IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Riascos v. Raudales,*
2024 BCSC 26

Date: 20240108
Docket: M184698
Registry: Vancouver

Between:

Angel Rodolfo Calimeno Riascos

Plaintiff

And

Karla Raudales-Figueroa, Insurance Corporation of British Columbia, John Doe and Richard Roe

Defendants

- and -

Docket: M1811798
Registry: Vancouver

Between:

Angel Rodolfo Calimeno Riascos

Plaintiff

And

Anmol Sian and Sucha Sian

Defendants

And

Insurance Corporation of British Columbia

Third Party

- and -

Docket: M220295
Registry: Vancouver

Between:

Angel Rodolfo Calimeno Riascos

Plaintiff

And

Adila Hashimi

Defendant

Before: The Honourable Madam Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:	M.L. Elliott M. Burtini
Counsel for the Defendants, Karla Raudales-Figueroa in Action No: M184698, Sucha Sian in Action No: M1811798 and Adila Hashimi in Action No. M220295:	H. Frost A. Mihailovic
Counsel for the Defendant, Insurance Corporation of British Columbia:	F. Mohamed
Place and Dates of Trial:	Vancouver, B.C. January 30–31, 2023 February 1–3, 6–7, 9, 2023 June 20–22, 2023
Place and Date of Judgment:	Vancouver, B.C. January 8, 2024

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INTRODUCTION

[1] The plaintiff, Angel Rodolfo Calimeno Riascos, claims for damages arising from three motor vehicle accidents: the first occurring on April 13, 2016, (the "1st Accident"), the second on June 27, 2017 (the "2nd Accident"), and the third on January 20, 2021 (the "3rd Accident").

[2] In the 1st Accident, the plaintiff was a passenger in a vehicle. In the 2nd Accident and 3rd Accident, the plaintiff was the driver.

[3] At the time of the 1st Accident, the plaintiff was a healthy and active 39-year-old who worked in a physically demanding job as a wooden pallet repairperson. He had been in that job for approximately 18 months after arriving in Canada in 2014.

[4] As a result of the 1st Accident, the plaintiff says that he sustained lasting injuries and symptoms and that the 2nd Accident and 3rd Accident resulted in an aggravation of these injuries. As well, the plaintiff says that the 2nd Accident resulted in a new onset of left elbow pain.

[5] The plaintiff contends that the accidents have changed his income earning capacity. He was forced to leave his high earning job because, as a result of the accidents, he no longer had the physical capacity to do the work in the future.

[6] The plaintiff seeks non-pecuniary damages, damages for loss of past and future income capacity, damages for cost of future care, and special damages.

[7] The defendants concede that the plaintiff sustained injuries but argue that the injuries have not affected his life as much as he alleges. They argue that the life he planned to have in Canada is not much different than what he has now. They also contend that his current function is better than he alleges and the quantum of damages must account for his failure to mitigate his losses.

[8] For the most part, the parties agree on special damages save and except a few minor expenses.

BACKGROUND

[9] The parties provided a great deal of evidence and material through various lay and expert witnesses. They also made detailed submissions, both oral and written, on the facts and the law they consider to be relevant. While I have considered all of the evidence, material, and the law, in these reasons I will focus on the facts and law that I consider to be most directly relevant.

[10] The plaintiff called six lay witnesses. Mr. Edward Leon, Mr. Elias Sanchez and Mr. Werner Vasquez were co-workers of the plaintiff. The plaintiff also called his wife, Faride Esmail, and his current supervisor, Mr. Jas Rahal. A witness to the 2nd Accident, Mr. John Blackburn testified on behalf of the plaintiff. The defendant, Ms. Karla Raudales-Figueroa also testified.

[11] A number of experts testified for both parties.

[12] At the time of trial, the plaintiff was 45 years old. He was born and raised in Colombia. The plaintiff is married and has two children aged 11 and 18. They live in a townhouse in Surrey, which the plaintiff purchased prior the 1st Accident.

Circumstances Prior to the Accidents

[13] Prior to the 1st Accident, the plaintiff was an active person, who worked hard in a physically demanding job which he described as his “dream job”.

[14] The plaintiff came to Canada as a refugee with very little English-speaking skills. Despite this, he was able to find a job that would allow him to live the immigrant dream and with plans to eventually reunite with his family who remained in Colombia.

[15] The plaintiff spent the first 39 years of life in Colombia where he led an active life from a young age playing sports and other physical activities.

[16] After graduating from the University of Valle with a diploma in information technology, he worked in IT at various shipping companies in Buenaventura. His

wife worked as a subdirector for a local bank. Both their children were born in Colombia.

[17] The plaintiff described his family life in Colombia as one oriented around sports and activities. The plaintiff spent much of his spare time playing soccer and basketball with his friends. He kept himself in shape by running or attending the gym three to four times per week. As well, he taught his son to play soccer. With his wife, he enjoyed social outings and dancing together.

[18] In Colombia, the plaintiff and his wife shared the household chores. However, he was responsible for the heavier work such as mopping, cleaning floors and painting.

[19] Life was good for the plaintiff and his family. However, in 2013 the family's fortunes took a turn which required the plaintiff to separate from his family for several years. The plaintiff started receiving death threats from the local drug cartel when the plaintiff refused to provide shipping logistics to them. The threats to his life forced the plaintiff to relocate his family and remove himself from the country. At the time, his daughter was one year old and his son was nine years old.

[20] The plaintiff's journey led him first through the United States before he ultimately arrived in Canada in November 2013. He was eventually granted refugee status in Canada in February 2014.

[21] Life in Canada was initially difficult. He received social assistance for a few months but then was able to find support in the Canadian Colombian community.

[22] Through friends in the Colombian community, in August 2014, the plaintiff began working as a wooden pallet repairperson at Advance Pallet & Crate Ltd. ("Advance Pallet"). The work involved removing damaged pieces of wood from heavy pallets and replacing them with new pieces. The pallets and the tools used to repair the pallets are all heavy. The Court was provided with video evidence of what entails in this line of work and the type of pallets repaired.

[23] The work involved manually removing a pallet from a stack of up to 18 pallets onto a work table. Depending on whether the pallet is wet or not, its weight can range from 80 to 100 pounds. The pallet is then repaired on both sides using a host of heaving tools including hammer, nail compressor gun, grinder and crow bar. The repaired pallet is then manually placed on a conveyor belt. Despite the physically challenging nature of the job, the plaintiff found great satisfaction not only because he was able to physically do the work but also because he was paid well for the work.

[24] At Advance Pallet, workers are paid by the number of pallets repaired per day, thereby creating a direct link between individual productivity and income. While it took the plaintiff about five to six months to figure out the nuances of the job, he eventually became efficient and with his strength and work ethic, quickly became one of the top-producing pallet repairpersons at Advance Pallet. The plaintiff repaired heavier pallets which paid more than the lighter ones. He often worked six days a week.

[25] The plaintiff testified that he worked on a three-man team. He was on what was referred to as “the dream team”— a team known for their speed and high levels of production. The team repaired approximately 900–1000 pallets per day.

[26] The plaintiff’s work at Advance Pallet prior to and after the 1st Accident was confirmed by his co-workers, including his mentor and supervisor, Mr. Vasquez, a senior pallet repairperson, and Mr. Sanchez and Mr. Leon. Mr. Vasquez confirmed that in the months leading up to the 1st Accident, the plaintiff had no problem working with the heavy pallets; that he was very strong, very agile and very fast. All three men confirmed that the plaintiff did not have any physical limitations and did not complain of pain prior to the 1st Accident.

[27] It was his goal to continue working at Advance Pallet for as long as his body could do the work. The plaintiff estimated he would work there for at least another 10 to 15 years, and had hoped that he would retire from this job following the path of Mr. Vasquez.

[28] In 2015, his first full year at Advance Pallet, the plaintiff earned $75,831. In 2016, he was on pace to earn over $87,000 but for the 1st Accident.

[29] The plaintiff was able achieve financial success at Advance Pallet and in August 2015, he purchased a townhouse in Surrey. In anticipation of his family joining him, he managed to do a number of renovation projects in the townhouse on his own.

[30] The plaintiff's goal was that, with his steady high income, he would be able to support his family when they came to Canada and support his wife's goal to study English and become a teacher or a social worker.

[31] Outside work, the plaintiff continued to stay active. Despite long days in a physical job, the plaintiff played casual soccer and basketball with friends after work. He also attended the gym for weight training three to four times a week and enjoyed going swimming and for hikes. This was confirmed by Ms. Raudales.

[32] Having enrolled in English classes which he attended in the evening, the plaintiff found them to be difficult and he was not learning as quickly as he had hoped.

[33] The plaintiff has no pre-accident medical issues of any significance. During the 18 months he worked at Advance Pallet prior to the 1st Accident, the plaintiff experienced a few minor injuries: an abdominal strain he incurred from lifting a pallet, a sore right wrist when a pallet fell on it, a bruised finger when he hit it with a hammer, and a piece of wood getting in his left eye. In total he missed approximately eight to ten days for these minor injuries. I accept that the symptoms from these injuries resolved completely prior to the 1st Accident.

[34] In particular, prior to the 1st Accident, I accept that the plaintiff did not have any injuries to his lower back, neck, or knees, nor did he have any issues with headaches, difficulty sleeping, cognition, or memory.

[35] The plaintiff acknowledges that he experienced a period of stress when he first arrived in Canada and sadness on being separated from his family. However, he was not diagnosed with any sort of depressive mood disorder. There is no evidence to the contrary.

[36] I find that before the 1st Accident, the plaintiff was, and remains, a resilient person, who carries on in the face of adversity.

The Accidents

[37] On April 13, 2016, the plaintiff was a passenger in a 2004 Nissan Maxima driven by the defendant, Ms. Raudales-Figueroa. Ms. Raudales is the plaintiff's friend and was his tenant at that time.

[38] Ms. Raudales was driving the plaintiff to work in the early hours. While travelling westbound down a hill on Old Yale Road near 128 Street in Surrey she lost control of her vehicle and collided with a telephone pole. Ms. Raudales testified that she was travelling approximately 65 km/hr on impact. There was significant damage to Ms. Raudales' vehicle which ICBC deemed was a total loss.

[39] The plaintiff says the impact was strong and he lost consciousness. He was taken by ambulance to the hospital where he was treated for his injuries.

