

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ponych v. Klose*,
2023 BCSC 1504

Date: 20230828
Docket: M209593
Registry: New Westminster

Between:

Mike Ponych

Plaintiff

And:

Rolf-Dieter Klose

Defendant

Before: The Honourable Justice Blake

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.
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New Westminster, B.C.
August 28, 2023

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I. INTRODUCTION

[1] On December 11, 2017, Mike Ponych was driving southbound on Highway 11 near Townshipline Road in Abbotsford, British Columbia, at approximately 70 or 80 km/hour. The defendant, Rolf-Dieter Klose, was travelling eastbound on Townshipline Road, struck a cement median, emerged into the direct path of Mr. Ponych’s vehicle, and collided with Mr. Ponych’s vehicle (the “Accident”). The defendant has admitted liability for the Accident for the purposes of this proceeding.

[2] Mr. Ponych was in good health prior to the Accident, which he alleges caused a mild traumatic brain injury (“mTBI”), post-concussion syndrome, chronic migraines, chronic pain, post-traumatic vestibulopathy and post-traumatic vision syndrome. He has also developed persistent depressive disorder and generalized anxiety disorder after the Accident.

[3] Mr. Ponych seeks damages for his pain and suffering, past income loss, loss of future income earning capacity, loss of homemaking capacity and cost of future care. He also seeks special damages.

[4] The defendant opposes Mr. Ponych’s claim on a number of bases. First, while the defendant does not dispute that Mr. Ponych was injured in the Accident, he says that Mr. Ponych did not suffer from an mTBI, but rather suffered from initial soft tissue injuries with related headaches and, over time, subjectively reported worsening pain symptoms and psychological symptoms. In the alternative, he says if Mr. Ponych did suffer from an mTBI, then it was at the mildest range of the spectrum and his symptoms should have been at their worst immediately following the Accident, and should have improved. For the reasons below, I am satisfied that Mr. Ponych has proven on a balance of probabilities that he suffered from an mTBI (or a concussion) and he continues to suffer from post-traumatic concussion syndrome.

[5] A significant issue in this litigation is Mr. Ponych’s entitlement to damages for past and future loss of earnings. There is no dispute that Mr. Ponych only missed one day of work following the Accident, and continued working full-time for the business he was the sole owner and operator of—Sherwood Painting and

Decorating Ltd. (“Sherwood”). While Mr. Ponych continued to work after the Accident, ultimately, he decided he had no choice but to sell his business as a result of the injuries sustained in the Accident, and he did so as of April 1, 2022. He argues that it was his injuries from the Accident, and his ongoing symptoms, that made the sale necessary. He seeks damages for his past loss of earning of \$643,000, and damages for his future loss of earning capacity of \$3,300,000.

[6] The defendant says that Mr. Ponych chose to sell his business after demonstrating a sustained capacity to work after the Accident for almost five years. He argues that given Mr. Ponych’s demonstrated ability to continue to work full-time from the date of the Accident, he has not suffered a significant loss of earnings, either past or future. He argues he should not be made responsible for the consequences of Mr. Ponych’s perception he could no longer work, nor for his decision to sell Sherwood, before exploring other reasonable alternatives.

II. BACKGROUND FACTS

[7] Mr. Ponych was born on November 25, 1974 and was 48 years old by the end of trial. Prior to the Accident, he was in good health both physically and mentally. He is married to Takako Ponych, and together they have a 14-year-old daughter. She was born significantly premature. Since her birth Ms. Ponych has stayed at home to take care of their daughter, as she has special needs and requires significant care. Mr. Ponych has been the sole breadwinner of the family since that time.

[8] Mr. Ponych described himself as an average student in high school. He did not pass grade 12 math, but passed all of his other grade 12 classes and graduated in 1992. After high school he moved out, and began to work full time at a Chevron gas station. When he was approximately 20 years old he decided to go to BCIT for a five-month painting and decorating program, and graduated at the top of his class. He got a job immediately after graduation as a painter, and was laid off a year later for a brief period of time due to a shortage of work. At this point, he opened up his own business—Ponych Painting.

[9] Ponych Painting was busy, and after a year he hired another painter, Philip Singzon, and they became partners. They formally started Sherwood Painting in 1998. It was a general partnership, and they were equal partners. In 2005 they incorporated, and at that time had between 10 and 15 employees. They did both residential and commercial work, and worked for general contractors and home owners.

[10] By 2009 Mr. Ponych was in a strictly managerial role in the business, and was no longer painting or working with the tools. By his estimate, between 2005 and 2009 he was working on average 60 to 70 hours a week. As of 2005 Sherwood was generating gross revenues of between \$1.0 and \$1.2 million. Their best year was in 2009 when they generated gross revenue of \$1.5 million.

[11] In 2010 Mr. Ponych asked Mr. Singzon to leave Sherwood, and Mr. Singzon left and started his own business. At that time they entered into a verbal agreement whereby they divided up their list of general contractors and their tools and equipment. They made a “gentleman’s agreement” that neither would solicit the other’s general contractors, and Mr. Ponych says they both honoured that agreement.

[12] In 2010 Mr. Ponych and Mr. Singzon did not finalize Mr. Ponych’s purchase of Mr. Singzon’s shares. There was a lack of evidence as to when and on what terms he ultimately purchased Mr. Singzon’s shares; however, by April 1, 2022 Mr. Ponych was the sole owner of Sherwood.

[13] After Mr. Singzon left Sherwood, Mr. Ponych struggled financially from 2010 to 2013 with cash flow for the business. In 2013 he and his wife sold their home in Langley, and with the proceeds of sale he paid off all of the personal and corporate debt. His family moved to South Surrey and rented for two years. This allowed Mr. Ponych to “start fresh” with Sherwood, and his evidence was the business again started to “grow in the right direction”. In approximately 2015 Mr. Ponych says Mr. Singzon was no longer running his painting business. At that time, many of the

contractors who had used Mr. Singzon’s company contacted him, and he began to work for them again.

[14] Mr. Ponych had difficulty detailing the growth of Sherwood after 2013, and was unable to provide a clear answer as to why the gross revenue of the company was lower in 2016 than in 2015. He testified that the gross revenues were reduced in 2016 because he was saving for a down payment to purchase a new home, and so he was using all of the available funds from the company, and as a result he had fewer resources available. While the evidence establishes that Mr. and Ms. Ponych withdrew \$110,000 in income from the business in 2015, Mr. Ponych’s explanation was vague and confusing. His evidence also did not address the increased business from the contractors Mr. Singzon had previously been serving, but were now contacting Mr. Ponych. I do not accept plaintiff’s counsel’s argument that Mr. Ponych’s evidence established that “due to the large withdrawal of money from the business in 2015, it impacted the amount and size of projects he could take on in the short-term, until the business would once again be able to build reserves to cover the up-front cost of projects”.

[15] Mr. Ponych’s evidence was that he became the sole shareholder of Sherwood at some point, but he was unsure of the date. He testified that in the six months before the Accident Sherwood was doing quite well, and he was finally out from underneath his partnership with Mr. Singzon. He was attempting to grow the business, both by re-establishing connections with the general contractors who had used Mr. Singzon, and by doing more marketing (by way of doing search engine optimization and other web-based advertising that did not cost a lot of money). Mr. Ponych was responsible for doing all of the day to day management of the company, doing all of the estimating, invoicing, hiring and firing of employees. He used both employees, and sub contractors, as painters. In addition, Mr. Ponych would pick up the majority of the paint for the jobs, drop off the paint, ladders and equipment at the job sites, and do quality control on each job. In the six months before the accident, he estimated he employed 15 to 20 painters and retained a book keeper and an accountant.

[16] Mr. Ponych described his normal day in the six months before the accident. He would wake up at 3 or 4 a.m., do paperwork for a couple of hours, shower and get ready, and then go to the first job site or estimate. From then on, throughout the day, he would go from job site to job site, bringing the necessary paint and equipment to each job site. At each job site Mr. Ponych would either do quality control, estimates, or talk to clients or potential clients. His day would end between 5 and 6 p.m., and he worked six or seven days a week depending on what was necessary.

[17] Before the Accident Mr. Ponych testified that he had never thought of selling Sherwood—he described it as his “baby” and one of the most important things in his life. Sherwood was his only way to provide for his family, and he enjoyed both the work itself and challenge of running his own business. Ms. Ponych described the business as his “first wife”, and testified that when they married she knew he was already married to his business.

[18] Before the Accident Mr. Ponych suffered from occasional gout attacks that affected his big toe, making it painful to walk. However, these gout attacks did not interfere with his day to day activities before the Accident.

III. CREDIBILITY ASSESSMENT

[19] The defendant argues that Mr. Ponych was not a reliable witness, and says that he was inconsistent in his evidence at trial and his evidence at his examination for discovery. They argue as a result of these inconsistencies, I must examine his evidence carefully, particularly where it relates to his injuries, symptoms, and their impact on his daily life that other evidence cannot corroborate.

A. Relevant Legal Principles

[20] The caselaw recognizes that credibility and reliability are separate concepts. Credibility relates to honesty and the willingness to speak truthfully, whereas reliability relates to a party’s ability to accurately observe, recall and recount the events in issue: *Radacina v. Aquino*, 2020 BCSC 1143 at paras. 94–95 [*Radacina*].

A party whose evidence is not credible cannot give reliable evidence on the same issue. Credibility is not, however, a proxy for reliability, as a credible witness may nonetheless be unreliable: *Mather v. MacDonald*, 2016 BCSC 948 at para. 18, quoting *R. v. Perrone*, 2014 MBCA 74 at paras. 25–27, aff'd 2015 SCC 8.

[21] The starting point in a credibility assessment is to presume truthfulness. However, when a party's evidence "is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way": *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10 [*Hardychuk*].

[22] In assessing reliability, the trial judge should consider whether the witness lacks the perceptive, recall or narrative capacity to provide reliable testimony and whether he or she may be unconsciously indulging in the human tendency to "reconstruct and distort history in a manner that favours a desired outcome": *Hardychuk* at para. 10. When assessing credibility, the trial judge should consider whether the witness is choosing, consciously and deliberately, to lie out of a perceived self-interest: *Hardychuk* at para. 10.

[23] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. An assessment involves an examination of various factors, such as the ability and opportunity to observe events, the firmness of the witness' memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witnesses' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of the witness generally: *Bradshaw* at para. 186.

[24] When there is little to no objective medical evidence supporting a plaintiff's self-reported symptoms, particularly when a plaintiff alleges chronic pain and injuries that are subjective in nature, the court must be exceedingly careful in examining and

assessing credibility, and should assess assertions in light of the surrounding circumstances, including the medical evidence: *Edmondson v. Payer*, 2012 BCCA 114 at para. 2; *Price v. Kostryba*, 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.).

[25] It is the doctor's function to take the patient's complaints at face value, and offer an opinion based on those complaints. It is the trial judge's function to assess credibility and reliability: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77.

B. The Parties' Positions on Credibility

[26] The defendant argues that Mr. Ponych was inconsistent in his evidence at trial, and they say he is an unreliable witness. They argue that he "displayed a marked propensity to overstate and catastrophize his symptoms and their impact on his daily life". They also say he was impeached several times with prior inconsistent statements he made at his examination for discovery. In particular, they argue that at trial Mr. Ponych:

- a) attempted to downplay his pre-Accident anxiety, that arose when his daughter was born significantly premature, notwithstanding he admitted at discovery that he suffered from anxiety when she was born;
- b) could not recall whether he was wearing his seat belt, notwithstanding he admitted at discovery he was;
- c) testified he could not recall if he had lost consciousness in the Accident, notwithstanding he admitted at discovery that he told Dr. Petrovic he did not believe he lost consciousness; and
- d) testified that the pandemic affected Sherwood because jobs were rescheduled or postponed, but denied that Sherwood lost any jobs, notwithstanding he admitted at discovery that there was some impact from the Covid-19 pandemic, and a lot of jobs were either cancelled, rescheduled or postponed.

[27] Further, they argue that Mr. Ponych’s evidence of hiring Joshua Bartolome to assist him at Sherwood was inaccurate and unreliable. In particular, they argue he was mistaken with respect to the training he gave to Mr. Bartolome. They also argue Mr. Ponych was inaccurate when he testified he hired Mr. Bartolome notwithstanding he did not have a suitable car, because he was concerned Mr. Bartolome would have worked for someone else if he did not.

C. Analysis of Mr. Ponych’s Credibility and Reliability

[28] The majority of the injuries in this case are not capable of objective determination. The treating physician’s evidence, and the expert reports, all rely upon Mr. Ponych’s reports of his symptoms. Mr. Ponych’s reliability, especially when reporting on the nature and extent of his injuries and their effect on his ability to function, is critical to his claim.

[29] First, while many of the injuries alleged by Mr. Ponych are subjective in nature, I accept that his evidence about their timing, severity, and persistence was not challenged in cross-examination. There was independent medical evidence of objective findings by both his treating practitioners and experts: Dr. Sigurdson objectively reported hypertonicity during multiple visits; Dr. Petrovic administered injections into his affected muscles; and Dr. Palak confirmed that upon his examination he made objection observations of palpitation of tenderness and muscle spasms in Mr. Ponych’s neck, shoulder, upper back, and lower back.

[30] I do not accept that the inconsistencies as noted above by the defendant give me any concern about Mr. Ponych’s reliability. Mr. Ponych testified candidly to his memory problems and a “brain fog”, symptoms he says persist to this day. During his testimony he requested breaks during both direct and cross-examination, explaining “this is all a bit much” for him and that he was struggling with his symptoms (in particular his headache, dizziness, brain fog and lower back pain) and needed some time to regain his composure. He repeatedly had to ask for a question to be repeated, after he began to answer, and lost his train of thought in giving

answers, again on both direct and cross-examination. Further, he testified candidly as to his daily use of medical marijuana.

[31] I find Mr. Ponych's testimony was forthright, in both direct and cross-examination. He admitted to memory and concentration issues, and struggled throughout both direct and cross-examination. While there were a number of inconsistencies in his evidence, I find they were minor in nature. When these inconsistencies were put to him on cross-examination, he continued to do his best to testify in a forthright manner and notwithstanding he clearly struggled. He never denied there were inconsistencies, nor did he attempt to either change his evidence, or justify the inconsistencies in any manner. In all of these circumstances, the defendant pointing to specific, and minor, inconsistencies in his testimony does not cause me concern, nor does it cause me to find Mr. Ponych to be unreliable.

[32] The Accident occurred over five years ago. Since then, Mr. Ponych has been in chronic pain and struggled with multiple symptoms arising from his injuries, including those arising from his mTBI. For most of that period, Mr. Ponych was either on medication or using medical marijuana. In my opinion, the minor inconsistencies are understandable, and, when looking at the evidence as a whole, they are not material. I find Mr. Ponych to be a credible and reliable witness.

[33] I also note that Mr. Ponych's evidence was corroborated by the evidence of his wife. Ms. Ponych gave clear and corroborating evidence as to the daily impact his injuries have had on his daily life, mood and recreational activities, and on their family.

[34] I do not accept that Mr. Ponych displayed any tendency to catastrophize his symptoms, nor their impact on his life.

IV. ADVERSE INFERENCES

[35] Both Mr. Ponych and the defendant ask that I draw a number of adverse inferences.

[36] The defendant asks that I draw the following adverse inferences:

- a) that Mr. Singzon would not have corroborated Mr. Ponych's evidence as to Sherwood's pre-2010 financial and tax records, nor the existence of their alleged gentlemen's agreement;
- b) that the contractors Mr. Ponych testified he was not allowed to work for from 2010 to 2015, pursuant to the alleged gentlemen's agreement with Mr. Singzon, would not have supported his interpretation of the alleged agreement; and
- c) that Dr. Mitchell (the physician Mr. Ponych says prescribes him with medical marijuana) would not have testified that he had knowledge of, and was medically regulating, Mr. Ponych's daily use of medical marijuana.

[37] Mr. Ponych, in reply, asks that I draw an adverse inference from the defendant's failure to produce the report from an independent medical assessment he undertook with another neuropsychologist in 2020.

[38] Upon a careful consideration of the relevant legal principles, I conclude it is inappropriate to draw any of the adverse inferences sought by either the defendant or Mr. Ponych, and I decline to exercise my discretion to do so, for the following reasons.

A. Relevant Legal Principles

[39] The adverse inference rule is a discretionary rule of evidence that permits the Court to draw an adverse inference against a party by reason of his or her failure to call a witness who could be expected to give material evidence in their favour at trial: *Singh v. Reddy*, 2019 BCCA 79 at para. 1 [*Singh*]; *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35 [*Thomasson*]. The adverse inference rule is discretionary, and a trial judge is not obliged to draw an adverse inference: *Singh* at para. 9; *Thomasson* at para. 34.

[40] An adverse inference is not to be drawn unless a *prima facie* case is established: *Thomasson* at para. 35; *Cranewood v. Norisawa*, 2001 BCSC 1126 at

para. 127 [*Cranewood*]. An adverse inference should only be drawn in circumstances where, absent sufficient explanation, the evidence of the person who could have been, but was not, called would have been superior to other similar evidence: *Singh* at para. 8.

[41] In *Singh*, the Court of Appeal endorsed the following considerations listed in Alan W. Mewett K.C. and Peter J. Sankoff, *Witnesses* (Scarborough: Carswell) (loose-leaf), at 2-23 to 2-24, as relevant for consideration in determining whether it is appropriate to draw an adverse inference:

- a) whether there is a legitimate explanation for the failure to call the witness;
- b) whether the witness is within the “exclusive control” of the party, and was not “equally available to both parties”;
- c) whether the witness has material evidence to provide; and
- d) whether the witness is the only person or the best person who can provide the evidence.

[42] In *Chabot v. Chaube*, 2014 BCSC 300 [*Chabot*] Justice Brown dealt with a personal injury case where the plaintiff failed to call a good friend, who had organized various recreational activities the plaintiff participated in. He noted that the existence of more contemporary liberal disclosure rules, which give parties equal opportunities to call witnesses who may assist with their “litigation position”, have “encouraged judges to move away from the idea that they ought to draw an adverse inference against a party who had failed to call a witness who might know relevant facts”: at para. 137, citing *McIlvenna v. Viebig*, 2012 BCSC 218 at para. 71 and CED (West. 4th), vol. 26, title 61 at §200.

[43] The law is clear that the adverse inference rule is related to the best evidence rule: *Buksh v. Miles*, 2008 BCCA 318 at para. 30. An adverse inference may only be fairly drawn from the non-production of witnesses whose testimony would be

superior to the evidence of the witness tendered in respect to the fact to be proven: *Singh* at para. 8; *Chabot* at para. 136.

B. Analysis of Adverse Inferences the Plaintiff Seeks

[44] In light of the defendant’s argument that little, or no, weight should be placed on the expert evidence of Dr. Izabella Shultz, the plaintiff seeks an adverse inference to be drawn from the defendant’s failure to produce any evidence related to the independent neuropsychology assessment obtained by the defendant at trial.

[45] The plaintiff relies upon *Chekoy Sr. v. Hall*, 2013 BCSC 790, a case in which the plaintiff had agreed to attend at an independent medical examination requested by the defence, in exchange for a copy of the resulting report. Notwithstanding counsel had agreed to this request, a copy of the report was never provided to plaintiff’s counsel, and defence counsel refused to produce a copy during trial. The trial judge concluded that the “failure of defence counsel to produce the medical report which counsel had agreed to provide to plaintiff’s counsel, without an adequate explanation, allows for an adverse inference to be drawn in this regard”: *Chekoy* at para. 85.

[46] There was no evidence before me that Mr. Ponych agreed to attend at the independent medical examination with the neuropsychologist in return for a copy of the resulting report. In those circumstances, I am not convinced it is appropriate to draw the adverse inference Mr. Ponych seeks, and I decline to do so.

C. Analysis of Adverse Inferences the Defendant Seeks

[47] With respect to Mr. Singzon, the general contractors, and Dr. Mitchell, I am not satisfied that any of them are properly characterized as being under the “exclusive control” of Mr. Ponych. All of these witnesses were known to, or could have easily been known to, the defendant. All of these witnesses could have been called to testify by the defendant. As noted in *Singh*, “[a]s long as the witness is available to be called by the other party, there can be no objection, in terms of trial fairness, to a court’s declining to draw such an inference”: at para. 25.

