

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Verma v. Friesen*,  
2024 BCSC 13

Date: 20240104  
Docket: M203048  
Registry: Vancouver

Between:

**Harish Verma**

Plaintiff

And

**Peter James Friesen**

Defendant

Before: The Honourable Justice Donegan

## Reasons for Judgment

Counsel for the Plaintiff:

C. McIvor

Counsel for the Defendant:

K. Dhaliwal

Place and Date of Trial:

Vancouver, B.C.  
April 24–28 and May 2, 2023

Place and Date of Judgment:

Vancouver, B.C.  
January 4, 2024

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### **Introduction**

[1] On June 20, 2018, the plaintiff, Harish Verma, was involved in a motor vehicle accident in Abbotsford, British Columbia (the “Accident”). The defendant admits liability for the Accident.

[2] Mr. Verma claims damages for injuries he sustained in the Accident. He claims he suffered some soft tissue pain that resolved within about 18 months of the

Accident, but more significantly, he claims he also suffered severe, persistent, permanent and disabling psychological injuries. He claims non-pecuniary losses, as well as various pecuniary losses including past and future loss of earning capacity, costs of future care and special damages. He also makes an in-trust claim on behalf of his wife. All told, Mr. Verma seeks damages in the total amount of approximately \$940,000.

[3] The defendant acknowledges that Mr. Verma was injured in the Accident, but takes issue with the extent, chronicity and causation of the psychological injuries alleged, the claimed impact on his life and the amount of losses claimed. The defendant urges me to award damages in the total amount of between approximately \$80,000 to \$150,000.

**General Credibility and Reliability Findings**

[4] Mr. Verma testified, as did his wife, Bharat Verma, who I refer to as Mrs. Verma, and his adult daughter, Vaishali Verma. He also tendered expert opinion evidence from Dr. Ijaz Hussain, a psychiatrist. The defendant tendered expert opinion evidence from another psychiatrist, Dr. Garth Kroeker.

[5] No issue was taken with the credibility of Mrs. Verma and Vaishali Verma. I find they were both honest witnesses who did their best to give an accurate portrayal of Mr. Verma's life as they experienced and observed it. Mrs. Verma's memory was generally good, and better than her husband's. The few areas where her memory was less than firm were as a result of the passage of time and did not reflect negatively on her credibility or the reliability of her evidence as a whole. While Mr. Verma's wife and daughter were clearly aligned with him, I did not find them to be biased in any way. They remained appropriately balanced and fair in their evidence.

[6] No issue was taken with the credibility of the expert witnesses. I find they were both highly credible witnesses. I will address the reliability of aspects of their opinions later in these reasons.

[7] The court's fact-finding role requires an assessment of credibility of witnesses and reliability of their evidence. Credibility refers to truthfulness or honesty and reliability refers to accuracy. Both credibility and reliability are to be assessed in the context of the evidence as a whole. I recently summarized the principles and factors that inform my assessment in *Aselstyne v. Stobbart*, 2021 BCSC 26 at paras. 4–8 and in *Toora v. Caldwell*, 2023 BCSC 1985 at para. 6.

[8] My assessment of Mr. Verma's credibility and the reliability of his evidence is central in this case. It is critical in determining his pre and post-Accident states, the causation, nature and extent of his psychological injuries and, ultimately, his damages. It is also important to the weight to be given to the medical opinions in this case, to the extent they rely on Mr. Verma's reporting and representation of his pre and post-Accident conditions.

[9] I find Mr. Verma was a very honest witness who tried his best to provide accurate evidence. His evidence had many strengths. Despite enduring obvious and genuine symptoms related to his mental health conditions at times during his testimony, he was a careful and balanced witness. He did not exaggerate or minimize his evidence. He did not testify in such a manner that he appeared to have an agenda. He acknowledged some personally difficult facts and made concessions against his interest. His evidence was generally consistent with other evidence I accept.

[10] While Mr. Verma was a very credible witness, his evidence was not perfect. His memory for dates and historical details was poor at times, but I find this was due to the passage of time or the relative unimportance of the event he was being asked to recall and not a deliberate effort to undermine the truth-seeking function. Fortunately, Mrs. Verma's memory for detail was much better, and allowed her to fill in the blanks left by her husband's evidence. Where their evidence differs, I prefer and accept Mrs. Verma's evidence.

[11] Overall, in consideration of the evidence as a whole, I find that Mr. Verma was a credible and reliable witness. Other than in those few areas where I prefer Mrs. Verma's evidence over his, I accept Mr. Verma's evidence.

**Facts**

[12] I will organize my general factual findings in chronological order and will make further specific factual findings as I consider the various issues.

**Prior to the Accident**

[13] Mr. Verma is currently 57 years old. He lived in Patiala, India until he moved to Canada around the age of 39.

[14] Mr. Verma grew up in a home with his parents and his two older brothers. His father worked as the superintendent at Punjabi University in Patiala and his mother was a homemaker. Despite the presence of some physical violence in the home and at school, Mr. Verma characterizes his childhood as a very good, happy one.

[15] As a child, Mr. Verma's father struck him on occasion, as did his teachers. Mr. Verma also witnessed his father striking his mother on occasion as well. Mr. Verma explained that he felt afraid during the times he was beaten, but that he never saw these events as out of the ordinary or too significant, citing the culture where he grew up. Now, with the benefit of hindsight, he realizes that what happened was not right.

[16] Mr. Verma did very well in high school. He went on to obtain bachelor and masters degrees in ayurvedic naturopathic medicine at the Punjabi University in Patiala. He started his own practice in ayurvedic naturopathic medicine in 1988 and, within about six months, bought a bigger clinic. He ran a very busy, successful practice.

[17] In about 1990 or 1991, Mr. Verma met his future wife. She was working as an account assistant with the railway department at the time. They married in 1991 and have lived together continuously since then.

[18] In 1992, the couple welcomed their daughter, Vaishali. Mrs. Verma took three months maternity leave and then returned to her job. In 1995, they welcomed their son, Siddharth. Mrs. Verma took a total of six months off work after his birth and then returned to work again. During all of this time, Mr. Verma continued to run his ayurvedic naturopathic medicine practice. Mrs. Verma helped him as she could on weekends.

[19] In 2000, Mr. and Mrs. Verma decided they wanted to move their family to Canada. They made this decision because they felt Canada would give their children a better environment and better educational opportunities. After a lengthy application process, the family moved to Canada as permanent residents in the summer of 2005.

[20] The family first stayed in Hamilton, Ontario. They lived with a friend for only a very short time before finding more permanent accommodation. Although his long-term goal was to one day operate his own business in Canada, Mr. Verma knew the immediate need was to support his family in any way he could, so he set about to find a job, any job. Mrs. Verma did so as well.

[21] Within the first couple of days of the family's arrival in Canada, Mr. Verma took a job cleaning his friend's neighbour's yard. Within the first week, he found a job making and sanding kitchen cabinets in a factory. He worked there for about eight or nine months before moving to another job in a cheese factory. He also did some part-time painting work on the side.

[22] Mrs. Verma found part-time work in those early days as well, first giving out tickets in a parking lot, then working at a balloon factory at night. She soon found full-time work during the day at a towel packing company.

[23] After about four or five months at the cheese factory, Mr. Verma learned of an opportunity for he and his wife to work at a Shell gas station in Alberta. As owning their own business was their ultimate goal, Mr. and Mrs. Verma seized this opportunity to gain some experience. They viewed it as a starting point.

[24] The family moved to Canmore, Alberta and the Vermas looked forward to starting their new jobs. Unfortunately, the opportunity was not as promised and did not materialize. Undeterred by this setback, the Vermas quickly found other work in a gas station in another community and moved to Nanton after only two days in Canmore. Once in Nanton however, Mr. and Mrs. Verma learned that they would not be working at the gas station as they expected, but rather would have to work as a cook and a server at the restaurant attached to the gas station.

[25] Neither of them had worked in such positions before, but again they were undeterred by this setback. They accepted what was offered and made the most of it. They continued to focus on their ultimate goal and approached these unexpected positions with the philosophy that “any experience is good experience”. Jumping in with both feet, the couple signed a one-year lease on an apartment and enrolled the children in school.

