IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Alagar v. Mackay,*
2023 BCSC 209

Date: 20230213
Docket: M199860
Registry: Vancouver

Between:

Ariel Alagar

Plaintiff

And

Fraser Mackay

Defendant

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:	P. Bisbicis R. Fang A. Hu, Articled Student
Counsel for the Defendant:	M. von Antal
Place and Date of Trial/Hearing:	Vancouver, B.C. August 23–26, 29–30, 2022 September 1–2, 2022
Place and Date of Judgment:	Vancouver, B.C. February 13, 2023

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Introduction

[1] The parties, Ariel Alagar and Fraser Mackay, were the drivers of two cars that were involved in a rear-end collision on December 13, 2017, near the intersection of Canada Way and Rosewood Street in Burnaby, BC (the "MVA").

[2] There is a dispute about who is liable for the MVA. Mr. Alagar says that Mr. Mackay is solely responsible for the MVA. In the alternative, Mr. Alagar says that Mr. Mackay is 90% liable and he is 10% liable.

[3] Mr. Mackay denies liability.

[4] Once liability is determined, the following categories of damages are in dispute:

a) non-pecuniary damages;

b) past and future loss of income earning capacity; and

c) future cost of care.

[5] The parties have agreed on Mr. Alagar's special damages.

[6] Mr. Mackay also argues that Mr. Alagar has failed to mitigate his damages although this argument was not aggressively pursued at trial.

The Witnesses at Trial

[7] On behalf of Mr. Alagar, I heard evidence from him; his spouse Maryrose Dalampines; his good friend Irene Dagan; his former co-worker Manasa Lutumailagi; his accountant, Alit Motedayeni; and Evelyn Kaiser, the office manager at Mr. Alagar's former employer.

[8] In addition, Mr. Alagar called two experts:

a) Dr. John Fuller, who was qualified as an orthopaedic specialist to give opinion evidence concerning musculoskeletal injuries, including their diagnosis,

causes, prognosis, and treatment. Dr. Fuller examined Mr. Alagar at the request of his counsel. Dr. Fuller's medical report was marked as an exhibit; and

b) Darren Benning, who was qualified as an expert economist to give opinion evidence with respect to the cost of future care multipliers and future income loss multipliers. Mr. Benning's original May 26, 2022 report was marked as an exhibit as was his supplementary report, together with his CV.

[9] Mr. Mackay testified on his own behalf, and he tendered a report from Dr. Zeeshan Waseem, a physiatrist who examined Mr. Alagar on behalf of the defence. Dr. Waseem was not required for cross-examination.

The Reliability and Credibility of Mr. Alagar's Evidence

[10] In his closing submissions, Mr. Mackay agreed that Mr. Alagar was, overall, a credible witness. However, he suggested that I should be cautious about the reliability of his evidence. He relied on Justice Skolrood's reasons in *Radacina v. Aquino*, 2020 BCSC 1143 at paras. 92–96, and the cases cited therein, including the distinction between credibility and reliability summarized by the Ontario Court of Appeal in *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[11] Mr. Mackay submits that there was an element of exaggeration in Mr. Alagar's evidence. I have considered the areas in which Mr. Mackay submits that Mr. Alagar exaggerated and do not agree that he did so.

[12] In my view, Mr. Alagar's evidence that when he is mopping floors as a part of his current commercial cleaning job, he experiences pain in his lower back which travels to his middle back, shoulder, and neck, and caused headaches was not exaggerated or inconsistent with the expert evidence.

[13] First, Mr. Alagar did not say that he always experiences headaches when mopping. Rather, his evidence, fairly considered, is that he does so when he does prolonged mopping. That is not inconsistent with his evidence that he experienced

headaches once or twice in the last three months and neck pain a few times. Nor is it inconsistent with the history Mr. Alagar reported to Dr. Waseem. The difference is with respect to whether the headaches were caused by activity.

[14] The headaches and neck pain Mr. Alagar experienced immediately following the MVA resolved quickly. That is what Mr. Alagar told both Dr. Waseem and Dr. Fuller. Those headaches and that neck pain were, on my understanding of Mr. Alagar's evidence, of a different character than those he experienced from activity.

[15] I also do not accept that the worksite photographs put in evidence were unreliable. The photographs were taken by Mr. Lutumailagi. Mr. Alagar testified that the photographs were representative of the worksites at which he worked. In his evidence, Mr. Lutumailagi said that the photographs were similar to worksites he worked on with Mr. Alagar from 2011 to 2020 and were representative of midsize projects. In cross-examination, Ms. Kaiser testified that, when the plaintiff worked as a foreman, he worked on a lot of smaller sites. She did not say he never worked on midsize projects, and Mr. Mackay did not call any evidence that the physical demands on a smaller site were any different than on a midsize site or that the tools used were different. He did not cross-examine Ms. Kaiser or Mr. Lutumailagi about any differences.

[16] Mr. Alagar was cross-examined about several pre- and post-MVA work-related injuries. He minimized the impact of the injuries. With respect to a piece of drywall falling on his back, causing a cut and a bruise, he testified that he made a quick recovery and returned to his post-MVA baseline. Although Mr. Mackay suggests that this makes his evidence about the severity of his MVA injuries unreliable, he did not call any evidence that conflicted with Mr. Alagar's evidence. For example, there was no worker's compensation evidence about any injuries Mr. Alagar suffered at work. I conclude that Mr. Alagar is someone who does not exaggerate his injuries. Perhaps because of his strong work ethic and his desire to support his family, he presented as a person who got on with life and work, despite

his injuries. He presented as a stoic individual who worked hard to support his family even when injured.

Background

Mr. Alagar's Life Prior to the MVA

[17] Mr. Alagar is 55 years old. In 1982, when he was a teenager, his family immigrated to Winnipeg, Manitoba from the Philippines. His highest level of completed education is grade 10 although he completed an autobody technician's program in about 2005.

[18] Mr. Alagar had the assistance of a Tagalog interpreter while testifying but, for the most part, was able to answer questions in English. He used the interpreter primarily to explain complex questions or to explain nuances.

[19] Mr. Alagar is in a lengthy spousal relationship with Maryrose Dalumpines, and they are the parents of an 11-year-old son. Ms. Dalumpines' father lives with the family.

Mr. Alagar's Early Life

[20] Mr. Alagar testified that his family was not wealthy. When in the Philippines, he often went to school without food or money. When he was about eight or nine years old, he began collecting tennis balls at nearby courts for money. He gave his earnings to his father who returned a little to him to buy food. His family did not support his education.

[21] When the family first moved to Winnipeg, and for about three to six months, Mr. Alagar went to school during the day and delivered newspapers nightly after school. When he turned 16, he worked at Arby's for four to six hours a day after school. He did that until he left school before completing Grade 11. He said that he needed to support himself as he did not get any support at home.

Mr. Alagar's Employment History

Early Work History

[22] After leaving school, Mr. Alagar worked full time at EH Price, a fan and vent manufacturer. He was responsible for transferring various sized panels from a conveyor belt above his head to another conveyor belt closer to the ground.

[23] Mr. Alagar left EH Price to work at a garment factory. He worked eight hours a day, five days a week, sorting fabric pieces into different sizes and colours and transporting them from one area of the factory to another. He left that job for a higher-paying job at a restaurant working four to six hours a day preparing produce; cooking; clearing tables; washing dishes; and cleaning the kitchen, including sweeping and sanitizing the floor. After a few months at the restaurant, he took another part-time position at the Fort Garry Hotel, working between four and six hours a day collecting and washing bottles and bringing food up from the basement. He said that with the two jobs, he worked full-time hours.