[48] With specific reference to Dr. Mitchell, Mr. Ponych bore the burden of proving that his use of medical marijuana was medically supervised and prescribed. Whether he has satisfied this burden, notwithstanding his failure to call Dr. Mitchell, is a matter I must determine. It is inappropriate to conflate the issue of whether Mr. Ponych has adduced sufficient evidence to discharge this burden, with the concept of drawing an adverse inference as a result of his decision not to call this evidence.

[49] Upon a careful consideration of the relevant legal principles, I conclude it is inappropriate to draw any of the adverse inferences sought by the defendant, and I decline to exercise my discretion to do so.

V. NON-PECUNIARY DAMAGES

A. Relevant Legal Principles

[50] Mr. Ponych must prove that the Accident caused his injuries. He need not establish that the admitted negligence of the defendant was the sole cause of his injuries, but he must demonstrate a substantial connection between the Accident and his physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

[51] The compensation awarded for non-pecuniary damages should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189. The assessment is necessarily influenced by each plaintiff's own experiences in dealing with the injuries, and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25. The amount awarded for non-pecuniary damages does not depend solely upon the seriousness of the injuries, but also an appreciation of the specific circumstances of loss and their specific circumstances: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45 [Stapley], quoting from *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35.

[52] Some of the relevant factors in assessing non-pecuniary damages include:

- (a) age of the plaintiff;

- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- ...
- (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 ...).

Stapley at para. 46.

[53] The impact of injuries upon a person's ability to work may be relevant to non-pecuniary damages "because it may impact a person's enjoyment of life": *Dabu v. Schwab*, 2016 BCSC 613 at para. 23.

[54] When alleging a mental injury, a plaintiff must show that the mental disturbance he is suffering from is serious and prolonged, and rises "above the ordinary annoyances, anxieties and fears that come with living in civil society": *Saadati v. Moorhead*, 2017 SCC 28 at para. 37. It is the symptoms and the effects of a mental injury that are relevant, and not whether there is a specific label attached to the mental injury itself: *Saadati* at para. 31. However, a plaintiff must prove those symptoms and effects on a balance of probabilities.

[55] Once causation is established, the burden shifts to the defendant to prove that the plaintiff failed to mitigate some of his loss or injury. The defendant does not argue that Mr. Ponych has failed to mitigate his symptoms.

B. The Parties' Positions on Non-Pecuniary Damages

[56] Mr. Ponych says that he suffered headaches, symptoms of concussion and pain immediately after the Accident. He says he suffered an mTBI, and he developed post-concussion syndrome; a persistent depressive disorder, a generalized anxiety disorder, and chronic migraines and chronic pain. He also

suffered from post-traumatic vestibulopathy and post-traumatic vision syndrome. He has suffered from cognitive difficulties, mostly confusion and difficulties with his memory, as a result of his physical injuries.

[57] He has been diligent in following the advice of medical professionals. He received physiotherapy, chiropractic treatment, and counselling. He pursued treatment at a pain clinic, and tried Botox injections. His prognosis is guarded and his symptoms have been ongoing for over five years.

[58] The change in Mr. Ponych's physical and psychological condition is significant from his pre-Accident state. Prior to the Accident, he had no significant health issues, his physical ability was unrestricted, and he had no psychological issues. Now, he suffers from chronic pain, debilitating headaches, a difficulty with concentration, memory and mental functioning, and a significant depression and anxiety, unfortunately with occasional suicidal tendencies. His suffering has caused a significant impairment on his marital and family relationships.

[59] Mr. Ponych submits that in applying the factors set out in *Stapley*, the Court must consider that he is 48 years old and has chronic pain, debilitating headaches, a significant mood disorder, and struggles with ongoing issues related to his memory and his ability to concentrate. He argues that when he lost his ability to continue to run his business, he lost his identity, his ability to be the breadwinner of the family, and his plans for the future of the business.

[60] Mr. Ponych submits that the following cases provide guidance in assessing the amount that should be awarded to him for his pain and suffering:

- a) *Kim v. Lin*, 2016 BCSC 2405, aff'd 2018 BCCA 77;
- b) *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81;
- c) *Wallman v. John Doe*, 2014 BCSC 79;
- d) *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96; and

e) *Grabovac v. Fazio*, 2021 BCSC 2362 [*Grabovac*].

[61] Based on these cases, Mr. Ponych submits that he should be awarded \$275,000 in non-pecuniary damages.

[62] The defendant conceded that the Accident caused Mr. Ponych’s physical injuries and that Mr. Ponych’s activities have been curtailed. However, he says it is not to the extent Mr. Ponych alleges. He relies upon Dr. Prout’s expert evidence and argues that Mr. Ponych suffers from chronic soft tissue injuries with cervicogenic headaches, as opposed to mTBI. Further, he argues that Mr. Ponych demonstrated that he can continue to work in the same field as he did before the Accident, notwithstanding it was “with some pain and discomfort”. The defendant says that the cases relied upon by Mr. Ponych all involved plaintiffs diagnosed with an mTBI, who experienced a more significant and ongoing impact from their injuries, than Mr. Ponych.

[63] The defendant relies on the following cases with respect to the quantum of Mr. Ponych’s non-pecuniary damages:

- a) *Melvin v. Li*, 2023 BCSC 241;
- b) *Lo v. Hughes*, 2020 BCSC 840;
- c) *Finley v. Choi*, 2023 BCSC 75; and
- d) *Gamesaee v. Priest*, 2020 BCSC 1763.

[64] Based on these cases, the defendant submits that Mr. Ponych should be awarded \$125,000 to \$140,000 in non-pecuniary damages.

C. Evidence Related to Non-Pecuniary Damages

[65] At the time of the Accident, Mr. Ponych testified that he was dazed and confused, and could not remember much. He managed to pull his car over to the side of the road, and he remembered a smoke smell. His door was seriously damaged, but he managed to open the door and squeeze outside. He was worried

the defendant driver was hurt or dead, and he started to make his way over to his car but was stopped by a witness who said someone else was helping Mr. Klose. The first responders attended—fire, police and paramedics. Mr. Ponych believes a paramedic checked him out, and told him that he did not need any further medical attention; however, he does not remember speaking to the paramedic. He testified that he assumes the paramedic would have advised him to go to the hospital if they saw something after they assessed him. He described himself as very disoriented and confused at the time. Mr. Ponych testified he does not remember what happened next, but the evidence is clear that at some point he took 23 pictures of the scene of the Accident, and was given a copy of the police report.

[66] Mr. Ponych’s car was not able to be driven, so he called his wife and asked her to pick him up at a farmer’s vegetable store down the road. Ms. Ponych testified that when she picked him up he was pale and quiet and appeared confused. She said he was not being himself, and he was not acknowledging either her or their daughter, which was highly unusual behaviour. She described him as a “statue” or a “robot”.

[67] Mr. Ponych went home and laid down; however, he then got up to go to the salvage yard where his vehicle had been towed, as he had some important personal and business materials in the vehicle. Ms. Ponych wanted to take him to a hospital, but Mr. Ponych told her he had been checked out by the paramedics, and he trusted them when they said he was all right. She testified he said “they said I am OK, so there must be nothing they can do for me”.

[68] Ms. Ponych drove them to the salvage yard, and she retrieved those items from the vehicle. Mr. Ponych said that at this time he still felt very dazed and confused. Ms. Ponych corroborated this evidence, and said he was having difficulties with balance, and was moving much slower when they went to the salvage yard. While she drove there he reclined his seat and tried to sleep. Upon his return home, he started to have an intense headache, which worsened overnight.

[69] The only time Mr. Ponych took off of work was the day after the Accident occurred. Mr. Ponych testified that he wished he could have taken more time off after the Accident, but as he was the only one who could run his business it was not possible. Mr. Ponych's decision to keep working, and his ultimate decision that he had to sell Sherwood, is the most controversial issue in this trial. It is dealt with in further detail under past income loss and future loss of earning capacity.

[70] The night of the Accident Mr. Ponych slept downstairs, separate from his wife. He did not have a family doctor, so the next morning his wife started trying to find him a doctor. While her doctor said he would take Mr. Ponych as a patient, he was not able to see him until the middle of January. Ultimately, she found Dr. Sean Petrovic, who agreed to take him as a patient and was only available to see him on December 20, 2017. This was the first medical attention Mr. Ponych received after the Accident.

[71] Mr. Ponych testified that in the nine days after the Accident, he had a worsening headache, was dizzy and was extremely sensitive to light and noise. He also had pain in his chest, left arm, and lower back. Dr. Petrovic gave him a prescription for his headache.

[72] However, his headaches worsened. He attended at the Abbotsford ER on December 23, 2017. At that point he was also experiencing dizziness, nausea, brain fog, sensitivity to light and noise, upper back tightness and discomfort, and upper back, lower back, shoulder and neck pain. Ms. Ponych corroborated his evidence, and said that in her opinion every day the symptoms continued to worsen. At the Abbotsford ER, he was advised that he had possibly sustained a brain hemorrhage. He ultimately had three CT scans at the Abbotsford ER: the first on December 23, 2017, the second on December 25, 2017; and the final one in early January 2018. That scan indicated he was not suffering from a hemorrhage. At the Abbotsford ER Mr. Ponych was told he had a concussion, and was given a handout on concussion management.

[73] Mr. Ponych’s symptoms have continued to the time of trial. He described his headache as there “24 hours a day”, with a constant, squeezing sensation on his head. He said “he wants to rip his head off”. On a pain scale out of 10, he reports his headaches have a baseline of 5 or 6, but that they can increase to a 9 or 10. He continues to experience dizziness and nausea. He has a “brain fog” several days a week, which affects his mental clarity to the point he “just can’t think straight”. He complains that he continues to experience memory issues and has significant difficulties retaining information and facts and “staying on task”.

[74] He still has upper back, shoulder and neck tightness, and has lower back and right hip pain. Mr. Ponych testified he experiences these symptoms every day, and they have worsened since the Accident.

[75] Mr. Ponych drives a significant distance every day for his job. He experiences anxiety while driving, but also the highway noise exacerbates his headaches, and his right hip pain.

[76] There was significant testimony about Mr. Ponych’s difficulties with sleep. He says that he has trouble staying asleep, and he wakes up frequently in the night and experiences insomnia. While this issue has persisted since the Accident, it has improved mildly. Mr. Ponych was diagnosed with sleep apnea in October 2018, and was prescribed a CPAP machine.

[77] Mr. Ponych also testified that while he has struggled with his weight since his teenage years, after the Accident he gained weight and weighed as much as 335 pounds. Ms. Ponych corroborated that he gained weight. He was challenged on this claim in cross-examination, and he explained that he thought he weighed 260 or 270 pounds at the time of the Accident, but acknowledged he did not weigh himself frequently. He confirmed that he has had a lifelong fluctuation of weight. In approximately 2019 he became a vegetarian in an attempt to lose weight and feel better.

[78] Finally, Mr. Ponych testified that since the Accident he is much more easily irritated and grumpy, and is much more short-tempered. He struggles with anxiety and depression, and has experienced suicidal thoughts. He testified that in front of his family he has expressed “I wish I were dead; I can’t go on any longer; why did this happen to me”. While still working, he would sit in his vehicle and cry on a regular basis.

[79] As a result of his constellation of injuries and resulting symptoms Mr. Ponych has slept separately from his wife since the Accident. He sleeps in the basement away from his wife and daughter. As a result of his symptoms, including his depression, anxiety and mood, there has been a significant impact on his marriage and on his daughter. Prior to the Accident, the family took their daughter on annual trips to Disneyland; since the Accident they have stopped travelling, and Mr. Ponych no longer participates in family events. He no longer enjoys watching movies nor socializing.

[80] Ms. Ponych corroborated that she and her daughter have been living on eggshells with Mr. Ponych, as “he is always on edge now”. She testified that she has had to caution her daughter not to bother Mr. Ponych, so as not to irritate him or make his symptoms worse, and that this has definitely affected their relationship. She says Mr. Ponych is now grumpy when he never used to be. She corroborates that they no longer travel, go to Disneyland, go to the movies, go out anywhere, nor even have movie nights at home. She says he simply cannot tolerate noise, people, or activities, and she said other than going to work he is “pretty much stuck at home”. While they had previously discussed having another child, they no longer see that in their future. Mr. Ponych’s friends and family members also noted that his personality has changed. He has become irritable, disorganized, and short-tempered since the Accident.

[81] Before the Accident, Mr. Ponych was responsible for the outside maintenance of the home, for putting up Christmas lights, and would occasionally help Ms. Ponych with vacuuming, cleaning and cooking. Since the Accident, Ms. Ponych says

he is unable to help with any of the chores, either inside or outside. She is now responsible for everything, including putting up the Christmas lights.

[82] Since the Accident, Mr. Ponych has been referred to a number of specialists by Dr. Petrovic, including a neurologist and a pain specialist. He has attempted myofascial activation, Botox injections, and pain injections. He has undergone counselling, and been referred to a psychiatrist. He has received acupuncture, chiropractic treatment, physiotherapy, vestibular physiotherapy, and occupation therapy. He has also attempted active rehabilitation.

[83] Mr. Ponych testified that he was having issues with some of the medications he was prescribed, and he was concerned about opioid addiction, so he looked for an alternative. On his own initiative, Mr. Ponych researched the use of marijuana in managing chronic conditions, and he began using medical marijuana in the summer of 2018. He denies using any marijuana or cannabis products before the Accident. He currently uses the following marijuana products:

- a) 6—8 mls of CBD oil a day;
- b) 3 mls of THCa oil a day;
- c) 1/2 ml of THC oil and 1 ml CBN oil before bed;
- d) vapes a mixture of 50/50 THC/CBD blend before bed; and
- e) occasionally vapes either 50/50 THC/CBD blend or straight CBD during the day if headaches are extreme.

He says the CBD oil assists with his headaches, the THC oil assists with his chronic pain, anxiety and sleep, and the CBN oil helps with his sleep. He has seen improvement in his pain management with these products, and some limited improvement in his sleep.

[84] I note that the term marijuana is commonly used to reference dried flowers and leaves from the cannabis plant. However, in these reasons I will refer to all of the various cannabis products that Mr. Ponych has used (and currently uses)

collectively as medical marijuana, as this was the term predominantly used by counsel and the medical experts during the trial.

[85] Mr. Ponych testified that he sees a physician, Dr. Mitchell, once a year to get a prescription for medical marijuana. Dr. Mitchell did not testify, nor were prescriptions tendered that reflect all of the medical marijuana referred to above. While two of Dr. Mitchell's prescriptions were tendered into evidence, those prescriptions were for both only for dried marijuana, and not for the majority of the medical marijuana Mr. Ponych now takes.

[86] Mr. Ponych's current medications are extra-strength Advil; Lyrica (for sleep), venlafaxine (for depression), mirtazapine (for sleep) and allopurinol (as needed for gout). He also uses a number of vitamins and supplements.

[87] His current symptoms are: headaches on a constant basis; dizziness and nausea; cognitive difficulties (including brain fog, difficulty with concentration and memory issues); pain in his neck, shoulders, back and right hip); difficulties with sleep; and depression, anxiety and irritability.

1. Treating Doctors Evidence

[88] Two of Mr. Ponych's treating doctors testified: Dr. Petrovic, his family doctor; and Dr. Leif Sigurdson, his treating chiropractor.

a) Family Doctor: Dr. Sean Petrovic

[89] Dr. Petrovic has been Mr. Ponych's family doctor since December 20, 2017. On that date he recorded the details of the accident, and the fact Mr. Ponych was experiencing headaches, neck pain, mid back and lower back pain, and left-hand pains. Dr. Petrovic testified on cross-examination that Mr. Ponych had signs of concussion on this visit, notwithstanding they were not documented on his medical note.

[90] At his next appointment with Mr. Ponych, on January 29, 2018, Dr. Petrovic reported in his chart that he had "mild post concussive symptoms". On cross

examination Dr. Petrovic confirmed he clearly had signs of a concussion on this visit, based upon Mr. Ponych's subjective complaints.

[91] Over the past five years he has noted restrictions in Mr. Ponych's range of motion of the cervical spine, and palpated trigger points in his upper back and neck. He treated these with trigger point injections.

[92] Dr. Petrovic immediately prescribed physiotherapy and chiropractic treatments. Mr. Ponych started physiotherapy in late December 2017, and did approximately 20 sessions of physiotherapy. He then started chiropractic treatment.

[93] Dr. Petrovic described Mr. Ponych as a very compliant and cooperative patient. Mr. Ponych has taken the prescription medications he was given, other than not wanting to go on Cymbalta (an anti-depressant) due to side effects, although he is tolerating Effexor (also an anti-depressant) well. He has participated in all medical referrals Dr. Petrovic made. Dr. Petrovic made clear he is always very reluctant in general to place patients with chronic pain on narcotics.

[94] When asked about Mr. Ponych's use of marijuana prescriptions, Dr. Petrovic explained that he and his clinic do not prescribe medical marijuana, as they have decided they do not have enough information to prescribe it safely. However, he has some patients who self-medicate with CBD products, and he acknowledged some notice benefits. He will not initiate discussions with patients about the use of medical marijuana, nor will he recommend it, but if a patient initiate discussions then he will often refer them to a third party to make such prescriptions. Dr. Petrovic acknowledges that patients have the right to try medical marijuana. He became aware Mr. Ponych was self-medicating with medical marijuana at some time in 2019. Dr. Petrovic was content with Mr. Ponych trying medical marijuana, but he advised him to do it in a safe way and to ensure no medications interacted adversely with it (such as muscle relaxants or opioids.)

[95] Dr. Petrovic was more comfortable with his use of the CBD marijuana prescriptions, as they are theoretically less addictive, and do not have hallucinogenic

properties. He noted that THC marijuana prescriptions are more likely to cause hallucinations or other mental problems. Dr. Petrovic noted that while he knew Mr. Ponych was “self-medicating” with marijuana prescriptions, it was not something he either recommended nor something he was against. By using the phrase “self-medicate” he meant using another doctor to prescribe, and monitor the use of, medical marijuana.

[96] Dr. Petrovic also referred Mr. Ponych to a neurologist for his headaches, and he first saw Dr. Singh on October 15, 2018. Dr. Singh did not testify. Mr. Ponych says Dr. Singh prescribed him a number of vitamin supplements, and referred him for a sleep apnea test (to Coastal Sleep). As a result of the sleep test, Mr. Ponych started using a CPAC machine towards the end of 2018. Mr. Ponych continues to take the vitamin supplements initially recommended by Dr. Singh. Dr. Singh was the first doctor who suggested Botox injections as a treatment option. Mr. Ponych was initially concerned about using Botox, and wanted to do more research before making a final decision.

[97] Dr. Petrovic also wanted to refer Mr. Ponych to a pain management specialist, but it was a two year wait list to see the specialist. Mr. Ponych’s counsellor, Mr. Koehn, referred Mr. Ponych to a pain specialist in Salmon Arm, Dr. de Wet, who was able to see Mr. Ponych much faster. Dr. de Wet did not testify. Ms. Ponych drove them up to Salmon Arm so Mr. Ponych was able to see Dr. de Wet in February 2019. Dr. de Wet assessed Mr. Ponych, and treated him with a series of injections. Unfortunately, the injections did not assist with his chronic pain, and Dr. de Wet discharged Mr. Ponych from his care.

[98] Dr. Petrovic also referred Mr. Ponych to a concussion clinic in Surrey. Dr. Kung did the original assessment, and then referred Mr. Ponych to Dr. Bogusz, the clinic’s neurologist. Neither doctor testified. Mr. Ponych testified that Dr. Kung told him that he had a concussion. Since June 2020 Mr. Ponych has been treated by Dr. Bogusz. Mr. Ponych says he initially saw Dr. Bogusz every six months, then started seeing him once a month while he treated him with myofascial activation. Dr. Bogusz

currently seeks Mr. Ponych every three months or so. Dr. Bogusz has also prescribed some different medications for him, some of which Mr. Ponych says had some serious and intolerable side effects (such as amitriptyline, which caused anger outbursts) and Botox injections (which did not cause improvement in his symptoms). Dr. Bogusz also referred Mr. Ponych to a psychiatrist, who saw Mr. Ponych initially at the end of October 2022, and who has increased the medication for depression.