[40] As I have noted earlier, Ms. Raudales has admitted liability for the 1st Accident.

[41] The 2nd Accident occurred on June 27, 2017 when the plaintiff was stationary at a four-way intersection in the Surrey Central City Shopping Centre parking lot. The defendant, Anmol Sian reversed, drove around another other stopped vehicle, entered the intersection without stopping and collided with the plaintiff's vehicle.

[42] There were a series of impacts. Mr. Blackburn testified that the impact was continuous, with sufficient force to shake and rock the plaintiff's vehicle. He noted that the damage to the plaintiff's driver-side door prevented the plaintiff from exiting the vehicle after the accident.

[43] The defendant, Anmol Sian had permission to drive the motor vehicle owned by his father, the defendant, Sucha Sian, at the time of the accident. Anmol Sian was subsequently convicted of impaired driving in relation to the accident.

[44] The impact resulted in $6,410 in damage to the plaintiff's vehicle and $1,219 in damage to the defendant's vehicle.

[45] Anmol Sian has admitted that, at the time of the 2nd Accident, he was negligent in his operation of the motor vehicle owned by his father. Given that Anmol Sian did not respond to a Notice to Admit sent by the plaintiff, it is a deemed admission.

[46] On January 20, 2021, the plaintiff was involved in the 3rd Accident, traveling northbound on Nordel Way in Surrey when he stopped at a yellow light at the intersection at Brook Road. The Defendant, Mr. Adila Hashimi rear ended the plaintiff's vehicle. Liability has been admitted.

The Plaintiff's Injuries

[47] The plaintiff submits that he suffered the following injuries and symptoms as a result of the 1st Accident:

a) Mild traumatic brain injury;

b) Post-concussive symptoms including lack of concentration, memory difficulties, and fatigue;

c) Myofascial and mechanical issues to his neck, shoulders, back, right wrist, and knees (left worse than right);

d) Headaches;

e) Difficulty sleeping; and

f) Anxiety and major depressive disorder.

[48] He says that the 2nd Accident and 3rd Accident aggravated the above injuries, specifically to his low back as well as his headaches and mood. As well, he argues that the 2nd Accident also resulted in a new onset of left elbow pain.

Plaintiff's Post-Accident Circumstances

[49] As noted above, the plaintiff submits that after the 1st Accident, he suffered physical and psychological injuries including injuries to his head, neck, low back, knees (especially the left one), shoulders, and right wrist, and had strong headaches which lasted up to three days. As well, he testified to experiencing cognitive issues.

[50] As a result of the injuries sustained from the 1st Accident, the plaintiff was off work for eight months. He returned to work for four shifts in December 2016 but could not continue. He was off work again until April 17, 2017.

[51] When he finally returned to work he felt weak, without any strength. The persistent back pain, headaches, wrist pain, and knee pain prevented him from performing his job with the same intensity prior the 1st Accident. He experienced low back pain at work every day after returning to Advance Pallet, culminating in a hospital visit on May 12, 2017. This continued right up until the 2nd Accident.

[52] This was confirmed by his co-workers. Mr. Vasquez testified that he often observed the plaintiff in pain and that the plaintiff was not able to do his work in the same manner as before the 1st Accident. He also noted the plaintiff attempted to work with lighter pallets and he often missed days of work.

[53] After the 1st Accident, the plaintiff was prescribed medications for pain which included Naproxen, Diclofenac, Cyclobenzaprine, and Ketorolac. He also attended physiotherapy and occupational therapy.

[54] The plaintiff's family arrived in Canada on May 31, 2017. It was not the reunion that he had hoped for. The plaintiff was struggling financially, which affected his mood and strained his relationship with his children and wife. He found himself being irritable with son, often arguing with him and found it difficult to support his

daughter with her anxiety. As well, he frequently argued with his wife, which affected their relationship.

[55] Ms. Esmail confirmed that the plaintiff missed considerable work at Advance Pallet due to his pain. She testified that the plaintiff would come home after work in pain. Because of their financial struggles, she was forced to seek employment, working at a window manufacturing company. She enrolled in evening English classes. Their plans of her studying to be a teacher or social worker were put on the back burner.

[56] As noted above, following the 2nd Accident, the plaintiff's injuries from the 1st Accident were aggravated. As well, he developed a new problem with his left elbow.

[57] After one month of a gradual return to work, the plaintiff attempted to continue working full-time at Advance Pallet. He was in debt from his time off after the 1st Accident, having fallen behind in his mortgage payments, and needed to support his family and pay his mortgage.

[58] On his return, the plaintiff found that lifting the heavy pallets hurt his low back and his knee, hammering hurt his wrist and reaching for pallets at the top of a stack hurt his neck.

[59] He struggled to keep up with his previous production level because he no longer had the same skill or strength. This affected his earnings. Mr. Vasquez confirmed that the plaintiff's productivity decreased dramatically. The plaintiff sought accommodations from his employer but it was not feasible in this line of work. The only lighter work was supervisory, for which the plaintiff did not have the requisite seniority. Mr. Vasquez also corroborated this.

[60] As the plaintiff no longer had the strength or ability to undertake the demands of working with the heavy pallets, he left Advance Pallet on October 7, 2017.

[61] The plaintiff was then able to find similar work at 18 Wheels Logistics Inc. ("18 Wheels"), where the pallets were lighter and easier to work with. However,

the rate per pallet was lower than what he had earned at Advance Pallet. Despite the lighter pallets, he was only able to repair 150 to 200 pallets per day. On a good day, he was able to repair up to 250 pallets per day. He continued to struggle physically with back and neck pain. He was not able to produce at an acceptable rate because his “body would not go along”. He consistently missed days of work due to his pain.

[62] In February 2018, the plaintiff left 18 Wheels due to his continued pain. He attempted to do lighter work in various jobs at Geo Pallets, Enviro Pallets, Express Container Management (“ECM”), UniFirst Uniform Services, Fleck Contracting, and Aris Moving. In each of these positions, the plaintiff found that he was limited in what he could do as a result of his lower back pain and continued to have pain sustained from the accidents. He also continued to miss work as a result of this pain. For instance, the plaintiff took the Court to an email dated March 15, 2019, wherein he advised his supervisor that he would need to miss work due to back pain.

[63] After the 2nd Accident, the plaintiff continued to attend for physiotherapy, massage therapy, occupational therapy, and active rehabilitation.

[64] In August 2019, the plaintiff was injured at work while working at ECM. While picking up a box from the floor, he felt increased pain in his low back. He made a WorkSafe BC claim and missed three months of work.

[65] The plaintiff testified that his low back pain was continuous since the 1st Accident and he worked with pain while at ECM. Ms. Esmail’s evidence confirms this. His pain continued right up until the workplace accident. After returning to work, he continued to feel the same pain.

[66] At the time of the 3rd Accident, the plaintiff was in between jobs, having been unable to find a job that he felt capable of performing given his limitations. The plaintiff fixed computers at home, for which he earned approximately $100 per

month. His clients were usually friends who needed repairs to their computers. He did not think this kind of work to be a full-time endeavour.

[67] Following the 3rd Accident, the plaintiff continued to experience similar pain, but the pain increased slightly. He continued having trouble sleeping as well. His mood remained “the same” and he continued to be “irritable” and was “always in a bad mood”. He felt that his 3rd Accident “increased [his] problems” because it was “another accident on top of the others”.

[68] In August 2021, he started working in demolition with Fleck Contracting. He left the position in December 2021 because of the pain he experienced while bending to bring down walls and ceilings.

[69] Eventually, he resigned himself to return to work at 18 Wheels. He says he “has no options”. All of his symptoms of pain and depressed mood continue to present date, as do his corresponding limitations.

[70] The plaintiff testified that he has experienced neck and shoulder pain practically everyday since the 1st Accident. His pain is aggravated when he needs to look up to bring down a pallet to his work table or when he has to rotate his neck from side to side for an extended period of time. He tries to stretch when he can during the work day. I accept that, while his neck pain may be slightly better, it has not substantially improved since the 1st Accident.

[71] Mr. Rahal, the plaintiff’s supervisor at 18 Wheels, testified that the plaintiff consistently fails to hit production targets and his job is in jeopardy. Mr. Rahal notes that, while this work involves a special skill set, he may have to replace the plaintiff if he finds the right candidate who can outperform the plaintiff. Mr. Rahal also noted that work accommodations are not feasible in this line of work.

[72] The plaintiff testified that he struggles to do housework. He is limited by his low back pain from being able to do simple chores such as laundry, mopping, or sweeping for any extended period of time. Since his family arrived from Colombia

after the 1st Accident, the plaintiff has performed only 20% of the household chores. His wife and son have taken over doing the remaining chores.

[73] While the plaintiff has sought out various treatments including physiotherapy, registered massage therapy, occupational therapy, ergonomic aids and various visits to the emergency room, he has not been able to sustain the expenses associated with these treatment methods due to his financial circumstances. For the same reasons, he has not sought medical treatments associated with either his mood problems or anxiety. Although he currently takes Celecoxib for his pain, the plaintiff testified that he has not taken prescribed anti-depressants because he does not like taking medications.

EXPERT EVIDENCE

[74] The plaintiff called the following experts:

a) Dr. Jacqueline Foley – Physical Medicine and Rehabilitation Specialist;

b) Dr. Garth Kroeker – Psychiatrist;

c) Mr. Rob Corcoran – Occupational Therapist; and

d) Mr. Trevor Lesmeister – Vocational Rehabilitation Specialist.

[75] Mr. Darren Benning, an economist, provided a report dated October 28, 2022, which was admitted into evidence by consent.

[76] The defendants called the following experts:

a) Dr. Simon Horlick – Orthopedic Surgeon.

b) Dr. Andrew Woolfenden, a neurologist, whose report of October 13, 2022, was admitted into evidence by consent.

[77] There were no objections to the admissibility of the expert evidence.

Dr. Jacqueline Foley – Physiatrist

[78] Dr. Foley was qualified to provide opinion evidence in physical and rehabilitation medicine. She assessed the plaintiff on September 21, 2020 and July 6, 2022 and drafted two reports, the first dated October 19, 2020, which covered the first two accidents and a second, updated report dated August 9, 2022, which included the 3rd Accident.