Work as Autobody Technician

[24] After about four to six months of working two jobs, Mr. Alagar resigned and began working as an autobody technician. Starting with car repairs, after gaining some experience, he began repairing trucks for another employer. Car or truck panels could be repaired in place or by removing them from the vehicle. The work was physical. It required heavy lifting and different body positions. He spent hours grinding and sanding damaged panels prior to repainting them. Throughout, he worked eight hours a day, five days a week. He continued in that work until he left Manitoba for BC.

[25] When he was 36 years old, Mr. Alagar moved to BC for a "fresh start". After orienting himself for about a month, and looking for a job, a friend offered him work as an autobody technician in Burnaby, eight hours a day, five days a week. When necessary, he worked longer hours to complete a job.

[26] After about two months, Mr. Alagar enrolled in a training institute in Surrey in a six-month autobody technician course. He completed the course in 2005 and was justifiably proud of his achievement. While going to school and studying late into the evenings, he was also working full time. He described being exhausted but he persevered to give himself a better future and greater opportunities.

[27] Mr. Alagar continued to work as an autobody technician with various employers until about 2008 or 2009. He became concerned about continually inhaling paint fumes and dust. The masks he wore did not completely protect him. He left the field and started to work as a drywaller.

Work as a Drywaller

[28] Mr. Alagar said that his work as a drywaller involved demolition and installation. He described the work as very physical. He estimated that a piece of drywall weighed between 30 to 100 lbs, depending on its size. He installed drywall panels on his own or with a helper. When on his own, he held the drywall in place with one hand and a knee, and used the drill in his other hand to install it to the studs. He worked eight hours a day, five days a week, and on some weekends. He said that he rarely missed a day of work unless he was very ill.

[29] Mr. Alagar said he enjoyed drywalling; it was exactly the type of physical work that his body needed. He noticed his body getting stronger and he was building muscle. He did that work for between six-months and a year, but he was concerned about the harm the fumes and dust might be doing to his lungs.

Hazmat Work Prior to the MVA

[30] Mr. Alagar approached his union, seeking a job as a house painter. A union representative discussed the option of hazmat work with him and showed him a pamphlet indicating hourly rates for that work at various levels. The hourly rates averaged from $13 to $33 an hour depending on the level. Mr. Alagar said he was interested in hazmat work because of its physicality, which he enjoyed, and because of the pay.

[31] Hazmat work involves demolishing and removing drywall, and other building materials, that might be contaminated by mould or other toxic substances like asbestos. It involves working overhead, to remove material from the ceiling, and reaching and bending to remove material from the walls. Removing drywall involved weights of between 30 and 50 lbs and, once removed, anything that remained, including the attachments used to affix drywall to the studs, was ground off with a grinder.

[32] The work also involved ripping out carpets or flooring, scraping glue from floors using a 10-15 lb scraper; breaking cement or drywall apart using a 20-50 lb jackhammer; and grinding ceilings, walls, or floors using a 15-30 lb grinder.

[33] The work was physical and hazardous. As a result, it paid premium rates for labourers.

[34] In 2009, Actes Environmental hired Mr. Alagar in his first hazmat job. He was paid $13 an hour and worked eight hours a day, five days a week. He remained at Actes for about four to six months. He left to join Phoenix Environmental, another hazmat company, where he started as a Level 1 worker earning $13 an hour. After about a month, his hourly rate was raised to $18.

[35] He worked eight hours a day, five days a week, and, if necessary, worked weekends to complete a job. At Phoenix, he worked on bigger projects and used different tools like negative air machines, jackhammers, and hammer drills. He also took a second job with another hazmat company, working eight hours a day on weekends. For about a year, he worked seven days a week.

[36] In 2011, he joined ProActive Environmental (“ProActive”), as a Level 1 hazmat worker, earning $23 an hour. After about a month, he was promoted to junior foreperson earning $25 an hour. As a junior foreperson, he was responsible for picking up paperwork and tools from the office and taking them to a jobsite. He was also responsible for ensuring that site safety procedures were followed. He worked longer hours, and if a worker did not show up, he took on their tasks. He testified

that he was proud of his promotion and wanted to work harder to earn further promotions.

[37] In either 2015 or 2016, Mr. Alagar was promoted to foreperson, earning $31 an hour. His responsibilities and work hours increased. He ran more job sites and attended meetings. He sometimes worked 14 or 15 hours a day. He said that he was physically able to sustain the long hours. He felt extremely tired on some days but had no physical limitations. He described feeling fit and enjoying the work he was doing.

[38] As a foreperson, he was responsible for checking the work site prior to the start of demolition to ensure that the containment area was properly sealed off and that there were no gaps between the poly sheets that were put up to create the containment area, and the walls, doors, and windows. He was required to climb ladders and scaffolds to ensure the poly sheets, weighing up to 30 lbs, were securely in place.

[39] Each job site required a negative air machine that filters contaminated air from inside a containment area before releasing it into the public areas. The machines vary in size from 50 to 200 lbs. A 50 lb one can be carried by one person, but the larger ones required two to four people to carry them into or out of a van and up or down stairs. Before the MVA, Mr. Alagar had no difficulty carrying, or assisting with carrying, negative air machines.

[40] Once hazardous materials are removed from a job site, they are placed in six mil hazardous waste bags, tied up, and hand-carried to waste disposal bins. A full bag could weigh over 25 lbs, and, depending on the project and the nature of the remediation, 500 to 1,000 bags might be carried up and down stairs and along ramps over a number of days.

[41] Mr. Alagar testified that before the MVA, he did not experience any pain at work. He regularly performed the physical tasks for days or weeks at a time. He described working above his head, or in different positions throughout the day.

[42] Mr. Alagar's evidence about the extremely physical nature of hazmat work was confirmed by Mr. Lutumailagi. Mr. Lutumailagi also confirmed that Mr. Alagar had no difficulty performing all aspects of the work prior to the MVA. He described the work as highly physical, involving working above your head and in crawl spaces. He testified that the protective gear that hazmat workers are required to wear adds to their weight, thereby increasing the physicality of the work.

[43] On the evidence about Mr. Alagar's work as a hazmat worker, junior foreperson, and foreperson, none of which was challenged, I conclude that Mr. Alagar was engaged in highly physical work in high-risk environments.

[44] Mr. Lutumailagi took a number of photographs which he said accurately represented the job sites on which he and Mr. Alagar worked.

[45] On the evidence, I conclude that, throughout his working life prior to the MVA, Mr. Alagar demonstrated a strong attachment to the workforce and a desire to better himself. He progressed from working a number of unskilled jobs, and barely being able to support himself, to a foreperson at ProActive, earning $31 an hour, a wage on which he was able to support his family and buy a home.

Hazmat Work Post MVA

[46] After the MVA, Mr. Alagar took one or two weeks off to recover. He returned to work on light duties consisting of lighter work for less hours. After that he was given moderate duties for a short time and then returned to full duties.

[47] After the first few weeks, he was not offered accommodations and, instead, he said he self-limited to avoid increasing his pain. For example, he used a jackhammer for shorter periods of time because it was hard on his back, and he was concerned that, if his back gave out while using a jackhammer, he could hurt himself or a co-worker. He eventually stopped using a jackhammer altogether.

[48] As a result of concerns about his back, Mr. Alagar also stopped using larger hammer drills and grinders. The smaller drills and grinders weigh less and would pose less of a risk to him and co-workers if his back gave out when using them.

