery. Many many months ago I had recommended they see a psychologist and referred them to the ABLE clinic (which I believe you did also at some point), and I've recommended several times that they seek RMT to manage some of the back and neck discomfort he's having. Neither of these recommendations have been followed through. He also continues to have headaches on and off (mainly when school is in), and while I've worked a lot on his visual and vestibular systems, I don't think this is the root cause. He does also complain of some mild dizziness (which he reports as more of a lightheadedness) when we do some Cardiovascular activities. …
>
> We've worked hard to get him back into shape for return to play, but for many months now I've been encouraging him to pick a sport or physical activity to begin transitioning back to play, but he's not interested and is therefore mostly inactive.
>
> Throughout my treatment of D., recommendations have been loosely followed, if at all, and I struggle to get Mom and Dad to implement what I am recommending. While his parents seem keen for him to get better and continue to bring him to PT, they are not helping to carry out my recommendations.
>
> Mom has expressed to me repeatedly that she is herself in a lot of pain, and doesn't appear to be managing her own condition well. I'm sure this is a huge barrier to her being able to help D.
>
> … I wonder if it might be more benefit for him to take some time off of Physio? If you have any other suggestions about how I can help D, or any input to provide, that would be greatly appreciated.

[62] Dr. Korn replied that same afternoon, advising that he completely concurred with her opinion, and commenting that the plaintiff's "problems are multi-factorial, and you have identified the barriers to resolution". He agreed that it might be helpful to take a break from physiotherapy, and suggested that Ms. Van Stolk let the family know "that moving in a different direction is what we both recommend, and that the ABLE Clinic might best deal with [the plaintiff's] problems." He concluded:

> I also hope mother will be able to find some relief from her ongoing symptoms. It must be debilitating for her, and I suspect is having a significant impact on [the plaintiff].

[63] The plaintiff's final treatment with KPG was on August 10, 2018. At that time, Ms. Van Stolk told both the plaintiff and his mother they would be taking a break

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from physiotherapy. Her notes indicated that she advised them that the plaintiff had reached somewhat of a plateau in his recovery, and that a break from physiotherapy would be wise so that he could focus on the psychological aspect of his recovery.

[64] The mother's recollection was slightly different. She recalled that Ms. Van Stolk did not know what else to do, and had the idea of massage therapy and counselling. With respect to massage therapy, the mother acknowledged that it was her job to make that arrangement, but she was really sick and it just did not get done. With respect to counselling, her recollection was that the plaintiff was opposed to counselling, and that although they had many conversations about it, she could not persuade him to go. She also recalled that at some point ICBC stopped funding physiotherapy and she had limited ability to pay for it out of her own pocket.

[65] The plaintiff's recollection was that Ms. Van Stolk told him that this was the best he was going to get, which he was disappointed about. His evidence was that he was interested in doing massage therapy, and asked his mother about doing it, but that it did not happen for some time. He confirmed that he was opposed to counselling. His evidence was that he did not want to talk to a counsellor about private things like what happened with his brother, or at home, and that if he was not able to deal with any psychological issues on his own, it meant he was "weak". His mother had told him that it was his choice, and he saw it as very scary to go to a counsellor.

[66] Ms. Van Stolk disagreed that she had communicated that this was the best the plaintiff was going to get. Her view, which she recalled communicating at the time, was that the plaintiff had plateaued in terms of what she could do for him, but that she recommended other treatments (massage therapy and counselling) she believed would help, and had left open the possibility of a return to physiotherapy in the future. Her observation was that there had been improvements in the plaintiff's neck and back pain, but that his headaches continued and were a major residual complaint.

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Grade 9

[67] The plaintiff saw Dr. Korn in September 2018, with that visit primarily focused on a bad sore throat, fever and chills, and again in October 2018, at which time he complained about ongoing back pain.

[68] There was evidence that, at some undefined point in his grade 9 year, the plaintiff attempted suicide by hanging himself with a rubber snake in his room. At the time, he felt he did not have friends and had a difficult situation at home. Dr. Korn was not aware that this had happened, and it only came to light in a February 2022 interview which will be discussed below. The plaintiff's evidence was that, after this grade 9 suicide attempt, he was quite relieved for a couple of months, then went back to feeling depressed.

[69] The plaintiff's brother moved back into the family home in about May 2019 and for a period of time the family got along well as a group.

[70] The plaintiff's grade 9 report card shows mostly B's, with a C- in French and a C+ in social studies.

Grade 10

[71] The plaintiff's brother moved out of the home again in mid-October 2019. The evidence indicated that there was a dispute between the brother and the parents, and the circumstances of his moving out were very unpleasant.

[72] In about the fall of 2019, the plaintiff became more physically active including returning to rock climbing.

[73] On November 7, 2019, the plaintiff was taken to BC Children's Hospital with complaints of left-sided chest pain.

[74] He saw Dr. Korn again on November 27, 2019. This appears to have been his first appointment with Dr. Korn in roughly a year. Dr. Korn commented in his reporting letter that the chest pain was likely secondary to musculoskeletal

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inflammation, and that the plaintiff had recently taken up rock climbing which might have caused the symptoms. He went on to comment:

> There has been further family strife relating to his older brother, which has been very upsetting for his parents. [The plaintiff] would benefit from involvement with a mental health specialist, and I recommended the local Child & Youth Mental Health Team to start off the process. I asked [the plaintiff] to bring my business card to the Child & Youth Mental Health Team (self-referral), as I would be very happy to speak to liaise with the intake worker.
>
> [The plaintiff] has also been hearing voices. They are nonspecific in nature, but essentially, he hears shouting in the background when he is in the shower, and also when he is trying to get to sleep. The voices are not instructing him to do anything. Because of the auditory hallucinations, I feel that the Child & Youth Mental health assessment is even more vital.
>
> I want to monitor [the plaintiff's] mental health, and asked him to return to the office in January for a review.

[75] Neither of the plaintiff's parents was aware that the plaintiff had been hearing voices until early 2022 – more than two years after they were first reported to Dr. Korn. The mother's evidence was that, by the time the plaintiff was in grade 10, she was asked to leave Dr. Korn's office from time to time when mental health issues arose.

[76] The plaintiff saw Dr. Korn again on January 3, 2020. In his reporting letter, after dealing with unrelated issues, Dr. Korn noted that:

> He is also complaining of some neck discomfort. As he continues to be quite sports-minded, I would recommend further physiotherapy, this time through Sun Gods.

[77] At some point in late 2019, the plaintiff's mother had contacted Pure Health Massage & Wellness and placed the plaintiff on a wait list for massage therapy. His first treatment was on February 8, 2020. The massage therapist that day recorded complaints of headaches and back pain – complaints which are consistently reflected in the massage therapy clinical records up to the date of trial some two years later.

[78] On February 13, 2020, the plaintiff's mother emailed Dr. Korn asking him:

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> I also really need 2 notes again for his recovery from the accident. I have him in massage finally now but I'm paying myself because the note is from nov 27th and they want an updated one. I have all notes from Jan 6th when he seen you but can't find one for massage. …
>
> I also need an updated note for Councilling. The note I have is from Nov saying for PTSD so I have had him see a clinical Councilor now and need him to continue.

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[79] Although there appear to have been ongoing efforts to get the plaintiff into counselling, he continued to be reluctant to participate.

[80] The plaintiff's term 2 report card in March 2020 showed a range of marks, from 54% in pre-calculus math and 55% in social studies to 87% in metalwork and 89% in physical education.

[81] The Covid-19 pandemic resulted in online classes following spring break in 2020. It also resulted in a cessation of massage therapy appointments between March 14 and June 24, 2020.

[82] The plaintiff had a telehealth visit with Dr. Korn on June 19, 2020. Dr. Korn's reporting letter noted that the plaintiff had not been very active since the Covid restrictions began, and had only been out of the house a handful of times. Dr. Korn noted that the plaintiff was trying to stay fit by doing squats, lunges and weightlifting. His health at the time was good other than some discomfort in his knee.

[83] The plaintiff's final grade 10 report card showed marks of C- in Social Studies and Career Life Ed, C's in Literary Studies and Math, B's in Food Studies and Science, and A's in metalwork and physical education.

[84] The plaintiff saw Dr. Korn in person on July 3, 2020, reporting more knee pain in his left knee. Dr. Korn arranged for an x-ray and for the plaintiff to be seen by Dr. Gerschman, a pediatric sports medicine specialist.

[85] The massage therapy clinical records on July 13, 2020, note that the plaintiff reported that he had started working out again after a few weeks of taking a break.

Grade 11

[86] The plaintiff commenced grade 11 in September 2020. For the grade 11 year, students did four short terms with two courses each term. In the first term, the plaintiff took Composition 11 and Social Studies 11, earning B grades in each.

[87] He was seen by Dr. Gerschman on October 7, 2020, who recommended he do stretches to help loosen up muscles related to his knee pain.

[88] Beginning in 2020, the plaintiff was provided support from an occupational therapist. The first occupational therapist – who did some initial work in the spring of 2020 – was replaced in about October 2020 by a Ms. Chee, who began to organize and advance support for various needs of the plaintiff that she identified.

[89] At Ms. Chee's instance, Dr. Korn completed various insurance forms recommending continuation of occupational therapy as well as ongoing massage therapy, general physiotherapy, active rehabilitation and a referral to the Child & Youth Mental Health outreach team.

[90] There was evidence from the plaintiff's mother that, about a year and a half before trial (which would have been late 2020), the plaintiff attended a drop-in group counselling session on a Wednesday after school which he did not find helpful and would not return to. The mother described efforts on her part, with support from the occupational therapist, to get the plaintiff into a child and youth mental health centre near their home, but because the centre was on the Delta side of Scott Road and they lived on the Surrey side, the centre would not accept him. His only option was a program that was a 25-minute drive away and in a very rough part of Surrey – all of which contributed to the plaintiff's reluctance to participate.

[91] For the second school quarter of grade 11, the plaintiff's courses were Active Living (PE) 11 and Food Studies 11, for which he earned marks of 93% and 90% respectively. Beginning in about December 2020, he began to report issues with shin splints. He had a further virtual health appointment with Dr. Gerschman in April

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2021, who provided advice on stretching out the calves before sports or activities and suggested these issues were related to an ongoing growth spurt.

[92] The plaintiff began active rehabilitation in December 2020 with a Mr. Shimbashi who began to see him approximately weekly.

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[93] For the third school quarter of grade 11, the plaintiff's courses were Chemistry 11 and Pre-Calculus Math 11. He received a 91% grade in chemistry, but failed math with a 45% grade. The plaintiff explained that he had the same two classes in the same order every day, and that by the time he finished the chemistry class each day he would have a bad headache and would have difficulty focusing in the math class.

[94] For the fourth school quarter of grade 11, the plaintiff's courses were metalwork and film studies. He earned an A in each of those two courses. His metalwork teacher, Mr. Kinahan, gave evidence at trial at the instance of the defendant. He commented that the plaintiff was able to complete projects and did not ask for any accommodations that were "out of the ordinary". Mr. Kinahan was unaware that the plaintiff had been in a car accident.

[95] The plaintiff had a virtual appointment with Dr. Korn on June 4, 2021. Dr. Korn noted in his reporting letter that the plaintiff had done "quite well academically" in grade 11 other than failing math. Dr. Korn also stated:

> [The plaintiff] continues to have chronic back pain. He has been followed by an occupational therapist and a kinesiologist. Occasionally he has some numbness and tingling in his lower limbs. I cannot see a record of us ever having done a back x-ray.
>
> Because of the chronic nature of his back pain relating to the motor vehicle collision in 2017, I think it would be worthwhile for him to be seen in the Spine Clinic. I would leave investigations such as an x-ray or spine MRI to one of the spine surgeons.

[96] Later that month, the plaintiff's occupational therapist prepared a funding request for physiotherapy treatment. On July 5, 2021, the plaintiff began

physiotherapy with a Ms. Secrest. At the time, he was already having regular massage therapy and active rehabilitation.

[97] The plaintiff spent the summer of 2021 retaking Pre-Calculus Math 11 and obtained a grade of 93%.

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[98] In August 2021, the plaintiff returned again to rock climbing. He initially found his back pain was somewhat manageable if he took frequent breaks to rest. However, his evidence was that as he continued he found the shoulder pain increased and made participation in rock climbing more difficult.

[99] The plaintiff saw Dr. Korn again on August 17, 2021. In his reporting letter, Dr. Korn noted that the plaintiff:

> … has experienced recent increased anxiety. This was in relation to a nine month relationship that recently dissolved. [The plaintiff] initiated the break up, based on some behaviours directed towards him that he felt was unacceptable. [The plaintiff] would like to get some counselling for his anxiety, and his mother, who is not aware of the exact details of the anxiety, will arrange some counseling with one of the counselors she is engaged with herself. I will write a letter on [the plaintiff's] behalf to assist in obtaining funding.
>
> …
>
> He finds that listening to music, being alone in his room and going for walks has been helpful. I have referred him to the Kelty Mental Health website, and again, encouraged him to be involved in mindfulness and meditation prior to seeing a counselor.
>
> …
>
> [The plaintiff] has been seen recently by Orthopedic Surgery at BC Children's Hospital, and it was felt that he had mechanical back discomfort with a mild degree of scoliosis which has not required surgical intervention.

