

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Manoocheri v. Doe*,  
2023 BCSC 2056

Date: 20231123  
Docket: S205522  
Registry: Vancouver

Between:

**Ashkon Manoocheri**

Plaintiff

And

**John Doe, Jane Doe, ABC Company and Insurance Corporation of British  
Columbia**

Defendants

Before: The Honourable Madam Justice W.A. Baker

## Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.  
August 21 – 25, 2023

Place and Date of Judgment:

Vancouver, B.C.  
November 23, 2023

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## I. Introduction

[1] On May 19, 2019, Mr. Manoocheri was driving his motorcycle in North Vancouver when he was in a collision with an unknown driver. Mr. Manoocheri suffered a shattered collarbone, and a number of myofascial injuries resulting in pain in his left neck and left upper midback region. In this action Mr. Manoocheri seeks compensation for his injuries sustained as a result of the accident, and the impact those injuries have had on his life.

[2] The defendants do not take the position that Mr. Manoocheri is contributorily liable for the accident, and do not deny that the driver of the car is liable for the accident. The only challenge to liability made by the defendants is a submission that Mr. Manoocheri failed make reasonable efforts to ascertain the identity of the driver, as required by s. 24(5) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 ["Act"]

## II. Issues

[3] This case raises the following issues:

- a) Has Mr. Manoocheri satisfied his obligations pursuant to s. 24(5) of the *Act*?
- b) Did the accidents cause Mr. Manoocheri's injuries?
- c) Is Mr. Manoocheri entitled to any damages?

## III. Analysis

### A. **Has Mr. Manoocheri satisfied his obligations pursuant to s. 24(5) of the *Insurance (Vehicle) Act*?**

[4] Pursuant to s. 24(5) of the *Act*, Mr. Manoocheri is required to satisfy the court that he used all reasonable efforts to ascertain the identity of the unknown driver, and that the identity of such person is not ascertainable.

[5] Moments before the accident, Mr. Manoocheri was travelling north on Lonsdale Ave in North Vancouver. He was approaching 17<sup>th</sup> Street and the light was

green. As he entered the intersection, a car travelling south entered the intersection and began making a left hand turn right in front of Mr. Manoocheri. Mr. Manoocheri attempted to avoid a collision with the oncoming car. He turned his motorcycle and the wheels slipped out from under him. He held onto the handlebars as he fell. His collar bone was shattered in the accident.

[6] Immediately after he stopped moving, Mr. Manoocheri tried to get up, but felt the pain of the broken bones. He felt he should lie still and not injure himself further by moving. He was wearing a full helmet, so his vision was restricted. People began coming towards him to see if he was alright. He looked up and saw the light was still green, and turned to look in the direction the car had been moving. He believes he saw the car had continued through the intersection, and had stopped down the road a bit. Then people were swarming around him and he could not see the car anymore. Somebody called 911 and an ambulance was dispatched within 5 minutes. Mr. Manoocheri asked some of the people if they had seen what happened, and they said they saw the car.

[7] Just before the ambulance arrived, Mr. Manoocheri said a person came up to him, took his hand and apologized to him, saying he had not seen Mr. Manoocheri in the intersection. Mr. Manoocheri told the man he was glad he had stayed. That was all Mr. Manoocheri had time to say before the ambulance attendants came on the scene and told everyone to move back. That was the last time Mr. Manoocheri saw the man he believes was the driver. The next time he was able to look towards where the car had stopped, the car was gone.

[8] The police came and took a statement from Mr. Manoocheri while he was in the ambulance on a stretcher. He understood they had interviewed some of the witnesses. Mr. Manoocheri told the police that the driver had been there, but he did not know where he was anymore. Mr. Manoocheri was then taken to hospital.

[9] On May 29, 2019 Mr. Manoocheri's parents put up posters around the intersection asking for witnesses to come forward. Mr. Manoocheri did not put up the posters himself, but he saw the posters when he returned to the intersection on May

30, 2019. Mr. Manoocheri understood that his parents made inquiries at the businesses on the four corners of the intersection to see if they had cameras which would have shown the accident. Based on information received from his parents, Mr. Manoocheri went to a business called Rosemary Rock Salt on May 30 to find out if they had any useful video recordings. He understood from his conversation that they had looked at their video and it did not show anything. Mr. Manoocheri also went to the Starbucks on the corner to find out if the staff had seen the accident. Mr. Manoocheri recalled a man speaking to him after the accident, who said he had been sitting at the Starbucks when the accident happened. Mr. Manoocheri asked if anyone at Starbucks recalled this man. Mr. Manoocheri was not able to obtain any useful information from the staff at Starbucks about the accident or witnesses to the accident.

[10] Loblaws was one of the businesses on the corner of the intersection. Mr. Manoocheri understood his parents has asked Loblaws if there was any video available, and Mr. Manoocheri confirmed by looking at the building that there were no cameras pointing at the intersection.

[11] On June 4, 2019 Mr. Manoocheri's counsel wrote to ICBC outlining the steps taken to identify the driver, including the posters seeking information and their intention to obtain the police report.

[12] On July 22, 2019 Mr. Manoocheri's counsel wrote to ICBC stating "I further confirm that you have retained an investigator to obtain statements from the witnesses listed on the police report and accordingly, you do not require our client to take any further steps under s. 24 of the *Act*."