[79] In her first report, Dr. Foley diagnosed the plaintiff with the following:

a) Mild traumatic brain injury;

b) Myofascial injury to the muscles of the suboccipitals, cervical paraspinals (left greater than right), and lumbar paraspinals; and

c) Mechanical cervical and lumbar spine pain

[80] Dr. Foley describes the plaintiff's condition as follows:

> Mr. Riascos has chronic daily musculoskeletal pain involving his posterior neck and low back that is at times severe. He experiences bilateral knee pain and right-hand pain. He has chronic headaches; his headaches are present greater than 15 times per month and last for longer than four hours at a time and meet the criteria for chronic migraine headache. He has depressed mood and symptoms of anxiety…

[81] With respect to the role of centralization, Dr. Foley opines:

> It is my opinion that Mr. Riascos has centralization of his pain. This is when the brain and spinal cord become sensitized to the pain and reproduce pain signals, regardless of the actual anatomy and physiology of the body structures. It is my opinion that Mr. Riascos now has chronic pain secondary to centralization of his pain.

[82] On causation, Dr. Foley opines:

> It is my opinion that but for the motor vehicle accident on April 13, 2016 (MVA1) Mr. Riascos' symptoms would not have developed.
>
> Following MVA2 Mr. Riascos experienced worsening of his chronic musculoskeletal pain, chronic migraine headaches, depressed mood and sleep disturbance.

[83] Finally, with respect to prognosis, Dr. Foley opines:

> It is my opinion that Mr. Riascos now has persistent pain secondary to centralization of his pain. It is probable he will continue to experience residual pain in the future in some form. It is my opinion that Mr. Riascos has experienced a permanent partial disability of activities of daily living, instrumental activities of daily living, social, recreational and vocational function.

[84] In her second report, Dr. Foley provided an updated prognosis:

> a) Chronic musculoskeletal pain of his posterior neck and lower back with centralization of pain;
> b) Post traumatic headaches in keeping with chronic migraine;
> c) Symptoms of moderate depression and severe anxiety;
> d) Sleep disruption; and
> e) Bilateral knee pain and right-hand pain

[85] However, her opinion from her first report remains substantially unchanged in her Second Report:

> Mr. Riascos' physical examination reveals tenderness on palpation of the suboccipitals, cervical paraspinals, and lumbar paraspinals, L3 to S1. His low back pain increases with lumbar extension and rotation maneuver bilaterally… He experiences bilateral anterior knee pain, left side greater than right side. Mr. Riascos knee pain has improved from his last assessment but has not fully resolved. He continues to have knee pain with resisted knee extension and squatting.
>
> …
>
> [Headaches] are associated with visual symptoms, nausea and light sensitivity. His headaches are at times 8/10 in severity and can involve the entire head. His headaches improve when laying down in a quiet dark room.
>
> Mr. Riascos has symptoms of moderate depression and severe anxiety…
>
> Mr. Riascos' sleep is disrupted nightly. Mr. Riascos awakes nightly with low back pain and posterior neck pain. He is able to fall back to sleep with position changes. Mr. Riascos has had some improvement in his sleep since last assessment but despite some improvement, he awakes every night with pain symptoms.
>
> It is my opinion that Mr. Riascos has centralization of his chronic pain. This is when the brain and spinal cord become sensitized to the pain and reproduce pain signals, regardless of the actual anatomy and physiology of the body structures. It is my opinion that Mr. Riascos is experiencing chronic with centralization of his pain.

[86] With respect to the 3rd Accident, Dr. Foley provides an updated opinion on causation:

> It is my opinion that but for the motor vehicle accident on April 13, 2016 (MVA1) Mr. Riascos' symptoms would not have developed.
>
> …
>
> It is my opinion that MVA2 did not result in any new injuries but resulted in worsening of the injuries he sustained in MVA1.
>
> …
>
> It is my opinion that Mr. Riascos did not experience any new injuries in MVA3 but had further worsening of his low back pain symptoms, posterior neck pain symptoms, chronic migraine symptoms and mood symptoms. His anxiety symptoms worsened from moderate to severe anxiety following MVA3.

[87] Dr. Foley's opinion on prognosis after her second assessment is that "the plaintiff's partial disability of activities of daily living, instrumental activities of daily living, recreation, social and vocational function was elevated to permanent".

[88] Dr. Foley made a number of multidisciplinary recommendations in her first report including a referral to a psychiatrist; a twelve-week treatment course of cognitive behavioral therapy; an eight-week program of active physiotherapy; an eight-week program working with a kinesiologist with a transition to an independent exercise program at a gym or pool; and twice-weekly restorative yoga. She also recommended that the plaintiff receive a referral to address his chronic migraine headache and a referral to a pain clinic. Finally, she recommended that the plaintiff meet with a vocational rehabilitation specialist to explore career or schooling options.

[89] The defendants submit that I ought to accept Dr. Horlick's evidence over Dr. Foley's. In support of their position, they note that in both of her physical examinations of the plaintiff, Dr. Foley could not point to any measures of physical impairment and the medical imaging was normal. However, I note that Dr. Foley responded that the plaintiff had pain throughout the whole time she examined him.

[90] Dr. Foley testified that even though the plaintiff had not undertaken any of the recommendations she made in her first report, centralized pain is very difficult to completely eradicate. In her opinion, the plaintiff will continue to have residual pain.

[91] In re-examination, Dr. Foley noted that just because the plaintiff has full range of motion, “does not mean they are not experiencing pain that is disabling”.

[92] I find Dr. Foley to be a knowledgeable and impressive witness. I did not find her to advocate for the plaintiff but, rather, she provided balanced opinion to assist the Court. I find her evidence to be consistent with the plaintiff’s testimony as to his pain symptoms and experiences.

[93] For reasons discussed below, I prefer her evidence over that of Dr. Horlick, an orthopedic surgeon. Accordingly, I rely on her evidence in my findings in these Reasons.

Dr. Garth Kroeker – Psychiatrist

[94] Dr. Kroeker was qualified to give opinion evidence in the field of psychiatric medicine. He met with the plaintiff on September 21, 2022 and prepared a report dated October 10, 2022.

[95] Over his seventeen years working as a psychiatrist, most of his patients have had depression complicated by other issues including pain disorders or physical injuries. The defendants submit that because 90% of Dr. Kroeker’s medical legal reports are done for the plaintiff’s side, his evidence is biased. I accept Dr. Kroeker’s obligation to the Court to not be an advocate for any party and I am not prepared to find bias simply on the basis of Dr. Kroeker’s history of report writing.

[96] Dr. Kroeker’s diagnosis is as follows:

> Mr. Riascos has had major depressive disorder since the April 13, 2016 accident. Symptoms include a pronounced loss of pleasure or enjoyment in activities, a depressed, anxious, and irritable mood, a pronounced difficulty with sleep, reduced concentration and subjective cognitive sharpness, fatigue, an increase in appetite/weight, and transient passive suicidal ideation. Severity has been in the moderate range.
>
> …
>
> After the April 13, 2016 accident, he had physical injuries which prevented him from enjoying sports or gym activities. He was no longer able to work as hard, and needed to take time off work. Hard work and sports were cornerstones of his identity, and as (sic) sources of purpose, through his life

> previously. He was less able to earn money or save money, leading to significantly increased financial stress and decreased self-esteem. He had significant difficulty with sleep, in part due to pain, in part due to anxious thoughts, which has never improved since April 13, 2016. While I believe the major depressive disorder label is most appropriate, a case could be made that "depressive disorder due to a medical condition" fits as well, since his psychiatric symptoms are strongly related to pain and pain-induced sleep disturbance.

[97] Dr. Kroeker's findings are consistent with the opinion of Dr. Foley. As well, the symptoms outlined by Dr. Kroeker are corroborated by lay witnesses including Ms. Raudales, Ms. Esmail and the plaintiff's co-workers.

[98] With respect to the plaintiff's head injury, Dr. Kroeker opines:

> He most likely sustained a mild concussion (brain injury) at the time of the April 13, 2016 accident, since it was a high-impact collision with a loss of consciousness. The concussion would likely be a contributing factor to his subsequent depression and cognitive symptoms.

[99] As for causation, Dr. Kroeker opines:

> If the April 16, 2016 accident had not happened, it is very unlikely that he would have had subsequent major depressive disorder or unspecified trauma and stressor-related disorder.
>
> If the June 27, 2017 and January 20, 2021 accidents had not occurred, he may have had slightly better mental health symptoms since those dates, but he still would have had major depressive disorder and unspecified trauma and stressor- related disorder, since the most significant harm came from the 2016 accident.

[100] Dr. Kroeker opines on prognosis:

> His symptoms of depression have a good chance of resolving with time and therapy, but are unlikely to disappear entirely. There will also be a high chance of relapse, and an increased vulnerability to new life stressors having an adverse impact on his mood. The prognosis of his mood symptoms also depends on the outcome of his physical pain problems, an issue I defer to experts in physical medicine.

[101] Dr. Kroeker did not diagnose the plaintiff with a chronic pain disorder or any features of central sensitization which Dr. Foley diagnosed. The defendants submit that Dr. Kroeker is more of an expert in making the diagnosis of central sensitization and chronic pain disorder than Dr. Foley. While that may be the case, I find that this

does not preclude Dr. Foley from making such a diagnosis and does not undermine Dr. Foley's diagnosis as it relates to pain centralization.

Rob Corcoran – Occupational Therapist

[102] Mr. Corcoran is a registered occupational therapist. He was qualified to give expert evidence in functional capacity evaluation and costs of future care analysis.

[103] Mr. Corcoran conducted a functional capacity evaluation on August 18, 2022 and a home visit on August 25, 2022. He prepared a functional capacity evaluation and cost of future care report dated October 4, 2022. Mr. Corcoran also wrote a rebuttal report in response to Dr. Horlick's opinion. Mr. Corcoran agreed that his opinion was based on facts, assumptions and diagnosis based on Dr. Foley's report, which I have accepted.

[104] Mr. Corcoran conducted eight hours of functional testing that involved tasks consistent with the core functions of his pallet repair work in a simulated environment. The work simulation included about two hours of pallet handling and repair.

[105] Mr. Corcoran noted that the plaintiff felt this was a lighter day of testing than his current occupation by way of pallet handling loads and pallet handling frequency. As well, the pallets handled over the functional capacity evaluation were lighter, 'recyclable' units, as opposed to the heavier, reusable ones he is accustomed to.