[49] Mr. Alagar's evidence about the lack of accommodations was confirmed by Ms. Kaiser. She testified that ProActive cannot provide accommodations for foremen or hazmat workers due to the nature of the work and the worksites. She testified that it was unlikely that Mr. Alagar would have been accommodated as he tended to work on smaller sites, either by himself, or with few others, and it was difficult for ProActive to provide accommodation on smaller sites.

[50] In September 2019, Mr. Alagar decided to voluntarily demote himself from foreman to a certified hazmat worker. He said he had to do so due to daily low back pain that went into his mid-back, and caused pain in his neck and shoulder and headaches.

[51] Mr. Alagar testified that when he returned to certified hazmat work, he called or texted the site foreperson a few days before he was scheduled to start to ask about the tasks required on that site. He did so to ensure that he could perform the tasks. He was unable to work on what he described as "heavier sites", and he wanted to notify the foreperson in advance and to prepare himself. When possible, he relied on his co-workers to help him with heavier work. On smaller job sites, he did not have anyone to help him.

Termination from ProActive

[52] Mr. Alagar was terminated by ProActive on August 26, 2020. Prior to his termination, he experienced rashes on his neck and face due to mandatory mask wearing. At the termination, Mr. Alagar was shown a list of his absences since the MVA. He testified that he was terminated due to his inability to wear a mask and his increased absences. Mr. Alagar's evidence about the dual reasons for his termination was not contradicted. Ms. Kaiser was not involved in the decision to terminate Mr. Alagar, and the responsible manager was not called by the defendant.

ITS Cleaning

[53] In December 2018, after her father was diagnosed with cancer, Ms. Dalumpines left her job with Lordco Auto Parts. Her father was in and out of the hospital during the day, so she looked for work at night. She had previously earned $1,800 bi-weekly.

[54] In April 2019, she accepted a subcontract from ITS to clean a Vancouver Audi dealership in the evenings. The subcontract paid $1,500 a month and took a maximum of two hours a night on Mondays, Wednesdays, and Fridays. Because Ms. Dalumpines does not drive, Mr. Alagar was responsible for driving the Zamboni used to clean the showroom floor. He estimated that he performed 10% of the work while she performed the balance, including wiping all the surfaces, mopping, and taking out the garbage. She and Mr. Alagar split the income for tax planning purposes. Between April 2019 and August 2019, Mr. Alagar worked at ProActive and for ITS.

[55] Mr. Alagar testified that although the Audi dealership was a small space, getting into and out of the Zamboni, and driving it, involved bending and twisting, and it exacerbated his low back pain. He and Ms. Dalumpines had decided to give up the Audi subcontract when, in June 2019, ITS offered them another subcontract to clean a Vancouver Mercedes-Benz dealership.

[56] Mr. Alagar testified that the Mercedes-Benz dealership was much larger but involves lighter cleaning and, for the most part, the work is easier. He does not drive a Zamboni. He is responsible for cleaning the showroom floor, and Ms. Dalumpines is responsible for cleaning the two floors of offices. He “spot” mops dirty areas on the floor, takes out light garbage, and vacuums small areas. She wipes the surfaces and tables, cleans the glass-walled offices and windows, cleans the 11 bathrooms, and vacuums the carpets. He estimated that he performs about 10% of the work and Ms. Dalumpines performs the rest. He said that he could not do the work that she does and in the time it takes him to do his share, she has completed the rest.

[57] They work at the Mercedes Benz dealership in the evenings, after it closes, from Monday to Saturday. They usually start at about 6:00 or 7:00 p.m. and, depending on how dirty the dealership is, they work three to five or four to six hours.

[58] Mr. Alagar modified the way he did the cleaning at Mercedes Benz. He bought a lighter mop. He tried using their backpack-style vacuum cleaner, but it caused him extreme back pain, so he bought a wheeled crate and he pulls the vacuum around in it. He testified that the only accommodations he requires to do the work are those that he self-imposes.

[59] Ms. Dalumpines testified that the $5,200 she and Mr. Alagar earn from the cleaning subcontract is not enough for their family to live on and that she may have to return to full-time work. She said that Mr. Alagar could not go back to construction work and she will have to adjust. She said that he was a good income provider and is unhappy being “useless” and not earning the income he did before.

[60] Ms. Dalumpines described how she could see in Mr. Alagar’s face that he was in pain. She described how he was prepared to suffer pain to interact with their son.

[61] Mr. Motedayeni testified that he prepared Mr. Alagar’s and Ms. Dalumpine’s income tax returns and that their gross business income from the ITS contracts was accurately recorded. Their net business income was split between them simply as a matter of tax planning and did not reflect the division of labour. No issue was taken about the appropriateness of the business deductions applied to arrive at their net income.

Mr. Alagar’s Health and Activities Before the MVA

[62] Mr. Alagar testified that prior to the MVA, he was healthy and active. He had no injuries that limited his ability to work. He acknowledged that the nature of hazmat work meant that he would have injuries from time to time, and that he took time off work, but he said that his injuries healed and did not prevent him from working.

[63] Mr. Alagar said that, in the two years before the MVA, he played basketball about twice a week; went fishing once or twice a month and stayed until he caught a fish; played pool about twice a week, spending eight to ten hours at the pool hall; went camping a few times a year during the holidays with friends and family; and hiked and picnicked in the park on the weekends.

[64] About a month before the MVA, Mr. Alagar injured his foot when he stepped on the prong of an electrical charger. He continued to work until his foot became infected. He took a month off for his foot to heal and returned to work fully recovered. His evidence was not contradicted.

[65] Ms. Dalumpines described Mr. Alagar as being very strong and healthy before the MVA and not having any limitations when he engaged in activities. Before the MVA, when Mr. Alagar came home from work, they went out and spent quality time as a family. Ms. Dalumpines observed Mr. Alagar playing basketball, soccer, and badminton with their son without any pain or discomfort. Mr. Alagar liked to play pool but no longer does so as it strains his back.

[66] Before the MVA, they often went to parks, camping, and hiking. On hikes, Mr. Alagar carried their son on his back when he became tired. They camped in Tofino with friends, once or twice a year. Ms. Dalumpines prepared the food for their camping trips, and Mr. Alagar took care of everything else, including carrying all the heavy items (tents, tables, chairs, and canopies). He would get wood at the campground and carry the water.

[67] Both Ms. Dalumpines and Mr. Alagar testified that, before the MVA, they split the housework. During the week, Ms. Dalumpines was responsible for cooking and tidying the house. On the weekends, Mr. Alagar would help her cook and clean. He had no difficulty in doing so. Mr. Alagar said he did the major exterior work like power washing the decks.

The Circumstances of the MVA

[68] No accident reconstruction evidence was called by either party.

[69] The MVA in this case did not happen during the course of a lane change.

[70] Mr. Alagar was driving northbound on Canada Way, which has two lanes of traffic travelling in either direction. Mr. Alagar was initially in the left lane. As he passed the bus stop near the intersection of Wedgewood Street and Canada Way, he saw traffic in front of him beginning to back up, as it slowed behind a left-turning vehicle.

[71] As Mr. Alagar approached Rosewood Street, he estimated that there were two to four cars backed up in front of him. He decided to avoid the backed-up traffic and to change into the right lane. He testified that before beginning his lane change, he slowed down, turned on his right turn signal, looked to his rear-view and passenger side mirrors, and performed a right-shoulder check. While waiting in the left lane, one or two cars passed him in the right lane.