[100] The plaintiff's evidence was that around this time, he began cutting on his thigh with an X-ACTO blade knife. He described things that affected him, in addition to his ongoing pain and the break-up, as including his parents getting better but still arguing, the ongoing situation with his brother, a lack of friends, and "no other girls [he] was talking to".

[101] Also, in about August 2021, the plaintiff began to experience visual hallucinations. His evidence was that these hallucinations did not happen every day, and were not really “that strong”, but they scared him.

Grade 12

[102] The plaintiff began grade 12 in September 2021. School returned to a two-semester system for the grade 12 year, with four courses each semester. His first semester included two physical education courses: Active Living 12 and Strength Training 12.

[103] His strength training teacher, Ms. Wittenshaw, was called as a witness by the plaintiff. Her evidence was that the plaintiff frequently complained about things hurting, and on some days would be unable to do some of the exercises. For the strength training program, she allowed the students to create their own program, and described the plaintiff as doing exercises that appeared to be more in the nature of physical therapy.

[104] In addition to these classes, the plaintiff continued to occasionally go to rock climbing. However, in late September, he began to experience tendinitis in his shoulders and eventually stopped rock climbing around the end of September 2021.

[105] The plaintiff had an independent medical assessment with a neuropsychologist, Dr. Schultz, beginning on September 24, 2021. Dr. Schultz’s report will be discussed below.

[106] In the fall of 2021, the plaintiff became involved in some social media chats in which others from his school threatened him. They did not follow up on their threats. The plaintiff also began to experiment with marijuana.

[107] The plaintiff saw Dr. Korn again on November 30, 2021, with complaints of shoulder discomfort. Dr. Korn arranged for an MRI of the shoulder. Dr. Korn’s reporting letter noted ongoing hallucinations, and he again recommended the

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plaintiff be assessed through the Child & Youth Mental Health team in his local community.

[108] In December 2021, the plaintiff broke up with another girlfriend which was upsetting to him. Later that month, he attended a concert in Vancouver and consumed an excessive amount of alcohol as well as some cocaine. He was told by those with him that he ended up convulsing in an alley. His evidence was that over the winter break from school, he spent time with friends and used cannabis daily. After the Christmas break, he stopped his regular cannabis use.

[109] The plaintiff's first semester report card included grades of 80% in Active Living 12, 82% in Food Studies 12, 70% in Strength Training 12, and 54% in Chemistry 12. With respect to the Strength Training course, the teacher (Ms. Wittenshaw) commented on his report card:

> A positive attitude but injuries have limited his ability to work out most days.

[110] The plaintiff had an MRI of his right and left shoulder joints on January 14, 2022, which came back normal.

[111] The plaintiff attended independent medical examinations with two physiatrists, Dr. Chow and Dr. Khan, on January 19 and 24, 2022. Their reports are discussed below.

[112] The plaintiff had a further virtual appointment with Dr. Korn on January 28, 2022. Dr. Korn's reporting letter includes the following:

> 1. [The plaintiff] had bilateral shoulder pain. He had MRI of both shoulders at Surrey Memorial Hospital, and fortunately, they were both normal. I have reassured [the plaintiff] that there are no structural abnormality, and the pain can be dealt with by physiotherapy, particularly strengthening exercises.
>
> 2. [The plaintiff] has struggled a bit with school. However, he has managed to bring his marks up in everything but chemistry, and he has now got a strong 'B' average. He will have to take chemistry online.
>
> …

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> 4. I remain concerned about [the plaintiff's] mental wellness. We had discussed this briefly at the end of last visit, and I want to explore this further today.
>
> [The plaintiff] has new visual hallucinations, and experiences frequent auditory hallucinations. He thinks he might be schizophrenic. There are features of Psychosis, possibly a Major Depressive Episode with associated Psychosis.
>
> I strongly recommend that he seek help through a mental health specialist in his community. His mother has tried to access resources for people that she knows, but has been unsuccessful.
>
> Subsequent to today's office visit, I contacted on-call psychiatrists at BC Children's Hospital and discussed [the plaintiff's] presentation. The Early Psychosis Intervention (EPI) Program in Fraser health would be the most appropriate resource. I contacted [the plaintiff] and his mother by phone, and advised them how to access this program.

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[113] The plaintiff underwent a vocational assessment with Mr. Derek Nordin, whose report will be discussed below. He was interviewed by Mr. Nordin on February 4, 2022, and completed a vocational test battery on February 7, 2022.

[114] The plaintiff also had a follow-up visit with Dr. Korn on February 7, 2022. Dr. Korn noted in his reporting letter the ongoing visual and auditory hallucinations, and his recommendation for a self-referral to the EPI program. However:

> [The plaintiff] is reluctant to call and make an appointment, and when I strongly suggested that he do so today, he said "I'm very busy". I gently tried to persuade him that this is an important avenue for his mental health, and that I hope that he might make the phone call today.

[115] Dr. Korn arranged for screening bloodwork as well as "a head MRI in view of [the plaintiff's] previous concussions".

[116] After this appointment with Dr. Korn, the plaintiff and his mother took steps to contact EPI and made an appointment for March 11, 2022.

[117] There was an incident on February 11, 2022, at a party with others from the plaintiff's school. This led to a group of students circulating allegations about the plaintiff on social media and confronting him at school the following week. The plaintiff's mother attended the school and contacted the local police about what was going on.

[118] On February 17, 2022, there were a number of meetings at the school. The school counsellor became concerned about the state of the plaintiff's mental health, and began to ask a number of questions about whether he was feeling suicidal. The counsellor ended up calling the police, who took the plaintiff to the emergency room at Surrey Memorial Hospital for a psychiatric assessment pursuant to the *Mental Health Act*, R.S.B.C. 1996, c. 288.

[119] By coincidence, the psychiatric team that was scheduled to see the plaintiff on March 11 was on call at Surrey Memorial Hospital on February 17, 2022. They interviewed the plaintiff on his own for a period of time, then met with the plaintiff and his parents together. They recommended that the plaintiff begin cognitive behavioural therapy ("CBT"), obtain education as to psychological issues, and begin a course of fluoxetine (Prozac). The plaintiff was released later that day.

[120] The plaintiff had a further telehealth visit with Dr. Korn on March 1, 2022. His reporting letter notes that:

> … [the plaintiff's] mental health deteriorated acutely in the last couple of weeks after an allegation of sexually inappropriate behaviour with a peer. It does appear that the allegations that were made had no basis in fact. The outcome unfortunately produced significant anxiety with increased suicidal ideation.
>
> He was seen on an urgent basis at Surrey Memorial Hospital by the Psychiatry Team and will have a followup appointment in the EPI Clinic on March 11th.

[121] Dr. Korn issued prescriptions for fluoxetine, and also wrote a letter supporting a request for funding for CBT.

[122] The plaintiff began therapy with a registered clinical counselor, Ms. Khaira, on March 2, 2022. He had weekly sessions with Ms. Khaira in the weeks leading up to the trial in this matter.

[123] The plaintiff attended the scheduled appointment at the EPI Clinic on March 11, 2022, where he was seen by Drs. Kanagarajan, Raissi and Chin. A detailed report from this appointment was in evidence, and Dr. Kanagarajan testified

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at the trial. None of the evidence with respect to this assessment was presented as expert evidence. At the conclusion of the assessment, the doctors concluded that the plaintiff did not require treatment for psychosis – rather, his symptoms were consistent with post-traumatic stress disorder, depressive disorder, and generalized anxiety disorder with panic attacks. The recommendations focused on continued counselling as well as an ongoing course of fluoxetine.

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[124] On March 13, 2022, the MRI of the plaintiff's brain was completed. The report was normal.

Current Symptoms

[125] The plaintiff described his current symptoms as including:

a) Constant headaches, which become acute from time to time;

b) Neck pain – pretty constant, with limited mobility;

c) Shoulder pain – including pain with most movements, the "upper traps" get quite sore because they carry the weight of the arms, the right shoulder blade is worse for physical pain, and the shoulder pain is worse if he is sitting a lot;

d) Mid- to lower back is always a bit sore with restricted movements.

Medical Expert Evidence

[126] The plaintiff tendered two medical expert reports: one by a physiatrist (Dr. Chow) and the other by a clinical psychologist/neuropsychologist (Dr. Schultz). The defendant tendered one medical expert report of a physiatrist (Dr. Khan).

[127] The parties each tendered a report of a vocational consultant. The plaintiff's consultant (Mr. Nordin) reported on an interview with and assessment of the plaintiff, while the defendant's consultant (Ms. Gallagher) provided commentary on Mr. Nordin's report.

[128] The final expert report tendered by the plaintiff was by an economist, Mr. Peever, who provided various financial calculations at the request of the plaintiff.

[129] In this section I will discuss the evidence of the medical experts.

Dr. Raphael Chow, Physiatrist

[130] Dr. Chow is a specialist in physical medicine and rehabilitation. He conducted an independent medical examination of the plaintiff on January 19, 2022, at the request of counsel for the plaintiff.

[131] Dr. Chow summarized the results of his physical examination as follows:

> Examination today showed decreased range of motion of cervical spine with pain and tenderness which could be reproduced when distracted. There was pain on range of motion of the thoracic spine. He had tender points in the neck and back in addition to trigger points in the trapezius. There was impingement finding of the shoulders bilaterally. There was mild cognitive defects on mini-mental status examination. There was weakness of the shoulder girdle with hypersensitivity to cold in the neck and back consistent with the central sensitization process.

[132] He concluded that the plaintiff suffered a soft tissue injury to the cervicothoracic spine and a concussion. Injury to soft tissues of the spine included muscle, ligament, tendon, facet joint capsule-cartilage, and disc.

[133] He described the plaintiff's residual accident-related conditions as chronic headache as well as chronic neck, shoulder girdle and mid-back pain. He described the plaintiff's physical limitations as follows, with specific respect to the cervicothoracic spine and shoulders:

> The injured tissues would lack the resiliency and tolerance to excessive loading force. With regard to the neck and mid-back, excessive static and dynamic neck and upper torso tasks such as sitting, standing, bending, twisting, reaching and driving beyond a certain frequency would aggravate his symptoms. With regard to the shoulders, activities at and above the shoulder level that is sustained, repetitive and strenuous will aggravate his pain. Physically demanding tasks in terms of carrying, lifting, pulling, pushing beyond a certain level also would exceed the limit and cause him pain.
>
> He has myofascial pain syndrome, and it is important that he avoid activities that aggravate his symptoms in the neck and back or shoulders since this will continue to stimulate the nociceptor and mechanoreceptor resulting in

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> ongoing peripheral and central sensitization associated with a chronic pain process.

[134] With respect to prognosis, Dr. Chow noted that most accident-related conditions such as soft tissue injury would recover within the first two to three years, and that:

> It is now 4.5 years following the accident. His prognosis remains guarded. Based on the clinical finding, in my opinion, it is unlikely that he will have complete resolution of his symptoms in the future.

[135] Dr. Chow was cross-examined at length on his report. He acknowledged that he had, in preparing his report, accepted some of the plaintiff's subjective reports of pain. He agreed that he was not aware of the plaintiff having suffered more than one concussion prior to the MVA, and that he was not aware that hallucinations had not been reported until some time after the MVA.

[136] Dr. Chow was specifically challenged on his conclusion that the plaintiff had suffered a concussion in the MVA. He acknowledged two things:

a) The emergency room records from the day of the MVA had a space for "Neurological Examination – GCS", which emergency room staff could have used to record "Glasgow Coma Scale" testing, and the GCS is widely used to assess the degree of any brain injury; and

b) Dr. Korn's first reporting letter after the MVA did not specifically use the word "concussion".

[137] However, Dr. Chow maintained his opinion that, based on his review of the medical records as a whole and his own examination, the plaintiff had suffered a concussion in the MVA.

[138] With respect to cognitive issues, Dr. Chow acknowledged that he had performed only a "mini-mental-status examination", which consisted of a few tests like repeating number sequences, and that he would defer to a more detailed neurological or neuropsychological examination.

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Dr. Abdul-Wahab Khan, Physiatrist

[139] Dr. Khan is also a specialist in physical medicine and rehabilitation. He conducted an independent medical examination of the plaintiff on January 24, 2022, at the request of counsel for the defendant. His report was tendered in evidence by the defendant, and his attendance for cross-examination was not required.

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[140] Dr. Khan provided the following diagnoses:

- Cervical spine sprain/strain
- Bilateral trapezius/posterior shoulder girdle sprain/strain
- Thoracolumbar spine sprain/strain
- Chronic myofascial pain in the aforementioned regions

[141] With respect to prognosis, Dr. Khan opined that:

> Given the duration of time that has passed since the subject accident without complete resolution of his pain symptoms to date, the prognosis for a complete recovery of [the plaintiff's] accident-related physical pain symptoms (or to a pre-MVA status) is poor. The pain symptoms that he currently experiences will likely continue to persist into the future.
>
> A "disability" is defined as an "activity limitation in an individual with a health condition, disorder or disease". In this case, the condition is the chronic pain that [the plaintiff] continues to experience.
>
> …
>
> … he suffers a partial disability in that he experiences limitations due to pain with respect to housekeeping, recreational and educational activities.
>
> …
>
> While there are no ongoing accident-related musculoskeletal diagnoses that require a medical restriction in order to avoid structural harm, I recognize that [the plaintiff] continues to experience pain with housekeeping, recreational, and educational activities. His pain symptoms will likely continue to create partial activity limitations due to apprehension of experiencing discomfort and fear of causing injury.
>
> His current presentation and associated partial limitations will most likely be consistent with his new baseline level of pain and function. He will likely have a decreased physical capacity/endurance in comparison to his pre-accident status as it relates to the aforementioned activities.
>
> I encourage him to pursue activities as tolerated to the best of his abilities, while being cautious and mindful of flare-ups.