[13] On July 23, 2019 ICBC wrote to Mr. Manoocheri's counsel stating "The IA has not been able to get a hold of the only witness that was listed on the police report. Does your client have any other witnesses?"

[14] On July 30, 2019, Mr. Manoocheri's counsel replied that due to the seriousness of the accident and the injuries Mr. Manoocheri sustained, he was unable to obtain the names of any witnesses.

[15] The police file contained the name and phone number of one witness, but he could not be located for trial. The police file also contained an audio recording of the interview with the witness. The recording was very bad, but to the extent I could assess the words spoken, the parties agreed that the contents of the interview could be accepted for their truth. From the recording, I accept that the witness saw the impact, and saw the car turn left, but he did not see the licence plate of the car.

[16] ICBC argues before me that Mr. Manoocheri did not take reasonable steps to ascertain the identity of the driver.

[17] In *Nicholls v Insurance Corporation of British Columbia*, 2011 BCCA 422, the court of appeal confirmed the test of reasonableness:

[29] The main proposition from *Leggett* is that the test of reasonableness in s. 24(5) has a subjective component. In the words of Taylor J.A.:

[11] I do not think the words "not ascertainable" should be strictly interpreted, so as to mean "could not possibly have been ascertained." I think they are to be interpreted with reference to subs. (5) so as to mean "could not have been ascertained had the claimant made all reasonable efforts, having regard to the claimant's position, to discover them."

[12] The test seems to me to be subjective in the sense that the claimant must know that the vehicle has been in an accident and must have been in such a position and condition that it would be reasonable for the claimant to discover and record the appropriate information. But the claimant cannot be heard to say: "I acted reasonably in not taking the trouble to find out."

[Emphasis added.]

[30] This is confirmed by this Court's decision in *Etter v. Insurance Corporation of British Columbia*, 1999 BCCA 281, 126 B.C.A.C. 144, where Madam Justice Ryan, for the Court, stated at para. 5, that the test in s. 24(5) of the *Act* was summarized in para. 11 of *Leggett*.

[31] Thus, the only qualification on the requirement of "all reasonable efforts" in s. 24(5), is the subjective aspect of the test that requires the "position and condition" of the plaintiff to be considered in determining what efforts are reasonable in the circumstances. In all cases, the single standard to be met is one of reasonableness.

[18] The defence relies on *Takhar v Insurance Corporation of British Columbia*, 2023 BCSC 718 and *Rieveley v. Doe*, 2017 BCSC 202 for the proposition that the plaintiff was required to take every reasonable step he could have taken to ascertain the identity of the driver. In my view, the defence argues for what the court has expressly said is not the burden on the plaintiff. In *Rieveley* the court stated that a “plaintiff does not bear an “exceptionally onerous” obligation under s. 24(5), particularly where there is no suggestion of fraud on his or her part.” (para. 24).

[19] In *Morris v. Doe*, 2011 BCSC 253, the court reviewed many of the cases in which s. 24(5) was considered, and set out a range of factors that have been considered reasonable and unreasonable in the circumstances. The court ultimately concluded that what is reasonable varies with the circumstances of each case. What is clear from all of the cases, is that the assessment of what is reasonable in the circumstances is a question of fact for the trial judge. There is no checklist which a plaintiff must complete in order to meet the test under s. 24(5).

[20] I am satisfied that Mr. Manoocheri acted reasonably immediately after the accident. Mr. Manoocheri was lying on the ground unable to move with a shattered collar bone. He was not able to get up and take down the licence plate of the driver, nor was he able to chase down the driver. He spoke to the driver for only a second, and before he could really say anything to him, the ambulance drivers ushered the crowd and driver away from Mr. Manoocheri. Mr. Manoocheri had just been in a relatively serious accident, and had suffered a serious break to his collar bone. The police attended and interviewed witnesses. There were no friends or family with Mr. Manoocheri that could have assisted him in looking for witnesses at the scene of the accident, when he himself was unable to do so. I find that Mr. Manoocheri was not required to take any more steps than he did immediately following the accident.

[21] Within two weeks, Mr. Manoocheri or people acting on his behalf had posted signs at the intersection looking for witnesses. Mr. Manoocheri spoke with a business which might have had a useful video recording, but that turned out to not have recorded the accident and had no useful information. Mr. Manoocheri spoke to

staff at the Starbucks across from the accident. Mr. Manoocheri obtained the police report of the accident with information about the witnesses obtained by the police on the scene. None of these reasonable efforts on the part of Mr. Manoocheri and his family resulted in the identity of the driver being ascertained.

[22] Mr. Manoocheri quickly gave all the information they had to ICBC and confirmed that nothing further was required pursuant to s. 24(5) of the *Act*. ICBC produced no documents or other evidence contradicting Mr. Manoocheri's understanding that nothing further was required of him.

[23] In the circumstances of this case, I find Mr. Manoocheri has met the obligation on him pursuant to s. 24(5) of the *Act*, and judgment against the corporation may be given.

**B. Did the accidents cause Mr. Manoocheri's injuries?**

**1. Mr. Manoocheri's abilities and health pre-accident**

[24] Mr. Manoocheri graduated from high school in 2012. The first year after high school, Mr. Manoocheri concentrated on improving his physical health, as he perceived himself to be skinny and not very fit. Over the year following graduation, Mr. Manoocheri focussed on going to the gym to get fit, and this developed into an activity he did religiously. He did not pursue a career goal initially, but rather worked here and there at different jobs.