[99] Mr. Ponych testified that both Dr. Petrovic and Dr. Bogusz recommended he take some time away from his business to recover. However, Dr. Petrovic testified that Mr. Ponych advised him he had made the decision to leave his work, and he supported that decision because his job as a painting contractor was too demanding and too stressful.

b) Treating Chiropractor: Dr. Leif Sigurdson

[100] Mr. Ponych has been seeing Dr. Leif Sigurdson, a chiropractor, since February 9, 2018. At that first visit, he recorded Mr. Ponych complained of headaches, as a “vice grip around head”, and “difficulty with concentration/memory/mood”.

[101] Since he has been treating Mr. Ponych, Dr. Sigurdson has noted objective findings in his examinations, including a reduction in his range of motion, spinal joint restrictions, and hypertonicity and muscle spasming through the mid back and low back (and later through the hips). Dr. Sigurdson has noted these objective signs since his first visit with Mr. Ponych, and he continues to see them currently.

[102] Dr. Sigurdson recalled Mr. Ponych telling him he was struggling with memory loss, fogginess and issues with concentration, but he knew he was seeing a neurologist and so he considered those issues properly within the scope of his treating neurologist. He acknowledged he may not have marked those complaints down, as Mr. Ponych had so many other complaints that he was already addressing (and those complaints were not within his field of expertise).

[103] Mr. Ponych continues to see Dr. Sigurdson once a month, and Dr. Sigurdson focuses on helping with his range of motion, particularly in the right hip, lower back and shoulder.

2. Medical Expert Evidence

[104] Mr. Ponych relies upon the expert opinion evidence of the following witnesses: Dr. Gurpreet Palak (physiatrist); Dr. Izabela Schultz (psychologist and neuropsychologist); and Dr. Manu Mehdiratta (neurologist). Together, their expert reports made diagnoses of chronic headaches and chronic pain; sleep issues related to pain and stress; several psychological illnesses, including anxiety and depression; and cognitive changes, including memory loss and mood dysfunction. The experts each concluded that these injuries were likely the result of the Accident and Mr. Ponych’s prognosis for a full recovery was poor or somewhat guarded.

[105] The defendant relies upon the expert opinion evidence of Dr. Alister Prout (neurologist).

[106] The majority of the expert medical evidence was in significant agreement as to the impact of the Accident on Mr. Ponych. The main point of disagreement was whether he suffered from an mTBI or from post-traumatic headaches. For clarity, I will refer to the reports as grouped by specialists.

a) Physiatrist: Dr. Gurpreet Palak

[107] Dr. Palak was qualified as an expert in physical medicine and rehabilitation and pain medicine. He met with Mr. Ponych on February 15, 2022 and prepared his expert report dated March 25, 2022 (“Dr. Palak’s Report”).

[108] Dr. Palak listed Mr. Ponych’s current symptoms as of February 2022 in order of severity as: headaches; post-concussion symptoms; neck and upper back pain; lower back and right hip pain; and mood symptoms. Mr. Ponych confirmed for Dr. Palak that before the examination, he has taken his allopurinol, used CBD oil, and taken his vitamins. Dr. Palak’s opinion was that the current diagnoses for Mr.

Ponych, based upon his assessment and review of the medical records, include the following:

- Mild traumatic brain injury (concussion) with ongoing post-concussion symptoms;
- Cervicogenic headaches with clinical features of bilateral greater occipital neuralgia;
- Post-traumatic migraine type headaches;
- Grade 2 cervical spine sprain/strain;
- Cervical facet joint injury, C4-5 and C5-6 levels;
- C6-7 and C5-6 disc bulges identified on MRI;
- Grade 2 thoracic spine sprain/strain;
- Grade 2 lumbar spine sprain/strain;
- Left-sided lumbar facet joint injury;
- Possible right-sided sacroiliac joint complex pain syndrome;
- L5-S1 disc degeneration with right L5/S1 radiculitis;
- Chronic pain;
- Severe anxiety symptoms;
- Severe depression symptoms;
- Clinically significant pain catastrophizing;
- Clinically significant kinesiophobia;
- Severe pain related sleep disturbance; and
- Weight gain.

[109] Dr. Palak opined as follows:

Causation

It is my opinion that Mr. Ponych sustained a concussion as a result of the subject motor vehicle collision and has ongoing post-concussion symptoms. I will defer further comment to Dr. Mehdiratta or another neurologist.

It is my opinion that Mr. Ponych is experiencing cervicogenic headaches emanating from the third occipital nerve with clinical features of bilateral greater occipital neuralgia. It is my opinion that these headache symptoms are as a result of the subject motor vehicle collision. It is my opinion that Mr. Ponych is experiencing post traumatic migraine type headaches as a result of the subject motor vehicle collision.

It is my opinion that Mr. Ponych has sustained a soft tissue injury to the cervical, thoracic and lumbar spines as a result of the subject motor vehicle collision. In addition, Mr. Ponych is experiencing pain emanating from the cervical and lumbar facet joints also as a result [of] the subject motor vehicle collision. Mr. Ponych's cervical spine MRI reveals a two-level disc bulge, the significance of this finding is currently unknown. Mr. Ponych's lumbar spine MRI reveals moderate to severe degenerative disc disease at L5-S1 with a mild to moderate circumferential disc osteophyte complex and contact of the right L5 and bilateral S1 nerve roots. It is my opinion that the disc disease at L5-S1 predated the subject motor vehicle collision, but contact and irritation of the right L5 and/or S1 nerve roots likely occurred as a result of or following the subject motor vehicle collision. Mr. Ponych's lower back pain symptoms may be further complicated by his body habitus, but his ongoing weight loss will be helpful.

In addition to the physical symptoms sustained, Mr. Ponych also presents with severe anxiety and depression symptoms, clinically significant pain catastrophizing and kinesiophobia, and pain related sleep disturbance. The presence of these findings are negative predictors for the development of chronic pain, delayed recovery and reduced functional outcomes. I will defer further comment on Mr. Ponych's anxiety and depression symptoms to Dr. Schultz or another specialist in psychology or psychiatry.

It is my opinion that Mr. Ponych attended and worked with his family physician as well as specialists to try and reduce his symptoms and recover from his injuries. He has engaged with a number of rehabilitation professionals since the motor vehicle collision. Mr. Ponych's work responsibilities have been noted as a barrier to his recovery. Mr. Ponych continues to engage in appropriate therapies including active rehabilitation.

Given the duration of symptoms since subject motor vehicle collision, it is my opinion that these acute symptoms have become chronic in nature.

[110] With specific reference to functional and vocational activities, Dr. Palak opined that activities requiring driving, carrying, lifting, overhead work, prolonged standing or sitting, concentration, stress, exposure to bright lights, and exposure to noises, would all likely aggravate Mr. Ponych's symptoms and would not be sustainable for long periods of time.

[111] On cross-examination Dr. Palak acknowledged that one would expect concussion symptoms to be present immediately following a trauma, or within the

following day. In his opinion, symptoms can develop within a day or two following a concussion. While Dr. Palak regularly diagnoses and treats concussion patients, he would defer to the opinion of a neurologist on the issue of whether Mr. Ponych suffered from a concussion and is experiencing ongoing post-concussion symptoms. He was firm in his opinion that you do not need to experience a loss of consciousness to be diagnosed with a concussion.

[112] He identified Mr. Ponych's medications as CBD oil; THC-A oil; dry medical marijuana; and allopurinol (for his gout). Although he did not list Lyrica, he confirmed that Mr. Ponych advised him he took Lyrica, and he simply failed to include it in the list of current medications. On cross examination he could not recall if Mr. Ponych advised him he also took CBN and THC, but if he did, he may have grouped those under the THC-A oil. He identified a number of vitamins and supplements Mr. Ponych took: magnesium, vitamin B; vitamin B12; coenzyme Q10; herbal mushrooms; red reishi (for sleep); ashwagandha; probiotic; omega 3 and vitamin C.

[113] Dr. Palak acknowledged that side effects from using THC can be hallucinations, paranoia, appetite issues, fatigue, low motivation, and potential addiction. He was not particularly familiar with THC-A nor CBN use, nor their side effects. His evidence was that while many medications used for chronic pain and mood disorders have side effects of dizziness, drowsiness, confusion and difficulty concentrating, once patients are on a stable dose those medications are much better tolerated.

[114] Dr. Palak further testified under cross-examination that poor sleep can negatively impact mood, the ability to recover and rehabilitate from injury, and can compound weight issues and can affect cognitive function.

[115] Dr. Palak made a number of recommendations for the ongoing management of Mr. Ponych's chronic pain symptoms: passive therapies (such as chiropractic therapy, physiotherapy, acupuncture and massage therapy); active therapy (under the guidance of a physiotherapist or kinesiologist); self management (through enrollment in a community based self management program that provides

assistance in living with chronic pain); psychological management as recommended by an appropriate specialist; pharmacological management (to assist with symptom management which may assist with further functional gains, and to improve his sleep and mood symptoms); a referral to a neurologist to discuss if re trialing Botox or CGRP inhibitors would be appropriate; a referral to an obesity medicine and dietician for weight loss management; and a referral to an interventional pain physician or physiatrist to determine if further injections or procedures may be appropriate.

[116] Dr. Palak’s prognosis was that the likelihood of spontaneous resolution of Mr. Ponych’s chronic pain symptoms was low; however, “...given that he has not undergone optimal management of his chronic pain symptoms to date, it is my opinion that further improvements may be made if the treatment recommendations are undertaken. I do not anticipate a full functional recovery”. Dr. Palak opined that if Mr. Ponych undertook his recommendations, he may see improvements with his chronic pain, mood and cognitive function, but that Mr. Ponych will need ongoing medical interventions and will not experience a full recovery.

b) Neuropsychologist: Dr. Izabela Schultz

[117] Dr. Schultz was qualified as an expert in clinical psychology and neuropsychology. She conducted three days of assessment with Mr. Ponych in November 2021, and prepared her expert report dated January 24, 2022. She diagnosed Mr. Ponych as follows:

At the time of the current neuropsychological and psychological assessment, Mr. Ponych presented with mild to moderate neurocognitive disorder, chronic emotional distress and dysregulation associated with Persistent Depressive Disorder and a major depressive episode, generalized and health anxiety, posttraumatic stress symptoms, Somatic Symptom Disorder with Predominant Pain (headaches and multisite pain), and interrupted sleep with early awakenings. Sexual dysfunction, mental fatigue, sensory intolerances, dizziness and balance difficulties were also documented. He showed high levels of a perception of injustice, catastrophizing, rumination and somatic preoccupations, factors predictive of disability. His medical records also indicated obstructive sleep apnea and obesity. Notably, Mr. Ponych felt overwhelmed by stress arising from his symptom burden and functional limitations, together with difficult-to-meet work, business and family demands.

[118] She made the following clinical diagnosis according to the *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Washington, DC: American Psychiatric Association, 2013):

- Mild Neurocognitive Disorder Due to Multiple Etiologies, without behavioural disturbance
- Persistent Depressive Disorder with intermittent major depressive episodes, moderate, with current episode and anxious distress
- Generalized Anxiety Disorder, moderate
- Other Specified Trauma- and Stressor-Related Disorder with partial posttraumatic stress and dissociative symptoms
- Somatic Symptom Disorder with Predominant Pain, moderate.

[119] Dr. Schultz opined that Mr. Ponych's cognitive impairment is likely "multifactorial", and potentially caused by his mTBI, his chronic emotional distress, his pain, his use of marijuana derivatives, and his sleep apnea and fatigue. She described his cognitive impairment in the following manner:

Mr. Ponych's overall neuropsychological impairment was mild to moderate, widespread. His cognitive deficits and difficulties were identified in aspects of balancing attention speed and accuracy, immediate and delayed auditory memory and learning, immediate and delayed visual recall and reproduction, word tracking and naming speed, and in aspects of visual perceptiveness, visual processing and nonverbal deductive reasoning. Among executive functions, impairments in higher order concept formation, learning from feedback (task-dependent) and inhibition of habitual response were found. Prior learning disorder was ruled out based on the results of academic testing.

[120] With reference to his sleep apnea, she testified that it was diagnosed and promptly treated, and so in her opinion it was unlikely that it had compounded in any significant way his cognitive impairments arising from an mTBI.

[121] With specific reference to Mr. Ponych's use of medical marijuana, she opined that it is more likely than not that his use of these products is unlikely to worsen his cognitive impairment, and may in fact improve it.

Mr. Ponych has been using cannabis-derived products for pain control and reported improved pain management. There is emerging research evidence that marijuana can improve pain control in selective conditions, such as neuropathic pain. Research in the field is in the initial stages but there are

some systematic analyses being published and a developing consensus that certain types of chronic pain can be treated with medicinal cannabis-derived products, enhancing pain control and quality of life; these findings need to be interpreted with caution and restrictions[Citations removed].

It is more likely than not that the cannabinoid derivatives used by Mr. Ponych are unlikely to worsen his cognitive impairment. Rather, the opposite may be true, due to improved pain control.

[122] Dr. Schultz opined that Mr. Ponych’s psychological/mental health impairment, and his pain and fatigue are “primarily attributable to the direct and [indirect] consequences of the 2017 MVA”. In her opinion, he has mild to moderate impairments in the activities of daily living, and his social functioning and ability to enjoy recreational activities has deteriorated.

[123] Dr. Schultz also addressed the impact of Mr. Ponych’s condition on his ability to work. She was of the following opinion:

Given this long list of work accommodations that Mr. Ponych requires, their implementation may not be a realistic expectation in many work settings and especially difficult in demanding entrepreneurial and competitive business contexts. At work, Mr. Ponych continues to struggle and his current situation is not sustainable. He is working with a significant disability burden and is at high risk for presenteeism (being present at work but showing low productivity), absenteeism, disability, early retirement and occupational injury. As a business owner and operator, he has lost his competitive edge. Under further business pressures, his functioning is likely to deteriorate. He may decompensate, from both mental health and functional perspectives, and stop working altogether. Mr. Ponych is already at the edge of his emotional and cognitive capacity, a problem compounded by his pain, fatigue, and balance and sensory issues. The risk for permanent occupational disability, possibly under the guise of early retirement, is high.

In conclusion, Mr. Ponych’s occupational impairment is moderate and fluctuating with his symptoms. Work pressures make his symptom burden worse. He sees himself and is likely to be perceived by potential business partners, customers and employers as an unattractive job holder. It is unlikely that Mr. Ponych would be able to maintain his current business much longer; let alone to secure and maintain any new employment commensurate with his pre-injury background. His vocational prognosis is guarded and his best option is to either sell his business (which has proven difficult to date) or secure a partner or manager to take over most of his duties, which may not be practical from a business viability perspective. Mr. Ponych may seek the advice of a small business consultant in this regard. His disability may become more severe with ongoing business pressures, with lack of access to work supports and accommodations, and with the worsening of his mental

health, cognitive, pain-related and other health issues, especially in the absence of appropriate treatment.

[124] In Dr. Schultz’s opinion, the clinical prognosis for Mr. Ponych’s “neuropsychological and psychological recovery is poor”. She opined that with further treatment and rehabilitation he “might improve somewhat” but noted that from a “cognitive perspective, of concern is his future aging due to increased risks of a progressive decline, above and beyond normal aging”. She stated “in the absence of appropriate intensive mental health treatment, pain rehabilitation and a substantial reduction in work demands, Mr. Ponych’s mental health conditions are likely to persist”, and may in fact worsen “with increased stress and decreased supports”. She noted:

Although running [a] business is part of his identity, working very long hours while struggling with a significant symptom and disability burden is not sustainable. Mental health disability and pain chronicity have already set in and will not spontaneously remit.

[125] Dr. Schultz made a number of recommendations for Mr. Ponych’s future care: psychiatric treatment for depression, anxiety, posttraumatic stress, insomnia and chronic headaches; psychological treatment; occupational therapy follow-up; a private multidisciplinary pain program; housekeeping and cleaning services; assessment at a specialty audiology clinic; a balance assessment by an ENT; vision and hearing assessments; a physical capacity evaluation; or professionally set up and monitored weight loss and exercise program with personal fitness instruction; referral to the VGH Sexual Medicine Clinic; and case co-ordination for the above, preferably by an occupational therapist.

c) Neurologist: Dr. Manu Mehdiratta and Dr. Alister Prout

[126] The plaintiff tendered Dr. Mehdiratta as an expert in medicine, with a sub specialty in neurology. He assessed Mr. Ponych virtually on December 2, 2020, and rendered his expert report on February 1, 2021.

[127] Dr. Mehdiratta testified that the terms mTBI and cerebral concussion are used interchangeably. He explained that a concussion is caused when a biomechanical force is applied to the brain, which sits within the hard shell of the skull. He likened the brain floating in the skull to an egg floating in a glass. When such a biomechanical force is applied, the brain can slam forward and slap backward, and is particularly prone to injury. During that process, the brain experiences an axonal disruption; that is, the different layers of the brain, when experiencing an acceleration and deceleration, move at different velocities, and shear from one another. This causes the shearing of the axons, which are the notional wires that travel from the cortex, down through the brain, and into the spinal cord. Axons are delicate structures within the brain, and during the process, axonal dysfunction is caused.

[128] At a microscopic level, when this occurs, there is a disruption in the brain chemistry, and a massive number of chemicals or neurotransmitters are released, some of which are inflammatory. These inflammatory neurotransmitters can cause further damage as well. He opined:

Based on my extensive file review, assessment and examination of Mr. Ponych, it is my opinion that he sustained a mild traumatic brain injury (mTBI) and cerebral concussion as a result of the subject accident. The definition and clinical signs for Concussion/Mild Traumatic Brain Injury that appear in the Ontario Neurotrauma Foundation Guideline for Concussion/Mild Traumatic Brain Injury & Persistent Symptoms – Third Edition (2018) are listed below.

- 1 . Any period of loss of a decreased level of consciousness less than 30 min.
- 2 . Any lack of memory for events immediately before or after the injury (post-traumatic amnesia) less than 24 hours.
- 3 . Any alteration in mental state at the time of the injury (e.g., confusion, disorientation, slowed thinking, alteration of consciousness/mental state).
- 4 . Physical symptoms (e.g. vestibular, headache, weakness, loss of balance, change in vision, auditory sensitivity, dizziness).
- 5 . Note: No evidence of intracranial lesion on standard imaging (if present, suggestive of more severe brain injury).

Mr. Ponych endorses options 2-4 above, which are important neurotrauma indicators supporting a diagnosis of concussion according to the Ontario

neurotrauma Foundation Guidelines. In addition, he may have had a subarachnoid hemorrhage as noted on CT scan at the time of the accident. Based on a balance of medical probabilities, the accident caused a sufficient force with which to cause a mild traumatic brain injury through axonal disruption. It has been demonstrated that the sheer force with which the brain moves within the skull during an acceleration-deceleration injury can cause axonal dysfunction and resultant concussive symptoms, even in the absence of direct contact injury. Following the accident, Mr. Ponych began to experience a constellation of symptoms classic for post-concussion syndrome (PCS).

[129] Dr. Mehdiratta's specific neurological diagnosis is that as a result of the Accident Mr. Ponych has suffered:

- a) Traumatic Brain Injury (TBI) with possible subarachnoid hemorrhage;
- b) Post-Concussion syndrome;
- c) Chronic Migraines;
- d) Post-Traumatic Vestibulopathy;
- e) Post-Traumatic Vision Syndrome; and
- f) Mild right ulnar neuropathy at the elbow, and left reduced velocity at the elbow, but not meeting criteria for ulnar neuropathy at the elbow; mild to moderate right carpal tunnel as per EMG/NCS.

[130] While on cross-examination Dr. Mehdiratta agreed that the most critical period to make a diagnosis of an mTBI and a concussion is, in general, the days following the event, he noted that there is a neuroinflammatory cascade and often the symptoms of that do not show up right away. He explained that many of the symptoms are noticeable when a patient starts to live their daily life. In Mr. Ponych's case, where he returned to work right away, Dr. Mehdiratta noted it was common for patients to do everything they can to continue in their occupation, but once they get home they cannot do anything else - so they sacrifice all of their daily living activities to ensure they can keep working.

[131] Also, on cross-examination Dr. Mehdiratta, when taken to Dr. Petrovic's note of December 20, 2017 (the first medical visit after the Accident), noted that frequently on a first visit doctors do not ask all of the questions necessary to

diagnose a concussion, as that is not the focus of the first visit. He did not agree with the proposition put to him on cross-examination that based on the list of symptoms at that visit, Mr. Ponych's headaches were most likely post-traumatic or cervical. He articulately explained that family doctors are under time constraints, and simply cannot do a full assessment of the patient in their first visit, let alone a complete concussion assessment.