[142] Dr. Khan's report contained no consideration of whether the plaintiff had suffered a concussion in the MVA or displayed any cognitive issues. Dr. Khan had been provided with a copy of Dr. Schultz's report prior to his examination of the plaintiff, but did not comment on her report or the psychological and neuropsychological issues identified by her.

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Dr. Izabela Schultz, Clinical Psychologist and Neuropsychologist

[143] Dr. Schultz is a clinical psychologist and neuropsychologist. She conducted an assessment of the plaintiff, which involved a comprehensive interview on September 24, 2021, neuropsychological, psychological and educational testing conducted at her office on September 25-26, 2021, and a collateral interview of the mother on October 24, 2021. Dr. Schultz produced her report on January 10, 2022.

[144] Dr. Schultz's report is lengthy and detailed. It considers both the plaintiff's neuropsychological/cognitive functioning and his psychological/emotional conditions. Dr. Schultz described the plaintiff's condition as complex.

[145] With respect to cognitive functioning, Dr. Schultz described the plaintiff's overall intellectual abilities as average, with average verbal comprehension, perceptual reasoning, processing speed and working memory.

[146] With respect to the cognitive testing, Dr. Schultz provided detailed lists of areas of cognitive strength (that is, areas where the plaintiff's testing results were in the high average to superior range), as well as areas in which the plaintiff's testing results were in the low average to average range. She then went on to identify the plaintiff's "relative cognitive weaknesses" from the cognitive testing as follows:

a) Among intellectual abilities: auditory letter-number sequencing speed (borderline);

b) Among attention functions:

   i. selective visual attention speed (map search): borderline to severe impairment; task-dependent;

ii. simple auditory attention to sounds: possibly abnormal;

iii. auditory attention and resistance to distractions: borderline to moderate impairment;

c) Among perceptual, language, memory and visuomotor coordination functions:

i. auditory comprehension: borderline to mild impairment;

ii. auditory figure-ground discrimination: severe impairment;

iii. listening comprehension: borderline to severe impairment;

iv. difficulty balancing speed and accuracy in performance; speed was slower than expected to achieve accuracy.

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[147] She concluded with respect to the testing that the plaintiff's:

> … cognitive abilities were mainly in the broadly defined average range, with strengths in aspects of verbal comprehension and continuous attention, in addition to visual perceptual and executive functions. Overall neuropsychological impairment was mild and selective, demonstrated primarily in auditory attention, working memory, perception and listening comprehensive domains, with significant variability across tasks. Visual selective attention speed on map search was borderline to impaired; the sole significant visually mediated problem identified in the current assessment.

[148] She concluded that the plaintiff's cognitive weaknesses meet the diagnostic criteria of Mild Neurocognitive Disorder due to Multiple Etiologies. She identified the following etiologies: protracted post-concussive sequelae augmented and maintained by chronic emotional distress, pain, insomnia and fatigue, and possibly also tinnitus. She went on to note that:

> On a positive note, academic achievement testing showed scholastic attainment commensurate with [the plaintiff's] education. There was no evidence of any prior learning disorder, in keeping with his above average school grades, especially before the accident.

[149] With respect to emotional impairment, Dr. Schultz concluded:

> In addition to mild cognitive diminishment, [the plaintiff] presently demonstrates complex, quite severe and evolving psychopathology, which is more functionally disabling than his cognitive issues. Superimposed upon his premorbid history of trauma (bullying) and family stress (parental stress and estrangement of brother), associated with heightened generalized anxiety, and fears, night terrors and panic attacks, after the accident, [the plaintiff's] symptoms of emotional dysregulation (including lability, moodiness and angry outbursts) became prominent, together with posttraumatic stress, increased generalized anxiety and panic attacks, persistent depression, insomnia and Somatic Symptom Disorder with Predominant Pain. A significant loss of self-esteem and a sense of self, with self-criticalness and feelings of inadequacy have emerged. In addition, in the last two years, [the plaintiff] began experiencing auditory and visual hallucinations, which he finds anxiety-provoking. Of concern, he did not receive any systematic mental health treatment, including psychology and psychiatry.

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[150] She concluded that the plaintiff meets DSM-5 criteria for Persistent Depressive Disorder, with Intermittent Major Depressive Episodes, with Current Episode, moderate, with Anxious Distress, noting a number of symptoms including low mood, feelings of worthlessness, helplessness and hopelessness, pessimism and discouragement, passive suicidal ideation, loss of self-esteem, sleep disturbance, and low energy.

[151] She identified a number of symptoms of chronic post-traumatic stress, which she concluded did not meet all of the required DSM-5 criteria for Post-Traumatic Stress Disorder, but were consistent with a diagnosis of Other Specified Trauma- and Stressor-Related Disorder.

[152] She commented that the plaintiff likely struggled with Generalized Anxiety Disorder even before the MVA, but noted that:

> His anxiety symptoms worsened significantly after the accident, including severe tension, difficulty relaxing, feeling on edge, excessive worrying and rumination for part of the day, with particularly worrisome thoughts at night. [The plaintiff] worried about problems between his parents worsening, about his future ("am I going to get better, mentally and physically?"), about being injured again, and about his inability to participate in sports. He also worried about being able to fulfill his vocational desire to become a sheet-metal worker, like his father.

[153] Dr. Schultz further concluded that the plaintiff meets the diagnostic criteria for Somatic Symptom Disorder with Predominant Pain, noting that the plaintiff's pain

involves multiple body sites and is likely maintained and exacerbated by his emotional distress and mood instability with poor sleep and fatigue. She describes the plaintiff as “preoccupied with his pain and tends to somatise emotional distress”, and comments that his chronic pain, especially his headaches, show stress-relatedness.

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[154] With respect to the auditory and visual hallucinations, she comments:

> From psychopathology perspective, these symptoms may represent an onset of a new mental health disorder with a psychotic component or represent an outgrowth of untreated posttraumatic, anxiety and depressive disorders.
>
> Further assessment by psychiatry, treatment and monitoring of his symptoms is recommended, given that [the plaintiff’s] age is a frequent time for males to develop prodromal symptoms of psychosis.

[155] This opinion, which in effect defers diagnosis on this point until a psychiatric evaluation is completed, can be read in light of the results of the psychiatric evaluation that occurred in March 2022. That evaluation negatived a psychotic component, and reflected diagnoses that were consistent with those provided by Dr. Schultz. While the evaluation report is not admissible as expert evidence, given that the onus of proof is on the plaintiff, it provides some comfort with respect to a conclusion that no psychotic component to the plaintiff’s psychological condition has been established on the facts of this case.

[156] With respect to causation, Dr. Schultz noted the plaintiff’s concussions in the early years of elementary school may have left him “with increased vulnerability to the subsequent concussions, such as the one that arose from the 2017 MVA”. She also considered what she described as the plaintiff’s “complicated prior family, trauma and adversity history”, noting factors including parental discord, his older brother’s disruptive behaviour, bullying at school and various health issues. She commented that at the time of the MVA, although mentally stable, the plaintiff “likely presented with increased psychological vulnerability to stress, trauma, life destabilization, and somatization of emotional distress”.

[157] With respect to causality of cognitive difficulties, Dr. Schultz noted certain matters which she identified as “post-concussive sequelae” following the MVA. Among them was “fragmentation of memory after the MVA, including emergency hospital admission and almost no memory of the balance of the day”. She identified these symptoms as coming from her interview with the plaintiff. However, none of these symptoms were specifically identified in the plaintiff’s evidence at trial, nor do they appear in the hospital clinical records.

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[158] The plaintiff’s evidence at trial was that, following the accident, he was “confused”, “disoriented” and “unsure of the whole situation”. He was able to describe what happened after the MVA, including talking to the ambulance attendance, the car ride home, and going to BC Children’s Hospital. The plaintiff commented that the car ride home “didn’t seem real”. When asked to explain, he said he was not sure if his vision was blurry, or just “weird” because of the hit to his head. The plaintiff’s evidence as to his memory of that day thus appears to be different than what was understood by Dr. Schultz.

[159] After reviewing these and a variety of other factors, Dr. Schultz concluded:

> … the causality of [the plaintiff’s] present mild cognitive impairment is multifactorial. The initial triggering effects of the concussion sustained in the 2017 MVA were likely compounded, complicated and made prolonged due to a host of secondary factors including persistent emotional distress, chronic headaches/pain, poor sleep, fatigue and tinnitus. [The plaintiff’s] post-concussive difficulties might have been superimposed upon pre-existing brain vulnerability due to three prior concussions, potentially producing a cumulative effect with diminished recovery outcomes.

[160] With respect to causality of emotional disorders, Dr. Schultz noted a number of factors that have contributed to the plaintiff’s emotional condition, including:

a) Post-concussive sequelae;

b) Trauma and psychological distress arising from the MVA;

c) Life, school and sports destabilization, with increased physical limitations, cognitive and school difficulties, fatigue, chronic pain and headaches, and

the inability to engage and find enjoyment in sports and other athletic pursuits;

d) Destabilization of family life;

e) Decreased socialization and social support;

f) Loss of future vocational direction; and

g) Lack of timely access to psychological and psychiatric treatment.

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[161] Dr. Schultz concluded that the plaintiff's depression and somatic symptom disorders were new and developed subsequent to the MVA, while his anxiety disorder and panic attacks were exacerbated following the MVA. His stress disorders were also new, although he:

> … was likely more prone to accident-related traumatization due to his emotional vulnerability associated with his prior trauma, psychological and mental health history.

[162] Thus:

> In conclusion, the direct and indirect long term psychological impact of the 2017 MVA had a predominant and the most substantial role in the development of [the plaintiff's] currently diagnosed multiply comorbid mental health disorders. The accident-related factors were superimposed upon his pre-existing vulnerability to stress, anxiety, trauma and somatization of distress, creating a complex and persistent disability burden with long term implications.

[163] Dealing with the impacts of these conditions on the plaintiff in the future, Dr. Schultz opined that:

a) The plaintiff will likely be delayed in his transition to independent living, and will need more support, encouragement and coaching in this process than others his age;

b) The plaintiff will likely face challenges in social functioning, particularly at times when his mental health symptoms worsen;

c) The plaintiff will likely face challenges in educational or training programs, including:

i. difficulty with auditory attention and vigilance, and with listening comprehension and note-taking

ii. difficulty with mental stamina and maintaining prolonged periods of study;

iii. decreased tolerance for sitting;

iv. difficulties with initiative, motivation and task completion;

v. distractibility and slowness in task and project completion; and

vi. poor tolerance of academic stress, deadlines and time pressures.

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[164] As a result, Dr. Schultz expressed the view that the plaintiff will require intensive mental health treatment and academic accommodations to sustain his education, that his ability to successfully complete post-secondary education is of concern, and his outcomes will depend on the effectiveness of those treatments and the availability of family, social and professional supports.

[165] With respect to impact on future work, she noted that the plaintiff is too young to have a work history, and that he:

> … is currently struggling with multiple mental health problems, pain and fatigue and needs intensive treatment to improve his recovery outcomes that are uncertain at this time. Given [the plaintiff's] young age and need for treatment, it is not advisable to make long term vocational predictions for him.

[166] That said, she identifies concerns about the plaintiff's ability to work in certain environments – including those that:

a) are safety-sensitive, where there is high risk for injury, that require overtime, or that may require him to sit for long periods of time;

b) would require him to handle criticism, manage interpersonal problems, or act in an independent, assertive and socially confident manner; or

c) would require sustained attention, vigilance and prolonged listening, to perform mental functions at a consistent pace without breaks, or tolerate fatigue, stress, pain or anxiety.

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[167] She provided a lengthy list of accommodations that would be recommended for the plaintiff's entry into employment, including a quiet and slow-paced work environment with frequent rest breaks and opportunities to change position. She noted that:

> Given the long list of work accommodations that [the plaintiff] will likely require, their implementation may not be a realistic expectation for many employers, especially in the entry level positions he would be seeking. Pre-vocational and vocational counselling is recommended before [the plaintiff's] future direction is established. Starting with volunteer or part time, entry-level work (accommodated) is likely to be the most practical approach, accompanied by occupational therapy, vocational rehabilitation and mental health supports. If employed, [the plaintiff] is at heightened risk for presenteeism (being present at work but showing lowered productivity), absenteeism, disability and occupational injury.

[168] Dr. Schultz described the plaintiff's prognosis for neuropsychological and psychological recovery as guarded, given that he has plateaued over four years after the MVA. However, she notes that to the time of her report he had not received the appropriate mental health, counselling and pain management interventions that had potential for improved recovery outcomes.