[25] Ultimately, Mr. Manoocheri determined that he would like a career in computer programming. Mr. Manoocheri appeared to me to be a very careful and cautious individual. He testified that he carefully considered his options and decided to pursue a program in computer studies at BCIT. The program was waitlisted, and so while he waited to get into the program he took some part time courses that were part of the program, to be sure that the program was what he wanted to do. In 2015, Mr. Manoocheri was admitted into the BCIT program. The two main focuses of the program were system administration and network administration.



[26] At the end of his first year, Mr. Manoocheri was able to obtain a position in the IT service department at BCIT. This was an intern position, that allowed him to work full time in the summer and part time in the school year. During the school year he worked two four-hour long shifts each week.

[27] Following graduation, Mr. Manoocheri started working full time at the BCIT service desk.

[28] Mr. Manoocheri was in good physical health prior to the accident. He had an active life before the 2019 accident. He liked to snow board, ride his motorcycle, and go to the gym regularly. He played pick up sports, such as basketball and football, with his friends.

[29] In the spring of 2017 he was in an accident where he was rear ended at a red light. He suffered soft tissue injuries, primarily in his left shoulder blade and neck. His last visit to a doctor for that accident was on September 12, 2018. By the time of the 2019 accident, Mr. Manoocheri had returned to his normal activities, including weight lifting at the gym, without limitation.

[30] Mr. Manoocheri was examined by Dr. Steyn, an orthopaedic surgeon, retained by ICBC. In his report, Dr. Steyn wrote that Mr. Manoocheri suffered from some residual symptoms from the 2017 accident; however, under cross examination he agreed that he did not know what residual symptoms he was referring to, and agreed that there was no reason to assume Mr. Manoocheri experienced residual symptoms from the 2017 accident. Dr. Steyn agreed that if the 2017 injuries were non-limiting before the accident, the current symptoms would not have arisen but for the 2019 accident. I am satisfied that Mr. Manoocheri's injuries from the 2017 accident had resolved and were non-limiting at the time of the 2019 accident.

## **2. *Mr. Manoocheri's abilities and health post-accident***

[31] On May 19, 2019 Mr. Manoocheri was riding his Triumph motorcycle on Lonsdale in North Vancouver. He was travelling north at about 40 km/hour. As he entered the intersection at 17<sup>th</sup> Street, a car made a left hand turn in front of him.

Mr. Manoocheri braked and tried to turn to avoid the car. The motorcycle slid out from under him and he and the bike fell to the ground. From the recorded witness interview, I could discern that the witness saw the motorcycle coming through 17<sup>th</sup> Street and on impact the rear end of the motorcycle snapped 180 degrees, launching Mr. Manoocheri in the air, with Mr. Manoocheri falling four to five feet down onto his shoulder.

[32] Mr. Manoocheri was in shock, and could not move. An ambulance was called and he was taken to the emergency room. Mr. Manoocheri was diagnosed with a broken collarbone. He required surgery to repair his clavicle, and that surgery took place on May 31, 2019.

[33] Mr. Manoocheri attended physiotherapy and other treatments as directed by his treating practitioners.

[34] Mr. Manoocheri attended independent medical examinations with two doctors: Dr. Steyn, and Dr. Adrian, a physiatrist. The qualifications of these doctors were not challenged, and I accepted their expert opinions within their fields of specialty.

[35] There is no dispute between the doctors that in the accident Mr. Manoocheri suffered a broken left clavicle, which was repaired with a later surgery, and suffered whiplash with upper mid and lower back myofascial pain. Dr. Adrian also diagnosed soft tissue injuries to the left shoulder girdle, caused by the accident.

[36] In addition to these physical injuries, Mr. Manoocheri testified that his pain affects his mood, making him irritable and unable to focus.

[37] Mr. Manoocheri was an active young man before the accident, and enjoyed spending time at the gym building strength. While he is still able to go to the gym, he must now be very careful in how he moves, and the weights which he can lift. The weights he used to use to warm up with are now too heavy for him to lift. His progression in the gym has been impacted, and the joy and satisfaction he used to experience has been tempered.

[38] Mr. Manoocheri has given up snowboarding, and for a number of years stopped riding his motorcycle altogether. In 2023 he started riding again, but only for limited rides of up to approximately 15 minutes.

[39] The defence submitted surveillance evidence of Mr. Manoocheri riding his motorcycle and working out at the gym. Mr. Manoocheri agreed that he rode his motorcycle to the gym, which was a 5 minute drive. Mr. Manoocheri reviewed the workout on the surveillance tape, and confirmed that it showed him using lighter weights than he lifted previously, adjusting for the pain in his shoulder, and doing the stretches he learned from physiotherapy. Mr. Altieri, an occupational therapist who examined Mr. Manoocheri, was shown the video and confirmed that what he saw was consistent with the limitations he observed in Mr. Manoocheri due to his injuries. In addition, Dr. Adrian was shown the video and confirmed that what he saw was consistent with Mr. Manoocheri's symptoms and his physical examination of Mr. Manoocheri.

[40] I find the injuries described by Mr. Manoocheri, Dr. Adrian and Dr. Steyn are consistent with the presentation of Mr. Manoocheri in the surveillance video, and I find Mr. Manoocheri's description of his limitations entirely credible.