[132] During the assessment, Dr. Mehdiratta advised he wanted to know about prescription medications, and Mr. Ponych advised Dr. Mehdiratta that his current medications, include betahistine 16 mg, topiramate 25 mg, and Advil. Dr. Mehdiratta testified he does not know of an interaction between marijuana products and prescription medications. When I asked, Dr. Mehdiratta confirmed that if he had known Mr. Ponych was using a combination of marijuana products, it would not affect his diagnosis of Mr. Ponych suffering from an mTBI and a cerebral concussion. He also confirmed it would not affect his opinion of the cause of any of his symptoms (particularly the cognitive difficulties and mood disorders), nor any of his recommendations.

[133] Dr. Mehdiratta recommended Mr. Ponych undergo:

- a) Neuropsychiatric assessment;
- b) Occupation therapy assessment;
- c) Botox Injections for chronic migraines; and
- d) Concussion Rehabilitation consisting of vestibular, ocular-motor and cervicogenic headache treatments, as well as the Buffalo Concussion Treadmill Test (12–24 sessions).

[134] Finally, he opined that Mr. Ponych's prognosis is poor.

Prognosis is poor given the severity and the duration of symptoms. There has also been an impact on his activities of daily living and his tasks of employment, both of which are also indicative of a poor prognosis. Prognosis is considered to be poor as well given that it has been over 1.5 years since the time of the accident. Patients who have symptoms for more than 1.5 years are more likely than not to have permanent post-concussion symptoms after mild traumatic brain injury. [Citations omitted.]

[135] The defendant tendered Dr. Alister Prout, also a neurologist, as an expert in medicine, with a sub specialty in neurology. He assessed Mr. Ponych in person on July 28, 2022, and rendered his expert report on August 16, 2022 (“Dr. Prout’s Report”).

[136] In Dr. Prout’s Report he records the “Facts extracted from the history obtained from Mr. Ponych”. One of the facts he relies upon in his opinion is that “Mr. Ponych indicates that he does not recall the impact as such but he appears to recall events immediately after the accident, being in the vehicle and being able to pull his vehicle off to the side immediately post-impact”. He also relies upon the fact “Mr. Ponych was aware that the airbags had deployed”. Finally, Dr. Prout records:

122. He is not sure when his problems with memory and concentration started but he believes that this was in the first days post-accident.

...

124. He then attended the Emergency Department a week or two post-accident when imaging was done and he was told that he may have had a “brain bleed” and scanning was later repeated.

125. He was told that subsequent MRI scanning did not show any abnormalities.

[137] Dr. Prout was also provided with numerous medical records, including the three CT scans performed at Abbotsford General Hospital in December 2017 and January 2018. He opines:

10. Mr. Ponych subsequently attended hospital and the Abbotsford Regional Hospital records include documentation of an Emergency Room visit on December 23, 2017.

11. The physician’s report dictated by Dr. Pourvali is dated December 23, 2017.

12. The Emergency Room Physician noted that there had been no loss of consciousness and no vomiting post-accident.

...

17. Dr. Pourvali described the imaging studies which included a CT scan of the cervical spine and head and noted that the case had been discussed with neurosurgery (Dr. Nikolakis) who suggested that a repeat CT scan at a later date.

18. The first CT scan of the head on December 24, 2017 is reported by Dr. Lee.

19. The radiologist reported the scans revealing subtle hyperattenuation adjacent to the inner skull in the left frontal region likely representing artifact although “trace subarachnoid hemorrhage be difficult to exclude in the appropriate clinical context”.

20. I have reviewed the imaging of the initial CT scan and I am of the opinion that the bony hyperostosis of the inner skull is resulting in artifact which is described in the report of the initial CT scan.

21. A repeat CT scan of the head on December 25, 2017 is again reported by Dr. Lee and similar findings are noted to likely relate to “calvarial artifact with persisting extra-axial hemorrhage difficult to exclude”.

22. I have reviewed the imaging of December 25, 2017 and am of the opinion that bony artifact is seen on that imaging and there is no evidence of subarachnoid hemorrhage or any brain abnormality.

23. The CT scans of December 24th and December 25th do not reveal any brain swelling (edema) in the area of artifact and did not reveal any soft tissue swelling over the scalp.

24. A repeat CT scan of the head on January 8, 2018 at Abbotsford Hospital is reported by Dr. Khalid and compared to the previous scans.

25. The radiologist reported the hyperostosis (increased bone) of the inner table of the skull with associated “beam hardening artifact as previously” and Dr. Khalid provided the opinion that there was no evidence of hemorrhage.

26. I have reviewed the imaging of January 8, 2018 and I am in agreement with the report of Dr. Khalid with respect to no intracranial abnormality.

[Emphasis added.]

[138] Dr. Prout also reviewed the records of Dr. Petrovic, and he opines that “[u]p to June 25, 2018 the clinical entries of Dr. Petrovic do not appear to refer to a diagnosis of concussion nor any type of brain injury or post-concussion syndrome”.

[139] In Dr. Prout’s opinion, Mr. Ponych sustained soft tissue injuries in the Accident and was diagnosed, correctly, with primarily a cervical strain type injury. In addition, he developed “persistent symptoms relating to a whiplash associated disorder”, presenting primarily with post-traumatic headaches.

[140] Dr. Prout does not agree that Mr. Ponych suffered an mTBI nor a concussion.

Mr. Ponych describes a clear history of the accident unfolding and although he feels that he does not recall the actual impact (this is not in my opinion unusual at the time of a very traumatic event) he has full recollection of the accident scene and what subsequently transpired, was not treated by Emergency Personnel or transported to hospital, and does not in my opinion fulfill criteria for having sustained a brain injury. There is no suggestion that Mr. Ponych had retrograde or anterograde amnesia (loss of recollection for

the moments before the impact and after the impact) and this appears to have been confirmed by other examiners and in fact noted in the testing report of Dr. Kung where it was noted that there was no loss of consciousness, no anterograde amnesia and no retrograde amnesia.

[141] In Dr. Prout’s opinion, Mr. Ponych has developed in what he characterized as “a delayed fashion” increased problems with headaches, and after that, varied cognitive concerns, insomnia, anxiety, depression and a persistent sleep disorder and fatigue. He opines that:

It is my opinion that the psychological difficulties and psychiatric problems have resulted in subjective cognitive concerns which appear to have escalated with the passage of time and the increasing symptoms, including increasing problems with headaches as documented in the records, are inconsistent with the clinical course of a patient suffering from any type of neurologic injury.

Mr. Ponych has gone on to have poorly defined feelings of dizziness which are not due to any neurologic injury or vestibular injury but in my opinion relate to the significant problems of a psychological nature and possibly the development of a somatic symptom disorder with ongoing evidence of catastrophization and fear of worsening of his symptoms. The symptoms of dizziness may in part [...] have been attributable to the whiplash associated disorder caused by the accident.

It is my opinion that, in conjunction with the soft tissue injury sustained to the upper back and neck, Mr. Ponych did continue to have post-traumatic headaches although the escalation in his headache problems and the degree to which they have become seemingly more disabling, overlap to a marked degree with psychological dysfunction which at this point is a significantly limiting problem for Mr. Ponych.

[142] Finally, with respect to Mr. Ponych’s prognosis, Dr. Prout opines that from a neurologic perspective, with the exception of the persistent post-traumatic headaches, is excellent. He recommends that future treatment should focus on the aggressive treatment of psychological and psychiatric difficulties.

D. Factual Findings and Analysis of Non-Pecuniary Damages

[143] I accept that Mr. Ponych was in good health physically, mentally, and emotionally prior to the Accident. His family, whose evidence I have accepted, described him as outgoing and active with no physical restrictions. He was passionate about Sherwood, and worked very hard to ensure its success. He

enjoyed going to the movies, going to fun centres with his family, and travelling with his family (particularly to Disneyland). He is now not able to do any of this.

[144] His current symptoms are: headaches on a constant basis; dizziness and nausea; cognitive difficulties (including brain fog, difficulty with concentration and memory issues); chronic pain (in his neck, shoulders, back and right hip); difficulties with sleep; and a persistent depressive disorder and a general anxiety disorder. His injuries have been, and continue to be, so severe that they led to his decision to sell his business, which is discussed further below. I accept that Sherwood was a significant part of his life and his identity, and that the decision to sell it was as a direct result of the Accident.

[145] As noted above, Mr. Ponych's wife noted that his personality changed following the Accident. He became disorganized, forgetful, short-tempered, and withdrawn. He is frequently irritable. His injuries have had a significant impact upon his wife and daughter, and have had a daily impact upon their lives, their extracurricular activities, their holidays and their plans for the future. He no longer sleeps with his wife in the same bed, they no longer enjoy movies and outings, and they no longer enjoy their annual trip to Disneyland. Their plans to have another child have been abandoned.

[146] Mr. Ponych's mood disorder is so significant, he is at times suicidal, which he has made clear to both his wife and his daughter. He testified that in front of his family he has expressed "I wish I were dead; I can't go on any longer; why did this happen to me".

[147] Since the Accident, Mr. Ponych has been referred to a number of specialists by Dr. Petrovic, including a neurologist and a pain specialist. Dr. Petrovic described him as a compliant and cooperative patient. He has attempted myofascial activation, Botox injections, and pain injections. He has undergone counselling, and been referred to a psychiatrist. He has received acupuncture, chiropractic treatment, physiotherapy, vestibular physiotherapy, and occupation therapy. He has also

attempted active rehabilitation. The defendant does not argue that Mr. Ponych has failed to mitigate his symptoms.

[148] On his own initiative, Mr. Ponych researched the use of medical marijuana in managing chronic conditions, and beginning in the summer of 2018 has managed some of his symptoms with medical marijuana.

[149] The defendant advances the argument that most of Mr. Ponych's symptoms developed in a delayed fashion, relying upon Dr. Prout's Report. They argue that this suggests there could be some other causation, and they say he started to self-treat his symptoms. They appear to infer that to the extent he continues to suffer from fatigue, and cognitive difficulties, it may be attributed to his use of medical marijuana, and that his decision to self-medicate must be taken into account.

[150] I do not accept this speculative argument. Mr. Ponych testified as to his use of medical marijuana, and as to the basis for his decision to begin using it. He also testified as to the relief he obtains as a result of using medical marijuana. While I accept he adduced insufficient evidence for me to conclude that his use of the medical marijuana is either prescribed by Dr. Mitchell, or medically supervised, that is an argument that must be addressed when considering his claim for special damages and for cost of future care. None of the medical experts testified that the use of medical marijuana itself could be responsible for the totality of Mr. Ponych's mood disorder, nor for his cognitive difficulties. Rather, they all agreed that medical marijuana may provide some relief for individuals suffering from chronic pain, and all opined it would be best for such use to be appropriately medically supervised.

[151] As noted, there is a disagreement between the plaintiff and defendant experts as to whether Mr. Ponych suffered from an mTBI. Dr. Prout opines that Mr. Ponych had recollection of the events that occurred immediately after the Accident, and he believes that he suffered from a cervical strain type injury, and developed post-traumatic headaches, but did not suffer from an mTBI. However, Dr. Palak, Dr. Schultz, Dr. Mehdiratta and Dr. Petrovic all opine that Mr. Ponych did in fact suffer from an mTBI in the Accident.

[152] The defendant argues that both Dr. Mehdiratta and Dr. Schultz’s opinion should be given little weight.

[153] With respect to Dr. Schultz, the defendant argues that she “was unnecessarily prolix, vague and gave rambling, often non-responsive answers to questions under cross-examination”. I do not agree. Dr. Schultz spent a significant amount of time with Mr. Ponych, and also spent a significant amount of time under cross-examination. Clearly an expert in her field, while I accept that Dr. Schultz occasionally slipped into the mode of lecturing rather than concisely answering questions, I do not accept that is a ground to give her report little weight.

[154] The defendant also points to a number of alleged errors in Dr. Schultz’s report: that she recorded he had used marijuana before the Accident, when in fact he did not; that she did not canvas in detail with him his use of marijuana; nor canvas with him his use of marijuana the day before, or the day of, her assessments with him. However, Dr. Schultz was clearly aware of Mr. Ponych’s use of marijuana, and did not feel the need to investigate it further than she did.

[155] I found Dr. Schultz to be an impressive and knowledgeable neuropsychologist, who clearly took a significant amount of time in her assessment of Mr. Ponych, and in reaching her ultimate opinion. I put significant weight on her report.

[156] The defendant also argues that I should put little, or no, weight on Dr. Mehdiratta’s Report, arguing he did not review the three CT scans, and he did not see Mr. Ponych in person. They identify a number of cases where his evidence was either not accepted, or not preferred over another expert, and they argue he was “vague and unnecessarily prolix in many of the answers he gave under cross-examination”. They particularly point to the fact he was dismissive of the fact that Dr. Petrovic’s initial entry on December 20, 2017 did not record a diagnosis of concussion.

[157] I found Dr. Mehdiratta to be careful and thorough in his testimony, and I do not agree that he was “vague and unnecessarily” prolix in cross-examination. Rather, I accept his evidence that it is important not to place too much weight on the clinical records, particularly when a number of injuries present to a family doctor, who has limited time to discuss and record those multiple injuries. I put significant weight on Dr. Mehdiratta’s opinion.

[158] The defendant argues that Dr. Prout’s opinion should be preferred over the plaintiff’s experts.

[159] With respect to the disagreement between Dr. Mehdiratta and Dr. Prout, as to whether Mr. Ponych suffered from an mTBI or not, I prefer the evidence of Dr. Mehdiratta. In reaching this determination, I am also significantly persuaded by the fact that Dr. Mehdiratta’s diagnosis of an mTBI is consistent with the opinions of Dr. Palak, Dr. Schultz and Dr. Petrovic. While I acknowledge that Mr. Ponych’s evidence was unclear as to whether he had lost consciousness in the Accident, both Mr. and Ms. Ponych testified as to his immediate cognitive difficulties that began at the scene of the Accident. I accept Dr. Mehdiratta’s explanation for the necessary criteria to diagnose an mTBI, and I accept his conclusion that, in the totality of the circumstances, it is more probable than not that Mr. Ponych suffered an mTBI in the Accident.

[160] In these circumstances, where significant and disabling symptoms continue five years after the Accident, and the majority of the medical opinions confirm that the prognosis for Mr. Ponych is poor, or guarded, the label for the diagnosis is not as important as the sequelae which arise from the injury. I am focussed on the latter.

[161] In addition to my finding that Mr. Ponych suffered from an mTBI, I accept the diagnoses of Dr. Palak, Dr. Schultz and Dr. Mehdiratta that Mr. Ponych suffers from chronic headaches and chronic pain; sleep issues related to pain and stress; several psychological illnesses, including anxiety and depression; and cognitive changes, including memory loss and mood dysfunction as a result of the Accident. I accept their opinion that his prognosis for a full recovery is poor, or somewhat guarded.

[162] I have carefully reviewed the cases referred to by the parties. In my opinion, an award at the level proposed by the defendant is too low and would fail to account for the fact I find he did suffer from an mTBI, and has experienced a resulting constellation of injuries and symptoms. Likewise, they do not account the significant impact of the injuries on Mr. Ponych's quality of life, and the impact upon his relationship with his wife and daughter.

[163] Similarly, I find that the decision in *Grabovac* relied upon by Mr. Ponych is distinguishable as the plaintiff was a young woman who as a result of the accidents would be unable to have children.

[164] A court must ensure that its assessment of a plaintiff's injury is done by reference to an individual's own circumstances: *Schubert v. Knorr*, 2008 BCSC 939 at para. 97.

[165] Having considered all of the relevant cases referred to by the parties and Mr. Ponych's circumstances and prognosis, I conclude that an award of \$250,000 is appropriate to fairly compensate Mr. Ponych for his claim for non-pecuniary damages. In reaching this conclusion, I have considered the *Stapley* factors, the purpose of an award of non-pecuniary damages and the cases cited by counsel.

VI. LOSS OF INCOME EARNING CAPACITY

A. Evidence Tendered on Loss of Earning Capacity

[166] There was significant testimony related to the financial performance of Sherwood, and its future trajectory. There are two major issues to be determined when considering the appropriate award for past loss of income and future loss of earning capacity:

- a) whether Sherwood was poised to grow significantly after 2017; and
- b) whether Mr. Ponych acted reasonably in concluding he had no choice but to sell Sherwood in 2022.

[167] Mr. Ponych was steadfast in his position that 2017 was Sherwood’s best financial year, and that the company was poised to grow significantly in the future. However, the evidence did not support this broad assertion.

[168] Mr. Ponych testified at length as to the difficulties he experienced after 2010, when he asked Mr. Singzon to leave the company. He explained that they made a “gentleman’s agreement”, and that they both honoured that agreement.

[169] After Mr. Singzon left Sherwood, Mr. Ponych said he struggled financially, from approximately 2010 to 2013. In 2013 he and his wife sold their home in Langley, and with the proceeds of sale he paid off all of the personal and corporate debt. The family moved to South Surrey and rented for two years. This allowed Mr. Ponych to “start fresh” with Sherwood, and his evidence was the business again started to “grow in the right direction”.

[170] Mr. Ponych had difficulty detailing the growth of Sherwood after 2013, and was unable to provide a clear answer as to why the gross revenue of the company was lower in 2016 than in 2015. His explanation appeared to be that the gross revenues of Sherwood were reduced in 2016 because he withdrew a significant amount of money from the company in 2015 to help with a down payment to purchase a new home. His counsel argues that as a result, he had fewer resources available in the company in 2016, and so it impacted the amount and size of projects he could take on in the short-term. However, his explanation was vague and confusing. Further, he had no explanation for why there was a reduction of revenues in 2016, when his evidence was that in 2015, he began to work for many of the contractors Mr. Singzon had previously worked for.

[171] In general, the financial success of business fluctuates over the years. Mr. Gosling testified to this, as did Mr. Ponych’s brother. However, Mr. Ponych’s evidence was Sherwood was poised to grow significantly in the future, beyond its best financial year in 2017. He had no formal business plan. His marketing efforts were simply attempting to utilize search engine optimization, online advertisements

on Facebook and other websites, and hiring a review system with “Trusted Pros”, which resulted in “quite a few” customers contacting him.

[172] As noted above, the only time Mr. Ponych took off of work was the day after the Accident occurred. His evidence was that he immediately struggled to work while coping with his symptoms from his injuries in the Accident, but that there was no one else at the company who could fulfill his role.

[173] In fact, Mr. Ponych worked full time at his business from the time of the Accident until he sold it in April 2022, and he ultimately stopped working for it in September 2022.

[174] Mr. Ponych called a number of other witnesses who testified to Sherwood’s business and their perception of Mr. Ponych’s work performance following the Accident: Mr. Shah, a former employee; Lance Ponych, his brother; Nancy Pow and Harold Koehn, former customers of Sherwood; and Mr. Gillan, a Benjamin Moore paint store manager.

[175] Mr. Shah corroborated that after the Accident Mr. Ponych was always talking about his headaches, and was in significant pain. While Mr. Shah also testified that work slowed down after the Accident, his explanation for why was also vague and uncertain. Lance Ponych corroborated that after the Accident he has observed his brother to become short tempered and moody, to refuse social engagements, and to have difficulty concentrating on work. In cross-examination he agreed that, based upon his own experience and time as a painter, there are good and bad years for a painting company, and good seasons and bad seasons. He agreed that, with respect to business revenues, they can fluctuate in the construction industry.

[176] Nancy Pow testified she had used Sherwood on three occasions, and that while she had an issue with the color for the last project in 2020, as the shade was darker than the one she had selected, she acknowledge that Mr. Ponych and his company did great work, and she would hire Sherwood again. In a similar manner, Harold Koehn testified that he contracted with Sherwood before he retired, and that

even after his Accident, Mr. Ponych did a good job, and he continued to hire Sherwood.

[177] Finally, Mr. Gillan testified and made a reference to an error in paperwork that caused him concern. However, he admitted he would not know if the work quality on the job had deteriorated, and that he had heard no complaints from anyone with respect to Mr. Ponych’s work. I note Mr. Gillan was of the erroneous impression that Mr. Ponych was still painting and working the tools before the Accident, when he was not.