[169] Dr. Schultz was cross-examined at length (over three hours). She was asked about the fact that her interview of the plaintiff was done by video link, rather than in person. She expressed the view that this was a reasonable accommodation in light of then-existing Covid-19 conditions and did not affect her ability to prepare her opinion.

[170] Dr. Schultz was asked about the fact that one of the standardized tests that was used, the Test of Everyday Attention, is normed for individuals aged 18 to 80, while the plaintiff was only 16 years and 11 months old at the time of testing. Her

view was that given the purpose for which she used the test (to establish whether there was a significant cognitive deficit), the difference between 16 years and 11 months and 18 years of age is not significant.

[171] Another of the tests used by Dr. Schultz was the Wechsler Adult Intelligence Scale-IV test (“WAIS-IV”). Counsel for the defendant asked Dr. Schultz about a 2009 article in the Archives of Clinical Neuropsychology, which dealt primarily with the WAIS-III test (an earlier version of the same test), and which suggested that a significant number of people in the “normal population” would be expected to exhibit one or more WAIS-III index score abnormalities, that composite scores are more reliable than subtest scores, and that neuropsychologists should “guard against over-interpreting isolated low scores and adopt a more scientific approach to evaluating test results”. Dr. Schultz described some of the conclusions of this article as controversial, but agreed that composite scores are more reliable than their component subtest scores, and that variability within a normal population is a known phenomenon.

[172] In the case of the plaintiff, only two of his four composite scores were below the 50th percentile, the lowest being the “Working Memory” composite score which equated to the 34th percentile – although the subtests within that composite ranged from the 5th percentile to the 63rd percentile.

[173] Dr. Schultz opined that it is important to contextualize the test results not only with respect to other tests in the battery, but also with the history of the subject and any real life difficulties reported by (or about) them. In her view, it is not appropriate to ignore variations in the test results. Rather, the job of the neuropsychologist is to analyze the results as a whole in the context of the subject’s medical, school and personal history.

[174] Dr. Schultz also agreed that performance on a neurocognitive test battery can be affected by the subject’s emotional issues, and that there are significant studies (including some published by her) on the cognitive impact of depression and anxiety.

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Issues

[175] The issues to be determined are the:

a) Nature and extent of the plaintiff's injuries caused by the MVA;

b) Assessment of the claim for loss of housekeeping capacity;

c) Assessment of non-pecuniary damages;

d) Assessment of loss of future earning capacity;

e) Assessment of the cost of future care; and

f) Assessment of special damages.

Analysis

Credibility and Reliability / Use of Clinical Records

[176] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.) at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[177] In considering credibility, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357.

[178] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

a) The ability and opportunity of the witness to observe events;

b) The firmness of their memory;

c) Their ability to resist the influence of interest to modify their recollection;

d) Whether their evidence harmonizes with independent evidence that has been accepted;

e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;

f) Whether their evidence seems generally unreasonable, impossible or unlikely;

g) Whether the witness has a motive to lie; and

h) The demeanour of the witness generally.

[179] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[180] Counsel for the defendant did not make substantial submissions on credibility or reliability, nor did counsel for the defendant directly challenge the plaintiff's evidence as to his various symptoms in cross-examination.

[181] One matter that arose with respect to the plaintiff was his evidence that, during his grade 8 year, he would tell Ms. Van Stolk that he did not have a headache, even if he did, so she would proceed with treatment. He said he had

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learned very early on that if he acknowledged a headache, he would be told to sit and wait before starting.

[182] Because of this evidence, and the plaintiff's acknowledgement that as a 12-13 year-old he was not always truthful, I have been somewhat cautious in my review of the plaintiff's allegations – including, but not limited to, his claims that he has consistently suffered from headaches since the MVA. While I remain alive to the possibility of exaggeration, in my view the plaintiff appears to have matured significantly in the years since his interactions with Ms. Van Stolk. Other than the concern identified in this paragraph, I did not have cause to doubt his credibility.

[183] I want to deal briefly with the defendant's submissions as to the lack of any reference in Dr. Korn's initial post-MVA letter to concussions. I do so with reference to the comments of Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118 at paras. 34-37:

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
>
> [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
>
>> ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important.
>>
>> ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.
>
> [36] While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, <u>the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence</u>

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> or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
>
> [37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.
>
> [Emphasis added.]

[184] Although the court was provided with extensive clinical records, the parties were agreed that the use that can be made of those records is limited. The use and admissibility of clinical records was summarized by Justice Metzger in *Seaman v. Crook*, 2003 BCSC 464 at para. 14:

> (1) That the observations by the doctor are facts and admissible as such without further proof thereof.
>
> (2) That the treatments prescribed by the doctor are facts and admissible as such without further proof thereof.
>
> (3) That the statements made by the patient are admissible for the fact that they were made but not for their truth.
>
> (4) That the diagnoses made by the doctor are admissible for the fact that they were made but not for their truth.
>
> (5) That the diagnoses made by a person to whom the doctor had referred the patient are admissible for the fact that they were made but not for their truth.
>
> (6) That any statement by the patient or any third party that is not within the observation of the doctor or person who has a duty to record such observations in the ordinary course of business is not admissible for any purpose and will be ignored by the trier of fact. It is not necessary to expunge the statements from the clinical records as this is a judge alone trial.

[185] Returning to the question of whether the plaintiff had been diagnosed with a concussion at or shortly after the time of the collision, it is my view that the weight of the evidence is that those treating the plaintiff believed that he had suffered a

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concussion. The absence of that term in Dr. Korn's first post-MVA letter and the fact that emergency room staff did not fill out the Glasgow Coma Scale portion of the form they were using does not undercut the conclusion that is otherwise apparent on the weight of the evidence.

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[186] It is thus my view that the defendant's questioning of the conclusions reached by both Dr. Chow and Dr. Schultz, in reliance on the various records indicating that a concussion had occurred in the MVA, does not undercut their opinions on that question.

Causation, Injuries and Prognosis

Legal Principles

[187] The general test for causation, for which the leading case is *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183, was concisely summarized by Justice Kent. in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 318:

> 1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
> 2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
> 3. it is not necessary for the plaintiff to establish that the defendant's negligence was the <u>sole</u> cause of the injury and damage. As long as it is it is <u>part</u> of the cause of an injury, the defendant is liable; and
> 4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.
>
> [Emphasis in original.]

[188] In *Athey* at paras. 32-35, Justice Major noted the following key legal principles:

> [32] …The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to

> assess what the “original position” would have been. It is the difference between these positions, the “original position” and the “injured position”, which is the plaintiff’s loss….
>
> …
>
> [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The “crumbling skull” doctrine is an awkward label for a fairly simple idea. It is named after the well-known “thin skull” rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.
>
> [35] The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage… Likewise, 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… This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.
>
> [Citations omitted.]

[189] These principles were further explained by Chief Justice McLachlin in *Blackwater v. Plint*, 2005 SCC 58 at paras. 78-81:

> [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*. Mr. Barney’s submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

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> [79] At the same time, the defendant takes his victim as he finds him — the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> [80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
>
> [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

[190] In this case, there is significant uncertainty as to both:

a) How the plaintiff's life would have proceeded absent the MVA; and

b) The future course of the plaintiff's physical and psychological symptoms, and his employment prospects in light of the MVA.

[191] The plaintiff's future prospects are hypothetical facts, as to which Major J. commented in *Athey* at para. 27:

> [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood … For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation …
>
> [Citations omitted.]

[192] Consideration of hypothetical events plays a significant role in assessing damages in this case.

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Positions of the Parties

[193] The plaintiff relies on the conclusions drawn by the medical experts that his ongoing physical pain and psychological symptoms are caused, in whole or in substantial part, by the MVA.

[194] The defendant, on the other hand, argues that the experts have improperly assumed that, simply because the plaintiff's symptoms arose after the MVA, they must have been caused by it. The defendant concedes that the MVA resulted in soft tissue injuries, but says those injuries significantly improved within a year, and that any residual symptoms are not functionally limiting. The defendant points to the lack of any treatment of the plaintiff during his grade 9 year, and argues that the court should conclude that any injuries or pain experienced after that time are not caused by the MVA.

[195] With respect to the plaintiff's psychological issues, the defendant argues that the plaintiff suffered from pre-existing undiagnosed emotional, psychological and psychiatric issues, and that regardless of the MVA, the plaintiff would have continued to experience stressors in the form of parental discord, family conflict and social conflict with peers (including ongoing bullying and relationship breakups). The defendant says that any stress perceived by the plaintiff initially after the accident was minor, and that the plaintiff's ongoing emotional, psychological and psychiatric issues were not caused by the MVA.

[196] The defendant argues that Dr. Schultz's opinion regarding the connection between the plaintiff's experience of pain from the MVA, and his psychological symptoms, should be disregarded on the basis that her opinion is based on an incomplete understanding of the family conflict and the bullying issues at school. The defendant notes as well that certain things that came out in the plaintiff's psychiatric interviews in early 2022, including his grade 9 suicide attempt, were not disclosed to Dr. Schultz. The defendant argues that Dr. Schultz failed to explain how the improvement in the plaintiff's mental health in grade 11, and his resultant improved performance at school (other than in math), was consistent with her opinion.

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[197] I note that Dr. Schultz met with the plaintiff on September 24, 2021, and the evidence indicates that this was at the early stages of what became a downward spiral in the plaintiff's mental health leading up to his February 2022 time at Surrey Memorial Hospital. It became clear in Dr. Schultz's cross-examination that she had been provided with the reports of the plaintiff's early 2022 psychiatric interviews, and was prepared to comment on them. Those interviews were, of course, several months after Dr. Schultz conducted her independent assessment of the plaintiff. Counsel for the defendant made clear that he was not asking Dr. Schultz to comment on them.

[198] The defendant also argues that Dr. Schultz's conclusions with respect to mild cognitive impairment are the result of "cherry-picking a few subtests of weakness" in the context of the majority of cognitive tests showing average or better results.

Analysis

[199] Dealing first with physical injuries, it is my view the evidence demonstrates the plaintiff suffered soft tissue injuries and a concussion in the MVA.

[200] The suggestion that there was no concussion, contrary to the opinions of both Dr. Chow and Dr. Schultz, and based simply on the absence of specific reference to it in two of the clinical records, simply ignores the balance of the evidence which clearly supports a finding that a concussion occurred in the MVA.

[201] The plaintiff's soft tissue injuries were primarily focused in his neck, shoulder and mid-back areas. The evidence establishes that the effects of those injuries continue to the present. The suggestion that the injuries resolved after one year, in my view, finds no support in the evidence. It is an inference that the defendant seeks to have drawn based on the lack of medical treatment for a period of time after the plaintiff ceased his physiotherapy treatments with KPG.

[202] However, the evidence surrounding the termination of those treatments is clear that the plaintiff's physical symptoms had not resolved, but that the results of physiotherapy treatment had plateaued and the medical professionals were of the

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view that other treatments should be tried next before a continuation of physiotherapy was required.

[203] The reasons for the lack of treatment in the next year or so were explained in evidence. They include the plaintiff's own understanding, regardless of whether it was correct, that his recovery was as good as it would get, and more importantly, the difficulty of the mother in organizing any treatment given her own poor physical and mental state.

[204] When the plaintiff began to show determination to return to greater physical activity, which appears to have happened around the start of grade 10, the resultant increase in his neck pain and other symptoms led to further medical involvement and recommendations for physiotherapy.

[205] The defendant argues the conclusions of the experts as to causation in this case rely excessively on the temporal connection between the MVA and the various symptoms experienced by the plaintiff subsequent to the MVA. In this case, the evidence at trial indicated that the plaintiff had continued to experience those symptoms even during that year when he did not see Dr. Korn. The fact that the plaintiff has consistently experienced these symptoms, and the absence of any alternative cause, in my view appropriately grounds a finding of causation.

[206] With respect to headaches, the evidence indicated consistently that the plaintiff has experienced multiple headaches per day since the MVA, with the extent of those headaches varying with the sorts of activities the plaintiff was undertaking. They appear to have been worse when the plaintiff was attending school – particularly on those days requiring concentration and note-taking for academic subjects. I accept the evidence that these headaches are caused by the concussion that the plaintiff suffered in the MVA. While the plaintiff had previous concussions, he was not experiencing concussion-related symptoms for some time prior to the MVA and it seems clear that, but for the MVA, he would not have experienced them after the MVA.

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[207] I am not prepared to make a finding with respect to the plaintiff's complaints of continuous low-grade headaches, given the inconsistent information he provided about them – particularly during his grade 8 year while being treated at KPG. However, in my view, the regular headaches he has experienced have had a significant impact on him. This pain, combined with that arising from his soft tissue injuries, has undercut the plaintiff's efforts to return to normal physical activities as well as his ability to perform in school.

[208] I turn now to the impacts of the MVA on the plaintiff's mental health.

[209] I accept Dr. Schultz's opinion that the plaintiff suffers from depression (Persistent Depressive Disorder, with Intermittent Major Depressive Episodes, with Current Episode, moderate, with Anxious Distress); chronic post-traumatic stress (Other Specified Trauma- and Stressor-Related Disorder), Generalized Anxiety Disorder, and Somatic Symptom Disorder with Predominant Pain. The symptoms described by her as founding her opinions for these diagnoses match the symptoms reported in the evidence. They are also supported by the ongoing concerns raised by Dr. Korn, who attempted over several years to persuade the plaintiff to seek out mental health support (as detailed above), and by the events of February 2022 as these mental health issues came to a head.