[72] Mr. Alagar testified that while performing his safety checks, he saw that the right lane in front of, beside, and behind him, were clear. The cars that had passed him in the right lane were well past when he began his lane change. He saw headlights behind him in the right lane but said that they were still at a distance. He testified that it was safe to change lanes, so he proceeded with his lane change.

[73] When it was put to him in cross-examination that he thought it was safe to make his lane change, Mr. Alagar was adamant that he knew it was safe to do so. His evidence remained firm in that regard.

[74] Mr. Alagar testified that, as he began to make the lane change, Ms. Ng, the driver of the vehicle directly in front of his, was at a complete stop. When his vehicle was already entirely in the right lane, or almost 100 percent so, and as he was starting to accelerate forward in the right lane, Ms. Ng suddenly, and without notice, moved over into the right lane causing him to brake to a complete stop.

[75] Mr. Alagar said that he braked and avoided a collision with Ms. Ng’s vehicle, which ended up at an angle straddling the two lanes. The front of her vehicle was in

the right lane and the back remained in the left lane. Had they collided, Mr. Alagar said that the front of his vehicle would have struck the right front door of her vehicle.

[76] Mr. Alagar testified that he was at a complete stop for three to five seconds, during which he honked loudly at Ms. Ng and exchanged eye contact with her, before he was rear-ended by Mr. Mackay.

[77] Mr. Mackay testified that Mr. Alagar's vehicle had moved completely into the right lane, and had come to a complete stop when his vehicle hit the rear of it. I accept that Mr. Alagar's vehicle was entirely in the left lane before it was struck. Their evidence is almost entirely consistent on this point, and the vehicle damage depicted in the photographs shows damage across the full front of Mr. Mackay's vehicle. I therefore conclude that Mr. Alagar had fully established his vehicle in the right lane, in front of Mr. Mackay's vehicle, before he was required to stop to avoid colliding with Ms. Ng's vehicle.

[78] Mr. Mackay testified that he saw a long line of cars stopped in the left lane behind a left turning vehicle and that a number of drivers were signalling right, indicating that they intended to move into the right lane to go around the left turning vehicle. In the circumstances, it was not unexpected that one or more of the vehicles in the left lane would move into the right lane.

[79] There is a duty on a following vehicle to maintain a reasonable distance from a vehicle in the lead: Sections 144(1) and 162(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, apply in the circumstances of this case. Those sections provide:

> **Careless driving prohibited**
>
> 144(1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> **Following too closely**

> 162(1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[80] Driving with due care and attention includes being on the lookout for unexpected manoeuvres by other drivers. In this case, Mr. Mackay was aware that traffic had stopped in the left lane. He was also aware that a number of drivers in the left lane were signalling their intention to move into the right lane to avoid the left turner. Mr. Mackay should have been immediately aware of the need for caution. It was not unexpected that one or more of the drivers in the left lane would move in front of him. In fact, a driver doing so was a significant possibility. Mr. Mackay should have begun to slow down anticipating such a lane change. Both Mr. Alagar and Ms. Ng who was in front of him, in fact, made the move into the right lane. Mr. Alagar moved first, and he testified that when Ms. Ng started to do so, he was able to stop in time to avoid a collision with her vehicle. In fact, he testified that he had been stopped for 3-5 seconds before he was hit from the rear.

[81] Although Mr. Mackay testified that it all happened in “microseconds”, and he was therefore unable to stop, I prefer Mr. Alagar’s evidence in that regard. Mr. Alagar described the events that occurred in the 3-5 seconds before the rear impact, and it is not possible that those events could have occurred within microseconds.

[82] Mr. Mackay’s evidence that Mr. Alagar moved into the space between Mr. Mackay’s vehicle and a vehicle in front of him is logically inconsistent with the uncontradicted evidence that very soon after Mr. Alagar was established in the right lane, Ms. Ng began her lane change. If there was a vehicle in front of Mr. Mackay’s vehicle, then it would not have been possible for Ms. Ng to make her lane change without striking that vehicle.

[83] I accept, on all of the evidence, that Mr. Alagar safely made his lane change and that he was established in the right lane when he was rear-ended. This is not a circumstance in which Mr. Alagar made his lane change without doing the necessary

safety checks. He made the lane change secure in the knowledge that he could safely do so. He was established in the lane in front of Mr. Mackay who was then the rear-following vehicle. If Mr. Alagar was able to stop to avoid colliding with Ms. Ng, Mr. Mackay should have been able to do so to avoid colliding with Mr. Alagar particularly because he said he saw Ms. Ng start to make her lane change.

Contributory Negligence

[84] Mr. Mackay argues that Mr. Alagar was contributorily negligent. It is not disputed that the burden of proof rests on him in that regard.

[85] As explained in a number of cases, the word negligence in "contributory negligence" means something different than when used in relation to a defendant's conduct. Rather than being concerned with a breach of duty to another person, contributory negligence involves the failure of a plaintiff to take reasonable care of themselves, thereby contributing to the injury. In *Bradley v. Bath*, 2010 BCCA 10, the court explains contributory negligence as follows:

> [25] The concept of contributory negligence was described in John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:
>
> > Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. …

[86] The analysis of contributory negligence involves two questions. Whether a plaintiff failed to take reasonable care in their own interests, and if so, whether that failure was causally connected the loss they sustained: *Wormald v. Chiarot*, 2016 BCCA 415 at para. 14, citing to *Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23 at para. 37.

[87] Mr. Mackay has the onus of proof on both questions.

[88] On the evidence in this case, Mr. Alagar took reasonable steps in advance of making his lane change, to ensure that he could do so safely. His evidence was uncontroverted that he checked his rear- and side-view mirrors and did a shoulder

check. He waited for one or two vehicles to pass in the right lane before moving over. He testified that he knew he could change lanes safely and, in fact, was completely in the right lane before the impact from the rear. Mr. Alagar's evidence that he performed a safe lane change was not shaken in cross-examination. He was only forced to stop when Ms. Ng started to move from the left lane into the right lane. He was able to avoid colliding with Ms. Ng when she started to move in front of him.

[89] Mr. Alagar's evidence is supported, in part, by Mr. Mackay's evidence that he peripherally saw another vehicle move in front of Mr. Alagar's vehicle as he struck the rear. The collision was the result of Mr. Mackay failing to stop his vehicle in time. It is not clear on the evidence whether Mr. Mackay was driving too quickly for the conditions or not paying sufficient attention to what was going on ahead of him. If Mr. Alagar was able to stop to avoid a collision, Mr. Mackay should also have been able to do so.

[90] In the circumstances, Mr. Alagar's conduct in initiating the lane change and then suddenly braking in response to Ms. Ng's attempt to change lanes in front of him was not a failure to meet the standard of care required for his own protection. He was entitled to assume that Mr. Mackay, in the following car approaching from the rear, would react promptly to the change and the possibility of a sudden stop. He was also entitled to assume that Mr. Mackay was travelling at a distance and at a speed which would allow him to stop in time to avoid a collision as Mr. Mackay was aware of traffic stopped in the left lane and signalling to make a lane change. In all of the circumstances, I find no contributory negligence on Mr. Alagar's part. Unexpected driver manoeuvres are part of city driving on a busy road, in the evening.

[91] This case bears some similarities to the circumstances in *Power v. White*, 2010 BCSC 1084, aff'd 2012 BCCA 197.

[92] Although in *Power* the plaintiff's lane change from the left to the right lane, and the subsequent breaking, was as a result of a deer on the highway, both drivers were aware of the possibility of a sudden lane change and braking.