[178] I accept that Mr. Ponych’s symptoms interfered with his ability to work. He struggled with multitasking and staying on task, and he had issues with memory and concentration. Completing the necessary tasks took him two to three times longer. I also accept he had difficulties loading equipment into his vehicle, and he struggled significantly with driving from job site to job site. He had difficulty focussing on talking to clients or employees and was easily distracted if there was any background noise. Likewise, he was not able to do quality controls as regularly as he had before the Accident. I accept Mr. Ponych’s testimony that he struggled to keep up with the management of his business.

[179] At the time of the Accident, Mr. Ponych and his family did not have any plans to move from their Abbotsford home. However, due to the fact his symptoms worsened with his driving, he decided to move to South Surrey in April 2019, to be closer to where most of his projects were. Unfortunately, the move did not help, and his symptoms continued, even with his driving being reduced.

[180] Mr. Ponych says the revenues of Sherwood decreased after 2017 and he blames the decrease solely on his injuries sustained in the Accident. He says that the decrease “was a direct result of not being able to keep up, and struggling with day to day symptoms of post concussion and all symptoms from the accident”. While he acknowledged there was some initial uncertainty as a result of the COVID-19 pandemic, he said that the construction industry “quickly rebounded within several weeks” and never shut down.

[181] No documents appear to have been produced with respect to Sherwood's revenue before the fiscal year ending October 31, 2011. There was significant expert evidence with respect to the revenues of Sherwood after this date. Anita Mohan, an expert tendered by Mr. Ponych, assembled a number of helpful tables, to demonstrate the revenue and net loss or net income of Sherwood. A summary of her tables is as follows:

Fiscal Year Sherwood Painting	Revenue	Net Loss or Net Income	Net Loss or Net Income Expressed as a Percentage of Gross Revenue
Oct. 31, 2011	\$705,455	(\$7,833)	-3.49%
Oct. 31, 2012	\$582,947	(\$13,333)	-3.57%
Oct. 31, 2013	\$522,793	(\$3,779)	3.90%
Oct. 31, 2014	\$599,806	\$63,092	22.93%
Oct. 31, 2015	\$759,328	\$28,256	18.73%
Oct. 31, 2016	\$683,605	\$95,223	20.14%
Oct. 31, 2017	\$1,022,231	\$232,330	25.07%
Oct. 31, 2018	\$906,722	\$144,261	20.00%
Oct. 31, 2019	\$826,912	\$12,241	5.10%
Oct. 31, 2020	\$616,746	\$59,053	20.63%
Oct. 31, 2021	\$803,017	\$134,245	24.52%

[182] While I accept that Sherwood's gross revenue did decrease in 2018, 2019 and 2020, I note that the gross revenue in 2018 and 2019 was higher than the gross revenue generated from 2012 to 2016. Further, I accept the defendant's argument the decline in 2020 must have been due, in part, to the COVID-19 pandemic. Further, in 2021, the gross revenue increased to \$803,017. This was also clearly one of Sherwood's most profitable years, when considering the net income expressed as a percentage of gross revenue was 24.52%.

[183] Eventually, ICBC approved funding to hire Mr. Ponych a driver; however, he could not find anyone willing to work the hours he needed and he was apprehensive of having a stranger drive him around, both because of the pandemic and also his own anxiety of being a passenger. ICBC ultimately approved him hiring a personal assistant. He hired a young man, Joshua Bartolome, at the end of June 2021, whose role was to be his personal assistant. Mr. Bartolome was to deliver paint to job sites, check the job sites, and take pictures of the ongoing jobs. However, Mr. Ponych testified that he was hired during his busy season, and that he did not have time to properly train Mr. Bartolome. Further, Mr. Bartolome only had a little car, so he was unable to bring any of the equipment to the job sites, and was limited in how much paint he could transport. Notwithstanding Mr. Ponych advertised for, and interviewed, Mr. Bartolome, he described it as a “make work project” and complained Mr. Bartolome did not assist with his symptoms in any way. Mr. Bartolome ultimately quit in December 2021.

[184] This evidence was inconsistent with the evidence of Mr. Bartolome, who testified that he told Mr. Ponych that he had a Mini Cooper during his interview, and that while Mr. Ponych was concerned with the size of it, it was not an impediment to him being hired. He was offered the position the same day he was interviewed, and was excited for the position. Further, Mr. Bartolome testified that for the first three days Mr. Ponych trained him, took him to various sites, introduced him to the various jobs and the employees, and instructed him on what to do. After the three days of training, then Mr. Bartolome started to work alone, and he delivered supplies to various job sites, met the painters, and devised a system of taking photographs on-site and uploading them to Google Documents for Mr. Ponych to review. Mr. Bartolome testified he wanted to keep the job, but that Mr. Ponych gave him notice of his termination in November 2021.

[185] Mr. Ponych testified he never considered hiring anyone to assist him on the managerial side of the business. He said he doubted he could have found anyone with the skill set necessary due to the labour shortage, and that if he had, after he paid them a salary there would not be much left over to pay to himself.

[186] While Mr. Ponych was initially confused in the timeline, he clarified that ultimately, he made the decision to sell Sherwood in the summer of 2020. His difficulty sleeping was getting worse: some weeks he was only sleeping 19 to 21 hours in total a week, and some nights he was unable to sleep at all. His other symptoms continued to worsen, and he was “not able to hang on anymore”. He felt he had no other choice but to sell the business.

[187] He retained Pacific Mergers and Acquisitions Inc., and hired them to perform a business valuation of Sherwood. Their business valuation he felt was undervalued, at approximately \$97,000. He asked his accountant if she knew any other business brokers, and she recommended Chris Savage in South Surrey. Mr. Savage gave him a valuation, and he was satisfied with it, so Mr. Ponych hired him to sell the business. He initially listed Sherwood for sale at \$395,000, and later lowered the price to \$295,000. Ultimately, he lowered the price to \$195,000, but was not successful in finding an appropriate purchaser. Mr. Savage’s mandate to sell the business finally expired in late 2021.

[188] 2021 was a busy year for Sherwood. Mr. Ponych was working hard in the spring and summer, notwithstanding his symptoms, as he wanted to try to maintain the pre-pandemic revenue to try to get some value for the business. In the spring and summer Mr. Ponych was working 50 to 60 hours a week. In late 2021, Mr. Ponych was concerned about his options. He consulted with an employment lawyer and was told if he closed the company he would owe his employees a significant amount of severance.

[189] Mr. Ponych described his state of mind at the time as finding it more and more difficult to run the company, and his symptoms were becoming more and more overwhelming, to the point he was crying in his vehicle on a regular basis, and having suicidal ideations. He testified that even in front of his family he would state that he could not go on any longer, and he wished he was dead. He testified that he felt he had to “fire sale” his business and focus on his recovery.

[190] Without his knowledge, a friend listed Sherwood for sale on the craigslist website, and solicited a few responses. He made first contact with Andrew van Buuren in late January 2022, and they ultimately entered into a Share Purchase Agreement for Sherwood dated April 1, 2022 (the “Share Purchase Agreement”). The sale closed April 1, 2022.

[191] Pursuant to the Share Purchase Agreement Mr. Ponych sold Sherwood to Mr. van Buuren for \$240,000 which was comprised of:

- a) a deposit of \$80,000;
- b) \$100,000 within five business days of the Closing Date (being April 1, 2022); and
- c) \$60,000 by way of an interest-free promissory note, repayable in monthly installments of no less than \$3,333 (commencing October 2022).

[192] In addition, Mr. Ponych and Mr. van Buuren agreed to an Independent Contractor Agreement dated April 2, 2022, in which Mr. Ponych provided the purchaser with training for the six months commencing April 1, 2022, for compensation of \$20,000 over that timeframe. Mr. Ponych’s last day of work was September 30, 2022.

[193] The parties agree that pursuant to the effective terms of the sale, Mr. Ponych received \$160,000 from the sale of Sherwood—\$140,000 for the sale, and an additional \$20,000

[194] Mr. Ponych agreed to a non-competition clause in the Share Purchase Agreement, with a five-year duration, that he would not be engaged in, or concerned with, or interested in, a painting or decorating business in British Columbia.

[195] Mr. Ponych testified that since September 30, 2022, his symptoms have remained the same—he is still struggling with headaches, dizziness, nausea, brain fog, and sensitivity to light and noise. His uncontroverted evidence was that his plan

is to focus on his health and recovery, but he does not know what is going to happen, or how he is going to provide for his family.

[196] In all of the circumstances, I accept that while Mr. Ponych made significant efforts to retain Sherwood; ultimately, his injuries as a result of the Accident led to his reasonable decision that selling his business was the only option left to him.

1. Expert Evidence

[197] Both the plaintiff and the defendant tendered expert evidence on the issue of past loss of earnings and future loss of earning capacity.

[198] First, I turn to the expert opinion evidence on the approach to be utilized in considering Mr. Ponych’s alleged past loss of earnings and future loss of earning capacity. The plaintiff tendered Ms. Mohan, a chartered accountant, as an expert, qualified to provide expert testimony with respect to both loss of past earning capacity, and loss of future earning capacity.

[199] The defendant tendered two experts: Jeff Matthews, a chartered professional accountant, qualified to provide an opinion of the estimated annual income available to Mr. Ponych from Sherwood for the years prior to, and following, the Accident; and Mark Gosling, an economist, qualified to provide expert testimony with respect to both loss of past earning capacity and loss of future earning capacity.

[200] There were significant differences in the methodology used by Ms. Mohan and Mr. Matthews, with respect to their approach to calculating both loss of past earning capacity, specifically:

- a) Ms. Mohan chose to use Sherwood’s best historical year, 2017, as her baseline; whereas Mr. Matthews chose to use an average of four fiscal years, being the 2014—2017 fiscal year of Sherwood;
- b) Ms. Mohan included the net sale proceeds Mr. Ponych received in 2022 from the sale of Sherwood in her calculation of his loss of past earning

capacity; whereas Mr. Matthews chose to end his calculation of the same as of April 1, 2022;

- c) Ms. Mohan took the position she could not calculate the appropriate income taxes to be deducted from her calculation of the loss of past earning capacity; whereas Mr. Matthews felt it was possible to do so; and
- d) Ms. Mohan chose to apply only an actuarial multiplier to her loss of future earning capacity analysis; where Mr. Matthews felt it was more appropriate to apply an economic multiplier.

i. Anita Mohan

[201] Ms. Mohan has been a chartered accountant since 2009, and obtained a designation in Investigative and Forensic Accounting in 2014. She was qualified as an expert in investigative and forensic accounting.

[202] Ms. Mohan tendered three expert reports: a Past and Future Income Loss report dated July 18, 2022 (the “Initial Report”); a Past and Future Income Loss Supplementary Report dated September 7, 2022 (the “Supplementary Report”); and a letter dated November 28, 2022, in which she provided revised calculations (the “Revised Calculations”).

[203] Ms. Mohan also tendered a report dated October 7, 2022, responding to the defendant’s expert reports, being Jeff Matthew’s report of August 15, 2022, and Matthew Gosling’s report dated August 25, 2022 (“Ms. Mohan’s Responding Report”). Finally, given the lengthy continuations in this trial, at my request Ms. Mohan updated her calculations for a valuation date of April 12, 2023 (“Ms. Mohan’s Updated Calculations”).

[204] Ms. Mohan’s Supplementary Report was intended to replace the estimates from the Initial Report, as she had new information provided to her. She also had the opportunity to interview Mr. Ponych on October 4, 2022, who advised her that:

- a) Ms. Ponych did the occasional errand for Sherwood Paining and worked on average five to ten hours per month;
- b) wages were paid to Ms. Ponych for income splitting purposes;
- c) Mr. Ponych sold his business due to limitations suffered from his accident;
- d) Mr. Ponych believes, had the Accident not occurred, the value of Sherwood would have been higher than the proceeds received from the sale;
- e) Mr. Ponych contracted to work at Sherwood under the new ownership, which ended at the end of September 2022; and
- f) Mr. Ponych's plan, under the advisement of his occupational therapist, was to rest in October 2022 and start physiotherapy in November 2022.

[205] In the Initial Report and the Supplementary Report, Ms. Mohan takes the position that:

In the early years of a business, it is not uncommon to see net income losses, and/or fluctuating gross sales and expenses. As owners gain experience, if their businesses succeed, they typically become more proficient at managing their businesses, resulting in increased sales and/or better controlled costs.

Her evidence was that she assumed that when Mr. Singzon left Sherwood, it was a significant change in the ownership and management of the business. In Ms. Mohan's Responding Report she explained this assumption in the following manner:

3.6 As owners gain experience, and their businesses succeed, they typically become more proficient at managing their businesses, resulting in increased sales and/or better controlled costs. Mr. Ponych initially worked with a partner. His business partner left the business in 2010. In the period 2011-12, Mr. Ponych was in the first few years of managing the business on his own (see Section 1.1 of the Mohan Report). This was a significant change in the ownership and presumably the management of the business, which may have affected profitability for some time after 2010.

[206] However, under cross-examination it was clear that Ms. Mohan did not have any knowledge about the division of duties between Mr. Ponych and Mr. Singzon

between 1998 (when their partnership formed), 2005 (when they incorporated) and 2010 (when Mr. Ponych asked Mr. Singzon to leave the business).

[207] Ms. Mohan elected to calculate the gross revenues of Sherwood solely based on the 2017 fiscal year. She characterized 2010 as a year of significant change, in part, based on the fact that Mr. Ponych did not have access to all of Sherwood's general contractors as a result of Mr. Singzon's departure from the business. She referred to Statistics Canada, including two tables related to the construction of houses and building permits.

[208] On cross-examination, she agreed that Sherwood did not show consistent growth in its gross revenue between 2011 and 2017. She also agreed that between 2015 and 2017 Sherwood did not show a consistent upward trend in gross revenue, but rather showed fluctuations. Nonetheless, she was adamant on cross-examination that it was appropriate to use the best historical year, the 2017 financial year, as her baseline. She would not agree that it was more reasonable to base her projection of loss of past earning capacity and future loss of earning capacity on an average of a period of past years of gross revenue, as she argued that her assumption was that Sherwood's gross revenues would grow, and so to take an average of past gross revenue would be inaccurate. She argued that taking an average of a period of years of gross revenue is only appropriate if she assumed that fluctuations would occur in the future.

[209] I am unable to accept Ms. Mohan's assumption that but for the Accident, Sherwood's gross revenues would be increasing in the future. Mr. Ponych has not established that as of 2017, Sherwood's business would not continue to fluctuate, but would rather be sure to increase steadily in the future. Accordingly, I find to use Ms. Mohan's approach would overstate Mr. Ponych's loss of earnings, both past and future.

[210] I am also troubled by her inclusion of the sales proceeds of Sherwood in her calculations for past loss of earnings. The sale proceeds are the result of the sale of

a capital asset, and as such, I do not believe their inclusion is appropriate in an analysis of a loss of earning capacity.

ii. Jeff Matthews

[211] Jeff Matthews was tendered as an expert in chartered professional accounting, with a specialization in forensic and investigative accounting, analyzing forensic data, and preparing projections and building financial models. He tendered an expert report dated August 15, 2022 (“Mr. Matthews’ Report”).

[212] Mr. Matthews was asked to estimate the annual income available to Mr. Ponych from Sherwood for the years prior to, and following, the Accident. He opined that the average adjusted net income for the fiscal years ending October 31st from 2014 to 2017 was \$163,475. He also noted that the average adjusted net income for the fiscal years ending October 31st for Sherwood, from 2018 to 2021, was \$126,442. He confirmed that these numbers were not indexed for inflation.

[213] He also provided statistical information, from the Economic Research Institute, that:

- a) the average salary for a painting supervisor, with 14 years of experience (the longest period available) is approximately \$88,000 per year;
- b) the average salary for a president of a company with \$1,000,000 in sales in the special trade contractors’ industry is approximately \$141,000 per year; and
- c) the average of these two salaries is approximately \$115,000 per year.

iii. Mark Gosling

[214] Mark Gosling has a master’s degree in economics and twenty years of experience in estimating economic damages in personal injury and fatal accident cases. He was qualified as an expert economist with expertise in estimate economic damages, including past and future income loss and cost of future care. Mr. Gosling tendered three expert reports: a Past and Future Loss of Earnings Report, dated

August 25, 2022; a Response to Ms. Mohan’s Report, dated October 5, 2022; and a Present Value of the Cost of Future Care Report, dated October 18, 2022.

[215] As with Ms. Mohan, given the lengthy continuations in this trial, at my request Mr. Gosling updated his calculations for a valuation date of April 12, 2023 (“Mr. Gosling’s Updated Calculations”).

[216] For the purpose of his Past and Future Loss of Earnings Report, Mr. Gosling was asked to assume that Mr. Ponych’s income, had the accident not occurred, would have been consistent with his adjusted net income from 2014 to 2017 as estimated by Jeff Matthews (see above). He was also asked to consider two scenarios: first, that Mr. Ponych continued to operate Sherwood after the accident with assistance; and second, that Mr. Ponych was not able to continue to operate his business and rather worked in another occupation.

[217] Based upon Mr. Matthews’ assessment of Mr. Ponych’s adjusted net income from 2014 to 2017, adjusted to 2018 dollars, Mr. Gosling estimates that between 2014 and 2017 Mr. Ponych’s adjusted net income from Sherwood averaged \$172,437 in 2018 dollars. On cross-examination Mr. Gosling explained that he could have converted all of the loss to 2022 terms initially, and then converted back to each calendar year, and that the calculation would have been more complicated but would have ended up with the same result.

[218] Mr. Gosling opined that using one year of high annual income is “probably not a good idea” and that it is useful to use historical figures, that average the “ups and downs”. In re-direct he clarified that economists prefer to use an average income period (such as over three or five years) and if just the best year is used, that is counting the best year without allowing for a change for lower earnings consistent with the previous years. He noted that Sherwood’s annual earning from 2014 to 2016 were within a fairly narrow range, and then extremely high in 2017. He opined that if there was evidence that supported that 2017 was more representative of future earnings than average you may want to use that year; however, without such

evidence he would prefer to use an average of the years. In his Response to Ms. Mohan's Report he criticizes Ms. Mohan's use of Sherwood's 2017 fiscal year:

5. In Section 2.2 of her report (at her page 7), Ms. Mohan projects Sherwood's absent-accident revenue from 2018 to 2022 based on its revenue in the fiscal year ending October 31, 2017 adjusted for inflation using the Consumer Price Index (CPI). In Table 2 of her report (at her page 14), Ms. Mohan summarizes Sherwood's revenue for the fiscal years ending October 31 of 2011 to 2017 expressed in constant 2022 dollars. Sherwood's revenue in the fiscal year ending October 31, 2017 was much higher than its revenue in prior years. In general, use of the best historical year as the base will tend to overstate expected post-accident revenue. In my view, a three-year or five-year average would be a more appropriate base and would reduce Ms. Mohan's revenue estimates by about 18% or 28%, respectively.

[219] Mr. Gosling provided an estimate of Mr. Ponych's net past loss from January 1, 2018 to April 1, 2022 (being the date he sold Sherwood). Mr. Gosling explained:

8. ... The absent-accident net income is based on average adjusted net income between 2014 and 2017 (\$172,437) adjusted for wage inflation based on changes in a fixed weighted index of average hourly wages in B.C. The with-accident net income figures are drawn from Schedule 1 of Mr. Matthews' report. For the purposes of calculating the tax deduction, I assume the Plaintiff paid himself employment income annually equal to the proceeds of the business. After deducting saved income tax (calculated based on prior year's tax parameter for absent-accident earnings and based on current year's tax parameters for with-accident earnings), I estimate the net past loss at \$169,752.

...

9. The loss estimate in Table B [of net past loss of \$169,752] does not consider the with-accident proceeds from sale of the Plaintiff's business, which would be offset to some extent by the proceeds from the business following retirement had the accident not occurred. The loss estimate in Table B also excludes any losses in the period from April 2, 2022 to the trial date.

[Emphasis added.]

[220] On cross-examination Mr. Gosling confirmed that for the purpose of calculating the tax deduction to determine net lost earnings, he assumed Mr. Ponych paid himself employment income annually equal to the proceeds of Sherwood, as that is the method most commonly used in cases of a small business. He agreed he did not know what share Mr. Ponych would have paid out to himself as wages as opposed to dividends, but confirmed that to estimate the taxes it is necessary to

make an assumption, which he did. He confirmed that even if he had assumed Mr. Ponych paid himself a portion as dividends and a portion as wages, although it complicates the calculation considerably, it “would not markedly change the result”.