[210] My conclusions with respect to the plaintiff's long-term pain experience are set out above. At the time of the MVA, the plaintiff was a successful student who was active in sports and socialized with other like-minded youth. The MVA severely impacted his ability to continue with the sports that had been not only a valuable outlet for him, but also a fundamental part of his identity. The evidence indicated he lost contact with friends and, as his mother observed, he "went quiet". Dr. Schultz's conclusions as to the connection between the plaintiff's experience of pain, the resulting "life, school and sports destabilization", changes in his socialization and social support, and his psychological condition are all well-supported in the evidence.

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[211] In my view, the evidence leads to a conclusion that, but for the MVA, the plaintiff would not have suffered the depression, stress and somatic symptom disorder that were identified by Dr. Schultz. The symptoms underlying those issues are closely tied to the MVA and the pain burden and resulting lifestyle changes that flowed from it.

[212] With respect to anxiety, it is clear the plaintiff had pre-existing anxiety issues. The plaintiff’s anxiety might have been triggered from time to time by family strife or the social pressures the plaintiff has experienced. But in my view, the evidence is clear that the anxiety was greatly exacerbated by the MVA. The MVA plays a key part in the plaintiff’s anxiety about the future, the plaintiff’s pain burden arising from the MVA is an ongoing contributor to the anxiety, and the changes the MVA has led to both in the plaintiff’s sports activities and his social circles have impacted his ability to cope with the anxiety. The plaintiff’s post-MVA experience of anxiety can be clearly contrasted to that prior to the MVA, when occasions on which the anxiety became acute were temporary and managed with the help of Dr. Korn.

[213] I turn now to the question of cognitive difficulties. In my view, the cognitive testing reported on by Dr. Schultz demonstrates that the plaintiff’s cognitive abilities are, overall, average with specific areas of strength and weakness. I have difficulty finding cognitive impairment in light of the plaintiff’s performance at school. In particular, in the plaintiff’s grade 11 year, he had significant academic success, including strong marks in two difficult academic courses – 91% in Chemistry 11 and 93% on his second attempt at Pre-Calculus Math 11. While his first attempt at Pre-Calculus Math 11 was a failure, there was a specific explanation for that and once the circumstances changed, he was able to be successful.

[214] The results of the testing by the vocational expert, Mr. Nordin, are in my view also material to the plaintiff’s cognitive ability. The testing is discussed below in the context of the claim for loss of earning capacity. I refer in particular to the Wide Range Achievement (“WRAT-5”) test results, which indicated a range of scores that

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included high average scores in reading comprehension and sentence comprehension.

[215] The inference I draw from the testing results as a whole, as well as from the evidence of his academic performance since the MVA, is that when the plaintiff's mental health is somewhat under control, he is able to work at a high cognitive level for a period of time until his physical symptoms begin to impact his concentration. Thus, I see the plaintiff as having the cognitive capacity to do complex academic work, but with limits as to the volume of such work that he can do on any given day. His limitations come from his chronic pain and headaches, not from a lack of cognitive ability.

[216] Thus, notwithstanding Dr. Schultz's opinion which I have carefully considered, I am not persuaded on a balance of probabilities that the plaintiff has suffered any cognitive disorder as a result of the MVA.

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Damages

Non-Pecuniary Damages

Legal Principles

[217] The legal principles underlying the assessment of non-pecuniary damages are found in the judgment of Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46:

> [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, supra, at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet

> the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [46] The inexhaustive list of common factors cited in Boyd that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list.
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[218] *Stapley* reminds the court that, in assessing non-pecuniary damages, one must consider the particular plaintiff, in their particular circumstances, and make an award that accommodates those unique circumstances.

Positions of the Parties

[219] The plaintiff submitted that an appropriate award for non-pecuniary damages in this case is $275,000, relying on the following cases that the plaintiff says bear similarities to the present circumstances:

a) *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155, aff'd 2018 BCCA 410: This case dealt with a 33-year-old plaintiff who began suffering from PTSD as a result of the collision. Although his physical injuries were not serious, his PTSD was "life-altering in every respect". His gregariousness was replaced by isolation and withdrawal. His "capacity for and love of hard work have been replaced by indolence and despair". His PTSD led to multiple failed suicide attempts, and he was hospitalized

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three times as a result. The trial judge concluded that there was little chance the plaintiff would ever recover socially, emotionally or physically from the effects of the collision. Non-pecuniary damages of $265,000 were awarded, which (considering inflation) would translate to *$308,000*.

b) *Sirna v. Smolinski*, 2007 BCSC 967: The plaintiff was 23 when she suffered a mild traumatic brain injury and soft tissue injuries in a collision. The trial judge concluded the plaintiff suffered significant and serious ongoing physical, psychological and emotional trauma that left her with permanent functional deficits, including chronic pain and fatigue, cognitive deficits affecting attention and memory, an impaired sense of smell and additional fatigue and depression. Non-pecuniary damages of $200,000 were awarded, which would translate to *$268,000* with inflation.

c) *Howell v. Strutt*, 2021 BCSC 92: The plaintiff was 48 when he was injured in an accident. While his physical injuries were relatively minor, he suffered serious psychological injuries. He was diagnosed with both PTSD and persistent depressive disorder, with a risk of developing major depressive disorder. He became passive, unmotivated to continue his work as a photographer, and artistically and socially insecure. Non-pecuniary damages of $190,000 were awarded, which would translate to *$202,000* with inflation.

d) *Bhatti v. Ethier*, 2018 BCSC 1779: The plaintiff was a 16-year-old grade 11 student when injured in two accidents within a relatively short period of time. Her soft tissue injuries had improved by about 80% by the time of trial, but still caused some issues. She suffered from depression, anxiety, PTSD and chronic pain. Cognitive testing showed diminished cognitive faculties, especially in concentration and short-term memory. She became socially isolated, lost confidence, and her career goal to become a nurse or doctor was likely lost to her. Her prognosis was generally negative.

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Non-pecuniary damages of $200,000 were awarded, which would translate to *$224,000* with inflation.

e) *Steinlauf v. Deol*, 2021 BCSC 1118, aff’d 2022 BCCA 96: The plaintiff was a 26-year-old RCMP officer when he suffered injuries to his neck, shoulder, lower left leg and back in a collision, and developed depression, anxiety, PTSD and cognitive difficulties. He was on track to build a successful career within the RCMP. After the accident, he was a shadow of his former self, was partially disabled, with limited mobility, shattered confidence, serious psychological problems, persistent and worsening pain and an uncertain future. Non-pecuniary damages of $225,000 were awarded, which would translate to *$240,000* with inflation.

[220] The defendant argues that the plaintiff is entitled to a modest award for non-pecuniary damages, based on the limited extent of injuries they say can be traced to the MVA. Specifically, the defendant argues that the plaintiff sustained a whiplash type injury for which he received physiotherapy for just over a year, and that he was able to attend school full-time while recovering. The defendant says that the other complaints advanced by the plaintiff in this action were not caused by the MVA.

[221] The defendant relies on the following cases that they say bear similarities to the injuries actually caused by the MVA in this action:

a) *Lehtonen v. Johnston*, 2009 BCSC 1364: The plaintiff was 37 at the time of the accident, and sustained a mild injury to the soft tissues of her neck and upper back, and a mild to moderate injury to the soft tissue injuries of her lower back. The neck and upper back symptoms improved significantly within six weeks, although they flared up from time to time. The lower back symptoms persisted for about a year but after the first few months were not disabling. The court concluded there was no causal relationship between the accident and the fibromyalgia with which the plaintiff was diagnosed or the headaches she experienced from time to time. While her injuries likely contributed to the plaintiff’s pre-existing

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depression, she would have had depression even if the accident had not happened, and any exacerbation of her mental health problems by the accident was temporary and minor. Non-pecuniary damages of $40,000 were awarded, which would amount to *$53,600* with inflation.

b) *Glesby v. MacMillian*, 2014 BCSC 334: The plaintiff was 24 at the time of the accident. She suffered soft tissue injuries which led to accident-related deficits and pain for a period of three years. The court concluded the other problems she faced were caused by the worsening of her pre-existing gastrointestinal complaints and anxiety which were unrelated to the accident. Non-pecuniary damages of $60,000 were awarded, translating to *$71,800* with inflation.

c) *Siddall v. Bencherif*, 2016 BCSC 1662: The plaintiff was involved in two accidents when she was aged 36 and 37. She suffered soft tissue injuries. She had pre-existing headaches, neck and shoulder pain from long hours of study and school work, and a long history of anxiety, depression and other psychological issues dating back to her teenaged years. The court found that her symptoms from the first collision resolved within several months, while the second collision exacerbated her pre-existing physical pain symptoms for no more than several weeks. The court concluded that while the plaintiff's psychological symptoms were exacerbated by the collisions, other factors going on at the time also exacerbated and greatly contributed to her condition. Non-pecuniary damages of $60,000 were awarded, which translates to *$70,725* with inflation.

Analysis

[222] I have considered the non-exhaustive list of factors set out in *Stapley*, alongside the cases provided by both parties.

[223] The cases cited by the defendant were selected based on theories of causation that I have not accepted. They generally involve much older plaintiffs whose physical symptoms resolved relatively quickly and whose psychological

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symptoms were found to be primarily attributable to other causes. They are of little assistance.

[224] The plaintiff's cases also mostly reflect older plaintiffs, most of whom suffered cognitive diminishment as a result of their accidents.

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[225] In my view, the case that is closest to the present is *Bhatti*, in which the plaintiff was 16 when the accident occurred. It had significant impacts on her education and vocational prospects, and her injuries included ongoing physical pain as well as psychological issues. Key differences include the younger age of the plaintiff in this case, as well as the difference in findings with respect to cognitive issues.

[226] In the next section, I will consider the claim for loss of housekeeping capacity. Difficulties with housekeeping do not appear to have been a key issue in *Bhatti*. For reasons I will discuss, I conclude the plaintiff will perform the bulk of his own housekeeping, notwithstanding its impact on his pain burden, and in light of cases that I discuss in the next section, I have taken that into account in the award for non-pecuniary losses.

[227] I would award the sum of $215,000 for non-pecuniary losses.

Loss of Housekeeping Capacity

[228] The plaintiff argues that a separate award should be made in respect of loss of housekeeping capacity. The plaintiff submits that this court should award an amount that will permit the plaintiff to pay for housekeeping services at a rate of $20 per hour for 10 hours per week. The plaintiff says the amount should be calculated based on the plaintiff requiring these services from the time he turns 20 – at which time he can reasonably be expected to have moved out of his parents' home to live on his own – until the time he turns 70. Applying the 2% discount rate (which is applicable to cost of future care claims but said to also be the appropriate rate in this situation), and the resultant multiplier of 31.4236, the plaintiff says that the present value of this claim is $326,805.

[229] The plaintiff relies on the judgment of Justice Basran in *Steinlauf*, who summarized the applicable principles as follows at para. 222:

> - Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
> - A plaintiff who has suffered an injury that would make a reasonable person in his circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
> - Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
> - As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
> - Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

[230] Prior to the accident in that case, the plaintiff lived on his own while he pursued a career as an RCMP officer. Having reviewed all of the evidence, Basran J. concluded the plaintiff was “incapable of performing household tasks and will continue to rely on others to do this work”. He awarded $164,000 for cost of future care, based on the plaintiff having help for five hours per week at $20 per hour. The Court of Appeal affirmed the approach taken by the trial judge: (*Steinlauf BCCA* at paras. 116-117), noting that it was consistent with the approach set out in *Kim v. Lin*, 2018 BCCA 77.

[231] The defendant says that *Steinlauf* is distinguishable because the plaintiff in that case had been living independently, but had been forced to move to his parents’ home because he was unable to perform those tasks.

[232] Recent appellate authorities on this issue include *Liu v. Bains*, 2016 BCCA 374, where the court approved an award of $70,000, commenting at paras. 25-26:

> [25] … it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63.

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> [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

[233] In *Kim v. Lin*, the plaintiff was a 27-year-old wife and mother who had, prior to the accident in question, been primary responsibility for the family's household work and child care. The Court of Appeal dismissed an appeal from an award of $418,000 for loss of housekeeping capacity. Chief Justice Bauman noted at para. 33:

> [33] … where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[234] In *Kim*, Bauman C.J. cited with approval (at para. 30) the comments of Professors Cassels and Adjin-Tettey in *Remedies: The Law of Damages*, 3d ed. (Toronto: Irwin Law Inc., 2014) at 187-188:

> Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing

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> plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.
>
> [Footnotes omitted.]

[235] In *Riley v. Ritsco*, 2018 BCCA 366, the court reviewed the state of the law (at paras. 98-100) and commented at paras. 101-103 that:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
>
> [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
>
> [103] The $85,000 figure that I have proposed for non-pecuniary loss takes into account all of the general damages the plaintiff has suffered and will suffer. It should not be augmented by a segregated award for loss of housekeeping capacity.