[26] Mr. Verma worked full time as a cook in the restaurant. As Mrs. Verma’s work as a server at the restaurant was only part-time, she approached the operator of a nearby Mac’s Convenience Store (“Mac’s”) and asked if they had any work available. Although the answer was no, Mrs. Verma nevertheless offered to work there for free. With a Mac’s franchise opportunity now in their sights, Mr. and Mrs. Verma thought working for free would be a good investment as it would give her experience and improve their chances of successfully applying for a franchise.

[27] Before long, this investment paid off. In 2007, Mrs. Verma was offered training with Mac’s in Calgary, which she attended. Mac’s then offered the couple a franchise location to run in Calgary.

[28] When the franchise opportunity came their way in 2007, Mr. and Mrs. Verma moved to Calgary. The couple dedicated themselves to working hard, seven days a week, to provide a good future for their children. For the first little while, they had to leave their children alone in Nanton during the weekdays so that the children could finish their exams before joining their parents in Calgary.

[29] Mr. and Mrs. Verma both worked more than full-time hours at the Mac's store in Calgary. They had one part-time employee and their daughter would occasionally help out as well. Their business was doing very well, but, unfortunately, Mr. Verma was the victim of two robberies, the second of which led Mac's to terminate their franchise agreement in early 2010.

[30] The first robbery occurred about four or five months prior to the second. Mr. Verma was working alone at night when he was robbed at gunpoint. For a short time after this first robbery, Mr. Verma felt fearful, even when he went to a shopping mall. He felt nervous if he saw someone wearing a hoodie or if he saw a customer put his hand in his pocket. Mr. Verma did not take any time off work after the first robbery, nor did he take any medication for the fear and nervousness he was feeling.

[31] The second robbery occurred when Mr. Verma was again working alone at night. On this occasion, two masked men wearing hoodies entered the store and demanded cash and cigarettes from him. Mr. Verma complied. On their way out of the store, Mr. Verma thought he heard one of the men say "we should kill him". This frightened him, so Mr. Verma defended himself by beating the men with a nearby baseball bat.

[32] Mr. Verma felt scared after the second robbery. He felt anxious, angry, and sometimes had suicidal thoughts. Mrs. Verma noticed her husband's mood was sad for a time. She also noticed that, for some time after the second robbery, he was scared if he saw someone wearing a hoodie. Despite these feelings, Mr. Verma was able to function and carry on his regular duties at the store. These feelings lasted for only about a month after the second robbery. Mr. Verma attended counselling for two days, following which he felt his symptoms were gone. He did not take any medication for his symptoms. As Mr. Verma described it, the two robberies were very scary and they impacted his mental health "for a short while, and then I was normal after that."

[33] In January 2010, a short time after the second robbery, Mac's terminated the Vermas' agreement to operate the store. As Mr. Verma understood it, the company



determined that Mr. Verma's use of the baseball bat was a failure to follow policy, and grounds for termination. This loss was difficult for the couple, as they had done very well with the franchise by that point.

[34] Again, the Vermas were undeterred. After losing the Mac's store in Calgary, they immediately started to look for the same type of work. While they looked, Mr. Verma took part-time work as a painter. The family continued to live in Calgary. After about three or four months, Mr. Verma was offered an opportunity to own his own gas station, a Husky, in Cranbrook, British Columbia. He and his wife seized the opportunity.

[35] In May or June 2010, Mr. and Mrs. Verma moved their family to Cranbrook so that they could operate the Husky gas station. Their work ethic remained the same as it had always been. They worked hard, long hours. They employed at least two other people. They were paid through a corporation they set up around this time.

[36] The couple operated the Husky gas station for less than a year. At the end of the fiscal year, in about March 2011, Husky advised the Vermas that they were required to purchase another location if they wanted to keep operating the one they had. As they were financially unable to do so, their agreement with Husky ended on or about April 1, 2011.

[37] It only took a few weeks before the Vermas seized another opportunity. They purchased and began to run a Fas Gas franchise in Cranbrook. Their work ethic remained as it had always been. They operated this business until about December 2013.

[38] Mr. and Mrs. Verma enjoyed working at Fas Gas, but left because they had aspirations to open their own business and a good opportunity to do so came their way. They were offered an Esso gas station, one that they would own, in Duncan. This opportunity seemed ideal. It would allow them to be their own boss and sell what they chose. It was in a location near to their son, who had recently begun attending the University of Victoria and was living in Duncan.

[39] The couple moved to Duncan. Again, they worked hard to make this business a success, working seven days a week. Although they increased its sales revenues, the Vermas sold the Esso at about the end of 2014 because they felt their profit margins were not high enough, and they had been unable to see their son as much as they had hoped. They lost approximately \$50,000 in the sale.

[40] Mr. Verma experienced anxiety due to difficulties he experienced during the sale process. He saw a doctor about these symptoms and was prescribed anxiety medication, which he took for a short period of time.

[41] After selling the Esso in Duncan, Mr. and Mrs. Verma decided to travel for a bit before returning to Canada to find a new store. In 2015, they travelled to India to see Mr. Verma's parents and also travelled to the United States. When they returned, they moved to Mission and began their search for a new business, hopefully a convenience store. After finding a suitable location in Abbotsford, the Vermas approached a Mac's sister company, Winks, about the possibility of setting up a franchise there. Following Winks' approval, Mr. and Mrs. Verma incorporated a company through which to operate the business, renovated the premises themselves, and eventually started operating the Winks convenience store (the "Winks Store") on about July 1, 2016.

[42] Mr. and Mrs. Verma operated the Winks Store, and were each paid as employees of their numbered company. They both worked long hours, eventually hiring one part-time worker as the store got busier. The Winks Store was open from 7 a.m. to 11 p.m. each day. Mr. Verma typically worked from about 10 or 11 a.m. to 11 p.m. each day, with the morning and early afternoon duties involving shopping for inventory. His time working in the store itself usually began at about 2 or 3 p.m. Mrs. Verma stayed at the store with him for about an hour or so before heading home. She returned later, bringing him dinner each night.

[43] In addition to the day-to-day running of the Winks Store, Mrs. Verma also liaised with the accountant. In addition to shopping for inventory, Mr. Verma's job duties included stocking, cleaning and dealing with customers. Eventually the

Vermas applied to have lottery sales in the Winks Store because they believed it would increase their sales.

[44] Mr. Verma felt he had finally found his dream business. He enjoyed working with the customers. He and his wife had complete autonomy. The business required very little financial investment and did not require them to obtain financing. There was no gas station or any of the other complexities that had been involved in their previous businesses.

[45] In December 2016, Mr. Verma was involved in a single vehicle motor vehicle accident when his car struck a pole. It had been snowing at the time. The airbags in his vehicle deployed and his vehicle was determined to be a total loss. Following this accident, Mr. Verma experienced short-term anxiety, fear of driving and poor sleep. He did not take any time away from work as a result of these symptoms. Mr. Verma and his wife continued to operate their store in the same manner after this.

### **The Accident**

[46] The Accident occurred on June 20, 2018. Mr. Verma was driving his vehicle northbound on Sumas Way, near that street's intersection with Highway 1 in Abbotsford, when his vehicle was struck by a vehicle owned and operated by the defendant. Mrs. Verma was sitting in the front passenger seat and his daughter's future mother-in-law and father-in-law, visiting from Sweden, were seated in the back. The defendant turned left in front of Mr. Verma's vehicle, striking its left side and causing damage to the extent that Mr. Verma's vehicle was no longer driveable. Firefighters attended the scene.

[47] Mr. Verma was wearing his seatbelt. He recalled hitting his head in the Accident. He also remembered feeling guilty and "kind of embarrassed" because his new family members were in the vehicle. He has little memory of what he did in the aftermath of the collision, other than going home to sleep for a little while. When asked directly whether he felt any new health symptoms immediately after the Accident and before he went to sleep, he testified that the "scene of the accident left

a mark. I couldn't get rid of that scene in my mind...that scene just kept playing over and over. But I didn't have any pain."

### **After the Accident**

[48] Mr. Verma began to develop physical pain soon after the Accident. He first described it as severe pain going down along his whole right side, with some involvement of his left side as well. It involved his neck, shoulder and back. He also began to wake up in the night. He had images of the Accident scene in his mind and found that he had to walk "back and forth" to try to forget those images.