[93] Mr. Mackay, as the following driver, was able to see what was happening in front of him. The fact that Mr. Alagar was completely in the lane in front of him when he came to a stop, means that, on a balance of probabilities, Mr. Mackay was not using sufficient caution in all the circumstances.

Injuries in the MVA and Mr. Alagar's Health after the MVA

[94] Mr. Alagar testified that when Mr. Mackay collided with the rear of his vehicle, his body went forward and back. Immediately after the impact, he experienced a headache, and he was shaken up. He drove home, continuing to experience a headache on both sides of his head, above his ears. Ms. Dalumpines described Mr. Alagar as being pale when he arrived home, and she gave him Tylenol because he was complaining of a headache. The next morning, Mr. Alagar said he still had a headache and pain in his low back which travelled up to his mid-back, shoulder, and neck.

[95] Ms. Dalumpines testified that she gave Mr. Alagar more Tylenol and told him to go to the doctor.

[96] During the one or two weeks that he took off work after the MVA, Mr. Alagar felt a lot of pain in his back, right shoulder, and the right side of his neck. The pain prevented him from doing any chores at home during this time, and his Doctor recommended that he take time off work.

[97] As discussed, he first returned to work on light duties and then graduated to moderate duties. While working light and moderate duties, he continued to feel pain in his low back and was careful about how he moved to avoid pain. He avoided carrying heavy materials. There were days when he was unable to work a full shift due to back pain.

[98] On his return to full duties, Mr. Alagar continued to experience daily pain in his low and mid- back, right shoulder, the right side of his neck, and headaches. He avoided twisting, bending, and over-reaching, which increased his pain, and he

adjusted the time he worked depending on the severity of his pain. When his pain was at its peak, he would experience a headache.

[99] Mr. Alagar testified that since his termination from ProActive in August 2020, the pain in his low back has decreased significantly and that, while he continues to experience daily low back pain, it is more manageable and only travels to his mid-back, right shoulder and the right side of his neck and causes headaches if he has a lot to clean at the Mercedes-Benz dealership. He says that is infrequent, as an example, after a snowstorm in 2021, he was required to mop the entire showroom floor, he experienced significant low back pain that travelled into his mid-back, right shoulder, and the right side of his neck, causing headaches for a few days afterwards. Ms. Dalumpines cleaned the facility on her own on those days.

Impact of the MVA on Mr. Alagar's Activities

[100] After the MVA, Mr. Alagar testified that he tried to play basketball and pool but experienced low back pain in doing so. He has gone camping with his friends and family since the MVA but he is unable to carry the heavy camping equipment and experiences pain setting up the campsite. Ms. Dalumpines confirmed this evidence.

[101] Ms. Dalumpines described Mr. Alagar as moody and irritable after the MVA. He has difficulty getting up and calls on their son to help him. Whereas in the past they would walk along the Quay in New Westminster in the evenings, after work, or on the weekends, after the MVA and while he was still working at ProActive, he came home and rested his back.

[102] Ms. Dalumpines testified that after the MVA, Mr. Alagar suffers from back pain. When he was still working at ProActive, about four times a week, she applied Salonpas, a pain relief patch on his back. She also put Rub-A-Dub in the backpack he took to work and applied Efficascent oil, a Filipino ointment.

[103] Ms. Dagan testified that she has known Mr. Alagar since the spring of 2016 and they remain close friends. They "hung out" almost every weekend going to

picnics in the park, a casino, and socializing at each other's homes. She said that, prior to the MVA, Mr. Alagar was an outgoing and energetic person and she did not observe him to have any health problems. She described how he and another mutual friend moved her out of a basement suite into another home across the street. He lifted and carried heavy furniture with no difficulty, including her sofa and a wood cabinet. The move involved going up the ten stairs leading from her basement to the ground level and carrying the furniture across the street and into the new home. Mr. Alagar made several trips, and she did not observe him having any difficulty during or after the move.

[104] Ms. Dagan also testified that she observed Mr. Alagar wrestling in the park with their other friends. She described how they went camping together in Tofino in the summer of 2017. She did not observe Mr. Alagar to have any physical limitations.

[105] Ms. Dagan said that she first learned that Mr. Alagar had been in an MVA in the summer of 2018. For a period of time, Mr. Alagar stopped attending functions, but she did not know why. In the summer of 2018, she went to the park with Mr. Alagar and observed him using a trolley to carry items from his car to the picnic spot. This stood out because, before the MVA, Mr. Alagar was very strong and carried the items by hand. She asked why he was using a trolley and was told that he was injured in the MVA.

[106] Ms. Dagan described Mr. Alagar as less sociable and moodier after the MVA. He does not stay out as late, and she observes him rubbing his back and indicating to Ms. Dalumpines that it is time for them to leave. They have not gone camping together since the MVA. Instead, they go glamping which does not require Mr. Alagar to carry items from the car to a campsite.

The Medical Evidence

[107] Drs. Fuller and Waseem agree that the MVA is the cause of Mr. Alagar's ongoing back pain. Dr. Waseem opines that Mr. Alagar's injuries have resulted in chronic myofascial pain of the thoracic and lumbar spine: Ex. 23, p. 9.

[108] Both doctors observed spasms during their physical examination of Mr. Alagar. Dr. Fuller observed moderate spasm in the superior trapezius area of the right shoulder girdle and significant spasm in the low back: Ex. 20, page 9, paras. 38 and 42. Dr. Waseem observed muscle stiffness, increased muscle tone, spasms, taut bands, and trigger points in Mr. Alagar's thoracic and lumber spines: Ex. 23 p. 8 lines 266, 267, 272, and 273.

[109] Dr. Waseem opines that Mr. Alagar is "capable of working full time on modified duties wherein he is restricted from handling materials of a heavier weight."

[110] The doctors disagree about Mr. Alagar's prognosis. Dr. Waseem is more optimistic about the possibility of further recovery. He recommends a course of active rehabilitation and a work hardening program to increase Mr. Alagar's endurance and tolerance with the intent of "returning to handling materials of a heavier weight." He opines that Mr. Alagar may be able to return to handling heavier weights if he responds favourably to the recommendations he sets out in his report. His opinion does not meet the standard of proof required to make a finding that Mr. Alagar will do so on a balance of probabilities.

[111] Dr. Fuller, on the other hand, opines that "four years and five months following [the MVA] there is no practical treatment that on the balance of probability is likely to significantly improve or alleviate [Mr. Alagar's] residual symptoms to the neck and back, the primary concern being the low back." He wrote, "it would be my opinion that symptoms will persist and for practical purposes he has reached maximum medical recovery".

[112] Dr. Fuller also opines that Mr. Alagar would not be considered disabled but that he "nevertheless experiences an ongoing level of symptom exacerbation and functional limitation with increased activity with particular reference the low back."

[113] Having considered the opinions of Dr. Fuller and Dr. Waseem, and Dr. Fuller's evidence, I agree with Dr. Fuller's prognosis. Mr. Alagar is now almost five years post-MVA. Dr. Waseem's opinion that Mr. Alagar may improve with a

supervised exercise program or a work hardening program is not supported on the evidence. It does not consider that Mr. Alagar did gradually return to work, in the physical occupation that he had prior to the MVA, but was unable to retain his job despite working reduced hours.

[114] In my view, it is inconsistent for Dr. Waseem to give a favourable prognosis regarding Mr. Alagar's injuries while concluding that he cannot return to the same level of physical work he did pre-MVA.