[236] An award for loss of housekeeping capacity was made in *Wright v. Admiraal*, 2022 BCSC 742. In that case, the plaintiff's father and a friend had gratuitously performed a wide variety of housekeeping tasks for the plaintiff. At paras. 170-171, Justice Gerow stated:

> [170] It is clear from the case law that loss of housekeeping or homemaking capacity is a claim for loss of capacity and not a claim for cost of future care: *O'Connell v. Yung*, 2012 BCCA 57 at para. 65. It is to reflect the diminished capacity of a plaintiff to take care of his household, not the cost of provision of services by others. An award for loss of housekeeping capacity reflects the loss of a personal capacity, and is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to

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> be required. The case law suggests a conservative approach should be taken in making an award for loss of housekeeping capacity.
>
> [171] Having considered the evidence, it is apparent the plaintiff suffers diminished capacity in his ability to perform household tasks as a result of his chronic headaches, dizziness and vertigo. Accordingly, I have concluded it is appropriate to make some award under this head of damage. However, the plaintiff is still capable of performing housework and other household tasks on days when he is not suffering from a headache. Having considered the evidence and the case law, it is my opinion that an award of $40,000 is appropriate to compensate the plaintiff for his loss of both past and future housekeeping capacity.

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[237] The plaintiff relies on comments of Dr. Schultz that, based primarily on his psychological issues, he will have a “delayed and difficult” transition to independent living, that he depends heavily on family support with respect to household responsibilities, and that he requires treatment of his mental health difficulties before he is ready to live on his own. Dr. Schultz also commented that the plaintiff will need support, encouragement, coaching and practical assistance as he moves to independent living.

[238] With respect to housekeeping, Dr. Khan commented that the plaintiff:

> … is currently able to perform some tasks such as loading and unloading the dishwasher, laundry, vacuuming, and some cooking. He may experience pain with these activities, such as shoulder pain while putting dishes away overhead. He also experiences neck and back pain while physical tasks such as vacuuming and laundry. He described that he has learned to work through the pain with housekeeping tasks, but may take breaks and rest on occasion as well.

[239] The defendant argues that the plaintiff has failed to establish any impairment, and that, in any event, this is a case in which difficulties in housekeeping are properly recognized through the award for non-pecuniary damages. The defendant also notes that no occupational therapy assessment has been conducted of the plaintiff’s ability to perform housekeeping chores. The defendant argues that, with the plaintiff having only recently commenced counselling, there is no basis to assess whether psychological impairments will prevent him from performing housekeeping services in the long term.

[240] In this case, I am satisfied that the plaintiff is in a position where he is capable of performing many lighter housekeeping services for himself by working through the pain, as recognized by Dr. Khan in his report. At the same time, it does seem clear that while he is living at home he is benefitting from significant family support in respect of housekeeping. Based on Dr. Schultz's evaluation, it seems likely that his transition to independent living will be delayed, and that even when he does so, he will continue to require significant support. As I assess the evidence, there appears to be a reasonable likelihood that the plaintiff will, from time to time, require assistance with heavier-duty housekeeping work. Given the plaintiff's young age, and the prognosis for a pain burden that will continue indefinitely, it is my view that there should be some recognition of this need through a small pecuniary award.

[241] I make this award notwithstanding that the leading authorities tend to choose either to recognize loss of housekeeping capacity through a non-pecuniary award or through a separate non-pecuniary award. I have reviewed those authorities in depth, and in my view nothing in them is inconsistent with recognizing different aspects of a plaintiff's loss of housekeeping capacity in the award for non-pecuniary loss and through a pecuniary award. Rather, the principles underlying those authorities support different aspects of the loss of housekeeping capacity giving rise to different consequences for a plaintiff that are appropriately recognized in different ways. What is key is to ensure that there is no duplication of the awards.

[242] In determining the pecuniary award in this case, I note that I have already taken account of the housekeeping work that the plaintiff will do himself, working through his pain burden, in the award of non-pecuniary damages. This pecuniary award is focused on the likely need for external support from time to time, either from family or from paid providers. I assess this amount taking into consideration the plaintiff's young age, the prognosis of ongoing pain and restrictions, and the applicable present value multiplier (for loss to age 70) of just over 31.

[243] In light of all that, it is my view that an appropriate award is $31,000.

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Loss of Earning Capacity – Future

Legal Principles

[244] The task of assessing a claim for loss of earning capacity was described by Justice Dickson (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 at 251:

> We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings,* [[1966] S.C.R. 532]. A capital asset has been lost: What was its value?

[245] Assessing a party's loss of future earning capacity therefore involves comparing a plaintiff's likely future, had the accident not happened, to their future after the accident. This assessment depends on the type and severity of the plaintiff's injuries, and the nature of the anticipated employment in issue: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[246] The fundamental goal is, to the extent possible, to put the plaintiff in the position he would have been but for the injuries caused by the defendant's negligence: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

[247] The proper approach to assessing future loss of income-earning capacity was canvassed by the Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345, where at para. 47, Justice Grauer set out the following three-step process:

> [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.

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Tripartite Test – Step One

[248] Step one requires consideration of whether the evidence establishes a potential future “event” that could lead to a loss of capacity such as a chronic injury.

[249] In *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, the court set out four factors that may be considered:

> [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment 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.

[250] With respect to the *Brown* factors, Grauer J.A. stated the following in *Rab*:

> [36] ... these considerations are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.

Tripartite Test – Step Two

[251] The plaintiff is not entitled to an award for loss of earning capacity if there is not a real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla* at para. 14. Thus, the second step of the tripartite test involves determining whether there is a “real and substantial possibility” of a future event leading to a pecuniary loss: *Rab* at para. 47. This “… is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative”: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[252] In describing the “real and substantial possibility” threshold in *Rab*, Grauer J.A. stated at para. 28:

> [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v. Naumann*, 2017 BCCA 158:
>
>> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

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[253] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. concluded at para. 75 that:

> [75] … to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[254] He continued at paras. 92-95 to note that:

> [92] …The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):
>
>> 46 …[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>>
>> 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, <u>that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the</u>

> tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.
>
> [Emphasis added.]
>
> [93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.
>
> [94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities. …
>
> [95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

[255] In *Lo v. Vos*, 2021 BCCA 421, the plaintiff had developed severe depressive symptoms after the motor vehicle accident. The trial judge reduced the award of damages based on a "real and substantial possibility" that the plaintiff would have developed depression after the collision anyway as a result of pre-existing back pain. The Court of Appeal concluded that nothing in the evidence in the case was capable of supporting that conclusion, commenting at paras. 71, 74-75 and 78-79:

> [71] I observe at the outset that no expert in this case suggested that, absent the accident, the appellant was at risk of developing a major depressive disorder, or any of the other psychological problems that the appellant experienced after the accident, and which were found to be the cause of her continuing disability. There was no evidence of a risk of a natural (i.e., without accident) progression from the pre-existing state to the relevant future hypothetical event.
>
> …
>
> [74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility: *Graham* at 15; *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.
>
> [75] In my respectful view, nothing in the evidence in this case is capable of supporting that conclusion. There was no indication that the appellant had any inherent vulnerability to mental health problems because of her without-accident state. Instead, on the evidence, it took a particular combination of

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> factors that began with the appellant's pre-existing condition, but also required the impact of the injuries caused by the accident in the form of (1) soft tissue and acute injuries leading to (2) a condition of chronic pain that, (3) when combined with PTSD arising from the accident, resulted in (4) the development of generalized anxiety disorder and major depressive disorder.
>
> …
>
> [78] I should add that it is, of course, essential to consider a plaintiff's pre-existing state, such as the appellant's low back problems here, in the assessment of damages. That is part of her original state, and distinguishes her from someone whose original state was free of any physical problems. But whether her original state gave rise to a measurable risk of a future hypothetical event is a different question, requiring additional evidence.
>
> [79] In the circumstances before us, it is my respectful view that the evidence was not capable of establishing, as found by the judge, a measurable risk that the appellant "would have developed a major depressive disorder consequent on chronic lower back pain even without the accident". That is no more than speculation.

[256] Thus, the trial judge's reasons reflected a palpable and overriding error. The Court of Appeal substituted the trial judge's award of $225,000 for loss of earning capacity with an award of $810,000.

Tripartite Test – Step Three

[257] The third and final step of the tripartite analysis involves assessing the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring.

[258] With respect to the assessing loss of future earning capacity, there are two established approaches: (1) the "earnings approach"; and (2) the "capital asset approach": *Rab* at paras. 66-68; *Grewal* at para. 48; and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both approaches are correct, but apply in different situations.

[259] The earnings approach is more straightforward, and is applicable when the loss is easily measurable: *Perren* at para. 32. For example, when an accident results in injuries that render the plaintiff unable to work at the time of trial, and for the foreseeable future: *Ploskon-Ciesla* at para. 11.

[260] The capital asset approach is less clear-cut, and is more appropriate when the loss "is not measurable in a pecuniary way": *Perren* at para. 12. For example, in

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instances where the plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident: *Ploskon-Ciesla* at para. 11.

[261] The capital asset approach is applied when there has been no loss of income at the time of trial. As helpfully stated in *Ploskon-Ciesla*:

> [17] … This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[262] The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation: *Pololos* at para. 133.

[263] In *Dornan*, the plaintiff was involved in an accident when he was 24 years old, suffering soft tissue injuries and a serious concussion. The Court of Appeal increased the award for loss of earning capacity from $300,000 to $600,000, commenting at paras. 168-169 and 172-174 that:

> [168] As the respondent notes, the circumstances in a case such as this do not lend themselves to precise calculations, but it would seem evident that the value of the capital asset that has been impaired, being the appellant's without-accident lifetime earning capacity, adjusted for real and substantial possibilities, is comfortably above $1,000,000, and I would put it in the range of $1,200,000, which I consider still to be a conservative figure.
>
> [169] To what extent has that capacity been impaired? The judge rejected the appellant's position that he was unlikely ever to return to gainful employment. He accepted that the plaintiff had been rendered less capable overall of earning income from all types of employment, but considered that with further treatment, this incapacity would improve. The judge further accepted that the appellant was less marketable or attractive as a potential employee, but again felt that with a reduction in his symptoms, this would improve as well. The judge agreed that Mr. Dornan had lost the ability to take advantage of all job opportunities that might otherwise have been open to him, but expected this, too, to improve.
>
> …
>
> [172] The result of this evidence is a person who is presently incapable of earning an income, *may* become capable of earning an income in time with appropriate treatment, but appears unlikely ever to reach the income level he could have attained without the accident.

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> [173] Taking into account all of the relevant hypotheticals, it becomes evident that the judge's award of $300,000, before contingencies, cannot be sustained. It is consistent with a return to normalcy within a few years, long enough to complete treatment and training, with an allowance that it could take a little longer—but there was no finding that the appellant would ever return to normalcy, nor could it be guaranteed that treatment and training would be successful. Dr. Kemble and Dr. Cheung, whose evidence the judge appeared to accept, both acknowledged the possibility of permanent cognitive deficits.
>
> [174] In these circumstances, given the uncertainties the appellant faced and the judge's findings about his incapacities, I would put the impairment at 50% of his without-accident capacity, or $600,000. This would be subject to the contingency discussed in the previous part of this judgment.

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[264] The question of reasonableness and fairness of an award should be reviewed at the end of the assessment, once the real and substantial possibilities that are identified have been assessed and a preliminary conclusion has been reached: *Lo* at para. 117.

Expert Evidence – Future Employment

[265] Before turning to the witnesses whose evidence is relevant primarily to questions of the plaintiff's earning capacity, I note the medical evidence set out above is of direct relevance to the extent to which the plaintiff's earning capacity has been impaired by injuries suffered in the MVA. I note in particular the comments set out above in my discussion of the report of Dr. Schultz with respect to the plaintiff's employment prospects and the sorts of accommodations he would require.

Derek Nordin, Vocational Rehabilitation Consultant

[266] Mr. Nordin is a vocational rehabilitation consultant. He interviewed the plaintiff via Zoom on February 4, 2022, and reviewed the results of a series of standardized tests conducted by an experienced test administrator at Mr. Nordin's office on February 7, 2022. He was provided with all of the plaintiff's school report cards, as well as the reports of Drs. Chow and Schultz.

[267] One of the standardized tests was the Wide Range Achievement Test (WRAT-5, Green Form), which tested a range of academic skills. With respect to those skills, the plaintiff obtained a low average score for spelling (19th percentile,

Grade 8 level), average scores in word reading and math computation (66th and 50th percentile respectively, which placed the plaintiff at a Grade 12 level or higher), and high average scores in reading composite and sentence comprehension (79th and 86th percentile respectively).

[268] The plaintiff also took the Occupational Aptitude Survey and Interest Schedule (OASIS-3), which measures six broad aptitude factors related to skills and abilities required for various jobs. Of the six factors, the plaintiff obtained below average scores in two (numerical aptitude and manual dexterity), average scores in three (general ability, verbal aptitude and spatial aptitude), and an above average score in perceptual aptitude.

[269] Overall, Mr. Nordin described the plaintiff as an individual of average to above average intellectual ability.

[270] Other tests included the Career Assessment Inventory (CAI-Enhanced), which reflected the plaintiff's interest areas, a Patient Competency Rating Form (a self-report questionnaire on the plaintiff's views as to his own abilities), and a series of psychological tests.