[49] Within a short time after the Accident, Mr. Verma began to experience a number of other psychological and physical symptoms as well. He felt "scared, very scared", to the point he found it difficult to go to the Winks Store. He found he no longer liked interacting with customers. He started spending more time smoking outside the Winks Store, even while customers were inside. He also started having what he described as "severe neuralgia" in his face. He began to stammer when he spoke. He found when he wanted to say something the "words wouldn't come out". He also began to get angry for no reason, break into "cold sweats", experience breathlessness and a rapid heart rate. Mr. Verma also began to feel anxious, which he described as wanting to "just run out of the store" and "to keep running and to not stop". He felt afraid going grocery shopping and driving.

[50] Mrs. Verma noticed many of these symptoms. Within a few days of the Accident, she noticed physical changes in him, including shaky and cold hands, stuttering when he spoke, excessive perspiration on his forehead and waking up in the night "drenched in sweat." She also noticed changes to her husband's personality. He now got angry easily and was easily disturbed in the night. The couple started sleeping in different rooms.

[51] As Mr. Verma's physical and psychological symptoms continued to worsen, he decided he needed to find a family doctor. He had never needed to find one before. Mr. Verma began seeing Dr. Harleen Bhatti on June 25, 2018.

[52] On that day, Mr. Verma discussed the Accident with Dr. Bhatti, including the anxiety he had been experiencing since it occurred. He confirmed that he had experienced anxiety previously, for short periods of time following the robberies in Calgary and then while in Duncan. He also confirmed that he had taken medication for anxiety prior to the Accident. He asked Dr. Bhatti for a prescription for the same anxiety medication he took while he lived in Duncan, as he found it had provided him with some relief.

[53] Dr. Bhatti also referred Mr. Verma to massage therapy and physiotherapy related to his physical injuries. Mr. Verma began physiotherapy treatment at Pro Motion Physiotherapy & Sports Injury Clinic on August 10, 2018. Including this first visit, he was seen for treatment there 18 times until the end of 2018. He was also seen for treatment at Total Care Chiropractic & Rehab Inc. twice in December 2018

[54] After his first visit with Dr. Bhatti in June, Mr. Verma saw Dr. Bhatti another 12 times throughout 2018. He was prescribed, and took, a variety of medications related to his psychological symptoms, including Citalopram, Trazadone, Clonazepam and others.

[55] At one of his appointments with Dr. Bhatti in July 2018, Mr. Verma expressed having suicidal thoughts, so Dr. Bhatti referred him to the Rapid Access Clinic for Mental Health (the “Clinic”). English is not Mr. Verma’s first language. His initial intake with the Clinic was delayed because of a language barrier with the caller, but he soon saw Dr. Sonia Uppal, a psychiatrist with the Clinic, in September 2018.

[56] Mr. Verma continued to work at the Winks Store in the first few months after the Accident, but struggled to do so as a result of his symptoms. Mrs. Verma noticed these struggles. They were significant changes in her husband’s work habits.

[57] Mr. Verma was quick to anger, even with customers. He now avoided customers or would act disrespectfully toward them. He spent more time outside the Winks Store, smoking, even when customers were inside the store. He was more forgetful, and making mistakes on orders and with deliveries, mistakes he had not

made in the past. He described instances where he left the store with the intention of making purchases, but would inexplicably come back empty-handed. He was allowing cleanliness, customer service and stocking to slide. Customer's Google reviews left Mrs. Verma with the impression that they were noticing these negative changes and the Winks Store's reputation was suffering.

[58] Mr. Verma began working less and less hours as a result of his symptoms.

[59] All of these changes in Mr. Verma served to increase Mrs. Verma's workload, both at the Winks Store and at home. Mrs. Verma was understandably very concerned about the changes she saw in her husband. Mr. Verma was very distressed by them as well.

[60] Mr. and Mrs. Verma eventually sold the Winks Store on December 20, 2018. Why they sold the store is a matter of contention. The plaintiff submits they did so as a result of Mr. Verma's health. The defendant suggests that their primary purpose in selling the store was to go to India to plan and attend their daughter's wedding.

[61] Mr. and Mrs. Verma each testified about why they sold the Winks Store. Mr. Verma said they did so because of his health situation. In cross-examination he agreed that he had used the proceeds of sale to pay for the wedding. When it was suggested to him in cross-examination that the primary purpose in selling their store was to go to India to plan and attend their daughter's wedding, Mr. Verma testified that "it was partially that. But it was also my health and the intention to come back and buy something bigger".

[62] Mrs. Verma's evidence differed somewhat from her husband's on this point. She testified that they decided they needed to sell the Winks Store because Mr. Verma felt he could no longer operate it. Mrs. Verma also felt that if things continued to slide as they had been as a result of her husband's health, the store would lose the value they had built. She was firm in her evidence that they did not sell the Winks Store, and never would have sold the Winks Store, for the purpose of

attending their daughter's wedding. She testified that if the Accident had not occurred, they would not have sold the Winks Store.

[63] I accept Mrs. Verma's evidence on this issue. It aligns with the preponderance of the evidence. The Vermas had worked very hard, in challenging and difficult conditions, to find the business that suited them, their dream business. They finally found it and, after two years of hard work, they were realizing some success. The Vermas planned to sell the Winks Store because of Mr. Verma's health. That they benefitted from the sale and used the proceeds toward their daughter's wedding does not convince me this was the primary reason for the sale. There can simply be no reasonable suggestion in all of the circumstances that the Vermas would have sold their store to plan and attend their daughter's wedding.

[64] After the sale of the business, Mr. and Mrs. Verma attended their daughter's wedding, but it was a very difficult experience for Mr. Verma as a result of his symptoms. Although he took prescribed medication, he continued to experience anxiety-related symptoms that affected his mood and his ability to be around people. He even struggled to perform his own personal daily routine.

[65] Mr. and Mrs. Verma returned to Canada about three or four months later with the same intention they held when they left – to find another business to own and operate, "something bigger". This proved to be very difficult. Although they found a potential opportunity, they realized they could not pursue it because Mr. Verma was continuing to experience significant symptoms. He described these symptoms as feeling afraid, unable to "face the clients", experiencing body shakes, stammering when he spoke, and having suicidal thoughts. Mr. Verma went back to see Dr. Bhatti on May 6, 2019. She referred him back to the Clinic.

[66] Mr. Verma received a call from the Clinic that summer, but again experienced communication difficulties. According to his understanding of the conversation, the caller told him that if he was having suicidal thoughts, he should phone them. He told the caller that he was not going to commit suicide. He was prescribed Venlafaxine for treatment of his psychological symptoms in July 2019.

[67] Mr. Verma saw Dr. Bhatti five more times after that, prior to his return to India in September 2019. Upon returning to India, he continued to seek out psychiatric treatment. He saw Dr. Yoseph Bhagwant Kale, a psychiatrist, on October 4, 2019. After that and until 2021, he attended a private clinic where he was given what Mr. Verma called “high-dose” or “high-potency” medications. Because those medications made him “sleep all day”, his wife encouraged him to again seek out treatment from a psychiatrist, which he did.

[68] Mr. Verma began seeing a psychiatrist, Dr. Arvind Sharma, in March 2021. He saw Dr. Sharma nine times between March 1, 2021 and April 12, 2023. Dr. Sharma has prescribed him certain medications, but Mr. Verma feels they are not effective. Dr. Sharma remains his psychiatrist today.

[69] Since the Accident, Mr. and Mrs. Verma have not been apart from one another except for two occasions when Mrs. Verma spent time with their daughter and their new grandchild in Sweden. Mr. Verma wanted to go on these trips as well, but he was unable to as a result of his symptoms. Mrs. Verma ensured her husband had support while she was gone, referring to him having a “maid” and both sets of their parents available to him. Mr. Verma found these times alone, away from his wife, extremely difficult. He called upon another relative, someone aware and understanding of his illness, to help him as well during these times.

[70] As of the date of trial, Mr. and Mrs. Verma continue to live in India with Mr. Verma’s parents. This was not their plan. Mr. Verma testified, and I accept, that he had been living in Canada for about 15 years, has Canadian citizenship and considers Canada his country. He never wanted to leave. He and his wife planned to continue operating their convenience store with the goal of increasing its revenues and value.

[71] Before turning to my findings on the plaintiff’s condition and causation, I will outline the expert evidence called in this case.