[106] As a result of the functional capacity testing, Mr. Corcoran found that the plaintiff:

a) completed the evaluation with high degree of effort;

b) does not possess functional capacity to perform the heavier duty pallet repairs which he had worked on leading up to the 1st Accident;

c) has functional capacity to work eight hour shifts in his current, lighter duty pallet repair occupation; however, lacks the durability and productivity of a labourer without chronic low back pain due to his need to take intermittent breaks to manage his symptoms;

d) fell short of the established job targets for occasional basis lifting on account of his low back symptoms; and

e) lacked the appropriate strength capacity for his line of work and which was required for the pallet repair occupation he worked leading up to the 1st Accident.

[107] Mr. Corcoran also found that the plaintiff's symptoms include:

a) low back pain when holding a deep crouch position, as well as with performing repeated crouches;

b) difficulty and pain with repetitive neck extension movements, associated with overhead tasks, as well as with repeated cervical flexion employed to look down at tasks performed over a work bench;

c) limitations with stooping, which is a core work function in his pallet repair occupation;

d) low back pain when stooping is coupled with heavier tool and materials handling; and

e) acute onset of left patellar/knee pain towards the end of the day.

[108] Mr. Corcoran noted that the plaintiff's difficulties are such that he requires pain management breaks, and that between floor and shoulder levels, the plaintiff can lift 45 pounds occasionally and 15 pounds frequently.

[109] In Mr. Corcoran's rebuttal report dated December 16, 2022, he responds primarily to Dr. Horlick's conclusion that the plaintiff "has no measures of impairment resulting in vocational disability". I accept Mr. Corcoran's response that Dr. Horlick's opinion is formed in the absence of functional testing.

[110] I accept Mr. Corcoran's explanation that the "the ability to perform a given movement or task, or assume a given posture (e.g. range of motion measures), does not necessarily equate to the ability to perform a relevant task durably over a lengthy period of time or at a level of productivity that would meet the standards for a given job."

Trevor Lesmeister – Vocational Rehabilitation Specialist

[111] Mr. Lesmeister is a vocational rehabilitation specialist and consultant. He was qualified to give expert evidence in the field of vocational rehabilitation and assessment.

[112] Mr. Lesmeister assessed the plaintiff on September 6, 2022 and wrote a report dated October 3, 2022. He also wrote an updated report dated November 3, 2022 having been provided with updated medical reports.

[113] In his first report, Mr. Lesmeister opines on the plaintiff's future. He notes that but for the accident, the plaintiff could have remained working at Advance Pallet for as long as he chose.

[114] Mr. Lesmeister made the following comments with respect to the plaintiff's employability after the accidents:

> Given Mr. Riascos' identified post-accident diagnoses, symptoms, limitations, and reports of difficulties managing his work responsibilities, it is my opinion that he is no longer competitively employable in his occupation as a Pallet Repairer.
>
> To mitigate his vocational loss, Mr. Riascos would benefit from participating in further training to help broaden his transferable skills and widen the occupations that would be available to him. However, his limited English abilities and vocational test results indicate that he is not a candidate for any significant educational program at this time.
>
> Mr. Riascos will continue to face limitations in his employability unless he experiences sufficient improvement in his symptoms and English skills.

[115] Mr. Lesmeister also noted the limitations for higher-paying alternatives for the plaintiff, given he was already 45 years old, had "already spent several years on improving his English, and has only tested at an elementary school level". Mr. Lesmeister was unsure of the plaintiff's capacity to improve his skills such that he would be able to attain a post-secondary education in Canada. He opined that while further training would help the plaintiff find work in a less physically demanding job, he would still be limited to positions that did not exceed his functional limitations, and the competitiveness of his employment would be affected by entering a new position as an older candidate without prior Canadian experience.

[116] In his second report, Mr. Lesmeister scaled back his opinion given the additional limitations noted in the reports of Dr. Kroeker and Mr. Corcoran which were not available to Mr. Lesmeister at the time he wrote his first report.

[117] Mr. Lesmeister noted the plaintiff faced challenges in re-training given his post-accident cognitive and emotional symptoms. He would have difficulty with typical academic responsibilities as a result of a reduction in his ability to concentrate, his cognitive sharpness, and as a result of his sleep difficulties. His mood changes including his loss of pleasure, depression, and irritable mood could also affect his motivation and thereby his attendance, time management and ability to work in groups. Ultimately, Mr. Lesmeister found that, considering the plaintiff's age and barriers to training, investing years to a re-training program may not be to his advantage. He found that, if the plaintiff improved his English and some of his administrative skills, he could consider occupational areas such as the following:

Occupation	Low	Median	High
Customer Service Clerk	$15.65	$22.00	$32.00
General Office Assistant	$16.00	$23.00	$33.96
Ticket Agent	$15.65	$21.00	$29.96

[118] Even in these other occupational areas, Mr. Lesmeister made the following cautionary remarks:

> While these occupational areas are generally lighter and can entail less demanding responsibilities, Mr. Riascos would still need to identify the select positions that would be suitable for his cognitive, emotional, and physical limitations. As such, there will be fewer employment options for him to consider and this could negatively impact his career growth and earning potential. Furthermore, as he would enter any occupation as a new employee without Canadian experience, it would be expected he would initially earn lower wages with opportunities for pay increases with time and experience.

Dr. Andrew Woolfenden – Neurologist

[119] Dr. Woolfenden is a neurologist tendered by the defendants. His report dated October 13, 2022 was admitted into evidence by consent.

[120] Dr. Woolfenden's opinion is limited to the plaintiff's headache and concussive symptoms. He specifically notes that he was not asked to opine on the plaintiff's spine injuries.

[121] Similar to the opinion of Dr. Kroeker, Dr. Woolfenden's diagnosis includes:

> MVA #1
>
> 1. Mild traumatic brain injury
> 2. Persistent headache attributed to trauma or injury to the head and neck
>
> MVA #2
>
> 1. Persistent headache attributed to whiplash

[122] Dr. Woolfenden notes that ongoing pain, sleep difficulties, and mild psychological difficulties can adversely impact cognition which can affect memory and concentration. In other words, these symptoms can result from difficulties other than a brain injury. This was also opined by Dr. Kroeker.

[123] Regarding the plaintiff's prognosis Dr. Woolfenden opined:

> Thus, the prognosis of Mr. Riascos' ongoing headaches are directly related to the prognosis of his persistent neck pain. If his neck pain resolves, the headaches are likely to resolve. If there is an improvement in his neck pain, headache frequency and/or intensity is likely to improve (and/or resolve) although the magnitude and likelihood is not possible to predict. Conversely, Mr. Riascos' current headaches are not likely to worsen unless there is concern about worsening neck pain the future.

[124] I note that much of Dr. Woolfenden's opinion was dependent on the plaintiff's neck pain resolving.

[125] The plaintiff notes that he did not have the benefit of an interpreter during Dr. Woolfenden's assistance. In my view, this is somewhat problematic given the plaintiff's limited English skills. Given this issue and the fact that Dr. Woolfenden's opinion is limited to head and concussive symptoms, I am inclined to give limited weight to his evidence.

Dr. Simon Horlick – Orthopedic Surgeon

[126] Dr. Horlick is an orthopedic surgeon tendered by the defendants. He was qualified as an expert in orthopedics and prepared three reports dated July 21, 2020, November 30, 2022, and December 12, 2022.

[127] In his first report, Dr. Horlick found that as a result of the 1st Accident and 2nd Accident, the plaintiff developed pain in the lumbar spine, left knee and left shoulder. With respect to prognosis, Dr. Horlick opined that the plaintiff has had minimal interference with respect to his return to vocational and recreational pursuits and there is no contraindication to him doing so.

[128] Regarding the plaintiff's functional capacity, Dr. Horlick opined:

> The plaintiff has found it difficult to return to the nature of his employ preceding his subject accidents, however, from his musculoskeletal assessment on July 21, 2020, there is no contraindication to him doing so. He had no measures of impairment resulting in vocational disability including that involving heavy physical activity.
>
> He has not required any assistance with personal care or home maintenance requirements, and none will be necessary in the future.

[129] The plaintiff argues that the Court ought to give no weight to Dr. Horlick's opinion for a number of reasons. The plaintiff argues that because Dr. Horlick is an orthopedic surgeon with a specialty in knee surgery, he is the wrong expert to give opinion evidence on the nature of the plaintiff's injuries.

[130] As well, the plaintiff argues that Dr. Horlick did not have adequate information to make his conclusions. Finally, the plaintiff submits that Dr. Horlick's report was misleading, placed disproportionate weight on evidence that only favored the defendants and displayed the hallmarks of being an advocate.

[131] In soft tissue injury cases, our Court has repeatedly recognized that evidence from a physiatrist is generally of more assistance than that of an orthopaedic surgeon when soft tissues injuries are involved.

[132] For example, in *Smith v. Law*, 2021 BCSC 1789, Justice Lyster framed the issue as follows:

> [126] In considering the evidence of both Dr. Boyle and Dr. Perey, I have considered *Goudbout v. Notter*, 2018 BCSC 1043, in which the Court discussed the report of an orthopaedic surgeon, Dr. Hummel, who had given opinion evidence about the plaintiff's soft-tissue injuries. The court in *Godbout* stated that, "[a]s the physical injuries claimed to have been suffered by [the plaintiff] are essentially soft issue injuries, the opinions of an orthopaedic surgeon such as Dr. Hummel are of little assistance to the court. In assessing soft tissue injuries, an evaluation by a physiatrist would have been more appropriate."
>
> [127] In this regard, I find the following passage from the decision of Madam Justice Sharma in *Shinzay v. McKee*, 2014 BCSC 2317, apposite:
>
> > [87] There is no reason to suggest any particular field of medicine is more reliable than another but I do think as a discipline, orthopedic medicine is more inclined to discount pain where there is no corresponding musculoskeletal injury. Dr. Oliver and Dr. Maloon opine on what is causing the pain, but they do so through an orthopedic surgeon's lens. That lens filters out the possibility that soft tissue injuries can cause pain that is not temporary. I am not disparaging orthopedic surgeons. My point is that their training is system-specific and less holistic than Dr. Kleinman's approach. I find this justifies placing greater weight on Dr. Kleinman's evidence.