[271] Mr. Nordin acknowledged that given the plaintiff's young age at the time of the MVA, it is not possible to predict what career path the plaintiff might have followed absent the accident, although he did note the plaintiff's expressed interest in following his father into sheet metal work.

[272] Based on the plaintiff's pre-MVA school records, Mr. Nordin expressed the opinion that absent the MVA, the plaintiff would have had the potential to go on to post-secondary education (possibly a one- or two-year program, and possibly also to an undergraduate level program), or alternatively would have been capable of completing trades training.

[273] Mr. Nordin opined that, in light of the plaintiff's physical limitations post-MVA, he would not be capable of managing work that falls within the medium to heavy

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strength category, which would preclude him from those trades training areas of employment. He went on to comment:

> 114. With respect to furthering his education, as noted, Dr. Schultz indicated he may well struggle with post-secondary schooling and should this be the case then it is less likely he will pursue schooling beyond the Grade 12 level.
>
> 115. Should this be the case, and assuming he remains restricted to work in the limited to light strength categories, [the plaintiff's] options going forward will be reduced. Essentially, he will be looking at entry-level, unskilled or semi-skilled occupations where the job duties are acquired through on-the-job training. Typically, occupations of this nature start at minimum wage (currently $15.20 per hour) and may go as high as $18 to $20 per hour (with experience).
>
> 116. That being said, at the present time I have concerns regarding [the plaintiff's] ability to be competitively employed in any capacity. I base this primarily on his significant psychological difficulties as identified by Dr. Schultz. In my opinion, [the plaintiff] will need to see significant improvement in his overall emotional / psychological functioning before he can be consider competitive employment.

[274] He recommended the plaintiff focus initially on the psychological treatment recommended by Dr. Schultz and then thereafter undertake career/vocational counselling in order to identify appropriate career paths.

[275] On cross-examination, Mr. Nordin acknowledged that on the WRAT test, the plaintiff had been scored in the 18-19-year-old age range, as this is the youngest age range for which the test is standardized. At the time, the plaintiff was 17. Mr. Nordin acknowledged it was possible that his ranking was underestimated.

[276] Mr. Nordin also acknowledged that, other than the WRAT test, the tests completed by the plaintiff were all primarily based on his self-reporting – including the OASIS test, which measures his perception of his skills and interests.

[277] With respect to the plaintiff's grade 8 marks, Mr. Nordin acknowledged that grade 8 is often a transition time when students move from elementary to high school, which may pose challenges to students in maintaining their scholastic level.

[278] Mr. Nordin also agreed that several of the courses completed successfully by the plaintiff in grade 11 were more academic in nature, and the sorts of courses a person might take in preparation to attend post-secondary education.

[279] Mr. Nordin was asked about his use of 2016 census data with respect to earnings rather than more recent labour force survey data. He explained that the labour force survey focuses on hourly rates, rather than average annual earnings, that there is variability as to the number of hours a person will work, and that he has data available to him converting the 2016 census numbers to 2019 dollars which is what he used in his report.

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Samantha Gallagher, Vocational Rehabilitation Consultant

[280] Ms. Gallagher is a vocational rehabilitation consultant. She provided a letter dated February 22, 2022, containing a critique of Mr. Nordin's report. She did not interview the plaintiff, but rather provided her opinion based on a document review. She was provided with the same documents as was Mr. Nordin, with the addition of Dr. Khan's report.

[281] Among the points made by Ms. Gallagher are the following:

a) Mr. Nordin's report does not reference having administered a test of effort, which in her opinion is typically part of a vocational test battery (I note that Mr. Nordin was not asked about this when he testified);

b) She would have used income information from the 2019-2020 labour force survey rather than the 2016 Census data – although in parts of her report she also used 2016 Census data (explaining in her testimony that the labour force survey does not break down information based on level of education);

c) With respect to Mr. Nordin's reliance on the comments of Dr. Schultz:

> Mr. Nordin also should have considered [the plaintiff's] academic performance and ability to function in high school since the motor vehicle accident. While it is important for a vocational rehabilitation

> consultant to consider the medical opinions, it is also important to consider a person's demonstrated abilities in a real-life setting. Often, a person's demonstrated in a real-life setting are the best indicator of their potential for further work or education.

[282] With respect to the latter point, although Ms. Gallagher sets out the plaintiff's high school marks in detail, she makes no reference to the fact that the plaintiff initially failed his grade 11 math course.

[283] Based on what she describes as the plaintiff's having "been able to perform well in high school" and there not having been "any issues with his ability to consistently attend and complete the requirements of his high school education", Ms. Gallagher opined that the plaintiff is likely capable of further post-secondary education. Again, the force of her conclusion is reduced given her apparent failure to recognize the plaintiff's difficulties with grade 11 math.

[284] She also suggests that Mr. Nordin was too quick to conclude that the plaintiff is incapable of competitive employment, and should have recommended volunteer work in addition to vocational consulting and job placement services in order to more thoroughly evaluate his employment potential.

Curtis Peever, Economist

[285] Mr. Peever prepared a report that provides tables to facilitate the calculation of present values of potential future losses of earnings and non-wage benefits, based on the plaintiff's age at the start of the trial. It includes a table that can be used to calculate present values of losses expressed in constant (2022) dollars over a period of years. The actuarial multipliers in that table have been adjusted for statistical probabilities of survival but not for other positive or negative labour market contingencies that might apply. They are based on the prescribed discount rate of 1.5% per year for evaluation of future wage losses.

[286] The report also provides estimates of the present values of earnings from various start dates to the plaintiff turning 70, considering various levels of education or certification, based on 2016 census data updated to 2019 dollar values, as well as

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labour market reports. The different start dates reflect the time it would notionally take for the plaintiff to obtain the specified qualification and be in a position to start earning income on that basis.

[287] The employment categories used by the report are as follows:

a) High school graduate, commencing July 1, 2022;

b) A tradesperson with a registered apprenticeship certificate, commencing September 1, 2022;

c) A sheet metal worker with a registered apprenticeship certificate, commencing September 1, 2022;

d) A college graduate from a one- or two-year diploma program, commencing July 1, 2024;

e) A university graduate with a bachelor’s degree, commencing July 1, 2026; and

f) A university graduate with a master’s degree, commencing July 1, 2028.

[288] The models underlying these tables start from estimates of potential earnings based on full-time, full year employment, and then make deductions to account for negative labour market contingencies. These include withdrawal from active participation, unemployment, and the income effects of part-time work. These contingencies are statistically derived and do not reflect the specific circumstances of the plaintiff. Separate columns in the tables reflect the statistical likelihood of involuntary withdrawal from the labour force, on the one hand, and the statistical likelihood of both involuntary and voluntary withdrawal (based on the average probability that a B.C. male may either choose to be out of the labour market or to work part-time or be placed in that position involuntarily).

[289] On cross-examination, Mr. Peever explained that the choice of whether to apply the risk-only or the risk and choice contingencies may depend on the court’s

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assessment of the particular individual, and in particular, that individual's likelihood of taking time away from work voluntarily.

Positions of the Parties

[290] The plaintiff argues that he has suffered the loss of a capital asset (his ability to earn income), in that he is less capable overall of earning income from any type of employment. He says he is less marketable or attractive as an employee to a potential employer, has lost the ability to take advantage of job opportunities which might otherwise have been open to him, and he is less valuable to himself as a person capable of earning income in a competitive employment market.

[291] The plaintiff argues that future income loss should be assessed based on the assumption that the plaintiff would, absent the MVA, have become a sheet metal worker with a registered apprenticeship certificate.

[292] Mr. Peever's report estimates the present value of the potential income for a person embarking on that career, to age 70, as $2,687,100. If one was to apply a deduction for the effects of risk-only contingencies, the total amount would be $2,366,700; while if deductions were applied for both risk and choice contingencies, the total amount would be $2,048,200. The plaintiff submits that the court should proceed based on the average of these two numbers, which is $2,207,481, based on the plaintiff's pre-MVA good health and interest in this career.

[293] The plaintiff argues that his loss should be calculated based on 80% of this amount, relying on some of the expert evidence suggesting he may never be competitively employable, while still acknowledging that he may get better but even then, will likely only be capable of part-time work at low rates of pay. Thus, the plaintiff submits that the appropriate award for loss of earning capacity is $1,765,985.

[294] The defendant argues that the plaintiff has failed to establish a real and substantial possibility that his injuries will affect his ability to work, and that no award should be made for loss of earning capacity. The defendant says that periodic or

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even ongoing pain does not necessarily equate to a real and substantial possibility of a future event leading to an income loss, and that pain during work without economic consequences is compensated through the non-pecuniary award.

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[295] The defendant argues that the plaintiff's pain is subjective, that there is no reason for him not to work through that pain, and that any disability the plaintiff experiences stems from his ongoing psychological issues, which the defendant says are not related to the MVA.

[296] In the alternative, the defendant argues that if the plaintiff has met the threshold, the court should apply the capital asset approach which in this case should result in an award roughly assessed at $50,000.

Analysis

[297] I find that the evidence as a whole indicates that the plaintiff has suffered a loss of his capacity to earn income. His physical limitations will prevent him from physically intense work like that done by his father. As well, I accept Dr. Schultz's conclusions that the plaintiff's capacity to obtain and maintain either further education or ongoing employment will be affected by such matters as:

a) Difficulties with mental stamina and maintaining prolonged periods of attention, lack of tolerance for sitting for any length of time, difficulties with initiative, motivation and task completion, distractibility and slowness in task and project completion, and poor tolerance of academic stress, deadlines and time pressures;

b) Dealing with emotional control in the work environment and handling criticism and negative feedback from those he works with;

c) Data entry and working with computers for prolonged periods of time;

d) Managing occupational stress; and

e) Dealing with high risk or unpredictable work situations.

[298] Some of these challenges may be ameliorated in part, to the extent that successful counselling allows the plaintiff to gain control over his depression, anxiety and stress issues. However, the evidence indicates it is unlikely there will be complete resolution of his pain issues, meaning that some of these factors will continue.

[299] I accept as well, based on the comments of Dr. Schultz as well as Mr. Nordin and Ms. Gallagher, that the plaintiff will require accommodations in any employment and that this will impact his competitive employability. Those accommodations may well include part-time employment, a low stress environment, a supportive supervisor and co-workers, provision of frequent rest breaks and opportunities to change position, well-scheduled, routine-based hours, and ergonomic work accommodations.

[300] I do not accept that these render him unemployable long-term. In my view, the evidence establishes that the plaintiff will be well advised to take some time to focus on his mental wellness, that he should obtain vocational or career counselling, and that to the extent he elects to consider post-secondary education, he at least initially do so on a part-time basis. It may also be appropriate for him, in transitioning to employment, to start with volunteer work in order to build capacity.

[301] In my view, the plaintiff's experience with his Pre-Calculus Math 11 program is instructive. His ultimate result, when he took the course a second time at summer school, demonstrated his capacity to do well even with a complex academic subject matter. But the stark difference between that result and what he was able to accomplish the first time through, when it was the second course each day after Chemistry 11, demonstrates the issues the plaintiff may well face with full-time study.

[302] It will be apparent from these comments that I reject the defendant's submission that no loss of earning capacity has been established. That would require me to reject the expert evidence, which I have not.

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[303] Nor is it appropriate to simply come up with a number like $50,000, which is not grounded in the extensive evidence available to me from Mr. Peever's report.

[304] Given the plaintiff's young age, and the conclusions of the experts that his symptoms will continue, neither of the approaches advanced by the defendant are appropriate in this case.

[305] I turn now to the assessment of loss in light of the facts as found. *Dornan* exemplifies the use of capitalized income streams as part of the capital approach to assessing loss of earning capacity. I would adopt that approach in considering both the plaintiff's likely without-accident lifetime earning capacity and his likely capacity in light of his present circumstances.

[306] There are, of course, many ways in which the plaintiff's without-accident career could have unfolded. The approach identified in the cases cited above requires me to identify those career paths that may have been a real and substantial possibility for the plaintiff. In my view, three alternative courses can be said to be real and substantial possibilities:

a) That the plaintiff would have followed his father into the sheet metal business, which I find is the most likely course given the plaintiff's expressed interest in that as a career goal, his interest in metalwork at school, and the fact that his older brother at one point attempted employment in that field;

b) That the plaintiff would have obtained a one- or two-year college diploma, which I find is also a real and substantial possibility given the plaintiff's strong school achievements prior to the MVA, his pursuit of academic-level courses in high school, and the success he obtained in both math and chemistry in grade 11; and

c) That the plaintiff would have obtained a bachelor's degree, which I find a real and substantial possibility for similar reasons, and which the plaintiff

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would have been particularly likely to pursue had he had success in an initial year of post-secondary education.

[307] I would assign likelihoods to these courses of action as follows: 45% likelihood of a career in sheet metal work, 30% likelihood of a one- or two-year college diploma, and 25% likelihood of a bachelor's degree.

[308] To assess the capital value of the plaintiff's earning capacity in each of these areas, I would use the numbers generated by Mr. Peever in the relevant tables in his report.