### **The Expert Evidence**

[72] Two psychiatrists, both well qualified in their field, prepared independent psychiatric medical evaluations in this case. They each diagnosed Mr. Verma as suffering from certain psychiatric illnesses arising from the Accident. Their opinions primarily diverge in the areas of the effect of pre-existing conditions, treatment recommendations and, to an extent, prognosis.

#### ***Dr. Ijaz Hussain***

[73] Dr. Hussain assessed Mr. Verma on two occasions. The first assessment occurred on September 16, 2019 and the second occurred on October 15, 2022. He prepared reports outlining his opinions regarding diagnosis, causation, prognosis, disability and treatment recommendations in relation to each assessment. The first report is dated October 27, 2019 (the “First Assessment”) and the second is dated January 3, 2023 (the “Second Assessment”).

[74] For the First Assessment, Dr. Hussain conducted a two-hour, in person, assessment of Mr. Verma. It was conducted in Mr. Verma’s first language (Punjabi). Mrs. Verma was present as well, but her participation was confined to confirming the accuracy of the information her husband provided.

[75] For the Second Assessment, Dr. Hussain conducted the assessment over Zoom as Mr. Verma was in India at the time. Dr. Hussain interviewed Mrs. Verma separately this time. Again, the participants spoke in Mr. Verma’s first language.

[76] In both the First and Second Assessments, Dr. Hussain diagnosed Mr. Verma with the following conditions arising from the Accident: (a) major depressive disorder, current episode, moderate to severe; (b) generalized anxiety disorder (“GAD”); and (c) post-traumatic stress disorder (“PTSD”).

[77] At the time of the First Assessment, Dr. Hussain recommended Mr. Verma receive regular treatment through a psychiatrist and make adjustments to his medications. By the time of the Second Assessment, Dr. Hussain felt that although

Mr. Verma had followed treatment recommendations, his mental health condition had worsened.

[78] Regarding the diagnosis of major depressive disorder, Dr. Hussain found that Mr. Verma's scores on the screening questionnaire indicated severe depression. He found Mr. Verma's mental status examination "clearly fits" with the description of this disorder, as Mr. Verma had "signs of anhedonia, loss of interest, and psychomotor retardation alternating with psychomotor agitation", as well as depressed mood and affect (Second Assessment at p. 7). He also noted that Mr. Verma's prescribed anti-depressant medication was not alleviating his symptoms.

[79] Regarding the GAD diagnosis, Dr. Hussain emphasized that Mr. Verma's score on the screening questionnaire was a high score. He opined that Mr. Verma exhibited all of the common symptoms of this disorder, including "cognitive, physical, and sympathetic symptoms of anxiety" (Second Assessment at p. 7).

[80] Regarding the PTSD diagnosis, Dr. Hussain opined that Mr. Verma's questionnaire score, as well as his symptoms, were suggestive of this disorder. He identified Mr. Verma experiences of avoidance, intrusive thoughts, reliving of trauma, numbed emotions and startle responses as "typical features" of PTSD.

[81] Dr. Hussain offered his opinion about Mr. Verma's prognosis at page 8 of the Second Assessment. He found it to be "guarded and poor" and explained:

... This is because we have not seen any improvement in his condition since the start of the treatment. He is struggling with exactly the same symptoms as he was two years ago. He is gradually withdrawing from his wider community. He is getting more dependent on his family. His caregiver burden is increasing. He is still symptomatic despite all the treatment that he received.

[82] Dr. Hussain also offered opinions about the cause of the diagnosed mental health conditions and the impact of Mr. Verma's previous traumas. He opined that Mr. Verma developed these conditions since the Accident, noting that there "is a temporal relationship" between the Accident and Mr. Verma's functional decline (Second Assessment, p. 11). He also opined, noting that Mr. Verma was not receiving treatment and had recovered from his previous traumas prior to the Accident, that the pre-existing psychological conditions arising from those traumas

made Mr. Verma more vulnerable to future psychological complications. He explained at page 9 of the Second Assessment:

While his pre-existing conditions made him vulnerable for development of future psychological complications, they are not completely responsible for the most recent presentation. He had a vulnerability factor present prior to the car accident but the car accident made it worse for him to the point where he became non-functional. He was able to function after previous traumas, but after this most recent trauma, his abilities to return to work significantly dropped.

[83] Dr. Hussain put it another way at page 8 of the Second Assessment when he opined that Mr. Verma “has a previous history of depression and anxiety, and he was at high risk of return of symptoms again based on his traumatic experience.”

***Dr. Garth Kroeker***

[84] Dr. Kroeker assessed Mr. Verma once on December 14, 2022. He prepared a report outlining his opinions regarding diagnosis, causation, prognosis, disability and treatment recommendations dated December 26, 2022.

[85] Dr. Kroeker conducted a two-hour interview with Mr. Verma over Zoom as Mr. Verma was in India at the time. It occurred in the middle of the night for Mr. Verma. As Dr. Kroeker does not speak Punjabi, the participants used an interpreter to communicate.

[86] Dr. Kroeker diagnosed Mr. Verma with PTSD and major depressive disorder, with symptoms including:

...low mood, angry mood, fatigue, loss of interest, loss of pleasure, sleep disturbance, diminished appetite, hopelessness, ruminations about the Accident, flashbacks about the accident, avoidance of driving cars (though not motorcycles), avoidance of social engagements, and avoidance of hobby activities such as going to the gym. He is also afraid of having a heart attack. (pp. 4 and 5).

[87] Dr. Kroeker further explained at page 3 that PTSD “is caused by exposure to a frightening or life-threatening situation, leading to fear, negative mood change, avoidant and hypersensitive behaviour, intrusive memories, nightmares or flashbacks, and disruption of normal life activities.”

[88] In terms of pre-existing issues, Dr. Kroeker diagnosed Mr. Verma at page 3 of his report as having a “lifelong history of PTSD, with childhood onset, at first due to severe childhood abuse.” He thought Mr. Verma’s PTSD symptoms settled, but most probably did not disappear during his early adult life. After settling into a successful life operating a store in Canada, Dr. Kroeker opined that Mr. Verma then developed a “severe exacerbation of PTSD” following the two 2010 robberies in Calgary. These symptoms also settled in the following years. Based on a clinical entry following the 2016 single vehicle accident, Dr. Kroeker thought Mr. Verma could have had a mild recurrent manifestation of PTSD symptoms at that time.

[89] Dr. Kroeker further opined that Mr. Verma developed PTSD and depressive symptoms after the Accident. He found these symptoms, which prevented Mr. Verma from working after the Accident, were the “most prolonged and debilitating compared to his previous episodes.” He also opined that some of his physical complaints could be due to, or greatly exacerbated by, anxiety. For example, various forms of fluctuating skin sensation can result from anxiety and associated hyperventilation.

[90] Regarding causation, Dr. Kroeker found that two hereditary factors predisposed Mr. Verma to depression and anxiety disorders: his father’s anger control problems and his mother’s history of anxiety. He opined at page 13 of his report that these two hereditary factors lead to a “significant probability” that Mr. Verma would have developed anxiety or depressive symptoms without the occurrence of the Accident. Put another way at page 7 of his report, he opined that had the Accident not occurred, Mr. Verma “still would have had a moderately high probability of having anxiety and depressive symptoms, though likely not a specific fear of driving a car.”

[91] Dr. Kroeker agreed in cross-examination that the phrase he used, “significant probability”, lacks clarity. While he could not be precise (in terms of a percentage) about the likelihood of Mr. Verma having developed these symptoms without the Accident, he emphasized that, in his opinion, the probability of him having developed

depressive or anxiety problems was much higher than if his parents had not had psychiatric symptoms themselves.

[92] Dr. Kroeker made many treatment recommendations, including that Mr. Verma engage in ongoing psychotherapy, and include his wife and his adult children in some of the sessions. He also recommended that Mr. Verma: see an occupational therapist to assist with him physically engaging in feared activities again; participate in a sleep study; make medication changes; and see other specialists related to his heart, facial pain and speech concerns.

[93] Dr. Kroeker is not optimistic about Mr. Verma's recovery, noting that he has not engaged in psychotherapy, has limited financial resources, and is living in another country with uncertain health care resources. Nevertheless, Dr. Kroeker feels that the various therapeutic options he recommends may have a chance of substantially helping Mr. Verma if he chooses to engage in them.