[115] I accept that, as a result of the MVA and his continuing symptoms, Mr. Alagar is unable to return to the physical work that he did in the past. Nonetheless, he is not disabled from working and has residual capacity. He has demonstrated residual capacity by continuing to do the work he does under the ITS subcontract.

Treatments after the MVA

[116] Mr. Alagar went to physiotherapy after the MVA. Based on the Agreed Statement of Facts #2, he attended 22 physiotherapy sessions between December 2017 and June 2018. He had one further treatment in physiotherapy session in November 2019.

[117] Mr. Alagar testified that he discontinued the treatments because of their high cost and because ICBC refused to continue paying for them. Of course, during the pandemic, physiotherapy treatments were not available.

[118] Mr. Alagar testified that he learned exercises from his physiotherapist that he is able to do at home and he continues them on a daily basis.

[119] I do not find that Mr. Alagar has failed to mitigate his damages.

Non-pecuniary Damages

[120] The factors a court considers when assessing non-pecuniary damages are well-established. They have been repeated in a number of cases since *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration in my award in this case.

[121] While other cases provide a useful guide to a non-pecuniary damage award, the specific circumstances of each plaintiff must be considered in compensating that plaintiff. In addition, any compensation must be fair and reasonable to both parties: *Miller v. Lawlor*, 2012 BCSC 387 at para. 109, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[122] Mr. Alagar seeks an $80,000 award for non-pecuniary damages. He submits, and I agree, that his stoicism should not result in a lower award.

[123] Mr. Alagar relies on the following cases in support of his suggested award:

a) *Mannella v. Obregon*, 2020 BCSC 715 – in which a 46-year-old plaintiff, who suffered neck, shoulder, and low back injuries and resulting chronic headaches, was awarded $80,000 ($89,271 inflated to 2022 dollars). His ability to engage in his pre-accident physical work and leisure activities had been affected, and he was unlikely to achieve a full recovery.

b) *Thind v. South Coast British Columbia Transportation Authority*, 2022 BCSC 197 – in which a 54-year-old plaintiff, who suffered mechanical low back and soft tissue pain in her right shoulder girdle, was awarded $80,000. Her low back pain caused her the most discomfort, and she had difficulty with prolonged sitting and standing, and with bending and lifting. She was able to continue to work as a kitchen helper but required help in heavy lifting, mopping, and cleaning.

c) *Larson v. Bahrami*, 2017 BCSC 2308 – in which a 42-year-old plaintiff, who suffered soft tissue injuries to his cervical, thoracic, and lumbar spine, was awarded $80,000 ($93,926 in 2022). His ability to engage in his pre-accident physical work and leisure activities had been affected, and he suffered ongoing chronic disabling pain which had reached the point of maximum medical improvement.

[124] Mr. Mackay submits that an award of $55,000 would sufficiently compensate Mr. Alagar for his injuries.

[125] Mr. Mackay relies on:

a) *Liu v. Conn*, 2020 BCSC 1195, in which a 54-year-old plaintiff, who suffered myofascial neck, low back, and upper torso pain that had resolved, and ongoing worsening of mild to moderate mechanical low back pain and left leg pain and numbness, was awarded $50,000 ($55,794 in 2022).

b) *Harle v. Williams*, 2020 BCSC 1684, in which a 29-year-old plaintiff, who suffered injuries to his neck, right shoulder, and back that persisted for almost three years, was awarded $50,000 ($55,794 in 2022).

c) *Cegielka v. Grace*, 2020 BCSC 115, in which a 32-year-old plaintiff, who suffered injuries to his neck, upper back and lower back, and left shoulder, was awarded $40,000 ($44,636 in 2022).

d) *Findlay v. Sun*, 2020 BCSC 1330, in which a 31-year-old plaintiff, who suffered bruising to her knees, chest, and right wrist; and soft tissue injures to her neck an upper back causing a chronic condition, was awarded $55,000 ($62,374 in 2022).

[126] Having reviewed all of the cases relied on by the parties, Mr. Alagar's injuries and prognosis, and the parties' submissions, I conclude that an appropriate and fair award for non-pecuniary damages is $80,000. In my view, the cases relied on by Mr. Alagar involved slightly more serious injuries than those suffered by him. However, two of those cases, when inflated to present dollar values, awarded more than $80,000. In my view, the case that is the most similar to Mr. Alagar's circumstances is *Thind.*

[127] On the other hand, the cases relied on by Mr. Mackay, for the most part, involved plaintiffs who were significantly younger than Mr. Alagar or, in *Liu*, a plaintiff whose unresolved injuries were an exacerbation of a prior condition.

[128] Given Mr. Alagar's prognosis, I conclude that an award of $80,000 is fair to both parties and reasonable in all the circumstances. Mr. Alagar's injuries are at maximum recovery and have prevented him from resuming his prior employment and leisure activities. He continues to suffer back pain which is exacerbated by physical activity and prevents him from engaging in his prior employment and leisure activities.

[129] I have exercised my discretion and included in the non-pecuniary award damages any loss of housekeeping capacity. Mr. Alagar agrees that, for the most part, he is able to manage his household duties. He testified that Ms. Dalumpines was primarily responsible for cleaning their townhouse and he did what he could on the weekends. Mr. Alagar is not disabled from all housekeeping tasks, and the family lives in a townhouse complex in New Westminster in which, presumably, major outside tasks are performed by the strata corporation.

[130] Mr. Alagar has some limitations, and heavier housekeeping tasks might cause an exacerbation in his symptoms. There was no evidence that he has had to hire outside assistance to help with the tasks he previously performed.

Loss of Earning Capacity

[131] Claims for both past and future loss of income earning capacity are subject to the same legal test. Mr. Alagar must demonstrate that the injuries caused by the MVA, and the resulting symptoms, have impaired his ability to earn income, and that there is a real and substantial possibility that his diminished earning capacity has resulted or will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

Past Loss of Earning Capacity

[132] An award for past loss of income earning capacity is intended to compensate a plaintiff for the loss of an asset that is the capacity to earn income. Damages under this head are quantified based on what Mr. Alagar would have earned had the injury not occurred.

[133] In this case, Mr. Alagar suffered a pre-trial loss of income as a result of the MVA. At the time of the MVA, Mr. Alagar was employed as a foreman at ProActive earning $31 an hour. He testified that he took between one and two weeks off before returning to light duties which included less physical work and shorter hours and which continued for another one or two weeks.

[134] Mr. Alagar suggests that his past loss of earning capacity should conservatively be calculated on the basis of $31 an hour for eight hours a day and five days a week for a period of one week totalling $1,240. I accept that figure as a conservative calculation.

[135] On the evidence before me, Mr. Alagar has not proven any further past wage loss for days or hours missed from work due to his back pain in the weeks and months following the MVA. ProActive's payroll records are inconclusive in that regard, and Mr. Alagar was not able to recall what days he was either unable to work or reduced his hours as a result of his injuries.

[136] In this case, Mr. Alagar also submits that he has suffered a past loss of earning capacity because of his voluntary election to demote himself in September 2019. I accept his evidence that the demands of the foreman's job were too much for him in light of his continuing back pain. He needed to take on less responsibilities and work less hours. ProActive confirmed his decision by way of a letter dated September 18, 2019 demoting him from a foreman to a Level 3 Certified Hazmat Worker and resulting in a decrease in his hourly rate from $33.64 to $25.23. He seeks to recover the difference in his wages which he says was solely as a result of the MVA.

[137] Mr. Alagar's evidence about why he self-demoted was not challenged in cross-examination and not contradicted by any other evidence at trial, and I accept that his decision was motivated by his back pain as a result of the MVA.