[309] I have considered whether there should be a deduction from the number I calculate to reflect the possibility that the plaintiff's pre-existing anxiety disorder would have interfered with his employment. The difficulty I have with that is there is no expert evidence establishing a measurable risk of this occurring, and without, the application of a contingency in the circumstances would run afoul of the principles set out in the excerpt from *Lo* cited above. More generally, I am not satisfied on the evidence that the likelihood of other life stressors impacting the plaintiff's income earning capacity, in the absence of the psychological impact of the MVA, is a real and substantial possibility.

[310] In my view, the use of the capital values calculated by Mr. Peever that account for both risk and choice contingencies in each of these areas would do fairness to the parties. Those numbers are $2,048,240 for a sheet metal worker (45% likelihood), $1,866,889 for a college graduate (30% likelihood) and $2,248,600 for a bachelor's degree (25% likelihood). Applying the percentage likelihoods I identified above, I calculate the plaintiff's without-accident earning capacity as $2,044,000 (rounded up from $2,043,925). Having used the risk and choice contingency numbers, it is my view that there is no need for a further contingency adjustment of this amount.

[311] There are two potential approaches at this point. One is to simply assess a percentage of that without-accident earning capacity amount that would represent

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the impact of the MVA on the plaintiff's earning capacity. That was the approach adopted in *Dornan*. It represents the inherently subjective nature of such an assessment, but the subjectivity involved is without any sort of constraint through checking against other analytical approaches.

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[312] In this case, I have earnings data from Mr. Peever that permit a more refined approach to the assessment of what the plaintiff might do in light of the physical and psychological injuries he has suffered. At trial, the plaintiff was completing high school, without any specific plans as to what he might do after graduation. He was also just embarking on a course of counselling that may provide some relief from the psychological issues he has been dealing with. It is thus difficult to predict when and how he will pursue either employment or further education.

[313] I accept that it is highly unlikely that the plaintiff will now pursue sheet metal work as a career. It requires physical ability, stamina and mental focus that the plaintiff does not appear to have.

[314] In my view, whatever course the plaintiff takes will be preceded by a period of time to focus on his mental wellness and consider what his next steps will be. To the extent he pursues work without further education, that work is likely to be preceded by a time of volunteer work and then, at least initially, work on a part-time basis. There is a possibility that he will work only part-time on a longer term basis. To the extent he chooses to pursue further education, he will likely do so only after a break from education and then only on a part-time basis.

[315] Once again there are a multitude of possibilities for the plaintiff. Having considered the plaintiff's evidence, and the comments of Dr. Schultz, Mr. Nordin and Ms. Gallagher, I have identified a further three options which I see as real and substantial possibilities:

a) Commencing employment as a high school graduate at age 20 (July 2024), which I would assess as a 40% likelihood;

b) Commencing a one- or two-year college diploma program at age 20 on a part-time basis, followed by commencement of work at age 24 (July 2028), which I would assess as a 45% likelihood;

c) Commencing a bachelor's degree program at age 20 on a part-time basis, followed by commencement of work at age 27 (July 2031), which I would assess as a 15% likelihood.

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[316] For each of these, I would use the cumulative present values net of risk and choice contingencies, and would also apply a reduction of 20% to the calculated earning capacity to reflect the increased likelihood that the plaintiff will work only part-time given his physical and psychological issues. While there are other contingencies that I have considered, both positive and negative (for example, that the plaintiff might start working earlier than in any one of these scenarios, or that he might start working later; or that the plaintiff might successfully complete counselling, or that he might relapse into depression), it is my view that overall those other contingencies effectively balance each other out.

[317] Dealing with each of these three possibilities:

a) For the first category (earning capacity as a high school graduate), I calculate the present value as $1,496,325, which after application of the 20% reduction comes to $1,197,060;

b) For the second category (earning capacity after a one- or two-year college diploma), I calculate the present value as $1,789,468, which after application of the 20% reduction comes to $1,431,574; and

c) For the third category (earning capacity after a bachelor's degree), I calculated the present value as $2,092,172, which after application of the 20% reduction comes to $1,673,737.

[318] I have calculated these amounts by simply reducing the cumulative present value (after risk and choice contingencies) as calculated by Mr. Peever to age 70 by

the amount he calculated for the first two, four or five years cumulative present value. This is not an exact approach, as the risk and choice contingencies are substantially greater for the first few years of employment than they are once a person is established in an area of employment. As such, they probably slightly overstate the cumulative income amounts.

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[319] If I apply the 40%, 45% and 15% likelihoods to the three numbers I set out above, I calculate the overall earning capacity after the MVA as $1,374,093. The difference between this and the without-accident earning capacity is just under $670,000. However, for the reasons set out in the preceding paragraph, this likely slightly overstates the with-accident earning capacity, and thus understates the difference.

[320] Damages are assessed and not calculated. In my view, having conducted this analysis, I would assess the plaintiff's loss of earning capacity at $700,000. That is approximately 34% (just over 1/3) of his without-accident earning capacity. In my view, that is a reasonable and fair award given the expert evidence and underlying facts of this case.

Cost of Future Care

Legal Principles

[321] The purpose of an award for the cost of future care is to restore the injured party to the position they would have been in, but for the accident. This is based on the necessary medical evidence to promote the mental and physical health of the plaintiff: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 56. In *Gao*, the Court of Appeal summarized the applicable principles at paras. 68-70:

> [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:
>
>> In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and

> permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "*restitutio in integrum*" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.
>
> [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

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[322] Assessing future care costs requires the court to determine the present value of future care needs of an injured party, while also considering contingencies to account for the fact the future may differ from evidence procured at trial: *Thind v. South Coast British Columbia Transportation Authority*, 2022 BCSC 197 at para. 76.

[323] The test is whether a "reasonably minded person of ample means would be ready to incur the expense": *Brennan v. Singh*, [1999] B.C.J. No. 520, 1999 CanLII 6932 (S.C.) at para. 78; *Cheema v. Khan*, 2017 BCSC 974 at para. 166. The court must be satisfied that the care item is one that the plaintiff would, in fact, use; that it was made necessary as a result of the accident; and it is not a care item that the plaintiff would have procured in any event: *Williams v. Sekhon*, 2019 BCSC 1511 at paras. 171-172.

Positions of the Parties

[324] The plaintiff claims the following items:

a) Psychological counselling: 24 sessions in year one, 12 sessions per year in the second and third years, plus a further five subsequent sessions, at a cost of $195 per session; and

b) Registered massage therapy, physiotherapy and massage therapy: 12 sessions of each, per year, over a four-year time frame.

[325] The plaintiff’s written closing submissions advanced a claim for each of these items over a 40-year time period. In the course of explaining the basis for the choice of 40 years, plaintiff’s counsel adopted the approach of claiming for only a four-year time period and advised that thereafter his client would rely on benefits pursuant to Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. The plaintiff will similarly pursue under Part 7 his claims for ongoing medication for psychological issues. The same would presumably also apply to the costs of vocational counselling – the need for which is supported by the reports of Dr. Schultz, Mr. Nordin and Ms. Gallagher, but no specific award for which was sought in closing submissions.

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[326] The plaintiff relies on the recommendations of Dr. Schultz with respect to psychological counselling, the recommendations of Dr. Chow with respect to massage therapy and physiotherapy, and of Dr. Khan for active rehabilitation. The plaintiff notes that, since the MVA, he has attended 86 physiotherapy sessions, 49 active rehabilitation sessions and 89 registered massage therapy sessions. The plaintiff submits that the frequency of these treatments has not diminished over time and that he finds them helpful to treat his pain symptoms.

[327] The plaintiff acknowledges the court must determine a present value for these claims, and for that purpose relies on tables found at Appendix E of *CIVJI: Civil Jury Instructions*, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia), loose-leaf update, calculating multipliers at the prescribed 2.0% discount rate under the *Law and Equity Regulation*, B.C. Reg. 352/81. The multipliers are 0.9804 for year 1, 0.9612 for year 2, 0.9423 for year 3, and 0.9238 for year 4.

[328] By my calculation:

a) For year 1, the amount claimed is $7,770, comprised of $4,680 for psychological counselling (24 x $195), $1,134 for massage therapy (12 x $94.50), $984 for physiotherapy (12 x $82), and $972 for active rehabilitation (12 x $81);

b) For years 2 and 3, the amount claimed is $5,430 per year, comprised of $2,340 for psychological counselling (12 x $195), $1,134 for massage therapy (12 x $94.50), $984 for physiotherapy (12 x $82), and $972 for active rehabilitation (12 x $81); and

c) For year 4, assuming the five final psychological counselling sessions are attributed to that year, the amount claimed is $4,065, comprised of $975 for psychological counselling (5 x $195), $1,134 for massage therapy (12 x $94.50), $984 for physiotherapy (12 x $82), and $972 for active rehabilitation (12 x $81)

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[329] Applying the present value multipliers to these numbers, I calculate the loss claimed as $7,617.71 for year 1, $5,219.32 for year 2, $5,116.69 for year 3, and $3,755.25 for year 4, for a total of $21,708.97.

[330] The defendant does not dispute the quantum of any of these claims. The defendant also does not dispute that the plaintiff is in need of psychological counselling. However, the defendant argues that the need for psychological counselling is not caused by the MVA. Similarly, the defendant argues that the plaintiff’s supposed need for massage therapy, physiotherapy and active rehabilitation is a result of his subjective perception of pain, rather than any actual proven physical need. Finally, the defendant argues that it is not reasonable to expect the defendant to pay for all three of massage therapy, physiotherapy, and active rehabilitation.

Analysis

[331] For the reasons set out above, I am satisfied that the MVA is a cause of the need for psychological counselling. Similarly, I am satisfied that given the evidence of both Dr. Chow and Dr. Khan, the plaintiff continues to suffer pain arising from the MVA, and that his periodic treatments in the areas of massage therapy, physiotherapy and active rehabilitation all assist him in dealing with that pain burden. While in many cases I would have concerns about the reasonableness of making an award for all three of these treatments, in the present case given the benefit the

plaintiff has derived from them, and given that he is only seeking monthly treatments in each area, I am satisfied that the award sought is reasonable.

[332] I would thus award the plaintiff the amount claimed of $21,709 in respect of cost of future care.

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Special Damages

[333] Special damages compensate a plaintiff for out-of-pocket expenses incurred as a result of the MVA. Factors to be considered were set out in *Abraha v. Suri*, 2019 BCSC 1855 at para. 74, and include:

a) Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained;

b) Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite; and

c) Subjective factors, such as whether the plaintiff believes the treatment is medically necessary, may also be considered.

[334] The plaintiff claims for expenses incurred (net of amounts reimbursed pursuant to Part 7) totalling $8,333.90, comprised of the following:

a) KPG treatments from July 2017 to August 2018 – $5,630.00;

b) mileage for KPG treatments – $608.76;

c) massage therapy from February 2020 to February 22, 2022 – $1,329.30;

d) mileage for massage therapy and physiotherapy from February 2020 to the end of February 2022 – $533.16; and

e) mileage for seven visits to Dr. Korn – $232.68.

[335] The defendant argued that, based on its assertion that the plaintiff had fully recovered by the summer of 2018, only the cost of KPG treatments and associated

mileage were recoverable. The defendant says that the subsequent treatments and associated mileage are not causally connected to the MVA. The defendant did not otherwise dispute the reasonableness of these charges.

[336] For the reasons set out above, I have not accepted the defendant's submission that the plaintiff had fully recovered by the summer of 2018. I accept all of the amounts claimed as appropriate, and would award special damages in the amount of $8,333.90.

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Management Fees and Gross-Up

[337] The plaintiff has advised that, depending on the result of these reasons for judgment, it may be appropriate to make application for management fees or for a tax gross-up. The plaintiff seeks liberty to make that application once this judgment is given, which the defendant does not oppose.

Anonymization of Reasons for Judgment

[338] The plaintiff asks that the names of the plaintiff and his parents be anonymized in these reasons for judgment in order to assist in protecting the mental health of the plaintiff. The order is not opposed by the defendant.

[339] The plaintiff notes that such an order was made in *G.P. v. W.B.*, 2017 BCSC 297 at para. 15.

[340] In light of the plaintiff's young age, what appear to have been material contributions to the plaintiff's psychological issues from social pressures, and given the highly personal nature of the issues canvassed in this judgment, I am satisfied that anonymization is appropriate in this case.

[341] I have thus prepared these reasons for judgment using only initials for the plaintiff and for his parents.

Conclusion

[342] For the reasons set out above, I would award:

a) Non-pecuniary damages of $215,000.00;

b) Loss of housekeeping capacity of $31,000;

c) Future loss of earning capacity of $700,000;

d) Cost of future care of $21,709; and

e) Special damages of $8,333.90.

[343] The plaintiff is entitled to court order interest as applicable.

[344] The plaintiff is at liberty to make subsequent application for management fees or tax gross-up, which shall be made in accordance with my directions below.

[345] If the parties identify any mathematical errors in my judgment, or if there is any issue that I have failed to deal with that was properly before me, then the parties may seek clarification of those matters with any request for clarification made in accordance with my directions below.

[346] Should either party seek costs other than the usual order, they may also make application with respect thereto in accordance with my directions below. If neither party makes a submission with respect to costs, then the plaintiff will have his costs on Scale B.

[347] If either party seeks orders for management fees or tax gross-up, for clarification in respect of mathematical errors, or for costs other than the usual order, that party should provide its submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary – although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate.

“Veenstra J.”

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