See also: *Khudabux v. McClary*, 2016 BCSC 1886 at paras. 91–93; *Cheung v. Choy*, 2021 BCSC 2314 at paras. 66–67; *Monga v. Smith*, 2021 BCSC 1430 at para. 162.

[133] In this case, I share the same sentiments, especially in light of the fact that Dr. Horlick's practice, academic work and publications all focus on surgery of the knee or shoulder. In fact, the only surgeries that Dr. Horlick performs out of UBC Health Sciences Centre are knee surgeries.

[134] In cross-examination Dr. Horlick confirmed that he would defer headache, traumatic brain injury and psychological issues to other specialists. He also conceded that he defers myofascial pain issues that do not have an orthopedic origin to physiatrists.

[135] More importantly, I am concerned about Dr. Horlick's opinion given that he did not have all of the relevant information before arriving at his conclusions. For

example, he did not inquire or know: the specific job duties of a pallet repairperson; what tools the plaintiff used in the job; whether the plaintiff was working with pain when he returned to work; or whether the plaintiff's productivity had changed. Nor did Dr. Horlick inquire about whether the plaintiff was limited in his duties at work.

[136] I agree with the plaintiff that, despite being aware that the plaintiff's injuries and the impact they would have on his ability to work was an important issue in this case, Dr. Horlick did not obtain this crucial information before making his conclusions with respect to the plaintiff's function or disability following the accidents.

[137] For these reasons, I prefer Dr. Foley's opinion over that of Dr. Horlick.

ASSESSMENT AND FINDINGS

[138] The main issues to be resolved are the quantum of damages to which the plaintiff is entitled from the defendants as a result of the accidents and whether the plaintiff mitigated his losses.

Credibility and Reliability

[139] Credibility and reliability are two different, but related, considerations. Credibility focuses on a witness's veracity, while reliability is concerned with the accuracy of the witness's testimony, with consideration of the witness's ability to accurately observe, recall, and recount events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *R. v. H.C.*, 2009 ONCA 56 at para. 41.

[140] In assessing credibility, factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), provide guidance:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his 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 witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[141] Where a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the Court must be exceedingly careful in assessing credibility: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399, 1982 CanLII 36 (S.C.); see also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 24–25.

[142] In this regard, the comments of Justice G.C. Weatherill in *Henry v. Fontaine*, 2022 BCSC 930, are most helpful:

> [54] As is generally the case in personal injury actions, the most important witness is the plaintiff himself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts.
>
> [55] A plaintiff who accurately describes his symptoms and circumstances before and after the collision, without minimizing or embellishing them, can reasonably anticipate that the court will find his evidence to have been credible and reliable.

[143] The plaintiff testified with the assistance of a Spanish interpreter. He also had the assistance of an interpreter during most of his independent medical examinations with the various experts. As such, I accept that there may have been instances where his words were lost in translation. I note there were instances where the plaintiff did not have the benefit of an interpreter. This includes his attendance in the emergency room after the 1st Accident as well as his assessment by Dr. Woolfenden.

[144] The defendant submits that the plaintiff's evidence has credibility issues, and the Court must be cautious to accept all of his evidence.

[145] Overall, I found the plaintiff to be credible in his testimony. I did not find that he embellished his symptoms. While there were some inconsistencies in his

evidence, I find that his description of his pain generally matches with what he reported to the various medical practitioners he has seen over the years. As well, there was corroborative evidence from the plaintiff's co-workers in respect of his work both before and after the accidents. Ms. Raudales and Ms. Esmail also provided evidence to corroborate the plaintiff's evidence.

[146] While I accept that some of the plaintiff's evidence lacked reliability, I find that, overall, it is not such that I ought to reject his evidence as it relates to the injuries he sustained in the three accidents and its effects on his work and personal life. I accept that memories fade over time. The accidents occurred in 2016, 2017 and 2021. It is hardly surprising that the plaintiff may have had some discrepancies in his evidence.

[147] In regards to the witnesses that testified for the plaintiff, the defendants say that the plaintiff's lay witnesses all attended court to support him, and that much of their testimony is similar and should be approached with caution.

[148] I am unable to agree. I found the witnesses to be sincere and to have provided objective evidence of what they observed in relation to the plaintiff's work. In particular, I find the evidence of Mr. Vasquez to be credible and helpful to the Court.

Causation

[149] The plaintiff is required to establish on a balance of probabilities that the defendant's negligence caused or materially contributed to her injuries. Each case must be determined on its own facts.

[150] In *Jenkins v. Casey*, 2022 BCCA 64 at para. 75, leave to appeal to SCC ref'd, 40203 (9 February 2023), the Court of Appeal noted that the trial judge correctly summarized the general principles of causation as follows:

> a) If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: at para. 115, citing *Athey* [(1996), 140 DLR (4th) 235, 1996 CanLII 183 (S.C.C.)] at para. 47.

> b) The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?": at para. 116, citing *Resurface Corp. v. Hanke,* 2007 SCC 7 at paras. 21–23.
>
> c) Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: at para. 117, citing *Athey* at para. 34.
>
> d) The general principles of causation in law apply to psychological injury just as they apply to physical injury: at paras. 119–120, citing *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.); *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.

[151] The "but for" test must be applied in a robust common-sense fashion: *Clements v. Clements*, 2012 SCC 32 at para. 9.

[152] Indivisible injuries are those that cannot be separated, such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate: see *Bradley v. Groves*, 2010 BCCA 361 at para. 20 and *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235, 1996 CanLII 183 (S.C.C.) at paras. 22–25.

[153] Ultimately, where the injury caused by the defendants is indivisible from injuries arising from other causes, the defendants are responsible for the whole of the loss. There is no apportionment or allocation between "wrongful" causes and "other causes". The other causes are merely the factual background for the relevant causal injury: *Athey* at paras. 17, 19.

[154] An intervening event may break the chain of causation, sometimes referred to as the principle of *novus actus interveniens*. The defendants must establish that a subsequent event was sufficient to break the chain. That is, the defendants must establish that the plaintiff's work-related incident was an extraordinary occurrence such that the original wrongful act is no longer regarded as a sufficient cause upon which to rest legal liability.

[155] In *Mandra v. Lu*, 2014 BCSC 2199 at para. 116, Justice Duncan found that a subsequent workplace injury involved "supporting a 75-pound weight" was "well within the plaintiff's pre-accident capabilities". She found that the defendant had not

met his burden of demonstrating the chain of causation was broken, and that "the injuries caused by the workplace incidents [were] indivisible from the motor vehicle injuries": at para. 116.

[156] Like in *Mandra*, I am satisfied that the workplace injury at ECM in August 2019 was insubstantial. It occurred while the plaintiff was engaged in the normal course of his work of lifting boxes that were well below the weight he was accustomed to lifting while repairing pallets before the 1st Accident. Accordingly, I find that the defendants have not established that the workplace incident was a *novus actus interveniens* sufficient to break the chain of causation.

[157] As I have noted above, the plaintiff did not have any pre-accident conditions and the minor injuries he sustained while working at Advance Pallet had fully resolved. In considering all of the evidence, I conclude on a balance of probabilities that the severity, continuity and persistent nature of the plaintiff's injuries have been established, and that they were caused by the 1st Accident and further aggravated by the 2nd Accident and 3rd Accident. As well, the workplace injury in August 2019 did not break the chain of causation.

Failure to Mitigate

[158] A plaintiff is required to take reasonable steps to reduce his damages, including by taking recommended treatment. Whether a plaintiff acted reasonably is a question of fact: *Gilbert v. Bottle*, 2011 BCSC 1389 at paras. 201–202. Mere delay in seeking recommended treatment is not necessarily unreasonable: *Sunner v. Lee*, 2023 BCSC 988 at para. 149.

[159] As Justice Matthews summarized in *Donaldson v. Grayson*, 2023 BCSC 1675:

> [236] A plaintiff in a personal injury action has a positive duty to mitigate. The defendant bears the burden of establishing: (1) that there were steps the claimant could have taken to mitigate; (2) that those steps were reasonable; and (3) the extent, if any, to which the loss would have been avoided by taking those steps: *Stevens v. Creusot,* 2019 BCSC 1781 citing *Chiu v. Chiu,* 2002 BCCA 618 and other cases.

[160] A reduction is appropriate where the defendant is able to satisfy the two-part test set out in *Chiu v. Chiu*, 2002 BCCA 618:

> [57] ... In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[161] It is a subjective/objective test of a reasonable person in the position of the plaintiff: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56; see also *Valencia v. Duggan*, 2023 BCSC 476 at para. 207

[162] Recently, in *Haug v. Funk*, 2023 BCCA 110 at paras. 72–76, the Court of Appeal confirmed that the defendant bears the onus to satisfy both parts of the *Chiu* test on a balance of probabilities. See also *Chand v. Aujla*, 2023 BCSC 1473 at para 80.

[163] In analyzing the reasonableness of the plaintiff's actions, "it is appropriate to consider his financial limitations": *Noori v. Hughes*, 2018 BCSC 965 at para. 101; see also *Brown v. Raffan*, 2013 BCSC 114 at paras. 121–126.

[164] The defendants submit that there should be a deduction in any award to the plaintiff due to his failure to mitigate his damages by following his doctor's orders. They point to the fact that in her first report of October 2020, Dr. Foley made recommendations for his mood symptoms and sleep issues. The defendants submit that had the plaintiff followed the recommendations, his pain could have decreased as his mood symptoms would decrease.

[165] However, I note that Dr. Foley also testified that centralized pain is very difficult to completely eradicate and that the plaintiff will continue to have residual pain.

[166] The defendants submit that the plaintiff did not attend cognitive behavior therapy and medication as recommended by Dr. Foley.

[167] The plaintiff testified that he did not attend the recommended therapy because he simply could not afford to do so. His family had arrived from Colombia and he was struggling to make the income he made prior the 1st Accident. He testified that he tried to exercise and go for walks to help with his mood symptoms. The plaintiff also stated that he did not like to take anti-depressants. I have considered the plaintiff's explanation and I am satisfied that it was reasonable.