[41] I find that the 2019 accident caused the following injuries to Mr. Manoocheri:

- a) Neck and upper midback pain,
- b) Soft tissue pain in the left shoulder girdle, and
- c) Fractured left clavicle, treated with open reduction and internal fixation surgery.
- d) Irritability associated with pain, and some anxiety associated with riding his motorcycle.

[42] Dr. Adrian assessed the prognosis for further recovery of his physical injuries to be poor. In addition, Dr. Adrian was of the opinion that these injuries leave

Mr. Manoocheri vulnerable to future injuries in his neck, upper midback and left shoulder girdle.

[43] Dr. Adrian agreed that injuries to joints and structures which had not healed within two years were unlikely to improve. He also stated that it was unlikely Mr. Manoocheri's tolerance for activities would improve in the future, because two years have passed and Mr. Manoocheri continues to experience pain.

[44] While in his report, in answer to the question of whether Mr. Manoocheri would have a permanent disability, Dr. Steyn opined that Mr. Manoocheri would not have any permanent disability, this statement is at odds with other sections of his report and his evidence under cross examination. Earlier in his report, Dr. Steyn stated:

At this time the prognosis of the whiplash associated disorder injury causing the back of his neck and shoulder blade area pain as well as his back pain to improve significantly in symptoms is poor. The relatively mild symptoms that he has at this stage are likely to persist long-term in my experience. Whiplash associated disorder injuries generally reach the point of maximal symptom recovery within six months to a year following the accident. The intermittent and occasional mild pain in the clavicle area, as well as the reported numbness over the incision of the clavicle repair are also likely to permanently persist.

[45] Under cross examination, Dr. Steyn agreed that Mr. Manoocheri's symptoms were permanent.

[46] I am satisfied that Mr. Manoocheri will suffer from permanent limiting symptoms arising from the injuries he suffered in the accident. The primary limiting symptoms are significant levels of pain in his left neck and left upper midback and shoulder region, which are triggered by prolonged sitting, awkward neck and back positioning, neck motion, reaching, lifting and carrying.

### **3. Credibility**

[47] Before I move to assessment of damages, I must address the defence submission on credibility. The defence submits that Mr. Manoocheri was neither credible or reliable. The defence submits that Mr. Manoocheri overstated his injuries

and failed to call corroborative witnesses with respect to his state of function pre and post injuries, and failed to call witnesses who could speak to current employment abilities.

[48] I found Mr. Manoocheri to be entirely credible. In considering the factors in play in an assessment of a witness's credibility, I agree with Mr. Manoocheri that the statement of the law in *Brodie v Khangura*, 2022 BCSC 1316 is a good summary of the relevant factors.

[49] In the case before me, Mr. Manoocheri had a good ability to recall events and did not modify his recollections throughout the trial. With respect to Mr. Manoocheri's injuries, the medical evidence which I have reviewed above is entirely consistent with Mr. Manoocheri's stated injuries. Mr. Manoocheri's evidence was reasonable and his demeanor was that of a careful witness. In my view, Mr. Manoocheri was not required to present a line-up of lay witnesses to confirm what he and the experts observed about his injuries and the impact they have had on his physical abilities.

[50] While the defence notes that the clinical records are inconsistent with Mr. Manoocheri's testimony at trial, I find that the clinical records were of limited assistance. I agree with the decision of Mr. Justice Smith in *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114 wherein he detailed the difficulty in placing undue reliance on clinical records, including the following:

[31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most

pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

[51] In the case before me, I find that the opinions of the experts who assessed Mr. Manoocheri, as I have set out above, are more than sufficient to overcome any minor discrepancies in the clinical records used in cross examination of Mr. Manoocheri.

[52] With respect to the current impact of his injuries on his work, I find Mr. Manoocheri credible and reliable. As to Mr. Manoocheri's predictions for future impacts, I accept his worries and concerns are valid and honestly held; however, I am not bound to accept his forecast of his limitations, no matter how honestly he holds those views today. I have considered the absence of witnesses from his workplace in my assessment of the likelihood of certain scenarios posited by Mr. Manoocheri in this litigation. However, this is not a negative reflection on the credibility or reliability of Mr. Manoocheri's honestly held views.

### **C. Is Mr. Manoocheri entitled to damages?**

[53] The plaintiff claims non-pecuniary damages, and damages for loss of earning capacity and special damages. The defence agrees that, if I find Mr. Manoocheri has met the burden under s. 24, Mr. Manoocheri is entitled to damages for non-pecuniary loss, cost of future care, and special damages. The defence disputes Mr. Manoocheri has suffered any loss of future earning capacity.

#### **1. Failure to mitigate**

[54] The defence argues that Mr. Manoocheri failed to mitigate his losses, and that his failure to mitigate should be taken into account in any damage award. The burden of proof is on the defence to establish that Mr. Manoocheri could have mitigated his loss, but failed to do so. The defence must prove not only that Mr. Manoocheri could have mitigated his loss if he had acted reasonably, but also how and to what extent that loss could have been minimized: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at pp. 163-164.