[221] Mr. Gosling does not include in his calculation of Mr. Ponych’s net past loss any compensation for losses from April 1, 2022 to the first day of trial.

2. Vocational Expert Evidence

[222] Unfortunately, neither party tendered any expert evidence with respect to a functional capacity evaluation. However, the plaintiff relies upon the expert opinion evidence of Alan Croxson, vocational expert, and the defendant relies upon the expert opinion evidence of Samantha Gallagher, vocational expert.

a) Alan Croxson

[223] The plaintiff tendered Alan Croxson as an expert in vocational evaluation. The defendant initially took the position that while Mr. Croxson was not an expert in vocational evaluation. Counsel ultimately came to an agreement that Mr. Croxson should be qualified as an expert in vocational evaluation, which agreement I accepted.

[224] Mr. Croxson obtained his honours BA from Carleton University in 1977 and then worked in the financial services sector from 1979 to 1995. He then did a practicum at George Brown College and obtain a Diploma as a Career and Work counsellor in 1997. He then began to work as an employment and career counsellor. In 2010 he became self employed as a vocational evaluator. He is certified by the Canadian College of Vocational Rehabilitation Professionals as a Canadian Certified Vocational Evaluator and a Canadian Certified Vocational Rehabilitation Professional.

[225] Mr. Croxson was asked to conduct a vocational evaluation and a transferable skills analysis of Mr. Ponych. He met with Mr. Ponych virtually on April 5, 2022 for 3 ½ hours, during which time he interviewed him, and administered a series of tests. He also reviewed the documentation and medical-legal reports provided to him by

plaintiff's counsel. He prepared an expert report dated April 20, 2022 ("Mr. Croxson's Report"). Mr. Croxson could not recall if Mr. Ponych described his business as "thriving", but if he did not, testified that he would have said something equivalent.

[226] Mr. Croxson is of the opinion that Mr. Ponych is competitively disadvantaged and his future employment prospects are severely guarded. Specifically, he notes:

Yet, the effect his injuries and [...] the related sale of his business will leave Mr. Ponych dislocated from his status as a long-serving self-employed person, ultimately, unemployed with a set of transferable skills, while potentially functional [and having perhaps some application to alternate prospective work options that tap on areas related to sales, customer service, entry clerical], that are comparatively elemental. His disposition in the open labour market, residually, outside the confines of having his own business, is viewed as highly precarious when one compares his premorbid status as an experienced painter contractor with a thriving business to what his prospects for work will be in a scenario where he must now contemplate working for someone else, let alone depending on a generalized and somewhat underdeveloped vocational profile [i.e. he has only in terms of his post-secondary education a painter's certificate and no other formal skills training or related qualifications to distinguish his candidacy for the more sedentary type of work he would likely require].

[227] Mr. Croxson provided some examples of potential employment for Mr. Ponych: general office support worker; production logistic co-ordinator; purchasing and inventory control clerk; dispatcher or other customer and information services representatives. He made clear these were simply examples of the type of work suitable for Mr. Ponych based upon his vocational test scores, and that the list of jobs "could be expanded perhaps through a vocational counselling process and ideally with the provision of funding that would enable Mr. Ponych to pursue suitable education and overall so he can develop a more informed plan to support future vocational decision-making". He opined that these jobs would be paid in a range of \$15.20/hour to \$36.22/hour. In his opinion:

...Indeed, Mr. Ponych's ability to engage his transferable skills and augment his worker traits is uncertain due to his continued issues with chronic pain, fatigue with emotional and cognitive challenges. In this context, notwithstanding his functional worker traits, Mr. Ponych is competitively disadvantaged and his vocational prospects outside the confine[s] of his long-standing work history as a self-employed painter/contractor are considered to be severely guarded. In light of these issues from a vocational perspective, Mr. Ponych should be considered to suffer a complete inability to engage in

any employment for which he is reasonably suited by way of his education, training or experience as a result of the index incident.

[228] He was not aware of how many hours Mr. Ponych was working in the six months before the Accident, but agreed that if he was working between 66 and 105 hours per week (as testified to by Mr. Ponych at trial) he did not think those hours would be sustainable for a long period of time. He was also unaware of other relevant facts:

- a) that when Mr. Singzon left Sherwood in 2010 Mr. Ponych was under considerable financial stress, and ultimately had to use the proceeds from the sale of his family home in 2013 to pay down personal and business debts; and
- b) that it took Mr. Ponych several years to restructure his business and come out from under the debt it had in 2010.

b) Samantha Gallagher

[229] The defendant tendered Ms. Gallagher as an expert, qualified to give opinions on vocational rehabilitation and counselling. Ms. Gallagher has a Bachelor's degree in psychology and a master's degree in vocational rehabilitation counselling, both from the University of British Columbia. She is a member in good standing of the Vocational Rehabilitation Association of Canada, and a Registered Rehabilitation Professional.

[230] She met with Mr. Ponych for approximately three hours on July 19, 2022 and prepared her expert report dated August 11, 2022 ("Ms. Gallagher's Report"). She also prepared a report dated September 29, 2022, in which she provided her comments on Mr. Croxson's methodology and conclusions, as set out in Mr. Croxson's Report.

[231] Ms. Gallagher opined:

[53] From a vocational rehabilitation perspective, a person's ability to work in a real-life work setting is often the best indicator of their potential for work in

the future. In this case, Mr. Ponych was able to continue running his company for a period of approximately five years following the motor vehicle accident. Although he reports limitations in his physical and cognitive abilities to manage the demands of the work, he was able to continue to employ other workers, take on new jobs and operate his business. This would suggest that he is capable of some employment in the future; however, potentially with some modifications to activities or schedule to better manage his limitations.

[232] Ms. Gallagher’s evidence was that Mr. Ponych’s decision to sell Sherwood was premature, and that he could have taken other steps rather than sell his business. Specifically she opines:

[55] While it is understandable that Mr. Ponych felt overwhelmed with his responsibilities given his reported ongoing symptoms following the accident, in my opinion there are likely further steps that could have been taken to help to assist Mr. Ponych in retaining and continuing to operate his business. Mr. Ponych had an assistant for a brief period of time but it seems that the assistant was ill-suited to the type of work. He was an international student with no experience in operating a business, working in the trades or in painting and only had a small car which made it difficult for him to transport equipment to and from job sites. As such, the assistant was unable to meet the demands of the tasks that Mr. Ponych had wanted him to undertake such as delivering painting equipment and overseeing quality control at job sites. If the assistant had been able to do the job as Mr. Ponych had hoped, then Mr. Ponych would not have had to drive to job sites. This would have allowed him more time to do the administrative work from his home office and would also have limited his exposure to aggravating tasks such as driving and physical work such as lifting paint and equipment. Unfortunately, hiring an assistant who was ill-suited to the work ended up adding additional stress to Mr. Ponych as opposed to taking away stress by decreasing his workload. Consequently, the trial run of having an assistant with this person was unsuccessful and did little to help Mr. Ponych with the operation of his business.

[56] In my opinion, it would have been reasonable for Mr. Ponych to try again and hire an assistant who had more of the skills and abilities that he was looking for to help manage his workload. If Mr. Ponych’s goal was to decrease the requirement for him to travel to job sites then he should have sought someone who had experience in painting and construction supervision who would be better equipped to supervise workers and ensure that the work was being done properly and to the standard that Mr. Ponych expected. He should have also ensured that the person he was hiring had an appropriate vehicle or the appropriate vehicle was provided for the employee to allow him or her to pick up painting equipment and deliver it to various job sites. Hiring an appropriate worker with the right experience and transportation would have allowed Mr. Ponych to take some of the work off his plate and would have decreased the requirement for him to leave his home office. This would have freed him up to focus on the administrative tasks where he could have implemented strategies such as pacing and

prioritizing to help manage the cognitive symptoms he was experiencing. In my opinion, a properly trained and experienced assistant likely would have made a significant difference to Mr. Ponych's workload and may have allowed him to continue to operate his business over the longer term.

[57] From a vocational rehabilitation perspective, returning a person to their previous employment and having them continue with that long-term is the optimal vocational goal. As such, it is unfortunate that Mr. Ponych has now sold the business without having had the proper support in place from an assistant to help him run the business. In my opinion, the sale of the business seems somewhat premature given that few adaptations or modifications to Mr. Ponych's workload or tasks seem to have been attempted prior to the sale of the business.

[Emphasis added.]

[233] Ms. Gallagher went on to opine that Mr. Ponych could return to construction related work, in either a supervisory or management position, or work as an estimator for a painting company. She opined he could do some retail sales work or sales representative job, related to the painting or construction industry. She noted these types of jobs would typically not require significant physical demands, nor significant driving. She suggested possibilities of working as a painting foreman, construction estimator, retail sales clerk, or sales representative, but was clear that this was "not meant as an exhaustive list of occupations that Mr. Ponych could consider post-accident but rather are examples of possibilities that could be explored further". These positions had a significant range of possible wages, from \$16.00/hour to \$49.00/hour.

3. Weight of Mr. Croxson and Ms. Gallagher's Reports

[234] I did not find the evidence of either Mr. Croxson or Ms. Gallagher to be of any significant assistance. As already noted, neither were asked to conduct a functional capacity evaluation of Mr. Ponych, nor to provide a fulsome vocational assessment.

[235] I accept the defendant's submission I may put little weight on Mr. Croxson's Report. I found Mr. Croxson to be defensive and argumentative on cross-examination, and he clearly advocated for Mr. Ponych in a way that was inappropriate for his role as an expert.

[236] Further, in Ms. Gallagher’s Responding Report, she identifies a number of outdated tests that Mr. Croxson chose to administer, and identifies significant concerns with respect to how he took test results and converted them into what he called “aptitudes”. Further, in his proposed list of alternative jobs for Mr. Ponych, he referred to the Department of Occupation Titles which is an American resource, whereas there is an equivalent Canadian resource, the National Occupational Classification system.

[237] With respect to Ms. Gallagher’s Report, I found her assessment that Mr. Ponych prematurely chose to sell Sherwood to be speculative, as she was not asked to conduct a functional capacity evaluation. As a result, her opinions as to potential appropriate jobs are likewise hypothetical. Further, I find her opinion that Mr. Ponych’s decision to sell Sherwood was “somewhat premature”, as he did not hire an appropriate employee or manager, was highly speculative. It was not based upon a consideration of the availability of such a person, the cost of such or person, nor of whether it would be financially viable.

[238] In closing argument, counsel for Mr. Ponych admitted that Mr. Ponych retains some residual capacity to work in the future. Their position was, taking the totality of Mr. Croxson and Ms. Gallagher’s evidence, that they accept that Mr. Ponych could find employment in the future that paid him between \$50,000 and \$75,000 per year. They argued that \$75,000 per year was optimistic, and unlikely on the evidence of his ongoing struggles, which will likely persist permanently.

4. Factual Findings

[239] In all of the circumstances, I accept that while Mr. Ponych made significant efforts to retain Sherwood; ultimately, his injuries as a result of the Accident led to his reasonable decision that selling his business was the only option left to him.

[240] However, I cannot accept Mr. Ponych’s evidence that Sherwood was poised to grow significantly in the future, beyond what he describes as its best financial year in 2017. Mr. Ponych has not established that as of 2017, it was a real and

substantial possibility Sherwood's business would increase steadily in the future, and not continue to fluctuate as it historically had.

[241] I accept Mr. Gosling's and Mr. Matthew's approach and find that the average adjusted net income for the fiscal years ending October 31st for Sherwood, from 2014 to 2017, was \$163,475 (\$172,437 in 2018 dollars) and the average adjusted net income for the fiscal years ending October 31st for Sherwood, from 2018 to 2021, was \$126,442. As updated to April 2023 by Mr. Gosling, the pre-accident average annual net income from 2014 to 2017, adjusted to 2023 dollars, results in absent-accident earnings of \$202,672.

B. Past Income Loss

1. Relevant Legal Principles

[242] Compensation for past loss of earning is based on what a plaintiff would have—not could have—earned but for their injuries: *Sekhon v. Cruz*, 2023 BCSC 319 at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[243] The burden of proof of actual past events is proof on a balance of probabilities. However, the assessment of both loss of past earning capacity and future earning capacity involves the consideration of hypothetical events; hypothetical events need not be proven on a balance of probabilities, but are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63–64 [*Dornan*], citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 [*Grewal*]; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183.

[244] The principles applicable to the assessment for past loss of income-earning capacity are:

- a) an assessment of a loss of income involves a consideration of hypothetical events;
- b) the plaintiff need not prove these hypothetical events on a balance of probabilities;

- c) a hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation;
- d) once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages;
- e) a causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed; and
- f) it is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal* at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37.

[245] A contingency deduction to a past loss of income-earning capacity may be appropriate where the material risk impairs the plaintiff's ability to maintain employment regardless of the Accident: *Dornan* at paras. 81–84; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 100–102.

[246] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages only for their past net income loss, less income taxes: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 176–177.

2. Parties' Positions on Past Income Loss

[247] Mr. Ponych says that he has suffered a past loss of income as a result of events he has proven on a balance of probabilities; namely that due to the Accident he was no longer able to perform his tasks and duties as the sole owner of Sherwood. He says the sale of his company was an unfortunate but necessary decision for him, in light "of the chronic and unrelenting nature of his symptoms". Relying upon Ms. Mohan's analysis, he seeks an award of \$642,670.80 for his past loss of income-earning capacity.

[248] The defendant argues that Mr. Ponych failed to mitigate his losses, which they say arises "from his premature decision to sell Sherwood without first attempting to find other reasonable alternatives". They go so far as to argue that "the

preponderance of evidence shows that the plaintiff acted unreasonably by not even trying to find someone suitable to help him with his duties in running Sherwood”, and that the defendant should not be held liable for the consequences of that decision.

[249] The defendant says that Mr. Gosling estimated the past net income loss, after deducting saved income tax, at \$169,752 (from January 1, 2018 to April 1, 2022). He says that for April 2, 2022, to April 12, 2023, it is possible to extrapolate for the income loss in that period, by assuming Mr. Ponych’s loss is the equivalent of the value of a replacement worker’s time replacing his labour, which they say is an annual loss of either \$50,000 to \$75,000, from which it would be appropriate to deduct 32% for income tax. Their position is that a reasonable assessment of Mr. Ponych’s net past loss of income from \$203,752 to \$220,752, from which the \$20,000 he received for training Mr. van Buuren should be deducted.

3. Analysis of Past Income Loss

[250] For the reasons already set out above, I cannot accept the methodology proposed by Mr. Ponych for his loss of past earning capacity.

[251] I accept, for the most part, the methodology proposed by the defendant to calculate Mr. Ponych’s past income loss; that is, for the period from January 1, 2018 to April 1, 2022, he suffered a loss of past earning capacity in the amount of \$169,752.

[252] However, I must also assess his loss of past earning capacity for April 2, 2022 to April 2023. I do not accept that the defendant has proven it is a real and substantial possibility that Mr. Ponych’s loss of income from that year is equivalent to the cost of a replacement worker. There was no evidence led of an appropriate replacement worker to assist Mr. Ponych, and only mere speculation of the cost of such a hypothetical person. There is also no link between the speculative cost of such a person and Mr. Ponych’s past income loss.

[253] I accept that using Mr. Gosling’s approach, Mr. Ponych’s lost earning capacity for that year was his pre-accident average annual net income, adjusted to 2023

dollars, of \$202,672. This amount does not include the \$20,000 Mr. Ponych earned from Mr. van Buuren, nor does it include a deduction for income taxes. Further, for the reasons set out below, I find there is a real and substantial possibility that Mr. Ponych could have made \$59,000 for this period, for the reasons set out below, rather than just the \$20,000 he earned from Mr. Van Buuren. I find it is a reasonable assessment that Mr. Ponych suffered a loss of past earning capacity for that time period in the amount of \$86,203.20 ($\$202,672 - \$59,000 \times 60\%$). I apply 40% as the suggested deduction tendered by the plaintiff to reflect the impact of income taxes.

[254] The defendant argued that a contingency of 20%, reflective of a general contingency for small businesses, should be applied to any award. However, given I have used the four-year average for Sherwood, I am satisfied that this contingency is already reflected in my calculation. On this basis, I conclude that Mr. Ponych is entitled to \$255,955.00 in past income loss as a result of the Accident.

C. Future Loss of Earning Capacity

1. Relevant Legal Principles

[255] The court's assessment of a plaintiff's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. It is not a mathematical exercise, but an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7 [*Ploskon-Ciesla*].

[256] The assessment is not of a plaintiff's actual loss of earnings, but rather, his loss of earning capacity: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 56, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251, 1978 CanLII 1. The process has been referred to as "one of determining the plaintiff's future earning capacity": *Steinlauf* at para. 72.

[257] Similar considerations arise in the assessment of hypothetical events in the context of assessing damages for both past wage loss and future loss of earning capacity. In a recent trilogy of cases, the Court of Appeal provided guidance as to the proper analytic framework to assess a plaintiff's loss of earning capacity: *Dornan; Lo v. Vos*, 2021 BCCA 421 [*Lo*]; and *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]. These cases did not change the fundamental principles for assessment of lost earning capacity, but rather set out a three-part test for proper assessment of such a loss. These three steps were described by Justice Grauer in *Rab*, at para. 47 as:

- a) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- b) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- c) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[258] The first two stages have been described as an entitlement analysis, and the third stage has been described as an assessment analysis: *Lee v. MacLean*, 2022 BCSC 312 at paras. 226–227.

[259] When an accident causes injuries that renders a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second step of the analysis may well be foregone conclusions, since the plaintiff clearly lost capacity and income: *Ploskon-Ciesla* at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real and substantial possibility of a future loss and the value of that loss; a speculative loss is insufficient: *Rab* at para. 33.

[260] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18 [*Rosvold*]. The essential task of the Court is to compare the likely future of the plaintiff's work life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. The assessment of a

claim for loss of future earning capacity generally involves consideration of hypothetical events: *Dornan* at paras. 133–134.

[261] The third step may involve either the “earnings approach” or the “capital asset approach”. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset, being their earning capacity, rather than an established loss of earnings. It is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff’s potential future: *Ploskon-Ciesla* at paras. 16–17.

[262] In the case of a plaintiff who is self-employed, and who is central to the operation and success of the business, the task of quantifying the plaintiff’s lost capacity is often inherently difficult, and is dictated by the unique circumstances of each self-employed plaintiff. It is even more complicated when the plaintiff alleges that their business would have continued to grow and increase its revenues. The case law provides guidance for factors that may be considered and weighed when assessing the loss of future earning capacity suffered by a self-employed plaintiff, which non-exhaustive list includes:

- a) the plaintiff’s education and training as it relates to the business in issue;
- b) the plaintiff’s employment history;
- c) the plaintiff’s earning history, both before the creation of the business and through the business;
- d) the existence (or absence) of a business plan setting out how the plaintiff intended to develop the business;
- e) actual steps taken to implement the business plan;
- f) the performance of similar businesses;
- g) market conditions that might impact the business, both positively and negatively, and
- h) existing and anticipated clients.

See *Rousta v. MacKay*, 2017 BCSC 644 at para. 102, quoting from *Bricker v. Danyk*, 2015 BCSC 2404 at paras. 150–151.

[263] Other factors to consider may include the profitability of the business before and after the accident; the viability of the business before and after the accident; and the value of the business before and after the accident. See *Engel v. Salyn*, [1993] 1 S.C.R. 306, 1993 CanLII 152; *Coles v. Spriggs*, 61 B.C.L.R. (3d) 228, 1998 CanLII 5829 (C.A.).

[264] Assessing the value of a future loss also includes an assessment of the relative likelihood of future events or contingencies: *Boal v. Parilla*, 2022 BCSC 2075 at para. 163. Contingencies recognize that the assumptions upon which an award is based may prove to be wrong: *Rab* at para. 28.

[265] In considering appropriate contingencies, they may be placed into two categories: general contingencies and specific contingencies. The general contingencies are those which, as a matter of human experience, are likely to be “the common future of all of us”, such as promotions or illness or disability. General contingencies may be considered in the absence of evidence; however, the trial judge must remember that everyone’s life has ups as well as downs. The specific contingencies are those peculiar to the specific plaintiff, such as a poor work record or a particularly marketable skill. While general contingencies are often modest and may be considered in the absence of evidence specific to the plaintiff, specific contingencies must be supported by evidence and may not be speculative: *Dorman* at para. 92.