[138] Mr. Alagar says that starting with his paycheque dated October 4, 2019, he worked the following hours:

Cheque Date in 2019	**Actual Hours Worked in a Two-week Period**
October 4	18.5
October 18	47.5
November 1	52
November 15	52
November 29	57.25
December 13	54.75
December 27	55
Cheque Date in 2020	
January 10	30.75
January 24	40.5
February 7	56
February 21	59.75
March 6	44
March 20	37.75
April 3	42.25
May 29	26.5
June 12	58.5
June 26	69
July 10	73.5
July 24	52.25
August 7	33.75
August 21	45.25
August 28	38.5

[139] Based on the total hours Mr. Alagar worked in this period, multiplied by the $8.41 reduction in his pay rate from his foreman's rate, this amounts to a loss of

income of $8,792.66 from September 2019 to August 2020 when Mr. Alagar's employment was terminated.

[140] Mr. Alagar testified that his termination was a result, in part, of his injuries from the MVA and his resulting absences from work. He also said that he was terminated as a result of his inability to wear a mandatory protective mask due to a skin allergy and other absences unrelated to the MVA. His evidence in that regard was not contradicted by other evidence at trial as Mr. Mackay did not call a witness from Mr. Alagar's employer.

[141] Mr. Mackay's negligence does not need to be the sole cause for this loss of income earning capacity.

[142] I accept that, but for the MVA, Mr. Alagar would have continued to work as a foreman earning at least $33.64 an hour. He had done that job since 2011, and prior to the MVA, there was no indication that his employment was at risk or that he would be unable to continue to perform at his previous level.

[143] In the two calendar years following the accident and before he was terminated by ProActive, Mr. Alagar worked an average of 1,834.38 hours a year. But for the MVA, it is reasonably likely that Mr. Alagar would have continued to work as a foreman in the two-year period between August 2020 (the date of his termination) and August 2022, (the date the trial commenced). If he had worked the same hours as a foreman, at his rate of $33.64, he would have earned a total of $123,417.08.

[144] Instead, in his submissions, Mr. Alagar said that in that two-year period, he earned a total of $80,805.23 from both ProActive and ITS based on the following calculations and based on a 50/50 split of the ITS income with Ms. Dalumpines:

- Gross business income in 2020: $27,887.40 (50% of $55,774.80).
- Gross T4 income in 2020: $20,068.92 (ProActive).
- Gross business income in 2021: $32,117.83 (50% of $64,235.65).

- Gross business income in 2022 to the commencement of trial: $20,800 based on the ITS contract amount of $5,200 per month in the eight months from January to August.

[145] It is not at all clear to me why Mr. Alagar's gross T4 income from ProActive was included in his calculation as, on my understanding of the evidence, that income was earned prior to his termination in 2020 and thus not in the two-year period before trial. Nonetheless, as this was not specifically addressed by the defence, I have based my calculations on Mr. Alagar's numbers.

[146] I conclude that there is a real and substantial possibility that, but for the MVA, Mr. Alagar would have worked full time at ProActive, earning his foreman's salary, while also working for ITS and sharing half of the income from the ITS subcontract evening work. Throughout his life, Mr. Alagar had demonstrated a strong commitment to the workforce, often working two jobs.

[147] Although Mr. Lutumailagi testified that he did not think that it would be possible to work two jobs while working as a hazmat worker, he was not specifically asked about the ability to do the type of cleaning that Mr. Alagar described as the second job. The evidence was uncontroverted that Ms. Dalumpines did 90 percent of the cleaning work and Mr. Alagar did the balance. In fact, from April 2019 until the date of his termination, Mr. Alagar did both jobs. Mr. Alagar and Ms. Dalumpines testified that he only started to work at ITS because Ms. Dalumpines resigned from her daytime job to care for her father who had cancer and because she needed to earn an income. Ms. Dalumpines, who does not drive, could not have done the Zamboni work at the Audi dealership without Mr. Alagar.

[148] It is also the case that Mr. Alagar was terminated by ProActive for two main reasons: his inability to wear a mask due to his skin condition and his reduced hours. Taking all of these figures into account, and discounting Mr. Alagar's loss of income from ProActive by 50% to reflect that absences due to his continuing difficulties from his MVA injuries were not the sole reason for his termination, I find that Mr. Alagar's

loss of income from the date of his termination to the commencement of trial is $21,305.93.

[149] As a result, and in summary, I award Mr. Alagar an amount for his past loss of earning capacity of $31,338.59, consisting of one week off work following the accident, his reduction in hourly rate after his self-demotion, and his termination due, in part, to his absences from work. This is a gross figure, subject to adjustment for income taxes to be agreed to by the parties.

Future Loss of Earning Capacity

[150] The test for assessing claims for loss of earning capacity has been canvassed at length in this Court and in the Court of Appeal. The jurisprudence was recently synthesized by Justice Grauer in *Rab v. Prescott*, 2021 BCCA 345, where he held at para. 47:

> [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.

[151] The Court of Appeal recently confirmed the three-step analysis set out by Justice Grauer in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217.

[152] As explained in *Rab*, a plaintiff must establish that their earning capacity was impaired and a real and substantial possibility that the impairment resulted in a compensable loss.

[153] Assessing Mr. Alagar's future losses involves a consideration of hypothetical events, specifically what his employment and earnings would have been had the MVA not occurred and what his employment and earnings will look like now given the impact of his injuries. This involves the court weighting the possibilities and

probabilities of hypothetical events occurring: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49.

[154] Mr. Alagar submits that the first two elements of the *Rab* test have been met on the evidence: there is both a potential future event that could lead to a loss of capacity in that the medical evidence establishes that his ongoing symptoms are likely to continue into the future and a real and substantial possibility that his injuries will cause him a pecuniary loss. Mr. Alagar submits that he has already suffered a pecuniary loss and will continue to do so over his working life.

[155] As is often the case, the central issue is the valuation of Mr. Alagar's loss under the third step of the *Rab* test. The central task is to compare the likely future of Mr. Alagar's working life if the MVA had not occurred with his likely future working life after the MVA.

[156] Once Mr. Alagar establishes on a balance of probabilities that the MVA has caused an impairment to his income earning capacity and that there is a real and substantial possibility that his diminished earning capacity has resulted in or will result in a pecuniary loss, the court must assess the appropriate measure of his damages. Courts have measured the damages for loss of future earning capacity using two approaches: the earnings approach and the capital asset approach.

[157] I accept that, in this case, Mr. Alagar's career path was well defined. He began working at ProActive in 2011 as a hazmat worker and had been promoted to a foreman prior to the MVA. He was clearly a valued employee.

[158] Mr. Lutumailagi testified that he started at ProActive shortly before Mr. Alagar, but that Mr. Alagar was promoted to a foreman before him. He also testified that, prior to the MVA, Mr. Alagar was committed to his job and had a strong work ethic. He showed up to work every day and was rarely absent from work.

[159] Mr. Alagar called Ms. Kaiser as a witness. She had been employed by ProActive since it was incorporated in November 2010 and had been the office manager since 2011.

[160] In cross-examination, Ms. Kaiser confirmed that Mr. Alagar could not be accommodated by ProActive. As a foreman, he needed to be there “in full capacity”.

[161] Ms. Kaiser was not involved in Mr. Alagar’s termination and was not aware of why he was terminated. Nevertheless, based on Mr. Alagar’s evidence, I conclude that he was terminated, in part, due to his inability to attend at ProActive for the hours expected of him.