### **Findings on the Plaintiff's Conditions and Causation**

[94] Mr. Verma bears the burden of proving, on a balance of probabilities, that the defendant caused or contributed to the injuries, and the resulting impacts, for which he seeks compensation.

[95] In *Borgfjord v. Boizard*, 2016 BCCA 317, leave to SCC ref'd 37210 (9 February 2017), Justice Savage summarized the law on causation as follows:

[54] Causation is a two-step consideration. First, the plaintiff must establish the damage was caused *in fact* by the conduct of the defendant: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54. The test for factual causation was restated by the Supreme Court in *Ediger*:

[28] This Court recently summarized the legal test for causation in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. Causation is assessed using the "but for" test (*Clements*, at paras. 8 and 13; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred (*Clements*, at para. 8). "Inherent in the phrase 'but for' is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the

injury would not have occurred without the defendant's negligence" (para. 8 (emphasis deleted)).

[55] Scientific proof of causation is not required; common sense inferences from the facts may suffice: *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 at paras. 38, 46. However, inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Kerr (Litigation Guardian of) v. Creighton*, 2008 BCCA 75 at paras. 58-62; *Haase v. Pedro* (1970), 21 B.C.L.R. (2d) 273 (C.A.) at 279-80, 305.

[56] Second, the plaintiff must establish causation *in law*. This has been described as proving the defendant was a proximate cause of the loss, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Hussack* at para. 54. Overall the inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at paras. 11 and 12.

[57] It is not necessary for the plaintiff to show the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable: *Hussack*, at para. 71.

[96] In *Nelson (City) v. Marchi*, 2021 SCC 41, the Supreme Court of Canada reiterated the two inquiries required in the causation analysis at paras. 96–97:

[96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

[97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadat*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[97] Although *Nelson (City)* dealt solely with physical injuries, the principles underlying the remoteness inquiry are the same for physical and mental injuries: *Maingot v. Wankowicz*, 2023 BCCA 89 at paras. 31–35.

[98] Causation must be established on a balance of probabilities before damages are assessed. The governing principle is that the plaintiff must be placed in the position that he would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (sometimes referred to as the "thin skull" rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which he would have experienced anyway (sometimes referred to as the "crumbling skull" rule): *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 32–35.

[99] The Supreme Court of Canada articulated the "crumbling skull" rule in *Athey* at para. 35 as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original; citations omitted.]

[100] I agree with Justice Taylor's observations in *Grewal v. Sanghera*, 2021 BCSC 621, that it is important not to place too much emphasis on the "thin" or "crumbling" labels, and to also recognize that the choice between these two categories is not necessarily binary in every case. Rather, the court must remain focussed on addressing the "underlying principle that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not put in a better position with respect to each of his individual symptoms and conditions": *Grewal* at para. 107.

[101] The factual and legal causation of Mr. Verma's physical injuries is not in dispute here. The defendant agrees, and I find, that Mr. Verma suffered soft tissue injuries, mainly in his neck, shoulders and back as a result of the Accident. He had no pre-existing physical conditions. The defendant also does not dispute, and I find, that these physical injuries arising from the Accident resolved within about a year to a year and a half after the Accident. These physical injuries caused Mr. Verma pain and affected his ability to do activities like bend over, turn his neck and other things.

[102] The dispute here lies with respect to Mr. Verma's psychological injuries.

[103] The defendant concedes Mr. Verma has established that he suffered some psychological injuries as a result of the Accident, but takes the position that there is a significant measurable risk that his predisposition to anxiety and depressive symptoms would have detrimentally affected him in the future regardless of the Accident. In other words, the defendant argues that, with respect to his psychological injuries, Mr. Verma is more a "crumbling skull" plaintiff and that this ought to be taken into account in reducing his damage award. They rely primarily upon Dr. Kroeker's opinion in this regard, urging me to accept his opinion over that of Dr. Hussain on this point.

[104] Mr. Verma submits that he has established he suffered severe, persistent, permanent and disabling psychological conditions, including major depressive disorder (moderate to severe), GAD and PTSD as a result of the Accident. He says that these injuries are both the factual and legal result of the defendant's negligence. He urges me to reject Dr. Kroeker's opinion about the likelihood he would have suffered these symptoms without the Accident. Rather than a "crumbling skull" plaintiff, Mr. Verma urges me to conclude that he is a "thin skull" plaintiff, rendering the defendant liable for his psychological injuries, even if they are unexpectedly severe owing to his pre-existing condition.

[105] For the reasons that follow, I agree with the position taken by the plaintiff. I will begin the analysis by defining the issues.



[106] The issue here is not whether Mr. Verma has been suffering from psychological health conditions since the Accident. I am satisfied from the whole of the evidence, including the evidence of both experts, that he has been suffering from significant psychological health conditions, diagnosed as major depressive disorder (moderate to severe), GAD and PTSD, since the Accident. The symptoms Mr. Verma experiences associated with these conditions are severe, persistent, disabling and likely permanent.

[107] Nor is the issue here whether Mr. Verma had psychological health symptoms at times prior to the Accident. He did. The issue here, as in *Grewal*, is: (1) whether and to what extent Mr. Verma's psychological symptoms after the Accident are attributable to these pre-existing conditions, in which case he would have suffered them even without the Accident and should not be put in a better position; or (2) whether the symptoms were separately caused or exacerbated by the Accident in a manner which is not solely attributable to the pre-existing conditions, and is separately attributable to the Accident, and are therefore compensable. I am satisfied the evidence establishes the latter.

[108] Earlier in these reasons, I made findings about Mr. Verma's pre-Accident psychological health symptoms. To summarize, I found that Mr. Verma experienced such symptoms related to stressful or traumatic events that occurred in 2010 (two workplace robberies), 2014 (sale of the business in Duncan) and 2016 (single vehicle accident). The symptoms he suffered related to these events were temporary. They each resolved after a short time, following recommended treatment such as counselling or anxiety medication.

[109] None of these pre-Accident symptoms, for the short times they lasted, caused Mr. Verma to lose any time from work, nor did they impact his daily functioning. They were not debilitating. Mr. Verma was not suffering from any symptoms related to his mental health at the time of the Accident. He was not receiving any mental health treatment at the time of the Accident. Rather, he was a hard-working, happy, healthy and fully functioning member of society at the time of the Accident.

[110] I find that I cannot accept Dr. Kroeker’s evidence that there is a significant probability that Mr. Verma would have developed these anxiety or depressive symptoms without the occurrence of the Accident.

[111] Dr. Kroeker’s opinion here rests on his determination that Mr. Verma has a family history of psychiatric symptoms; specifically, anger in his father and anxiety in his mother. As was revealed in cross-examination, the foundation for this determination is far too frail to be considered reliable.

[112] Dr. Kroeker based his determination about Mr. Verma’s family history solely on the information he believed Mr. Verma was communicating to him during their interview. Dr. Kroeker did not have any medical records or any kind of medical assessment pertaining to either of Mr. Verma’s parents. He did not speak to Mr. Verma’s parents. Regarding his mother, Dr. Kroeker believed that Mr. Verma told him that he witnessed her worrying, which made Mr. Verma think she has anxiety. Dr. Kroeker conceded in cross-examination that relying on Mr. Verma’s subjective comments about his mother is a “weakness in this part of the psychiatric family history reporting”.

[113] Regarding his father, Dr. Kroeker relied on what he perceived Mr. Verma was telling him during their interview as well. Dr. Kroeker felt Mr. Verma’s tone when describing events of childhood abuse was one of “depressed gravity”, as though Mr. Verma was sharing this information for the first time, and the events had really impacted his life negatively. He felt Mr. Verma was communicating that what happened to him as a child was beyond that which had happened to his peers.

[114] I find that Dr. Kroeker’s perception of what Mr. Verma was trying to communicate is not reliable.

[115] As Dr. Kroeker recognized at the time and confirmed in his testimony, the interview conditions were very poor. It was the first, and only, time he met Mr. Verma. For Mr. Verma, it was the middle of the night. Neither spoke the language of the other, forcing them to communicate through an interpreter. They both found the

interpreter experience challenging. Dr. Kroeker was concerned about poor communication at the time of the interview. He observed that, even with the interpreter, a “very substantial language barrier” remained between them. He felt that Mr. Verma may not have understood all of the questions and that some of the questions may not have been well interpreted.