[55] As clarified by the court of appeal in *Haug v. Funk*, 2023 BCCA 110:

[65] I note in this regard that British Columbia is not out of step with other Canadian jurisdictions, a review of which shows that courts follow *Janiak* as having imposed a two-step test on a balance of probabilities. The below passage from the Alberta Court of Appeal in *Byron v. Larson*, 2004 ABCA 398, succinctly summarizes the issue:

15 The general proposition underlying the principle of mitigation is that a defendant cannot be held liable for damages which the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146 (S.C.C.) ("*Janiak*"). Once a plaintiff establishes the liability of the defendant, damages, and quantum of damages, the burden shifts to the defendant to prove that the plaintiff could and should have mitigated his or her losses: *Janiak* at 163. To establish mitigation, the defendant must prove on a balance of probabilities that: 1) the plaintiff acted unreasonably; and 2) had the plaintiff acted reasonably, his or her losses would be reduced or eliminated: *Janiak* at 163-166.

[Emphasis added; further citations omitted.]

...

[69] *Janiak* imposes a not insignificant burden of proof on a defendant seeking to reduce a plaintiff's damages on the basis of a failure to mitigate. This is appropriate when one appreciates that a successful plea of mitigation completely denies the plaintiff that portion of their damages attributed to the failure. There is no apportionment of liability for this portion of the loss; mitigation and contributory negligence are distinct concepts leading to different assessments.

[56] In support of their position on Mr. Manoocheri's alleged failure to mitigate, the defence relies on the statement by Mr. Altieri, an occupational therapist who conducted a functional and work capacity evaluation of Mr. Manoocheri. Mr. Altieri stated that Mr. Manoocheri would benefit from more physiotherapy. The defence also relies on Mr. Manoocheri's testimony that he used to attend physiotherapy, but has not gone back to physiotherapy even though his pain symptoms persist. Finally, the defence relies on Dr. Adrian's opinion that it would not be unreasonable for Mr. Manoocheri to return to treatment.

[57] I note that Mr. Altieri and Dr. Adrian are not Mr. Manoocheri's treating physician, or treating therapist. There is no evidence that Mr. Manoocheri failed to follow any treatments recommended by any of his treating medical practitioners.

[58] The defence concedes that there is no evidence before the court that, had Mr. Manoocheri done more physiotherapy, his losses could have been reduced or avoided.

[59] None of the evidence cited by the defence is sufficient to establish on a balance of probabilities that Mr. Manoocheri acted unreasonably or that, had Mr. Manoocheri attended more physiotherapy, his losses would be reduced. I find the defence has not met its burden to prove on a balance of probabilities that Mr. Manoocheri has failed to mitigate his losses.

## 2. *Non-pecuniary damages*

[60] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

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

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[61] Mr. Manoocheri seeks \$110,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is between \$80,000 and \$100,000.



[62] Mr. Manoocheri relies on *Van Sprang v. Tweed*, 2021 BCSC 69; *Dickenson v. Passero*, 2015 BCSC 908; *Taba v. North Shore Taxi (1966) Ltd.*, 2016 BCSC 1989; and *Chernichen v. Mundy*, 2022 BSCS 1704 where awards ranged from present values of \$107,000 to \$137,000 for plaintiffs suffering chronic soft tissue pain.

[63] The defence relies on *Charters v. Jordan*, 2023 BCSC 954; *Siu v. Clapper*, 2020 BCSC 944; and *Staff v. Moore*, 2020 BCSC 284 where awards ranged from \$70,000 to \$100,000 for non-pecuniary damages in cases with a range of soft tissue injuries.

[64] Each case is unique. Non-pecuniary damages must be assessed taking into account the unique factors arising in the case at bar. Of the cases noted above, I find the following to be useful comparators: *Chernichen* and *Staff*.

[65] Mr. Manoocheri was 24 years old at the time of the accident. He suffered a serious break to his collar bone, and soft tissue injuries which have had and continue to have a lasting negative impact on his life. Before the accident, Mr. Manoocheri was a respected and hard working employee at BCIT. He volunteered extra time, and took on difficult tasks. In 2021, Mr. Manoocheri moved to a position with Shared Services Canada (“SSC”), and he is concerned he will not be able to progress in that career due to his physical limitations and inability to put in the extra work required for more senior positions. He is a person who identified closely with his job, and received a lot of satisfaction from it. That job satisfaction has been negatively affected.

[66] Mr. Manoocheri’s days are focussed on managing his pain. He plans his work day so that he completes the work which requires the most concentration early in the day, and takes conference calls and meetings in the afternoon, often lying on his back. He requires additional time to recover from onsite jobs, where his pain increases due to awkward onsite positioning of equipment, or long travel.

[67] Mr. Manoocheri worries about the future, and his ability to continue working. He worries about whether he will be able to adapt to the pressure of having children

in the future. He worries about his ability to care for his parents as they age, as he is their only child.

[68] In all of the circumstances of this case, I find that an award of \$100,000 is appropriate for non-pecuniary damages.

### 3. *Loss of future earning capacity*

[69] Mr. Manoocheri does claim any past income loss, and submits that an earnings approach to the assessment of his loss of future capacity is appropriate.

[70] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position he would have been in had the accident not occurred. The plaintiff must establish an impairment in his earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[71] The court in *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

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

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

[72] Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies.

[73] In *Rab v Prescott*, 2021 BCCA 345 the court of appeal summarized the three step process to be engaged when determining claims for loss of future earning capacity:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras 93-95.