[168] It must be remembered that this is the defendant's burden on a balance of probabilities. Accordingly, I am unable to accept the defendants' submissions that it is a reasonable inference that had the plaintiff followed Dr. Foley's recommendations, he would have likely improved. I find that the evidence does not support that the plaintiff's failure to attend cognitive behavior therapy or to take anti-depressants would have resulted in a reduction to his damages or some likelihood that the plaintiff would have received substantial benefit.

[169] I am satisfied that the defendants have not met the burden of establishing the plaintiff failed to mitigate his damages.

Findings Regarding the Plaintiff's Accident-Related Injuries and Impact

[170] At the time of the 1st Accident, the plaintiff was a healthy, active and strong 39-year-old. I find he did not have any pre-existing medical conditions prior to the 1st Accident.

[171] The defendants accept that the plaintiff suffered probable soft tissue injuries to the neck and back as a result of the accidents. The defendants also accept that the plaintiff suffered a concussion and headaches as a result of the accidents. However, they submit that while the plaintiff's life was impacted to some degree due to the accidents, the extent that the accidents continue to affect the plaintiff is minimal.

[172] The defendants argue that the plaintiff has been able to obtain work in a new occupation and continues to work in a heavy labour job. They say he continues to be able to socialize with his family. The defendants argue that any troubles in the

plaintiff's family life would have been present without the accidents, given that the family has had to adjust to a four-year absence of their father, and a move to a new country and culture. Finally, the defendants submit that the plaintiff is able to do some work around the house including making breakfast.

[173] The plaintiff submits that the injuries suffered from the combined three accidents have had life altering consequences for him.

[174] I accept that the plaintiff was pain free prior to the 1st Accident. While he may have had some minor work place injuries, I find that they did not affect the injuries he sustained from the three accidents.

[175] I make my findings based on the opinions of the experts in regards to their prognosis of the plaintiff's symptoms. Their opinions support a conclusion that plaintiff sustained the following injuries arose as a result of the 1st Accident:

a) Mild traumatic brain injury;

b) Post-concussive symptoms including lack of concentration, memory difficulties, and fatigue;

c) Chronic daily pain in his neck and low back and shoulders;

d) Chronic migraine headaches; and

e) Depressed mood, sleep disturbances, and moderate anxiety.

[176] As a result of the 2nd Accident and the 3rd Accident, I find that there was an aggravation of the above injuries and new pain in the plaintiff's left elbow which he sustained from the 2nd Accident. In particular, I find that the 3rd Accident resulted in further worsening of his low back pain symptoms, posterior neck pain symptoms, chronic migraine symptoms and mood symptoms. I accept Dr. Foley's opinion that the plaintiff's anxiety symptoms worsened from moderate to severe anxiety following the 3rd Accident.

[177] I find that on a balance of probabilities, the plaintiff's physical and psychological symptoms sustained from the three accidents will not fully resolve to his pre-accident state in the future. In particular, I find that his psychological symptoms are directly related to his ongoing pain and they, too, will not fully resolve.

[178] While I accept that the plaintiff may improve in some areas with further treatment, I find that his continued pain will impact him in all aspects of his life, including socially, personally and in his work.

[179] I further find that the plaintiff will be able to work in a limited capacity but the likelihood of him returning to his pre-accident level is very low. While I accept that the plaintiff was at Advance Pallet for less than two years at the time of the first accident, I find, given that he was a healthy strong man, the likelihood of continued long-term employment in that job was strong.

ASSESSMENT OF DAMAGES

Non-Pecuniary Damages

[180] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The plaintiff is to be placed back into the position they would have been in, but for the injuries and losses caused by this accident. The plaintiff must be placed in the position they would have been if not for the defendant's negligence; no better or worse: *Jenkins* at para. 75; *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

[181] The award should be fair to all parties, and fairness requires reviewing comparable cases. However, each case must be assessed on its own unique set of circumstances: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[182] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined a non-exhaustive list of factors to consider in assessing non-pecuniary damages:

(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;

…

(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…

[183] The plaintiff seeks an award of $200,000 as a reasonable and fair award under this head of damage, including loss of housekeeping capacity.

[184] The plaintiff relies on the following cases:

- *Craven v. Brar*, 2022 BCSC 291: the 51-year-old plaintiff was awarded $170,000 (inclusive of housekeeping capacity) arising from injuries suffered from one accident. She suffered from chronic pain in her neck and back, cervicogenic headaches and migraines, insomnia, fatigue, dizziness, major depressive disorder, and somatic symptom disorder. The symptoms dramatically impacted the plaintiff's ability to work, manage her home, and maintain a social life.

- *Bieling v. Morris*, 2021 BCSC 1905: the 58-year-old plaintiff was awarded $165,000 arising from injuries from one accident. She suffered soft tissue injuries to her neck, shoulder, and low back, as well as an aggravation of pre- existing right knee osteoarthritis and pain down the leg. There was not a significant psychological component.

- *Beaudoin v. Adams*, 2021 BCSC 414: the 57-year-old plaintiff was awarded $170,000 (inclusive of loss of housekeeping capacity) for injuries suffered in one accident. She sustained significant physical injuries, cervicogenic headaches, and depression, which impacted her ability to work, be a mother, and manage the home.

- *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81: the 47-year-old plaintiff was awarded $180,000 for injuries suffered from one accident. He sustained soft tissue injuries to his neck, mid and lower back and a concussion, among other injuries. The prognosis for improvement was generally negative.

- *Felix v. Hearne*, 2011 BCSC 1236: the 49-year-old plaintiff was

> awarded $200,000 for injuries suffered from one accident. She had chronic back and neck pain, headaches, left wrist pain, left shoulder pain, left ankle pain, and depression. Her personal and vocational life were devastated.

[185] The Defendants submit that the non-pecuniary award should be in the range of $75,000 to $95,000. The defendants rely on the following cases:

- *Liu v. Zhang,* 2019 BCSC 778: the 56-year-old plaintiff was awarded $60,000 for injuries suffered from one accident. She sustained pain to her neck and back, headaches, and had difficulty sleeping. She also suffered symptoms of driving anxiety and depression. Her symptoms improved over time and with treatment but did not resolve. The plaintiff's injuries were also found to impact her mood and she suffered ongoing emotional difficulties.

- *Fleming v. McAllister*, 2017 BCSC 521: the 56-year-old plaintiff was awarded $70,000 arising from injuries from three separate accidents. In the first accident the plaintiff suffered injuries to his neck, mid-back, and lower back. He was not fully recovered by the time of the second accident which aggravated his lower back pain, caused additional pain to his neck and shoulder, and caused pain in his hips and waist. In the third accident the plaintiff injured his knee. At trial the plaintiff's primary ongoing complaint was of chronic lower back pain with occasional spasms.

- *Abraha v. Suri*, 2019 BCSC 1855: the 48-year-old plaintiff was awarded $70,000 arising from injuries from one accident. She was diagnosed with soft tissue injuries to her neck, shoulder area, and lower back. She had sleep issues related to her pain and stress and developed symptoms of anxiety and depression. The prognosis for her recovery was guarded. Her physical symptoms plateaued three years post-collision, and she continued to have lower back pain that was exacerbated by extended periods of sitting, standing, or walking.

- *Peter v. Beveridge*, 2020 BCSC 750: the 30 year old plaintiff was awarded $85,000 arising from injuries from one accident. The plaintiff suffered from ongoing chronic back pain, intermittent and ongoing headaches and sporadic back pain.

[186] Based on my consideration of the *Stapley* factors, and the cases cited by the parties, I consider that $170,000 (including for loss of housekeeping capacity) to be a fair and reasonable award of non-pecuniary damages to the plaintiff.

[187] I make this award on the basis that the three accidents have been life altering for the plaintiff. He was 39 years old at the time of the accident. He is now 45 years

old. As a result of the accidents, he continues to suffer from chronic pain in multiple parts of his body, headaches, sleep difficulties, and depressive symptoms.

[188] The plaintiff's economic stability has been affected by the accidents. After being forced to leave both his comfortable life and his family behind in Colombia, he was able to find a new career as a pallet repairperson where he earned more income than he had ever earned before with the further capacity to earn more in the years to come. He had hoped to work at Advance Pallet until retirement just like his mentor, Mr. Vasquez. His injuries have prevented him from being able to work the hours and duties required to be a successful pallet repairperson.

[189] He is also not able to live the active and healthy lifestyle he had prior to the 1st Accident. I agree that his identity as an active, strong, and capable man has been severely compromised. His social life has also suffered as has his relationship with his children and wife.

[190] Having reviewed all of the cases relied on by the parties, I consider *Craven* and *Beaudoin* to be the most comparable. I find the other cases relied on by the plaintiff and those relied on by the defendants to not be analogous to the one before me: *Callow v. Van Hoek-Patterson*, 2023 BCCA 92 at paras. 17–19.

Loss of Earning Capacity

[191] Claims for past and future loss of earning capacity are subject to many of the same legal principles. Both involve claims for the loss of the value of the work the plaintiff was or will be unable to perform because of the injuries and symptoms caused by the accidents: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45.

[192] The plaintiff is required to demonstrate that the injuries and symptoms caused by the accidents have impaired his capacity to earn income, resulting in a past or future pecuniary loss. While actual past events must be proven on a balance of probabilities, hypothetical events including what would have happened in the past had the accident not occurred, and what would have and will occur in the future, will

be considered where there is a real and substantial possibility they would occur. A hypothetical event is then given weight according to its relative likelihood and compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158, at paras. 44–48.

[193] Evidence of a speculative loss, rather than a real and substantial possibility of loss, however, is not sufficient to establish an award for loss of earning capacity: *Gao v. Dietrich*, 2018 BCCA 372 at para. 66.

Past Loss of Income

[194] A plaintiff is entitled to loss of the value of work that a plaintiff would have—not could have—performed but for the injuries sustained as a result of the defendants conduct: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[195] A plaintiff may only recover damages for past net income loss: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.

[196] Projecting what a plaintiff would have earned in the past had they not been injured is a hypothetical exercise. Establishing a real and substantial possibility means that any hypothetical loss must be shown to be realistic considering the plaintiff's likely circumstances without the injury. The plaintiff's claim must have an evidentiary foundation: *Gao* at paras. 34, 36.

[197] If the plaintiff establishes a real and substantial possibility, the Court must then assess the relative likelihood of the hypothetical event and adjust the damages accordingly: *Gao* at para. 37.