[116] Dr. Kroeker was concerned enough during the interview about Mr. Verma’s comprehension that he asked him about it directly. Mr. Verma told him that there were times he would exhibit what he believed were socially appropriate cues to indicate understanding (smiling and nodding), while in fact did not clearly understand the question or the things being said to him.

[117] In hindsight, Dr. Kroeker fairly agreed that communication would have been improved if he had the ability to speak to Mr. Verma in his own language and had more than one session with him. He agreed that two sessions, a few years apart, would have been helpful. He also felt that many sessions with Mr. Verma would have been helpful.

[118] These communication difficulties undermine the reliability of what Dr. Kroeker perceived Mr. Verma to be saying about his childhood, and perhaps other things as well.

[119] Rather than a “crumbling skull” situation, I find this is a situation, as Dr. Hussain opined, where Mr. Verma’s pre-existing psychological conditions made him more vulnerable to experiencing more serious psychological injuries from the trauma of the Accident than the average person.

[120] The defendant criticizes the completeness of Dr. Hussain’s report and thus the reliability of his opinions. I would summarize the alleged deficiencies in the following categories: (a) Dr. Hussain’s failure to gather more detailed information about Mr. Verma’s previous traumas, including in his childhood; (b) Mr. Verma’s failure to tell Dr. Hussain about anxiety issues he had in Duncan and following the 2016 single vehicle accident; and (c) Dr. Hussain’s failure to include relevant

information in the body of his report, such as referring to medical records he reviewed and whether he conducted a mental status examination.

[121] I find these criticisms do not undermine the reliability of Dr. Hussain's opinions. Regarding the detail contained in his reports, Dr. Hussain explained, and I accept, that his reports are simply a synthesis of all of the detail he reviewed and received. He felt it unnecessary to refer to all of the detail he considered in the body of the report itself. Regarding further detail about childhood trauma, Dr. Hussain explained, and I accept, that he felt it clinically unnecessary to delve into any further details. He understood, and accounted for, Mr. Verma's father's anger and the difficulties that caused for Mr. Verma as a child in formulating his opinions. Finally, I note that Dr. Hussain's opinions did not change when provided with additional information, including the previous experiences of anxiety.

[122] I accept Dr. Hussain's explanations for these alleged deficiencies as reasonable and supportable. Unlike Dr. Kroeker's opinions, I have no concerns about the reliability of the information that grounds Dr. Hussain's opinions. Dr. Hussain assessed Mr. Verma on two occasions, three years apart, which allowed him to get a more complete picture of Mr. Verma, his experiences and his symptoms. He met with Mr. Verma in person on the first occasion. As well, Dr. Hussain and Mr. Verma had no communication difficulties.

[123] I agree with the plaintiff's position on causation and the impact of pre-existing conditions. There is no reliable evidence before the court that Mr. Verma has any family history of depression, anxiety or PTSD. Similarly, there was no reliable information before Dr. Kroeker that Mr. Verma has any such family history when he formulated his opinion. Therefore, I find that Dr. Kroeker's opinion that there is a significant probability that Mr. Verma would have developed anxiety or depressive symptoms absent the Accident as a result of his family history is not grounded in any reliable fact and I give it no weight. For the same reasons, I give Dr. Kroeker's opinion that Mr. Verma first began to suffer from PTSD in childhood no weight either. Put another way, I have rejected Dr. Kroeker's opinion that Mr. Verma would have

developed psychological symptoms in any event, without the Accident, as it is an opinion based on unreliable assumptions not grounded in the evidence.

[124] Mr. Verma's symptoms arising from his major depressive disorder, GAD and PTSD have plagued Mr. Verma since the Accident. These symptoms are completely different than the short-term, episodic symptoms he experienced in the past. The post-Accident conditions and symptoms are debilitating and have not responded to treatment.

[125] Mr. Verma tried to explain how his symptoms affect him on a daily basis. I could see how difficult this was for him to articulate. He provided details and examples, including that he experiences excessive perspiration, feelings of panic, body shakes, clammy hands, and stammering. He is quick to anger, often feels like yelling, wants to "run away", and has feelings of sadness that fluctuate with feelings of being "hyper". Sadly, Mr. Verma also experiences times where he feels like he has "lost his mind", and other times where he wants to hit himself or hurt himself "with something very sharp". Mr. Verma also finds that certain things will aggravate his anxiety symptoms, including noise, mess, or if someone questions him about something. He is anxious driving. He has difficulty concentrating.

[126] Mr. Verma does not want his wife to leave his side because he feels afraid when he is alone. When he is alone, his symptoms are aggravated. When with his wife, he can talk through what he is feeling, which helps. He also practices yoga and goes for long, fast walks with her, which are two of the techniques he has learned to help him control his anxiety symptoms. Other techniques include focussing on a fan or on his breathing.

[127] Mr. Verma's psychological symptoms cause him to rarely leave the house. He will get groceries and go for walks, but when he tries to force himself into other situations, his symptoms are aggravated.

[128] While Mr. Verma had some treatable and episodic anxiety or depressive symptoms related to specific events in the past, he was not experiencing mental

health symptoms at the time of the Accident. He has never experienced anything even close to what he now experiences since the Accident.

[129] I am satisfied that the evidence in this case establishes that the Accident had the effect of injuring not only Mr. Verma's physical health, but his psychological health as well, resulting in psychological conditions of major depressive disorder, GAD and PTSD. These debilitating conditions would not have occurred without the Accident. While these injuries may be considered unexpectedly severe owing to his pre-existing conditions, there is no evidentiary basis for me to conclude there is any real and substantial possibility, to any likelihood, that Mr. Verma would have experienced these debilitating conditions absent the Accident.

[130] It follows that no deduction to Mr. Verma's damages award ought to be applied to reflect any hypothetical future disability arising from depressive and/or anxiety symptoms in the absence of the Accident. Such a hypothetical does not meet the real and substantial possibility threshold. I do not consider this a pre-existing condition from which I could find there was a "measurable risk" that he would have suffered from the debilitating psychological conditions he now suffers in any event.

[131] To summarize, I am satisfied that Mr. Verma has established that his short-term physical and long-term psychological injuries would not have occurred but for the defendant's negligent act. I am also satisfied that this physical and psychological harm suffered by Mr. Verma in the Accident was a reasonably foreseeable result of the defendant's negligent conduct. In other words, I am satisfied that Mr. Verma's psychological injuries are both the factual and legal result of the defendant's negligence.

### **Findings on Prognosis**

[132] Both Dr. Hussain and Dr. Kroeker opined that Mr. Verma's prognosis for improvement is guarded or poor. Dr. Kroeker holds out what I would characterize as cautious optimism for improvement, if Mr. Verma is able to avail himself of his additional treatment recommendations. Mr. Verma's psychological health conditions

arising from the Accident have only worsened over time, despite the treatments he has followed. The evidence as a whole supports Dr. Hussain's opinion that his prognosis is guarded or poor.

### **Assessment of Damages**

[133] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 167, citing *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940 at 962–63.

### **Non-Pecuniary Damages**

#### ***Legal Principles***

[134] The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, disability, and loss of enjoyment of life. Non-pecuniary loss must be assessed for losses suffered by the plaintiff to the date of trial and those he will likely suffer in the future: *Tisalona v. Easton*, 2017 BCCA 272 at para. 39.

[135] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd [2006] S.C.C.A. 100, the Court identified common factors influencing an award of non-pecuniary damages, including: the plaintiff's age; the nature of the injury; the duration and severity of the pain; the level of disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle. Generally, stoicism should not penalize the plaintiff: *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at paras. 54–55.

[136] An award of non-pecuniary damages must also be fair and reasonable to each party. Fairness is measured, in part, against awards made in comparable cases. However, other cases only serve as a rough comparator, as each case must be decided on his own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189. The

amount of the award does not depend only on the seriousness of the injury, but also on the loss in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39.

### ***Positions of the Parties***

[137] Mr. Verma seeks an award of non-pecuniary damages of \$235,000. He relies on the following authorities in support of his position: *Babkowski v. Perry* (December 23, 1982), Vancouver B800591 (B.C.S.C.); *Whatley v. Badshah* (September 26, 1991), Vancouver B884949, 1991 CanLII 139 (B.C.S.C.); *Shongu v. Jing*, 2016 BCSC 901; *Debruyn v. Kim*, 2021 BCSC 620; *Howell v. Strutt*, 2021 BCSC 92; *Kempton v. Struke Estate*, 2020 BCSC 2094; and *Dabu v. Schwab*, 2016 BCSC 613.