[74] At the time of the accident, Mr. Manoocheri was a junior systems analyst with BCIT, earning approximately \$1,910 biweekly. Mr. Manoocheri enjoyed the people he worked with while he was a BCIT intern, and knew what the environment and work flow would be at the BCIT IT department. He was offered a full-time position at BCIT after graduation, and decided that he would stay there rather than moving into the unknown. Mr. Manoocheri was a hard working employee, and did very well in his position.

[75] At the time of the accident he had been considering moving to a new position. He had starting speaking with other people about positions with a higher salary. He considered moving to private industry where he could earn more. He testified that it was common to train in Canada, and then move to the U.S. where the pay was much higher. He was not actively looking for a new position at the time of the accident, but was researching his options, and reaching out to other people, including friends and other students, so that he could make an informed decision.

[76] After the accident, Mr. Manoocheri was on sick leave from May 21, 2019 to June 9, 2019. When Mr. Manoocheri returned to work at BCIT, he experienced pain in his collarbone, shoulder, back and neck. He testified the pain does not come on right away, but builds, with the muscles seizing over the day, cramping in his back, between his shoulders, and up to the base of his skull. He attended physiotherapy,

where he learned stretches that allow him to manage the pain. If he feels the pain coming on, and is able to do his stretches, take a pain killer, and lie down, he can stop the progression of pain.

[77] During COVID, much of Mr. Manoocheri's work took place remotely over zoom. This allowed him to lie down and work, and relieve his pain. He worked remotely from September 2020 to summer 2021. By the summer of 2021, staff were required to come into the office more often, and at least one person was required to be onsite each day.

[78] By the summer of 2021, Mr. Manoocheri began looking to leave BCIT. He talked to people he knew in different jobs, to get a sense of the work they were doing. He talked to a person working at the City, and another working in a private company. Mr. Manoocheri felt the private company would be too challenging because of the heavy work load. He felt a job with the City might be a better fit for him. He was no longer considering working outside of Canada because he felt it was too risky. In the US, Mr. Manoocheri had no connections, no reputation, no insight into the work culture, and he was no longer willing to take on such risks associated with a job in the US.

[79] Mr. Manoocheri learned of an opportunity with SSC. He spoke to someone he knew who worked there, and learned what the roles and responsibilities would be, what the team and manager would be like, and how they handle operations. After interviewing with SCC, Mr. Manoocheri was offered a position, which he decided to accept.

[80] Mr. Manoocheri resigned from BCIT effective November 5, 2021. He began working for SSC as a support technician, starting November 8, 2021, where his starting salary was \$65,180. This position was described as an "IT-01" position.

[81] In his initial position with SSC, Mr. Manoocheri supported networks for various federal departments. His first three months with SSC were very slow for various internal reasons in the department, unrelated to Mr. Manoocheri's

performance. In February 2022, his work began to pick up. Mr. Manoocheri was responsible for “racking and stacking”, meaning putting in equipment for teams where the configurations of the systems were mostly done in Ottawa. He did some rewiring of switches and was responsible for confirming the systems were up and running. The switches are components that are roughly 20 inches wide and deep, and 2 inches high, and weigh approximately 20-25 lbs. They are often stacked up to six high.

[82] In the summer of 2022, Mr. Manoocheri moved to a new team, because he wanted to do more hands-on work with programming switches and configuring systems. His new team handles a different federal department and they are responsible for everything from the ground up, including configurations and trouble shooting. There is less onsite work with the new position.

[83] On March 30, 2023, Mr. Manoocheri was promoted to IT analyst, an “IT-02”, and his salary increased to \$74,129. Mr. Manoocheri currently earns \$75,129, with extended health benefits and pension contributions. He is eligible for paid overtime above the annual base rate of pay.

[84] For most of his time with SSC, when he was not onsite, Mr. Manoocheri was able to work remotely. In April 2023, a new policy was announced that required Mr. Manoocheri to be either in the office or onsite two days a week.

[85] When he works at home, Mr. Manoocheri begins work early, at approximately 7:30 a.m., while he is still relatively pain free. He does the more detailed work early in the morning before he is fatigued. By 11:00 am his back is painful and he needs a break. He needs to lie down, and is no longer able to complete detailed work at the computer. Typically he will then conduct online meetings while lying on his back. After his meetings are over, he tries to go to the gym. When he returns from the gym, the people in Ottawa have left for the day and things slow down. He is able to speak on the phone, do email, do planning and send messages, all while lying down and resting his back. Ms. Ariel Edmunson, Mr. Manoocheri’s partner who lives with him, corroborated Mr. Manoocheri’s work

schedule when he works from home. She also testified that he become more withdrawn and agitated as the day goes on, and he complains about pain in his back.

[86] When he has to work in the office, he starts at 7:30 am. His in-office days are spent in meetings, collaborating with others on the team. He does not work at a desk for extended periods of time on these days, which is easier on his back. However, by lunch time he will not be feeling great. He uses medication if he is in pain. His supervisor allows him to leave early if he is feeling bad. He does not go to the gym on the days he goes to the office as the transit is too difficult for him. Ms. Edmunsen confirmed that when Mr. Manoocheri gets home from the office, he goes straight to the bed or the couch and lies down. He doesn't go to the gym or do anything active.