[266] In *Dorman*, Justice Grauer stated that in undertaking the analysis of positive and negative specific contingencies, courts are required to assess three things: what happened to the plaintiff in the past, proven on a balance of probabilities; what might happen to a plaintiff in the future, which must be found to be real and substantial possibilities; and finally, the relative likelihood of that real and substantial possibility: at para. 94.

[267] A plaintiff’s own perception that he has a diminished capacity to earn income in the future is insufficient. A plaintiff must show that there “is a realistic possibility [they] will be less able to compete in the marketplace—with economic consequences, not merely psychological ones”: *Kim v. Morier*, 2014 BCCA 63 at para. 8.

[268] Finally, at the end of the assessment, the court must consider whether the award of damages is “reasonable and fair”: *Lo* at para. 117.

2. Accountant and Economist Expert Evidence

[269] As dealt with above, there were significant differences in the methodology of Ms. Mohan and Mr. Gosling. Mr. Ponych has not established, as a real and substantial possibility, that as of 2017, Sherwood’s business would not continue to fluctuate, but would rather increase steadily in the future. Accordingly, as set out in para. [209], I am unable to accept Ms. Mohan’s assumption that but for the Accident, Sherwood’s gross revenues would increase from the 2017 point into the future. I find to use Ms. Mohan’s approach would overstate Mr. Ponych’s loss of earnings, both past and future. For that reason, and others already mentioned, I prefer the approach of Mr. Gosling, which is based on the average of the 2014 to 2017 fiscal years.

[270] However, in addition to the differences in methodology already addressed, Ms. Mohan chose to apply only an actuarial multiplier to her loss of future earning capacity analysis; where Mr. Gosling opined it was more appropriate to apply an economic multiplier.

[271] Ms. Mohan provided a multiplier to be used to age 65, from November 21, 2022 (the first day of trial) of \$14,500. She advised that the only contingencies provided for in this multiplier were the discount fact of 1.5% per annum (as prescribed by the *Law and Equity Act*, R.S.B.C. 1996, c. 253 s. 56) and survival probability. The multiplier provided by Ms. Mohan is virtually identical to the actuarial multiplier provided by Mr. Gosling (his is \$14,502). In her Responding Report, Ms. Mohan advised:

4.21 In calculating the estimate of future loss, Mr. Gosling uses his economic multiplier for both his absent accident estimate and the with-accident estimate. All negative and some positive contingencies are already largely built into the estimate of absent accident net income, as it is based on Mr. Ponych’s historical earning. Reducing the value for contingencies that are already reflected in the estimate results in a lower estimate of absent accident earnings and estimate of gross past loss.

[272] While Ms. Mohan agrees that ultimately the appropriate positive and negative contingencies to be applied to Mr. Ponych’s lost earning capacity are to be determined by this Court, her view is that as Mr. Ponych was self-employed, and not an employee, if an average a number of years of gross revenue of Sherwood and the economic multiplier are used, then the result would be double counting contingencies.

[273] Mr. Gosling also provided employment income multipliers—both an actuarial multiplier and an economic multiplier. He provided an easy to understand explanation of what employment income multipliers are:

5. Employment income multipliers are essentially tools that can be used to estimate the present value of future earnings (or earnings loss). These multipliers can be estimated on an actuarial basis (accounting only for survival and discounting) or on an economic basis (accounting not only for survival and discounting but also for labour market contingencies). Both types of multipliers are provided below.

[274] Mr. Gosling’s actuarial multipliers to age 60, 65 and 70, as updated to April 12, 2023, were \$10,442, \$14,213 and \$17,533. He explained that these actuarial multipliers:

7. ... are not adjusted for labour market contingencies (non-participation in the labour force, unemployment and part-time work). As such, the multiplier to the expected retirement age is appropriately applied to an annual income figure (including non-wage benefits) which already accounts for the expected impact of unemployment, part-time work and non-participation for any reason other than retirement.

[275] Mr. Gosling also provided a table of economic multipliers. These economic multipliers adjust for the same discount factors and survival risks as the actuarial multipliers, but they “also account for labour market contingencies related to labour

force non-participation, unemployment, and part-time work based primarily on 2016 Census data for BC males with other trade certificates or diplomas". Mr. Gosling chose this category as it excludes individuals with registered certificates of apprenticeship, such as a red seal electrician.

9. Based on the above assumptions, I estimate the economic multiplier to a maximum potential working age of 70 at \$10,971.

10. Since the multiplier in Table 1 already accounts for labour market contingencies, it is appropriately applied to full-time, full-year income figures (or reductions in full-time, full-year earnings). Also, the multiplier to age 70 should typically be applied because the possibility of retiring before age 70 is already accounted for in the labour force participation contingency.

[276] On cross-examination Mr. Gosling was challenged on whether the contingencies in the economic multipliers, namely non-participation in the labour force, unemployment and part-time work, were applicable to individuals who were self-employed. He confirmed that in his opinion these contingencies are equally applicable to those who are self-employed. He also confirmed that if it was proven that a business had a demonstrated ability to grow, then one would have to consider using an annual income that was higher, to account for expected future growth, but that he would not consider it to be a positive contingency that should be applied.

[277] Mr. Gosling provided two separate methodologies to calculating Mr. Ponych's loss of future earning capacity: one with retaining Sherwood and paying someone to assist him; and one with selling the business. He was asked to provide a future loss estimate assuming Mr. Ponych could have continued to operate Sherwood (with assistance) and assuming he was unable to continue operating Sherwood due to his accident-related injuries.

[278] For the first scenario, Mr. Gosling assumed that Mr. Ponych could have hired a skilled replacement worker for \$100,000 per year. These references are to Mr. Gosling's updated calculations.

14. For the purposes of these calculations, I assume that the Plaintiff could have hired a skilled replacement worker for \$100,000 per year. I further assume that a portion of the replacement worker's time would be spent covering the tasks that the Plaintiff would otherwise have done but is no longer able to do, but some of the replacement worker's time would be spent

on productive value-added activities. The annual loss is the portion of the \$100,000 paid to the replacement worker for the time spent replacing the Plaintiff's labour. I assume this would be in the range of \$50,000 to \$75,000 per year. Based on this range and the economic multiplier in my Table 2 (\$10,971), the present value of future loss can be estimated as follows:

- (a) Assuming an annual ongoing loss of \$50,000, I estimate the present value of future earnings loss at $(\$50,000 \div \$1,000) \times \$10,971 = \mathbf{\$548,550}$; or
- (b) Assuming an annual ongoing loss of \$75,000, I estimate the present value of future earnings loss at $(\$75,000 \div \$1,000) \times \$10,971 = \mathbf{\$822,825}$.

[279] Mr. Gosling agreed that his assumption that Mr. Ponych could hire an appropriate replacement worker for \$100,000, and that that replacement worker's time spent replacing Mr. Ponych's skilled time would be in the range of \$50,000 to \$75,000 was merely speculative, and an illustration of an approach to the calculation only. There was no evidence advanced at trial as to the cost of hiring a skilled replacement worker to assist Mr. Ponych, and accordingly I find this approach of Mr. Gosling was merely speculative and not grounded in the evidence.

[280] However, Mr. Gosling went on to consider an economic approach to calculating Mr. Ponych's loss of future earning capacity if Mr. Ponych was found not to be able to continue to operate Sherwood, even with assistance. Using Ms. Gallagher's non-exhaustive list of potential with-accident occupations for Mr. Ponych, in his updated calculations, Mr. Gosling assumed that Mr. Ponych's with-accident future earning capacity could range from about \$67,000 to \$108,000 per year. Based upon this assumption, he illustrated an approach of calculating his future loss in the following manner:

15. If it is determined that the Plaintiff is not capable of continuing to operate the business, even with assistance, then the future loss can be calculated based on the difference between the Plaintiff's absent-accident earnings operating the business and his with-accident earnings in an alternative job that is within his with-accident capacity. In this regard, in Table A at page 3 of this report, I estimated the Plaintiff's 2014-17 pre-accident average annual net income at \$172,437 in 2018 dollars. Adjusting this to 2023 dollars (based on changes in a fixed weighted index of average hourly earnings in BC) results in absent-accident earnings of \$202,672 per year. Based on the non-exhaustive list of occupations summarized in Table C at page 6 of this report, the Plaintiff's with-accident future earnings could perhaps range from about

\$66,000 to about \$108,000 per year. Based on these earnings figures and the economic multiplier from my Table 2 (\$10,791) the future loss can be estimated as follows:

(a) Assuming with-accident earnings of \$108,000 per year, I estimate the future loss at $(\$202,672 - \$108,000) \div \$1,000 \times \$10,971 =$
\$1,038,647; or,

(b) Assuming with-accident earnings of \$66,000 per year, I estimate the future loss at $(\$202,672 - \$67,000) \div \$1,000 \times \$10,971 =$
\$1,488,458.

[281] This formula for the approach to the loss of future earning capacity may be adjusted to use the amount I conclude Mr. Ponych is capable of earning in the future.

3. Parties' Positions on Future Loss of Future Earning Capacity

[282] Mr. Ponych regards himself as being vocationally impaired due to his chronic pain, headaches, cognitive impairments, depression and anxiety. He tried to do everything he could to retain Sherwood, but ultimately, his best efforts failed and he saw no choice but to sell the business he had spent his working career building. He is concerned about his ability to provide for his family.

[283] Mr. Ponych argues that using a "four year-average [of Sherwood] would result in a gross understatement of Mr. Ponych's loss". He states that his "record-breaking year in 2017 was not a coincidence, or the market. It was the fruit of his labour since 2010." He argues he made many sacrifices, and worked up to 70 hours a week, to have Sherwood perform as it did in 2017. He relies upon Ms. Mohan's report, and says that if it is accepted that he can earn \$75,000 a year, then his future loss of earning capacity is \$3,374,401.95. As already noted, Mr. Ponych accepts that he could work in the future and earn between \$50,000 and \$75,000 per year, although he says \$75,000 a year is "optimistic".

[284] Mr. Ponych argues that it is not appropriate to apply a general negative contingency to him, with the exception of the risk of forced exclusion from the workforce due to illness or disability. He also says that "the application of any risk contingency should be countermanded by the application of a general positive

contingency reflecting the plaintiff's ambition to grow his business and the fact that he had begun to realize this ambition in the years prior to the occurrence of the Accident". He seeks an award of \$3,300,000 with respect to his loss of future income-earning capacity.

[285] In their written submissions, the defendant said that Mr. Ponych's future loss of earning capacity should be analysed by the income asset approach, and they proposed an appropriate damage award of between \$548,500 and \$822,825. However, in oral argument, they changed position, and argued that any loss should be analysed using the capital asset approach, and that an appropriate award would be between \$200,000 and \$400,000. The defendant says that Mr. Ponych has not established a real and substantial possibility that he will experience a future loss, and they argue that Mr. Gosling's approach overstates his loss and is of no particular assistance. The defendant says Mr. Ponych has failed to establish he lost opportunities in his business after the Accident, and that he showed he could work for almost five years after the Accident. They rely upon the argument that individuals who sustain soft tissue injuries, but can continue to work, are generally not entitled to an award for loss of future income earning capacity, and they cite numerous cases in support of this argument: *Brooks v. Habib*, 2019 BCSC 1398; *Jacobi v. Monteith*, 2020 BCSC 218; *Fontaine v. Van Kampen*, 2013 BCSC 1702; *Gartner v. Baumeister*, 2019 BCSC 1291; *Jefferson v. Virk*, 2020 BCSC 306; *Ju v. Morpurgo*, 2019 BCSC 194; *Lowe v. Johnson*, 2019 BCSC 1283; *McKay v. Raiwal*, 2015 BCSC 220; *Mirsaeidi v. Coleman*, 2014 BCSC 415; *Urwin v. Hanson*, 2019 BCSC 1145; and *Williams v. Dolhan*, 2020 BCSC 136.

[286] They say subjective apprehension about the future is insufficient to ground a claim for loss of earning capacity: *Horne v. Goglia*, 2020 BCSC 122 at para. 140. They say his belief he could not continue to run his business was a self-imposed limit, and his decision to sell Sherwood should not be visited upon the defendant. They go so far as to argue that Mr. Ponych did not do everything he could have done to keep his business. They say he did not make reasonable efforts to find someone appropriate to whom he could delegate some of his duties. They rely upon

Ms. Gallagher’s evidence as proof he remains competitively employable, notwithstanding she was not asked to perform a functional capacity assessment. They rely upon Dr. Prout to support their argument that he can expect significant improvements in the future. They say Mr. Ponych failed to mitigate his loss of future earning claim, as a result of his “premature decision to sell Sherwood without first attempting to find other reasonable alternatives”. Their position is summarized in the following paragraphs from their written argument:

296. More importantly, the plaintiff chose to sell his business when sales and revenues were beginning to recover. The plaintiff failed to consult a business consultant, including his own brother, and failed to hire someone who could assist him with the significant amount of driving required. In addition, the plaintiff agreed to an all-encompassing non-compete clause as part of the sale of Sherwood to Van Buuren, which reveal as his intention of never working in the painting and/or decorating industry for at least the next five years in British Columbia. The plaintiff’s choices have created future consequences for himself, most notably, the limited availability of suitable employment. This is not attributable to the defendant’s negligence, but is rather a consequence that the plaintiff must bear, and that this court must consider in its assessment of loss of income earning capacity.

297. Further, the plaintiff chose to sell Sherwood and stop working in the absence of any expert medical opinion recommending that he cease work entirely and after four and a half years of demonstrating a significant, consistent capacity to work. In selling his business, the plaintiff agreed to an all-encompassing five-year no-compete clause in the only industry he has known for decades. The plaintiff’s choices have generated future consequences, namely the limited availability of suitable employment, which is not attributable to the defendant’s negligence, but rather is a consequence that the plaintiff must bear.

[287] In the event I do not accept this argument, then in the alternative, the defendant says they were incorrect to initially argue in their written submissions that an income asset approach should be used, and rather argue that a capital asset approach is appropriate in the circumstances. They say that an appropriate award would be between \$200,000 and \$400,000.

4. Factual Findings and Analysis of Loss of Future Earning Capacity

[288] I have already set out my finding that Mr. Ponych suffered from an mTBI, and suffered cognitive difficulties as a result. I have also set out my determination that

while Mr. Ponych made significant efforts to retain Sherwood; ultimately, his injuries as a result of the Accident led to his reasonable decision that the only option left to him was to sell his business: see *Shrieves v. Smith*, 2020 BCSC 710 at paras. 77–98, referring to *Riley v. Ritsco*, 2018 BCCA 366 at paras. 83–84.

[289] I cannot accept the defendant’s argument that Mr. Ponych suffers from a subjective apprehension about his ability to work. Rather, he worked diligently to attempt to retain the business, and the injuries as a result of the Accident frustrated his stoic efforts. I find he has established a real and substantial possibility that he will be unable to work to the level he did at Sherwood, or even at close to that level, which leads to a loss of his capacity. I am satisfied, on the totality of the evidence, he has established that there is a real and substantial possibility that this will cause him a pecuniary loss. The issue becomes then how to assess the value of that possible future loss.

[290] I find in all of these circumstances; the earnings approach is the appropriate one to utilize. Mr. Ponych has been engaged in the painting business since very shortly after his graduation from high school, and has an identifiable loss of income at the time of trial. He had an established and settled career path, from which it is possible to use the earnings approach.

[291] However, for the reasons set out above, I do not accept that Mr. Ponych has established that as of 2017, it was a real and substantial possibility Sherwood’s business would not continue to fluctuate, but would rather increase steadily in the future. In all of the circumstances I prefer Mr. Gosling’s approach, and find it is appropriate to use the average of the earnings of Sherwood over the four-year period, to establish the baseline from which to extrapolate the future loss of Mr. Ponych’s earning capacity.

[292] The difficult issue, with the dearth of evidence adduced, is what value to assign Mr. Ponych’s remaining earning capacity. To his credit, he does not say he has no residual earning capacity, and acknowledges he does have a residual capacity to earn between \$50,000 and \$75,000.

[293] Neither Mr. Croxson nor Ms. Gallagher did a vocational assessment of Mr. Ponych; but rather each merely provided hypothetical job he would be capable of. The average annual salary for the jobs Mr. Croxson hypothesized was \$51,397. The average annual salary for the jobs Ms. Gallagher hypothesized was \$67,236. These are speculative salaries, but they are the only evidence adduced at trial. Notwithstanding I put little weight on Mr. Croxson's Report, the average annual salary he suggested was close to the lowest amount Mr. Ponych agreed he could earn. Further, I note that I accept the defendant's argument that Mr. Ponych chose to enter into the non-compete clause with Mr. van Buuren, and they should not be held responsible for that choice. Accordingly, I accept that jobs may have been open to him in the painting industry, which he voluntarily chose to restrict himself from. That is not something the defendant is responsible for. Given the limited evidence tendered at trial, I find that Mr. Ponych retains a residual earning capacity to earn \$59,000 annually, which is the average of Mr. Croxson and Ms. Gallagher's average hypothetical salaries.

[294] Utilizing Mr. Gosling's methodology, I find that Mr. Ponych has suffered a loss of his earning capacity of \$1,576,225.51 $((\$202,672 - \$59,000) / \$1,000 \times \$10,971)$. This methodology has built into it an economic multiplier to the expected retirement age, which accounts for the general contingencies of survival and discounting, and also labour market contingencies, such as non-participation in the work force for any reason other than retirement, unemployment or part time work.

[295] However, in these circumstances, given Mr. Ponych's uncertain plans for his future employment at this time, the application of a further specific contingency deduction is appropriate. I accept there is a real and substantial possibility that Mr. Ponych will earn more than \$59,000 in the future. Mr. Ponych has a strong history of employment and has demonstrated success in running his own business. He has well over a decade of employment before him, during which his capacities and abilities may result in an increase of earnings. He agrees that he could earn up to \$50,000, although he says \$75,000 would be optimistic. To determine the relative likelihood of this occurring, I must balance Mr. Ponych's evident dedication to his

work with the limitations imposed by his injuries. His prognosis has been described as “poor” and “guarded” by many of the experts at trial, and it is unclear how his injuries will limit him in his future employment.

[296] Given these factors, I would apply an additional 20% contingency to reflect the fact he may, in the future, earn more than \$59,000. Accordingly, I award him \$1,261,000 as an award for his loss of future earning capacity. In these circumstances, given Mr. Ponych’s age, his physical and mental impairments and their chronic nature, I find this award to be fair and reasonable.

VII. COST OF FUTURE CARE

A. Relevant Legal Principles

[297] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore the plaintiff to their pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff’s mental and physical health: *Milina v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.) [*Milina*]; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[298] The test for determining the appropriate award for the cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina* at 84; *Fabian v. Song*, 2018 BCSC 762 at para. 125–127; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63. However, where ongoing treatment provides only periodic temporary relief, but little to no improvement, then that is not something for which compensation should be paid for the rest of the plaintiff’s life, but rather is a loss that has already been considered as an aspect of non-pecuniary damages: *Ho v. Dosanjh*, 2010 BCSC 845 at para. 91.

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

B. Evidence Tendered on Cost of Future Care

[300] The plaintiff tendered the expert opinion evidence of Russell McNeil (occupational therapist) on the cost of potential future care for Mr. Ponych. The defendant tendered the expert opinion evidence of Tania Percy (occupational therapist) on this issue. They also tendered a report of Mr. Gosling dated October 18, 2022, in which he provided present value of the future care multipliers, and then used those multipliers to estimate the present value of the cost of future care based on Ms. Percy’s recommendations.

[301] Dr. Schultz, Dr. Palak and Dr. Mehdiratta all made a number of recommendations for Mr. Ponych’s future care, which are set out above.