[138] The defendant submits that an award for damages in the range of \$80,000 to \$90,000 is fair and reasonable. He relies on the following authorities in support of his position: *Pan v. Lau and Tai*, 2020 BCSC 288; *Grewal*; and *Abraha v. Suri*, 2019 BCSC 1855.

### ***Discussion***

[139] Mr. Verma gave up his secure career in India, years ago, to pursue opportunities in Canada. He gave up everything to start over, from the bottom. His primary motivation in doing so was to provide a better life for his children. By the time of the Accident, he and his wife had worked very hard for 13 years to establish their own small business in Canada. Their hard work paid off in 2016 when they pursued the Winks Store opportunity. Mr. Verma had found his “dream” job. He was good at it and he enjoyed it. The injuries he sustained in the Accident, particularly the psychological injuries, took this dream from him. His symptoms were such that he could no longer work as he once had. He and his wife, reasonably in my view, felt they had to sell the Winks Store before it lost its value.

[140] Mr. Verma is now 57 years old. He has not worked since he and Mrs. Verma sold their store in late 2018. His soft tissue injuries resolved within about 12–18



months after the Accident, but his psychological injuries have been long-lasting and profound. His prognosis for improvement is guarded or poor, but there is room for some cautious optimism if Mr. Verma is able to avail himself of the additional treatments recommended by Dr. Kroeker.

[141] The psychological injuries Mr. Verma suffered in the Accident have had a serious and negative impact on all aspects of his life. The effects of these injuries have been devastating to Mr. Verma's personal, social, family, recreational and vocational life. He is a changed man who has completely lost his pre-Accident lifestyle.

[142] At the time of the Accident, Mr. Verma was a happy, jolly, healthy and ambitious person. He was involved in a loving marriage and had close relationships with his children. He was pursuing a job that he loved. He enjoyed socializing and attending family events. His future, after so many years of sacrifice and hard work, was bright. The effects of his psychological injuries have been devastating to all aspects of his personal and vocational life. He is a shadow of his former self.

[143] Other than the companionship his wife offers him, Mr. Verma is isolated and withdrawn from contact with family and friends. Mr. Verma's marital relationship and the relationship he has with his other family members have been strained and directly impaired. His social relationships have also been directly impaired.

[144] Mr. Verma now experiences frequent bouts of sadness, anger and agitation. While his wife and daughter understand that Mr. Verma's mood changes and withdrawal from family and friends are all symptoms related to his psychological health conditions, they nevertheless struggle with their family's new dynamic. Mr. Verma is not the person he used to be. His ambition and drive towards his career goal of owning and operating his own business has been replaced by apathy and despair. He has lost his confidence and his sense of self-worth. Once independent, he finds it hard to be alone. He does less cooking than he did before the Accident and no longer cleans and irons his own clothes. He requires his wife's assistance and presence at nearly all times. His previously busy life has been replaced with

difficulties getting out of bed. He rarely leaves the house other than to shop for groceries and go for walks with his wife. Mr. Verma's emotional suffering, with its physical side effects, has been extreme. He is self-medicating with alcohol. He is frustrated, angry, lonely and frightened. He always carries medication, Clonazepam, in his pocket to take when he experiences a panic attack, like he did on one occasion during the course of his testimony.

[145] The effect of these psychological injuries on Mr. Verma's day-to-day functioning is significant. He is often unable to even engage in basic activities, has thoughts of self-harm and experiences suicidal ideation.

[146] Although no two cases are identical, I have reviewed the authorities provided by the parties and find that this case more closely aligns with some of the authorities provided by the plaintiff.

[147] For example, in *Howell*, the plaintiff was 48 when he was injured in an accident. His physical injuries were minor, but he sustained serious psychological injuries. He was diagnosed with PTSD and persistent depressive disorder, with a risk of developing major depressive disorder. He had experienced some depressive symptoms prior to the accident, but they had resolved. Justice Macintosh found that Mr. Howell was a "changed man" as a result of his psychological injuries: *Howell* at para. 57. He was now passive, unmotivated to continue his work as a photographer and socially and artistically insecure. The court awarded him \$190,000 in non-pecuniary damages, which is approximately \$210,000 in 2023.

[148] Mr. Verma once told his wife that he wishes he would have suffered more serious physical injuries in the Accident, such as a broken leg, rather than the psychological ones he did. He felt he would have recovered from the broken leg and been well otherwise. This sentiment aligns with the Supreme Court of Canada's description of the grave consequences of serious mental injuries in *Saadati v. Moorhead*, 2017 SCC 28, where Justice Brown for the Court wrote:

[23] I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the

Court's decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health — like a person's physical integrity or property, injury to which is also compensable in negligence law — is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (*Bourhill v. Young*, [1943] A.C. 92 (H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (Stevens, at p. 55).

[149] In consideration of all of the foregoing, I assess Mr. Verma's non-pecuniary damages at \$210,000. This award includes considerations related to any loss of housekeeping capacity. It also factors in a slight reduction for the pain, suffering and loss of enjoyment of life Mr. Verma experiences in relation to his facial pain, which condition the evidence falls short of establishing was caused by the Accident. Overall, I find such an award is fair and reasonable in the circumstances.

### **Pecuniary Damages**

#### ***Past Loss of Earning Capacity***

##### ***Legal Principles***

[150] An award of damages for loss of earning capacity, whether in the past or in the future, compensates a plaintiff's pecuniary loss. Compensation for past loss earnings is based on what a plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[151] The burden of proof of actual past events is a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and

substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 44, 48 and 49.

[152] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, the plaintiff's recovery is limited to net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, aff'd 2010 BCCA 398.

#### ***Positions of the Parties***

[153] Mr. Verma seeks a net award of \$135,000 under this head of damage. He submits that, had the Accident not occurred, he would have continued to work at the Winks Store throughout the pre-trial period, and until age 65. He further submits that he has established that his psychological injuries arising from the Accident have prevented him from working at all during the pre-trial period, causing a pecuniary loss.

[154] Mr. Verma submits that his pecuniary loss should be assessed using an annual income of \$40,000 as an appropriate baseline. This amount, he submits, represents a rough representation of his pre-Accident earnings in the closest fiscal year to the Accident (\$30,000) plus an additional amount (\$10,000) reflecting half the increase in the business' shareholders' equity at that time. Adjusting the gross income of \$40,000 to reflect a 20% income tax rate yields a net annual income of \$32,000. Multiplied by the 4.33 years Mr. Verma was unable to work in the pre-trial period, this yields a loss, before any contingency deductions, of \$138,560.

[155] Mr. Verma argues that if any specific or general negative contingencies are found to apply, they should be balanced out by the specific positive contingency that the Vermas' business would have experienced growth over this period. As this is an assessment rather than a calculation, Mr. Verma submits that \$135,000 is a fair and just award for his loss of past-income earning capacity.

[156] The defendant submits that Mr. Verma's injuries arising from the Accident did not cause a loss of capacity leading to any economic loss. He urges me to consider that there are two distinct periods in the pre-trial period. The first period is from the

date of the First Accident to the date of the sale of the Winks Store on December 20, 2018 (the “First Period”). The second period is from December 20, 2018 to the time of trial (the “Second Period”).

[157] For the First Period, the defendant submits that Mr. Verma has failed to establish any loss of earning capacity leading to a pecuniary loss. He emphasizes that Mr. Verma continued to work at the Winks Store during the First Period and, although he worked less hours than his wife, he continued to be paid for the work he was doing. Importantly, there is no precise evidence about what salaries each of them took in this period. Further, the defendant points to the fact the Vermas employed part-time students at the Winks Store during the First Period, but there is no evidence about when they worked there, their hours or their salaries.