[87] Mr. Manoocheri is usually in too much pain to socialize after work. He only participates in work related after hours activities if it would harm his career not to go. He is concerned that he is losing out on opportunities to build relationships because he has to leave right after work to go home and rest.

[88] When Mr. Manoocheri has to work onsite, he typically has to perform physical work in awkward spaces. The systems are usually kept in telecom rooms that are often no bigger than a closet. He has to swap out equipment and balance his laptop in awkward positions which cause pain in his neck and back. There are no chances for breaks, and he requires medication to manage his pain. Mr. Manoocheri gave an example of a recent on-site job, where he had to drive to Nelson, BC. He was originally expected to drive to Nelson one day, do the work the next day, and drive home the same day after completing the work. He was not able to do that due to pain, and had to stay a second night. After the drive home, the pain was so excruciating that he had to take the next day off work to recover.

[89] I find Mr. Manoocheri's evidence of his current abilities at work to be credible and reliable. I accept his description of how he presently is able to conduct his work days. I find that the evidence of his girl friend corroborates Mr. Manoocheri's evidence.

[90] Mr. Manoocheri agreed under cross examination that he has not specifically sought any accommodations for his injuries, although he recognizes his employer has a duty to accommodate for injuries. Mr. Manoocheri testified he takes approximately 1 sick day a month.

[91] Mr. Manoocheri testified that the next progression was to an "IT-03" position, which is a tech advisor. This position is the same level as a team lead, and can be either a technical or a managerial position. Mr. Manoocheri testified that the jump from IT-02 to IT-03 was significant, as the IT-03 position requires longer hours and additional coordination with other teams. The IT-03 position who works over Mr. Manoocheri at the present, typically works a 12 hour day. There are two more levels: IT-04 and IT-05 which operate on a national scale, and have a greater work load than an IT-03.

[92] Mr. Manoocheri has not applied for any other jobs since he started working at SSC. He believes he could not survive in the more competitive private sector given the accommodations he requires. He is concerned that he could not take on an IT-03 position, or anything higher, because of the additional work load those positions require. Mr. Manoocheri believes he can continue in his current position, as long as it remains a three day work from home position. If he was required to work in the office five days a week, he is concerned about how he could manage that.

[93] Mr. Manoocheri also expressed concern that if he is not able to be promoted, due to his injuries, he may need to find ways to reduce his expenses. Both Mr. Manoocheri and Ms. Edmunsen testified that they were considering a move to Calgary, where the cost of living is less expensive than Vancouver. Mr. Manoocheri testified that he could move laterally within SSC, to a position in Calgary if one became available.

[94] Mr. Manoocheri's annual employment income from 2017 to the date of trial was:

2017	\$32,780	BCIT
2018	\$52,240	BCIT
2019	\$64,156	BCIT
2020	\$64,351	BCIT
2021	\$63,789	BCIT/SSC
2022	\$68,591	SSC
2023	\$74,129	SSC

[95] In 2022, in addition to his employment income, Mr. Manoocheri received \$10,420 as the cash out value of his BCIT pension.

[96] Mr. Manoocheri agreed under cross examination that he has received positive reviews each year. The performance reviews Mr. Manoocheri has received in his current employment point to his successful and valued work, including:

- a) "He rescued GCWiFi deployment at Capital NRCan office on Vancouver Island by stepping in and covering the gaps no one else could fulfill",
- b) "In addition to meeting to meeting all of the above expectations, Ash has been a pleasure to work with. He is self sufficient, reliable, hard working, effective and an efficient team member",
- c) "Ash has volunteered for many work related tasks and projects and offered a helping hand to his peers",
- d) "Ash received kudos for stepping in for other service lines and rescuing a number of situations this year alone",
- e) "Ash has volunteered for a number of tasks and projects as well as assisting IT-02s and IT-03 technical advisor with complex network deployments as part of his learning and IT-02 development", and
- f) "His team work, analytical thinking, and client focused skills couple with strong technical, verbal and written communication abilities have helped him in landing a well deserved promotion to IT-02 position on March 30, 2023. Well done, Ash!"

[97] In March 2023, Mr. Nicholas Altieri, a senior occupational therapist, performed a functional/work capacity assessment of Mr. Manoocheri, and his expert report was admitted into evidence. Mr. Altieri noted Mr. Manoocheri's current



symptoms included constant pain in his left shoulder blade, intermittent pain in the base of his neck on the left side, and altered sensation over the anterior aspect of his left shoulder. These symptoms are consistent with Mr. Manoocheri's testimony at trial, and the medical evidence accepted at trial.

[98] Mr. Altieri was of the opinion that Mr. Manoocheri did not meet the full physical demands associated with his position at SSC. He has limitations related to prolonged keyboarding and associated postures, and limitations with prolonged outer range forward reaching and reaching above shoulder height. His limitations are pronounced when Mr. Manoocheri is required to be onsite installing computer networks and working in confined spaces.

[99] Mr. Altieri opined that Mr. Manoocheri requires work that allows him to limit his keyboarding to 20-25 intervals. He is able to meet the demands of his work provided he can pace himself, take breaks as needed to manage his symptoms, and use ergonomic supports. To maintain his current work participation, Mr. Manoocheri will experience some degree of symptom aggravation, will require medications to alleviate and manage his symptoms, and will require pacing of his work activity to manage his symptoms. He will experience symptom flare-ups and will need a sympathetic employer that will allow him to miss work following periods of increased overtime while performing onsite computer and network set ups.