[162] Mr. Alagar is not an educated man. After leaving school in grade 10, he never completed his high school credentials. He worked in relatively low skilled jobs until he became an autobody worker. He then went on to do drywalling and, eventually, hazmat work. The asset that Mr. Alagar brought to the workplace was his ability to engage in heavy labouring jobs. He has no other vocational skills and is restricted in his capacity by his age and his language barriers. His ability to do heavy labouring jobs, according to Dr. Fuller’s evidence which I have accepted, has been permanently affected by the injuries he suffered in the MVA. Based on Mr. Alagar’s education, employment history, it is not likely that Mr. Alagar would be a suitable candidate for non-physically demanding work.

[163] I am satisfied that there is a real and substantial possibility of a loss of earning capacity. The possibility arises as a result of the potential limits of Mr. Alagar’s employment options based on his chronic low back pain and/or the risk of aggravating it that restricts him from doing heavy work. It also arises from the risk of higher than normal absenteeism rates due to flare-ups of pain, and that pain may, at times, make Mr. Alagar less productive. Dr. Fuller opines that Mr. Alagar has reached maximum medical improvement. On a balance of probabilities, further treatment is unlikely to improve Mr. Alagar’s neck and back pain which has been present for more than five years after the MVA.

[164] I also find that, on the evidence, there is a real and substantial possibility that Mr. Alagar’s loss of capacity will result in a pecuniary loss. I accept Mr. Alagar’s evidence that, but for the MVA, he would have continued to work at ProActive until

the end of his working life. Mr. Alagar has not returned to remunerative hazmat work because his lower back pain was exacerbated by his work at Proactive.

[165] Despite that, Mr. Alagar and his wife have found a way for him to continue to contribute to the overall finances of the family by doing contract cleaning.

[166] Mr. Alagar makes less money as a contract cleaner than he did as a foreman for Proactive or than he earned as a hazmat worker after his self-demotion.

[167] Mr. Alagar called Darren Benning, who was qualified to give expert evidence as an economist, to give opinion evidence with respect to the cost of future care and future income loss multipliers.

[168] Mr. Benning prepared two reports: one dated May 26, 2022, and the other dated August 25, 2022. The first report calculated future income loss based on a trial date of August 2, 2022, and the second reflected the actual date of the commencement of this trial on August 22, 2022. I will only refer to the second report in these reasons.

[169] In preparing the tables in his report, Mr. Benning presumed that Mr. Alagar would retire at age 67.

[170] Mr. Benning presents two scenarios with respect to Mr. Alagar's future loss of income capacity. The first scenario is premised on the fact that absent the MVA, Mr. Alagar would have continued to work full time as a foreman at ProActive making $33.64 an hour until age 67. The net present value of that loss based on Mr. Benning's multiplier tables is $215,183.64 to age 67. Given the high-risk nature of hazmat work, the plaintiff suggests that a 5% contingency be applied to reduce the claim under this scenario to $204,424.46.

[171] The second scenario is premised on the fact that absent the MVA, Mr. Alagar would have become a superintendent at ProActive, making $42.50 an hour from the commencement of trial until age 67. Mr. Lutumailagi, who started before Mr. Alagar, but was promoted to a foreman after Mr. Alagar was, was promoted to a

superintendent in 2022. Mr. Alagar submits that, absent the MVA, there is no question that he would have been promoted to a superintendent and that he would have excelled in this position.

[172] In my view, the evidence does not support that there was a reasonable possibility that Mr. Alagar would have been promoted to a superintendent and there was no evidence on which I could conclude that he would have excelled in the position. Mr. Alagar did not testify that he aspired to become a superintendent. There was no evidence of the job requirements for a superintendent and whether it required a greater facility with oral or written English than that demonstrated by Mr. Alagar during his evidence. Ms. Kaiser was not asked about how many superintendent positions existed within ProActive. In my view, the second scenario is merely speculative.

[173] I therefore conclude that the first scenario proposed by Mr. Alagar is the most reasonable approach to his future loss of capacity claim. However, I also conclude that it is not likely that Mr. Alagar would have worked in a highly physical and inherently dangerous job until he was 67. In my view, it is more likely that he would have retired at age 65.

[174] Based on ProActive's payroll records, between 2018 and 2019, Mr. Alagar worked an average of 1,834.38 hours. I will use those pre-accident years as the basis for my calculation. Based on his foreman's rate of $33.64 an hour, Mr. Alagar's gross yearly income is $61,708.54.

[175] Applying Mr. Benning's economic multipliers, which reflect the negative labour market contingencies of non-participation in the labour force, unemployment, and part-time and part-year work, the net present value of Mr. Alagar's income as a foreman at Proactive until age 65 is $436,279.38.

[176] In 2021, Mr. Alagar's 50% share of the ITS business income was $32,117.83. Assuming that this income continues, the net present value of Mr. Alagar's income from ITS until age 65 is $227,073.06.

[177] Subtracting the net present value of what Mr. Alagar is earning as a result of the MVA from what he would have earned but for the accident, results in a net present value of the total loss of future capacity of $209,206.32 to the end of the year in which he turned 65.

[178] In my view, Mr. Alagar also had a 15% likelihood of leaving hazmat work for reasons other than his MVA-related injuries. When he was terminated, he was suffering from contact dermatitis as a result of wearing a mask. He also had allergies to dust. In addition, he left his work as an autobody technician and later as a drywaller because of concerns about continuing exposure to fumes and dust. There is real and substantial possibility that he would have had similar concerns about hazmat work in his later working years.

[179] Accounting for the likelihood that Mr. Alagar would have retired on his 65th birthday instead of working to the end of that year, and applying the 15% negative contingency, I award a total of $175,000 for Mr. Alagar's future loss of earning capacity.

Cost of Future Care

[180] The test for an award of future care costs is that the treatments or care items be reasonable and medically justified in the sense that they are intended to ameliorate the impacts of the plaintiff's injuries and to promote the physical and/or mental health of the plaintiff: *Owen v. Folster*, 2018 BCSC 143 at paras. 311–12; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).

[181] In his report, Dr. Fuller does not make any recommendations for future treatments for Mr. Alagar. In his report, Dr. Waseem recommends active rehabilitation and Botox treatments.

[182] The parties agree that if I make an award for the cost of future care, active rehabilitation costs $83 a session and Botox is $1,000 a session. Dr. Waseem

recommends 36 sessions of active rehabilitation – three times a week for three months.

[183] Mr. Alagar participated in physiotherapy until he could no longer afford it. He testified that he continues to do the recommended exercises ongoingly. I am satisfied that if active rehabilitation was available to him, he would participate in it. I award him $2,988, the cost of the 36 sessions.

[184] Mr. Alagar was not asked whether he would be prepared to submit to Botox sessions. Absent that evidence, an award for those sessions is not reasonable.

Special Damages

[185] The parties were able to agree on special damages totalling $1,045.

Summary of Damage Awards

[186] For the foregoing reasons, and as set out, I award Mr. Alagar:

a) $80,000 in non-pecuniary damages;

b) $31,338.59 for past loss of earning capacity;

c) $175,000 for future loss of earning capacity;

d) $2,988 for the cost of future care; and

e) $1,045 for special damages.

Costs

[187] As Mr. Alagar was successful in establishing the Mr. Mackay was liable for the MVA and has been awarded damages, as is the usual case, he would be entitled to his costs of this action. If there are circumstances that would affect the costs order, and of which I am not currently aware, the parties may file written costs submissions not exceeding five pages.

"MacNaughton J."