[198] A fair and reasonable award is an assessment rather than a purely mathematical calculation: *Grewal* at para. 54. Determining past loss of income requires the Court to consider what the plaintiff would have earned and not what he could have earned but for the accidents.

[199] Based on the evidence, I am satisfied that the evidence supports that the plaintiff would have earned between $80,000 and $100,000 per annum from the date of the 1st Accident to the date of trial.

[200] As I have noted, the plaintiff was paid according to the number of pallets he repaired. This unskilled heavy-labor position paid well and the plaintiff made a good income because of his strength, efficiency and work ethic.

[201] The evidence of the plaintiff's co-worker supports this. Mr. Vasquez noted that the plaintiff was someone who "had no problem working with major pallets", "never missed work" and "worked very fast". Mr. Vasquez earned upto $120,000 per year over the many years working at Advance Pallet.

[202] Mr. Leon described the plaintiff before the 1st Accident as a very strong and fast person at work. Mr. Leon was able to earn $70,000 to $80,000 per year.

[203] Mr. Sanchez worked at Advance Pallet repairing the smaller lighter pallets and earned approximately $70,000 per year.

[204] In his first full year at Advance Pallet in 2015, the plaintiff earned $75,831. I accept based on the plaintiff's income in the first 14 weeks of 2016, before the 1st Accident, that he was on pace to earn approximately $87,000. There is no evidence to the contrary.

[205] I find there is a substantial possibility that the plaintiff would have continued to work at Advance Pallet up to the time of trial, and beyond.

[206] The defendants concede that the plaintiff would have earned $80,000 per year after the first accident until the trial.

[207] The plaintiff submits that the evidence supports he had the ability to potentially earn as much as $100,000 per year. I accept the plaintiff's reasonable position that on average he would have earned at least $90,000 per year repairing the heavier pallets at Advance Pallet had the accidents not occurred. I accept that

this is consistent with the income that he was on pace to earn in 2016 but for the 1st accident.

[208] I have considered the following: Mr. Vasquez's income ($100,00 to $120,000) before he slowed down his work three years ago; that Mr. Leon regularly earned between $70,000 and $80,000 at Advance Pallet; and that Mr. Sanchez, despite repairing the lighter pallets which are paid less per pallet, earns $70,000 per year.

[209] In determining actual income earned from 2016–2022, the parties agree on the plaintiff's income in years 2017–2019 and 2022. They do not agree on years 2016, 2020 and 2021. In these years, the plaintiff also received employment insurance benefits. The defendants have included these benefits in calculating the plaintiff's actual income earned in those years, while the plaintiff has not.

[210] In *Caffrey v Davies*, 2020 BCSC 792 at para. 160 citing *Hayre v. Walz* (1992), 67 B.C.L.R. (2d) 296, 1992 CanLII 1261 (C.A.) and *Luis v. Marchiori*, 2015 BCSC 1 at paras. 185–186, the Court held that employment insurance benefits received by a plaintiff are not to be considered as income in determining net past income loss. The Court in *Luis* relied on the insurance exception as articulated in the leading cases of *Ratych v. Bloomer,* [1990] 1 S.C.R. 940, 1990 CanLII 97 and *Cunningham v. Wheeler,* [1994] 1 S.C.R. 359, 1994 CanLII 120. See also: *Bracchi v. Roberts* (1990), 51 B.C.L.R. (2d) 257, [1990] B.C.J. No. 2429 (S.C.).

[211] Accordingly, the employment insurance benefits received by the plaintiff will not be considered in the income calculations for this purpose.

[212] In 2016, the plaintiff's income included $444 in RRSP income. The defendants take the position that this should be included in calculating the plaintiff's 2016 income.

[213] In *Klein v. Sangha*, 2016 BCSC 1864, the court considered RRSP income with respect to past loss of income. It noted that "the small amount of [the plaintiff's] RRSP income should not be included in his income as that income would have been earned irrespective of the accidents": at para. 69.

[214] Accordingly, the RRSP income will not be included in his 2016 income in my assessment in respect of his past loss of income.

[215] The plaintiff's past loss of income is calculated as follows:

Year	***Without-Accidents Income***	***With-Accidents Income***	***Loss***
2016	$87,000	$23,437	$63,563
2017	$90,000	$39,702	$50,298
2018	$90,000	$33,140	$56,860
2019	$90,000	$41,374	$48,626
2020	$90,000	$21,376	$68,624
2021	$90,000	$12,775	$77,225
2022	$90,000	$18,340	$71,660
		Gross Total Loss	$436,856

[216] Pursuant to s.98 of the *Insurance (Vehicle) Act*, the plaintiff is only entitled to recover damages for the net past income loss. The net income loss is therefore determined after an allowance for income tax. The above amount is the gross amount which would have a 25% deduction resulting in a net wage loss of $327,642.

Future Loss of Earning Capacity

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

[218] As stated in *Rab v. Prescott*, 2021 BCCA 345 at para. 47, a tripartite test should be used to assess damages for loss of future earning capacity. I have found

Justice Burke's summary of the three steps in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182, most helpful and will reproduce it below:

> a) First, does the evidence disclose a potential future event that could result in a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues which may affect their ability to maintain gainful employment or remuneration.
>
> b) Second, does the evidence demonstrate that there is a real and substantial possibility that this potential loss of capacity will cause pecuniary loss? Having established that the plaintiff may suffer from long-term health issues which could affect their earning potential at the first stage, the trial judge must assess the likelihood that the plaintiff's loss of capacity will affect their ability to earn income.
>
> c) Third, having established that there is a real and substantial likelihood that the plaintiff will suffer from ongoing loss of capacity, and that this loss of capacity will result in a loss of income, the trial judge must assess this possible future loss. It is at this stage that the trial judge should consider the basis for compensation (*i.e.*, capital versus earnings approach), contingencies, and the relative likelihood of the loss occurring. The damages award should be reduced based on the relative likelihood that the potential future would not occur.

[219] The Court must also ensure that the award is fair and reasonable. While the assessment must be based on evidence, it is a matter of judgment, not a mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

1. Does the evidence disclose a potential future event that could lead to a loss of capacity?

[220] In *Steinlauf v. Deol*, 2022 BCCA 96 at para. 52, the Court of Appeal noted that the first step is an evidentiary one. It is a matter of common sense that constant and ongoing pain will no doubt take a toll and over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations are made: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Gill v. Davis*, 2023 BCCA 381 at para. 12.

[221] I find that the plaintiff has met the first step in *Rab*. The medical evidence supports that the plaintiff has been rendered less capable of earning income from all types of employment because of the injuries, both physical and psychological, which

he sustained from the accidents. These injuries have resulted in constant and ongoing pain that has had a detrimental effect on the plaintiff's ability to work.

2. Does the evidence demonstrate that there is a real and substantial possibility that the future event in question will cause a pecuniary loss?

[222] A real and substantial possibility is the standard of proof for admitting hypothetical events, both past and future, into the evidentiary record as if they already happened. As courts have consistently stated, it is a lower threshold than a balance of probabilities but a higher threshold than something only possible and speculative: *Dornan v. Silva*, 2021 BCCA 228 at para. 94; *Gao* at para. 34. The onus is not a heavy one but it must be met: *Kim v. Morier*, 2014 BCCA 63 at para. 7; *Sankey v. Balabag*, 2023 BCSC 1727 at para. 113.

[223] In *Sandhu v. Sandhu*, 2022 BCSC 727 at para. 117, Justice G.C. Weatherill listed a number of factors relevant to determining whether there is a real and substantial risk of pecuniary loss, citing *Dornan* at paras. 67, 119–120 and *Rab* at paras. 60–62. These factors include:

a) the plaintiff's intention to keep working and what they intend to do for work;

b) where the potential event precludes income from a particular occupation the plaintiff does not intend to pursue, there will not be a real and substantial possibility, because that income would never have been earned;

c) inability to devote the same energy or hours to her pre-accident occupation;

d) work history;

e) medical condition; and

f) the plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans.

[224] The plaintiff has also met the second step in *Rab.* There is a real and substantial possibility that the plaintiff's chronic pain in his neck, shoulders, low back and knee will continue for some time. Dr. Foley opined, which I have accepted, that the plaintiff has chronic pain with centralization of his pain and it is probable that he will continue to experience residual symptoms in the future.

[225] The plaintiff left his job at Advance Pallet, which he enjoyed, because he no longer had the strength to perform the physically demanding work of repairing heavy pallets for which he was compensated very well. The evidence supports that there is a real and substantial possibility that he would have continued working there until the age of 65 just like his mentor, Mr. Vasquez.

[226] I am satisfied that although the evidence supports that the plaintiff has tried working in various other pallet repair companies and returned to 18 Wheels where he currently works, the injuries he sustained make him less marketable and attractive as an employee to potential employers in this industry.

[227] He has not only lost the opportunity of long-term employment at Advance Pallet, he is also at risk of losing his current employment if his employer is able to find a replacement. I find that 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 in the accidents.

[228] Finally, I am satisfied that as result of his reduced capabilities, the plaintiff is less valuable to himself as a person capable of earning an income in a competitive labour marketplace. Consequently, there has been an impairment of the capital asset: *Rab* at paras. 36 and 60.

3. Assessing the value of the future loss

[229] In *Ploskon-Ciesla*, the Court discussed the capital assets and earnings approaches:

> [16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the “earnings approach” or the “capital asset approach”: *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is

> particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

[230] Under both approaches, the amount arrived at must be adjusted to account for the relative likelihood of the pecuniary loss occurring, taking into consideration relevant contingencies. Factors relevant to determining what the relative likelihood of the risk is include:

> (1) history and nature of the sources of past income;
>
> (2) profitability and nature of the plaintiff's intended future economic activities;
>
> (3) plaintiff's pre-existing limitations concerning capacity to work due to age or health;
>
> (4) strength of the evidentiary basis for the amount whereby the plaintiff's income is alleged to have been reduced; and
>
> (5) level of continuing exposure to risk given the plaintiff's intentions concerning their future activities, and the risk inherent in those plans.
>
> See *Rab* at para. 80; *Dornan* at para. 145.