1. Mr. McNeil (occupational therapist)

[302] Mr. McNeil’s Report was dated August 29, 2022 (“Mr. McNeil’s Report”). He based his report upon his evaluation of Mr. Ponych, Mr. Ponych’s reports of limitation to him, and the expert medical-legal reports he was provided with. He opined that Mr. Ponych would require specific future care, and set out the items and their specific cost. Mr. Ponych does not seek an award for all of these specific items, and so I set out only those items Mr. Ponych does seek:

- a) Yard work and home maintenance;
- b) Rehabilitation/Health Maintenance, as set out below:
 - i. Kinesiology treatment – 12 sessions;
 - ii. Massage Therapy - 12 sessions per year;
 - iii. Physiotherapy – 12 sessions per year;
 - iv. Acupuncture – 12 sessions per year;
 - v. Chiropractic care – 12 sessions per year;

- vi. Psychologist treatment - 36 sessions over 2 years, and long term follow up;
 - vii. Occupational therapy - 12 sessions;
 - viii. Vocational counsellor - 24 one hour sessions; and
 - ix. Multidisciplinary pain management program;
- c) Medication and pain related substances, as set out below;
- i. Advil;
 - ii. Medical marijuana products;
 - iii. Lyrica; and
 - iv. Mirtazapine.

[303] Mr. McNeil provided a summary of these future care costs, but did not provide any multipliers to calculate the current value of the future costs.

2. Ms. Percy (occupational therapist)

[304] Ms. Percy was asked to “provide an opinion regarding the future care recommendations outlined” in Mr. McNeil’s Report and she did so in a report dated October 7, 2022 (“Ms. Percy’s Report”). She disagreed with many of Mr. McNeil’s recommendations.

[305] With respect to the supportive passive therapies, namely massage therapy, physiotherapy, acupuncture and chiropractic care, she was of the opinion that the number of sessions recommended was too high. She noted:

Supportive Passive Therapies: With respect to the recommendation for ongoing passive therapies, it is my opinion that the number of sessions recommended per year (combined total of 48 sessions) is high and not supported in the context of chronic pain, where evidence-based principles support engagement in active therapy over passive therapy. While there is a place for supportive therapies to address flare-ups, assist with maintenance of functioning and promote engagement in employment, recommending up to 48 sessions per year with multiple disciplines is considered significant on an ongoing basis.

It is my opinion that it is more typical to see a recommendation for up to 12 sessions per year, ongoing, for supportive therapies. ...

[306] There was some confusion between Mr. McNeil and Ms. Percy for the recommendation for a multidisciplinary assessment and focused course of rehabilitation, and the recommendation for a pain program. Mr. Ponych no longer seeks both a rehabilitation program and a pain program, but rather seeks only funding for the pain program.

[307] Ms. Percy “agreed with the recommendation for a multidisciplinary assessment and focused course of rehabilitation”, for a total cost of \$6,610 to \$10,570. However, she did not agree with the recommendation for a pain management program in addition, as she felt it was duplicative.

[308] Ms. Percy did not address psychological counselling, and agreed with Mr. Percy’s recommended hours and rate for both occupational therapy and for a vocational counsellor.

[309] Finally, she agreed with Mr. McNeil’s recommended costs for the Advil, and for the prescription medication. However, with respect to the medical marijuana products, she opined:

With respect to the recommendations for CBD, THC, and CBN, I recommend that this be reviewed by Psychiatry and/or a Pain Specialist to determine suitability for Mr. Ponych’s musculoskeletal pain and psycho-emotional issues. In my clinical practice it is my understanding that THC is contraindicated in patients with anxiety and therefore this should be reviewed by a medical specialist.

[310] She explained that when she sees such a patient using these substances, it is a flag for her to ensure there is oversight by a treating psychologist or pain specialist, to ensure they are being used properly, and there are no contraindications in the individual. She noted that there are benefits and also concerning side-effect to the use of these products, particular in patients with anxiety or depression.

3. Mr. Gosling (economist)

[311] Finally, the defendant tendered a separate report from Mr. Gosling, dated October 18, 2022, in which he provided cost of future care multipliers for annual future care costs. He noted that:

9. Future costs must be discounted to account for the fact that the amount received at the trial date, as compensation for a future loss, may be invested for the period between the trial date and the date of the future loss. Future care costs are discounted at a rate of 2.0% per annum. ...

[312] In his report, he provided a Table of multipliers, including a mechanism by which the present value of future care costs can be estimated. He updated this cost of future care multipliers to April 12, 2023.

C. The Parties’ Positions on Cost of Future Care

[313] Mr. Ponych seeks an award for cost of future care of \$420,000.

[314] He seeks an award for one-time costs of \$28,692, comprised of the following:

Pain Program	\$10,000 to \$15,000
Kinesiologist	\$1,008 (12 sessions)
Psychologist	\$8,100 (36 sessions)
Occupational Therapy	\$2,784 (12 sessions)
Vocational Counsellor	\$1,800 (24 sessions)
Total One-Time Costs	\$28,692

[315] He also seeks an award for annual costs of future care, to age 80, based upon an annual cost of \$17,272.50, and the *CIVJI: Civil Jury Instructions*, 2nd ed. (Vancouver: CBLBE, 2017) (loose-leaf 2019 update), Appendix E [*CIVJI*] multiplier of 22.9377, of \$390,000. He seeks compensation for annual costs for massage therapy, physiotherapy, chiropractic treatment, acupuncture, Advil, Lyrica, and the medical marijuana he uses—being CBD, THCa, and CBN. Specifically, he seeks the following annual expenses:

Massage Therapy	\$1,320
Physiotherapy	\$1,440

Chiropractic Treatment	\$ 840
Acupuncture	\$1,080
Advil	\$ 65.70
Lyrica	\$ 58.40
CBD	\$5,986
THCa	\$5,840
CBN	\$ 642.80
Total Annual Costs	\$17,272.90

[316] The defendant says that a reasonable award for cost of future care ranges from \$85,659 to \$127,619. He takes the position that no allowance should be made for the future cost of medical marijuana products, as Mr. Ponych has not provided sufficient evidence he is using these products under the supervision of a physician. The defendant also says that the request for a combined total of 48 sessions of passive therapies—namely the massage, chiropractic, physiotherapy and acupuncture— is excessive, and that a budget of between \$840 and \$1,440 per year would be appropriate.

D. Factual Findings and Analysis on Costs of Future Care

[317] I will first address the one-time costs.

[318] Ms. Percy agreed with the recommendation of a multidisciplinary assessment and focused course of rehabilitation that included physiotherapy and athletic therapy or kinesiology, for a total cost of \$6,610.00 to \$10,570.00. She took the position that such a program would be duplicative with a recommendation for a pain management program, and she opined that a community-based model was more appropriate than a program-based model. Further, she agreed with the one-time costs for occupational therapy and a vocational counsellor, and she deferred the issue of

psychological counselling. She did not agree with the request for a kinesiologist, as she felt that would be duplicative of the pain program.

[319] In my view, the one-time costs sought by Mr. Ponych, as recommended by the experts at trial, are medically justified and reasonable. Accordingly, I order he is entitled to the one-time cost of the future care he seeks in the amount of \$28,692.

[320] Turning to the annual costs, there are two significant areas of dispute: whether the medical marijuana is a proper and medically reasonable expense, and whether the cumulative frequency of the passive therapies is appropriate.

[321] Like other costs of future care, medical marijuana must be medically justified and reasonable: *Milina* at 84.

[322] In circumstances where there is no medical recommendation, there must be sufficient evidence to conclude that the plaintiff would benefit from the use of medical marijuana: see for example *Maingot v. Wankowicz*, 2021 BCSC 1596 at para. 420; *Borgford v. Ball*, 2022 BCSC 2026 at para. 320; *Sawires v. Paris*, 2021 BCSC 240 at para. 122; *Culver v. Skrypnyk*, 2019 BCSC 807 at para. 252(9) [*Skrypnyk*]. A plaintiff's belief that medical marijuana assists them is insufficient to find it medically justified: see *Bernatchez v. Chisholm*, 2022 BCSC 105 at para. 193; *Sawires* at para. 122.

[323] As already noted, I am unable to conclude based upon the evidence adduced by Mr. Ponych that the medical marijuana he uses has been recommended by a medical professional. Further, given the totality of the evidence tendered at trial, I am unable to conclude that Mr. Ponych benefits from his use of the medical marijuana. His own personal belief that it assists him is insufficient to establish it is medically justified. Accordingly, I would not allow this as an acceptable cost of future care.

[324] With respect to the passive therapies, Mr. Ponych seeks 12 sessions each for physiotherapy, acupuncture, massage therapy and chiropractic treatment.

[325] In my view, this recommendation is excessive, but I find that the request for 12 sessions a year of chiropractic treatment and physiotherapy is medically justified and reasonable and meets this two-pronged test. Mr. Ponych has continued with chiropractic treatment since shortly after the Accident, and receives some benefit from it. He also recently began treatment with a physiotherapist trained to do myofascial activation, and testifies he wishes to continue with these treatments. Dr. Palak testified that he recommends passive therapies to Mr. Ponych, together with active rehabilitation.

[326] Accordingly, I find that Mr. Ponych is entitled to an annual amount for the cost of future care of \$2,404.10 per year (being 12 sessions of chiropractic treatment, 12 sessions of physiotherapy, and the cost of Advil and Iyrica). Applying Mr. Gosling's cost of care multiplier, I find Mr. Ponych is entitled to \$58,095.08 ($\$2,404.10 \div \$1,000 \times \$24,165$).

[327] Accordingly, Mr. Ponych is entitled to \$86,787.08 for the costs of future care.

VIII. LOSS OF HOME MAKING CAPACITY

A. Relevant Legal Principles

[328] A plaintiff is entitled to an award for loss of housekeeping capacity if they establish on a balance of probabilities such a loss: *Kim v. Lin*, 2016 BCSC 2405 at para. 189, aff'd 2018 BCCA 77. An award may be made under one or more separate heads of damage, including pecuniary, non-pecuniary, and cost of future care.

[329] The principles applicable to the loss of homemaking capacity are:

- 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 her 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.

See: *McKee v. Hicks*, 2023 BCCA 109 at paras. 93–112; *Kim v. Lin*, 2018 BCCA 77 [Lin] at paras. 28–34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 96–103; *Liu v. Bains*, 2016 BCCA 374 at para. 25–26; *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63.

B. The Parties' Positions on Loss of Homemaking Capacity

[330] Mr. Ponych submits that before the accident he did some vacuuming, some laundry, a little bit of cooking, and he would do all of the outside yard work, the power washing, and putting up of the Christmas lights. He says he is unable to do any of this now, and he relies on his wife to complete these tasks. He seeks \$75,000 with respect to past and future loss of housekeeping capacity under this head of damages.

[331] The defendant argues that by Mr. Ponych's own evidence, he worked six to seven days a week, often exceeding 60 hours a week. While he did describe discrete activities he did, such as hanging up the Christmas lights and doing repairs around the house, he obviously devoted the vast majority of his time to running Sherwood. It is a reasonable assumption that he had very limited time to spend on any interior or exterior chores. They say in those circumstances, the evidence does not warrant a separate award for loss of housekeeping capacity, but rather he is appropriately compensated under the non-pecuniary head of damages.

C. Expert Evidence Tendered on Loss of Homemaking Capacity

[332] In Mr. McNeil’s Report, he provided the following opinions in regard to Mr. Ponych’s needs for assistance in performing homemaking tasks, yard work and home maintenance:

51. ... In my opinion, Mr. Ponych has the capacity to perform short periods of light household chores and I would encourage him to assist in order to increase activity level and as a means of functional exercise.

...

52. Mr. Ponych was not responsible for mowing his lawn prior to the MVA. However, given the measured biomechanical restrictions during this assessment, he will need assistance with yard work (trimming and pruning) and home maintenance chores (cleaning gutters, power washing, painting, staining, repairing). I would recommend assistance for 2 hours per week throughout the year, in order to maintain the house and yard.

53. On average yard services and home maintenance services will charge \$45.00/hour (ranging from \$35.00 to \$65.00) depending on the size of the yard, resulting in a yearly cost of **\$2,700.00**.

[333] In Ms. Percy’s Report, she disagreed with Mr. McNeil’s assessment of the amount of home and yard work required:

...Mr. McNeil recommends a total of 104 hours per year for home and yard maintenance work specifically for trimming and pruning bushes and maintenance chores (i.e. cleaning gutters, power washing, painting, staining and repairs).

Some of these chores are done annually (i.e. yard maintenance, gutters and power washing) while others are performed more episodically (i.e. painting, staining and repairs). This is consistent with that outlined on p. 18 of Mr. McNeil’s report. As such, it is my opinion that the recommended hours are high and exceed the time Mr. Ponych would have spent on home and yard maintenance or would have been required to spend in their current home, based on the description of the home and property contained in Mr. McNeil’s report.

[334] Specifically, her opinion was that a range of 40 to 48 hours per year was reasonable, plus a budget for 24 hours every 3 to 5 years for episodic tasks.

D. Factual Findings and Analysis on Loss of Homemaking Capacity

[335] While I have accepted Mr. Ponych’s submission that he now suffers significantly disabling symptoms as a result of the Accident, I cannot accept that he

has a dramatically diminished capacity to take care of his home. Before the Accident he was the primary breadwinner, and Ms. Ponych was the primary homemaker and parent.

[336] After the Accident, notwithstanding his injuries, Mr. Ponych continued to work long hours, for a period of over four years, before he ultimately sold Sherwood.

[337] I find that before the Accident, and even after it, he had very limited time to contribute to homemaking. However, I disagree with the defendant's suggestion that Mr. Ponych's loss of homemaking capacity would be better considered as a non-pecuniary loss. While Mr. Ponych's contributions to homemaking may have been limited, as I have outlined, he has lost the capacity to perform those tasks and is now reliant on others to perform them. This fits squarely within the circumstances outlined by the Court in *Lin* as warranting consideration under their own category of pecuniary loss.

[338] However, I cannot accept Mr. McNeil's assessment of the annual cost of the outdoor home maintenance and yard work at \$2,700. Given the hours Mr. Ponych worked, I find that his assessment overstates what Mr. Ponych contributed before the Accident. Rather, on this issue, I accept Ms. Percy's opinion "that a range of 40 to 48 hours per year more reasonably reflects Mr. Ponych's participation rates in the pre-accident period". She recommends a budget of \$1,800 to \$2,160 per year, plus \$1,080 every 3 to 5 years.

[339] Using Ms. Percy's figures, I award Mr. Ponych \$2,160 per year for the past five and a half years, for a total of \$11,880. I decline to award any amount for every 3 to 5 years, as there was no evidence Mr. Ponych did any jobs of significance around the home that would support such an award.

[340] Using Mr. Gosling's analysis of Ms. Percy's assessment, I award Mr. Ponych the amount of \$56,607, being the present value of her high end of cost range for future homemaking capacity to the end of his life, assuming a normal life expectancy.

[341] In my view, it is appropriate in the circumstances of this case to award Mr. Ponych \$68,487 for his loss of homemaking capacity.

IX. SPECIAL DAMAGES

A. Relevant Legal Principles

[342] The concept of compensation to a plaintiff for “special damages” is that an injured plaintiff is entitled to recover reasonable out of pocket expenses incurred as a result of injuries sustained in an accident: *Brown v. Gill*, 2021 BCSC 1734 at para. 58.

[343] Justice Basran provided a convenient summary of the principles applicable to the assessment of special damages in *Manhas v. Jaswal*, 2020 BCSC 586 at para. 86, which I reproduce here:

- Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established.
- Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite.
- Subjective factors may also be considered such as whether the plaintiff believes the treatment is medically necessary.
- \$0.50 per kilometer is a reasonable rate to attend treatment.

[344] The legal test for whether an expense is a valid special damage claim is whether the expense was reasonable. Within limits, those may include expenses associated with non-traditional or unconventional treatment, notwithstanding the treatment was ultimately not effective: *Lee v. McGuire*, 2005 BCSC 241 at paras. 16–19, citing *Chiu (Guardian ad litem of) v. Chiu*, [1999] B.C.J. No. 2082 at para. 59, 1999 CanLII 5633 (S.C).

[345] In *Skrypnyk*, Justice Davies allowed a claim for costs incurred for medical marijuana products, despite disallowing a claim for medical marijuana products as a cost of future care: at paras. 259–260. At trial, the plaintiff failed to establish the future health benefits of medical marijuana; however, Justice Davies found that the plaintiff’s pre-trial use of medical marijuana was medically justified and reasonable at

the time because the plaintiff used it upon the recommendation of his doctor and the plaintiff reported benefits from its use: *Skrypnyk* at para. 261.

B. Factual Findings and Analysis on Special Damages

[346] Mr. Ponych seeks special damages in relation to expenses he incurred for pre-trial treatment, including concussion therapy, physiotherapy, massage therapy, acupuncture, chiropractic treatment, psychotherapy, and mileage to attend these treatments. He also seeks reimbursement for the cost of the meditation application “Calm”. The defendant agrees that Mr. Ponych should be reimbursed for these expenses, which total \$10,303.94. I am satisfied that the Accident caused the need for these treatments. Mr. Ponych has diligently continued with the treatments that benefit him and that were specifically recommended to him by his various doctors.

[347] Mr. Ponych also seeks the costs he incurred from selling Sherwood, in the amount of \$14,529.04. However, he acknowledges that if I find this is the sale of a capital asset, which would have happened at some time regardless of the Accident, then these are not reasonable expenses. I agree, and would not make such an award.

[348] In the agreed statement of facts, the parties agreed:

76. The plaintiff incurred costs associated with prescriptions, medication, and health supplements totalling at least \$25,841.72.

[349] Mr. Ponych seeks special damages in relation to those expenses; but the defendant denies the reasonableness and the medical justification for them arguing:

- a) to the extent any of the medical marijuana is in an oil form, there is no medical justification as the only two prescriptions were with respect to dried marijuana. They argue there is no evidence that Mr. Ponych’s self-medicated daily medical marijuana use is pursuant to a doctor’s advice; nor is it medically justified; and
- b) to the extent any of those expenses were from prescribed, or recommended vitamins and supplements, there was no evidence to corroborate this.

[350] I accept that Mr. Ponych was prescribed a significant amount of medication, that was changed by doctors as they struggled to find a way to best manage his symptoms, and I accept that he was advised to try a variety of vitamins and supplements, and that he followed all medical advice. I am also satisfied that Mr. Ponych was diligent in using different medications and supplements to attempt to ease his symptoms. I am satisfied in doing so, Mr. Ponych has established that at the time he incurred those costs, they were medically justified. While he has not established all of the medical marijuana was prescribed, his doctors were clearly aware of his use of the products. In those circumstances, I accept the medical marijuana is reasonable under the category of special damages. I note that an explicit medical recommendation is not a prerequisite to establishing a claim for special damages. I would allow Mr. Ponych's claim for \$25,841.72.

[351] Finally, Mr. Ponych seeks his costs incurred in purchasing a new bed, in the amount of \$3,372.96. He testified that Dr. Petrovic recommended he do so, for even weight distribution to help with his disturbed sleep. The defendant denies the reasonableness and medical justification of this claim, arguing Mr. Ponych had struggled with his weight since his twenties, and that they speculate his sleep troubles were likely due to his sleep apnea, which is unrelated to the Accident. Given Mr. Ponych diligently pursued his sleep apnea difficulty, and complied with the treatment, including wearing the prescribed CPAP machine, I am not persuaded by this argument. I find the new bed was both medically justified and reasonable, and so would allow Mr. Ponych's claim in the amount of \$3,372.96.

[352] Mr. Ponych has established that the appropriate quantification of his claim for special damages is \$39,518.52, of which the defendant has already reimbursed him \$3,656.69. Mr. Ponych has established that he has reasonably incurred expenses, which remain unreimbursed, in the amount of \$ 35,861.83 that are attributable to the Accident. He is entitled to special damages of this amount plus pre-judgment interest.

X. CONCLUSION

[353] Mr. Ponych is entitled to:

- a) \$ 250,000 for pain and suffering;
- b) \$ 255,955 for loss of past earning capacity;
- c) \$1,261,000 for loss of future income earning capacity;
- d) \$ 86,787.08 for cost of future care;
- e) \$ 68,487 for loss of homemaking capacity; and
- f) \$ 35,861.83 for special damages.

[354] There will be pre-judgment interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

XI. COSTS

[355] Absent any further submissions from the parties respecting costs, Mr. Ponych is entitled to his costs at Scale B of Appendix B to the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. If either party wishes to make submissions on costs, that party is at liberty to make further written submissions on costs, and must do so within 28 days of these reasons. The other party must respond within 21 days thereafter. The written submissions are to be no more than 10 pages, double spaced, in 12-point font. After both parties have filed their written submissions, the parties are to file a request to appear to set down an oral hearing of no more than one hour, to occur at 9 a.m.

“Blake J.”