[100] I am satisfied that Mr. Manoocheri has established on the evidence that the injuries he suffered in the accident will continue to impact his physical ability to perform his work as an IT analyst at the highest level. His physical limitations will negatively impact his ability to progress in his work, in a way that he was not limited before the accident.

[101] I am also satisfied that there is a real and substantial possibility that some pecuniary loss will arise as a result of his physical limitations. I say this because I am satisfied that he is compromised in his ability to work at all tasks for extended periods of time without taking breaks, to work on a computer for more than several

hours at a time without needing to lie down, and to perform network set-ups, overtime, and travel without requiring hours or days to recover.

[102] In valuing the future loss, Mr. Manoocheri submits that I should consider that he was likely to obtain a position in the U.S. at a company such as AT&T, earning substantially more than he would in Canada. Mr. Manoocheri submitted an advertisement for a position, which he said he would have been able to obtain but for the accident, in which he would earn \$79,000-\$115,000 USD.

[103] Mr. Manoocheri impressed me as a very cautious individual. His career choice to remain at BCIT after graduation reflected his cautious nature. He testified he wanted to stay with the people and work environment he knew and was familiar with. When he moved to SSC, he did so after discussions with friends he knew who worked there. Again, he was very cautious and careful about ensuring that the work environment would be a good match before he made the move. I do not accept that there is a real and substantial possibility that Mr. Manoocheri would have taken a position in the U.S. I find such a move would be unlikely given Mr. Manoocheri's cautious personality. I find that Mr. Manoocheri has not established a real and substantial possibility he would have taken a job in the U.S. but for the accident.

[104] Mr. Manoocheri also submits that he has established a real and substantial possibility that he would have progressed through the levels of IT-03, IT-04 and IT-05 in his career at SSC, but for the accident. I agree that Mr. Manoocheri has established, given his prior work history and his very positive reviews, a real and substantial possibility that he would have progressed to an IT-03 position within five years.

[105] Mr. Manoocheri also submits that he would have then progressed to an IT-04 position, which is a management position, and ultimately an IT-05 position, which is a director level position in the federal government. With respect to these last two positions, I am not satisfied that Mr. Manoocheri has established a real or substantial possibility that he would have achieved these positions. No witnesses were called to assist me in understanding how many people typically rise to such positions, how

many such positions are available across the country, or the kinds of skills required for such positions. To agree with Mr. Manoocheri's proposition would be purely speculative on the evidence before me.

[106] Having found that there is a real and substantial possibility that Mr. Manoocheri would have reached an IT-03 position within five years, I must now consider the likelihood of any loss occurring. In other words, for Mr. Manoocheri to suffer a loss in this respect, I must also find that there is no likelihood that Mr. Manoocheri will become a IT-03 even with his injuries.

[107] Mr. Manoocheri submits that he is unlikely to progress further in his career at SSC, and will remain at IT-02. I am not persuaded that he will finish his career at this level. He is clearly an important member of the team, and has received extremely positive reviews over his time thus far. Mr. Manoocheri agreed that his employer has a duty accommodate him, although he has never formally asked for any accommodation. There was no evidence before me that he would not be accommodated with an ergonomic desk or other equipment, or be allowed to take breaks to rest his back. While I accept Mr. Manoocheri's apprehension about moving to an IT-03 position, I am not satisfied that such a move would be impossible for him. I find that there remains a real possibility that Mr. Manoocheri will be able to move to an IT-03 position at some point in the future in his career with SSC, even with his injuries. I assess the likelihood of Mr. Manoocheri progressing to an IT-03 position is 20%.

[108] I assess that there is an 80% likelihood that Mr. Manoocheri will not progress to an IT-03 position, given his current injuries.

[109] Mr. Manoocheri submits that if he remains in the IT-02 position for the rest of his career until age 65, the present value of his earnings would be \$2,363,977. Mr. Manoocheri also provided the present value of his earning to age 70, but I am not satisfied Mr. Manoocheri has established a real and substantial possibility he would work past 65.

[110] Mr. Manoocheri submits that if he was promoted to IT-03 when he was 31 years old, and stayed in that position until age 65, the present value of his future earnings would be \$2,749,047. The difference between these two scenarios is \$385,070.

[111] The determination of a loss of earning capacity is an assessment, and not a mathematical calculation. The present value calculations are helpful in informing my assessment, but I am not bound by them.

[112] I assess Mr. Manoocheri’s future income loss at \$400,000. The likelihood of this loss arising is 80%, resulting in a loss of \$320,000.

**4. Cost of future care**

[113] The defence agrees that Mr. Manoocheri is entitled to \$1,500 for cost of future care in relation to future kinesiologist sessions to ensure Mr. Manoocheri’s gym workouts do not place unnecessary strain on his body. Mr. Manoocheri did not dispute this award.

**5. Special damages**

[114] The parties agree on payment of special damages in the amount of \$206.50.

**IV. Conclusion**

[115] Mr. Manoocheri is awarded the following damages against the defendants, jointly:

Non-pecuniary damages	\$100,000
Loss of future earning capacity	\$320,000
Cost of future care	\$1,500
Special damages	\$206.50
TOTAL	\$421,706.50

[116] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Mr. Manoocheri at Scale B.

“W.A. Baker J.”