[231] In *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court of Appeal identified three acceptable methods for assessing a capital loss:

> 43 The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income…

See also *Gill v. Davis*, 2023 BCCA 381 at para. 17; *Davies v. Penner*, 2023 BCCA 300 at para. 28; *McKee v. Hicks*, 2023 BCCA 109 at para. 80; *Deegan v. L'Heureux*, 2023 BCCA 159 at para. 84.

[232] Both the plaintiff and defendants submit that the capital asset approach to assessing future loss of income earning capacity is appropriate. However, they do not agree on the quantum.

[233] The defendants submit that an appropriate award should be in the range of one to two years salary. They base this on a yearly salary of $80,000. As such, they submit the appropriate award should be in the range of $80,000 to $160,000.

[234] The plaintiff submits that at his current age of 45 years, he had another 20 years of work ahead of him from the date of trial. As such, he says the correct multiplier to use from the Civil Jury Instructions is 17.1686.

[235] The plaintiff submits that he was on track to earn $87,000 in 2016, the year of the 1st Accident. The most likely, without accident scenario for him is that he would have continued to work in the pallet repair industry at least until the age of 65.

[236] In some years he would have likely earned in excess of $100,000 but in some years, he may have earned less than $80,000.

[237] The plaintiff provides the following anchors in valuing his loss based on without accidents earnings of $80,000, $90,000, and $100,000 per annum to age 65, with corresponding diminishments of 50%, 65%, and 80% of the plaintiff's capital asset:

DIMNISHMENT OF CAPITAL ASSET	**WITHOUT INJURY LIFETIME EARINGS**		
	$1,373,488 (*$80,000/annum*)	**$1,545,174** (*$90,000/annum*)	**$1,716,860** (*$100,000/annum*)
80%	$1,098,790	$1,236,139	$1,373,488
65%	$892,767	$1,004,363	$1,115,959
50%	$686,744	$772,587	$858,430

[238] In my assessment of past loss of income, I accepted that the plaintiff would have earned an average of $90,000 from the date of the 1st Accident to the date of

trial. As such, I conclude that over the course of the next 20 years he likely would have earned an average of $90,000 per year.

[239] The defendants submit that 25% should be subtracted for contingencies which include that: the plaintiff's symptoms will improve; the high probability that individuals will leave the job of heavy pallet repair work prior to the age of 65; the plaintiff could be off work due to sickness unrelated to the accidents or go to part time employment; the plaintiff may change his employment to IT and take time for training; and the plaintiff could continue to do computer repair work or lighter work.

[240] I decline to accept the defendants' position of a 25% negative contingency because some of the contingencies provided by the defendants are not realistic. This includes that the plaintiff could continue to do computer repair. As I have noted earlier in these Reasons, this was not a realistic option for full-time employment. As well, the plaintiff testified that it was not likely he would have switched to work in IT given his poor English skills.

[241] The plaintiff submits that a 10% negative contingency should be applied. This accounts for the possibilities: that wages decrease; of early retirement for reasons unrelated to the accidents; and that the plaintiff may not have been able to maintain high production as he aged in any event.

[242] Considering the various contingencies, I am of the view that 15% should be deducted.

[243] The plaintiff earned an average of $27,000 per year since the 1st Accident, which is about 33% of what he would have otherwise been earning but for the accidents. However, this does not consider that, with treatment including cognitive behavioral therapy, physiotherapy and kinesiology, the plaintiff's capacity to earn more will improve, albeit not to his pre-accident level.

[244] In all of the circumstances, I am satisfied that the plaintiff has suffered a 60% diminishment of his capital asset. Applying the calculation in the above chart at $90,000 per annum and 60% diminishment, I am satisfied that the plaintiff's future

loss of income earning capacity is $927,104. After subtracting 15% for contingencies, I find that $788,038 (rounded) is fair and reasonable to compensate the plaintiff for his future loss of earning capacity.

Cost of Future Care

[245] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, Justice Adair summarized the principles that apply to the assessment of future cost of care claims:

> [107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

See also *Donaldson* at para. 461.

[246] The purpose of an award for cost of future care is to restore the injured party to the position they would have been in, but for the accident. Assessing future care costs is not a precise accounting exercise, rather, it is a matter of prediction: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. A common sense approach must be taken: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[247] Mr. Corcoran prepared a functional capacity and cost of future care report. The report outlines the various care and treatment recommendations made by medical experts. As well, he made recommendations in regards to housekeeping and home maintenance and repair in his capacity as an occupational therapist after his visit to the plaintiff's home.

[248] The plaintiff submits that all of the recommendations are medically justified and are directly related to his disability arising out of the accidents.

[249] The defendants agree with some of Mr. Corcoran's recommendations but not all.

[250] Based on the recommendations made by Mr. Corcoran and Dr. Foley, I award the following care and treatment items:

Rehabilitation Services & Exercise	**Cost**	**Replacement**
Psychological Counselling $208/hour, 12 hours	$2,496	One time
Physiotherapy $85/treatment, 8 weeks	$1,700	One time
Kinesiology Supervised Exercise $90/hour, 20 hours	$1,800	One time
Yoga Class (City of Surrey) $110/12-week program/class	$110, plus taxes	One time
Vocational Counselling $110/hour, 10–15 hours	$1,100 - $1,650, plus taxes	One time
Celecoxib 200 mg $0.27/tablet, 104 tablets	$28	Yearly

Adaptive Aids & Equipment	**Cost**	**Replacement**
Portable TENS Unit $100/unit, 1 unit	$100, plus taxes	5 years, beginning in 5 years
TENS Pads $36/pair, 2.5 pairs	$90, plus taxes	Yearly

[251] I do not find it appropriate to award an amount for the pool/fitness centre yearly pass given that the plaintiff was already attending there prior to and after the accidents.

[252] In regards to the additional medications, I decline to make an award for these as the plaintiff testified that he only takes celecoxib for his pain and does not like to take anti-depressants.

[253] Further, given that Dr. Foley recommended that the plaintiff should be seen by a neurologist for an evaluation to determine if Botox would be appropriate, I decline to make an award for Botox injections. As well, Dr. Woolfenden did not make such a recommendation.

[254] The steroid injections were not recommended by Dr. Foley; rather, she recommended a referral to an interventional pain management specialist for possible corticosteroid injections.

[255] As well, a neck pillow was not recommended by any of the medical experts.

[256] The defendants submit that the none of the medical experts recommended housekeeping or a repairperson for home maintenance and repairs. While I agree, Mr. Corcoran made this recommendation based on his experience as an occupational therapist after he attended the plaintiff's home. His recommendation was made on account of the plaintiff's low back injury and associated functional limitations for stooping and heavier materials handling—issues recognized by Dr. Foley.

[257] As well, Mr. Corcoran's evidence was that during his home visit, he observed unfinished repairs, such as incomplete drywall and painting and that the plaintiff intended on replacing his flooring with new laminate.

[258] I find these recommendations made by Mr. Corcoran are not excessive. Accordingly, I made an award for seasonal housekeeping and home maintenance and repair.

Seasonal Housekeeping	Cost	Replacement
Housekeeping Support – Team Clean $75–$91/hour, 8 hours	$600–$728, plus taxes	Yearly until age 75

Home Maintenance & Repair – Repairperson Support	Cost	Replacement
$45-$75/hour, 16 hours	$720–$1,200, plus taxes	Yearly until age 75

[259] Mr. Benning provided present values for the various care items. Using his calculations, I assess the plaintiff's entitlement to the following under the cost of future care:

Item	Cost	Duration or Replacement Time	Total with Present Value
Psychological Counselling $208/hour, 12 hours	$2,496	N/A	$2,468
Physiotherapy – 20 treatments	$85/treatment	N/A	$1,681
Kinesiology – 20 hours	$90/hour	N/A	$1,869
Yoga Class – 12-week program	$110, plus taxes	N/A	$114
Medication – Celecoxib	$28	Yearly till age 75	$712
Portable Tens Unit	$100, plus taxes	5 years beginning in 5 years	$525
Tens Pads	$90, plus taxes	Yearly	$2,562
Vocational Counselling $100, 10 -15 hours	$1,100–$1,650, plus taxes	N/A	$1,360
Housekeeping Support $75–$91/hour, 8 hours	$600–$728, plus taxes	Yearly until age 75	$14,486
Home Maintenance & Repair – Repairperson Support	$720–$1,200, plus taxes	Yearly until age 75	$20,944

$45–$75/hour, 16 hours			
TOTAL			$46,721

[260] Finally, in my view, a negative contingency of 10% should be applied to account for the possibility that the plaintiff may not use all of the recommended future care and assistance, or may not use it for as long as recommended. Accordingly, I award $42,049 (rounded) for cost of future care.

Special Damages

[261] The plaintiff submits that he is to be restored to the position he would have been but for the accidents: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.).

[262] Justice Fleming in *Dhillon v. Singer*, 2017 BCSC 414 at para. 200 stated:

> [200] Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care, although plaintiffs are not entitled to recovery for the cost of any procedure they believe will make them feel better.

See also *Searle v. Xie*, 2023 BCSC 1716 at para. 154.

[263] The plaintiff has substantially been paid by ICBC for special damages. However, the plaintiff still seeks the remaining net amount of $4,977.19.

[264] The defendants submit that the plaintiff attended for physiotherapy in September and October 2019 as a result of his WorkSafe Claim of August 22, 2019, and that the cost of this therapy forms part of that claim. They submit that ICBC has already paid $549 for this therapy, which was paid in error. The plaintiff claims a further $236 in therapy, and mileage of $37.09. The defendants submit that $785 in total

therapy costs plus $37.09 in mileage must be deducted for a total of $4,155.10 in special damages.

[265] Given that I found the workplace injury in August 2019 did not break the chain of causation, I decline to deduct the sums the defendants claim should be deducted. Accordingly, I make an award of $4,977.19 under special damages.

CONCLUSION & ORDERS

[266] I award the following damages:

Non-pecuniary damages	$170,000
Past Income Loss	$327,642
Loss of Future Earning Capacity	$788,038
Cost of Future Care and Assistance	$42,049
Special Damages	$4,977.19
TOTAL DAMAGES	**$1,332,706 (rounded)**

[267] The plaintiff seeks prejudgment court order interest on his past income loss and special damages. The plaintiff is entitled to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[268] Unless there are circumstances of which I am unaware, the plaintiff is entitled to his costs and disbursements at Scale B.

"Girn J."