[158] For the Second Period, the defendant submits that the plaintiff has failed to establish that he suffered a loss of earning capacity from his Accident-related injuries and, if he has, he has failed to establish any pecuniary loss arising from it. The defendant argues that it was not Mr. Verma’s injuries that caused him to sell the Winks Store and never work again, but rather his desire to plan and attend his daughter’s wedding in India and then move back to India permanently to care for his elderly parents. To reach this conclusion, the defendant urges me to consider the primary purpose of the Vermas’ move to Canada (to give their children opportunities) in light of the timing of the Vermas’ move back to India (when their children were well-settled in their careers). He says that, having accomplished his goal in Canada, it follows that Mr. Verma chose to return to India to care for his elderly parents, not for any reason related to the Accident.

[159] Alternatively, if I find that Mr. Verma’s injuries caused a loss of earning capacity leading to a pecuniary loss in the Second Period, the defendant submits that his loss should be limited to one year’s income in the amount of \$30,250 (less a 20% deduction to derive a net award), which is the average of Mr. Verma’s T4 earnings for the 2018 and 2019 taxation years.

[160] In assessing the loss as he suggests, the defendant urges me to rely on Mr. Verma's evidence that his physical pain would increase his anxiety, which in turn affected his ability to work. Given that Mr. Verma did not seek treatment for his psychological injuries after October 2019 and until March 2021 and given that his physical injuries resolved about a year after Mr. Verma sold the Winks Store, the defendant asks me to conclude that Mr. Verma was in position to return to work, if he wished, by the end of 2019. From this, the defendant argues that Mr. Verma's loss of earning capacity has not been established beyond that point.

### ***Discussion***

[161] I find there is a real and substantial possibility, to a very high degree of likelihood, that were it not for the Accident, Mr. Verma would have continued working at the Winks Store during the entirety of the pre-trial period. He would have continued to work long hours toward his goal of making his business, his dream business, as financially successful as it could be. That the likelihood of this possibility is very high is supported by several facts.

[162] Mr. and Mrs. Verma moved to Canada to provide their children with better opportunities. In the course of doing so, they worked incredibly hard, from the ground up, to find a business they could run on their own. They considered Canada their home and had no intention of moving back to India at any point. After years of moving to different communities throughout the country, and operating different businesses, Mr. and Mrs. Verma finally found the one they wanted. The Vermas operated their business for two years prior to the Accident. They worked as hard as they ever did. They enjoyed the work and were experiencing some financial success. They planned to continue. On the evidence, there is simply no real and substantial possibility that Mr. Verma would have not continued to work at the Winks Store, in the manner I have described, during the entirety of the 4.33-year pre-trial period.

[163] The suggestion Mr. Verma sold the Winks Store and moved back to India to care for his parents, just like the suggestion he did so to plan and attend his

daughter's wedding, does not rise above the level of speculation. The defendant argues that Mr. Verma left Canada because his goal regarding his children had been achieved and he needed to care for his elderly parents. I accept Mr. Verma's evidence that he had no intention of leaving Canada, for any reason. His children had achieved success, but Mr. Verma and his wife had spent many years in Canada and had finally found a business they could own themselves. They considered Canada home. Mr. Verma had no intention of moving to India to care for his parents.

[164] I find as a fact that Mr. Verma has suffered a loss of earning capacity as a result of the injuries he suffered in the Accident. Prior to the Accident, he operated his own convenience store. It was a job that involved work inside the store such as stocking shelves, cleaning, customer interaction, handling cash and other things. It also involved work outside of the store such as driving, shopping for supplies and the like. It required many long hours.

[165] Due to his injuries, Mr. Verma was no longer able to carry out the core functions of this job. While his physical injuries contributed to this lack of capacity in the first year to year and a half after the Accident, it has been his psychological injuries that affected him the most. These injuries are much more severe, have persisted and have been disabling throughout the entirety of the pre-trial period. It is his psychological injuries that have continued to affect him and make it unlikely he will regain the capacity to return to that type of work, or any work.

[166] I do not accept the defendant's criticism of the plaintiff for failing to obtain a functional capacity evaluation and a vocational consulting report, or such other expert evidence. In this regard, I agree with the remarks of Justice Shergill, who was faced with similar criticisms, at paras. 167–169 of *Moge v. Sanderson*, 2020 BCSC 1511. As Shergill J. noted at para. 169, my focus is on the evidence that has been tendered, “not the evidence that could have been received had counsel turned every stone”. The absence of expert evidence from an occupational therapist, or some other form of formal work capacity evaluation, does not undermine my finding that Mr. Verma's injuries caused him this loss of capacity.

[167] I have made findings, from the whole of the evidence, about Mr. Verma's psychological health symptoms and how they affected, and continue to affect, him. To put it bluntly, this is a man who struggles to get out of bed each day as a result of his psychological health conditions. He fights thoughts of self-harm. When he does make it out of bed, he struggles to interact and communicate with people. He has trouble focussing and concentrating. He has trouble regulating his emotions. He experiences difficult and uncomfortable physical effects. This is also a man who, when he makes it out of bed, struggles to even leave his house. When he does, it is for specific purposes and he needs his wife by his side. I have no doubt these symptoms not only prevented him from working in his previous job, or any job, they would prevent him from having the capacity to even attend a job interview. Dr. Hussain's evidence supports these findings.

[168] Dr. Hussain opined that Mr. Verma's psychological injuries caused a decline in his functioning. Based on his diagnoses, and the symptoms Mr. Verma was suffering from these conditions, Dr. Hussain expressed no doubt about the legitimacy of the functional decline described by Mr. Verma. Dr. Hussain discussed features of Mr. Verma's functional decline throughout his opinions, including that Mr. Verma is not able to return to work, that he has gradually withdrawn from the wider community, is dependent on family for most activities and that his mental health prognosis is guarded and poor.

[169] Mr. Verma made significant efforts to retain the Winks Store, but ultimately his injuries as a result of the Accident led to his reasonable decision that the only option left to him was to sell his business so as to retain some of its value. Since the time he sold the store, I am satisfied from the whole of the evidence that his psychological injuries arising from the Accident prevented him from working not only in his business, but in any capacity. I am satisfied Mr. Verma suffered a pecuniary loss as a result of this loss of capacity.

[170] To assess the value of this loss, I must consider what Mr. Verma would have earned without the Accident, continuing to work at the Winks Store as I have found



he would have, and compare that with what he was capable of earning with the Accident during the pre-trial period. The question is what he was capable of earning, based on a real and substantial possibility. While I am mindful that I am to assess damages for past loss of capacity and not calculate them mathematically, I am also to endeavour to use mathematical aids or anchors as a starting foundation to quantify such loss: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18; and *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36–37.

[171] I will approach the analysis as the defendant suggests by considering it in two distinct periods.

[172] Regarding the First Period, I have found that Mr. Verma suffered a loss of income earning capacity during this period. Owing to his work ethic and desire to maintain his business, he tried to continue working. He wanted to keep his store, but the symptoms arising from his injuries, particularly his psychological injuries, ultimately prevented him from continuing to work. I would characterize Mr. Verma's loss of earning capacity in the First Period as diminishing over time, to the point of a total loss of capacity where he felt, reasonably in my view, that he had to sell the Winks Store while it still had value.

[173] However, in the First Period, I am unable to find that Mr. Verma's loss of earning capacity led to any pecuniary loss.

[174] Mr. and Mrs. Verma operated the Winks Store through their numbered company. They paid themselves each a salary, as employees. There is no evidence about how they decided what to pay themselves. In 2017, Mr. Verma paid himself \$31,000 for the work he did at the Winks Store. Given the significant number of hours he worked during this time, it seems very unlikely this salary was based upon an hourly wage. In 2018, Mr. Verma paid himself a very similar salary, \$29,500, for the work he did at the Winks Store. Again, it seems very unlikely this salary was based upon an hourly wage. Mr. Verma also reported other income in 2018, likely arising from the proceeds of sale from the Winks Store. His total line 150 amount for 2018 was \$118,486.

[175] While I have found that Mr. Verma's injuries caused him to work fewer hours at the Winks Store (causing his wife to work more) and he says he was paid less than his wife during the First Period as a result, there is no evidence about what either of them was actually paid during this period. There is no evidence about how they calculated the salaries they would draw, or how many hours they each worked. Nor is there any evidence about their employees, the hours they worked, or their remuneration. The evidence shows that the Winks Store brought in more revenue in 2018, allowing the Vermas to retain more equity that year. Although there was very little evidence about the sale of the Winks Store, it stands to reason that the Vermas realized this equity when they sold. In the end, the evidence shows that Mr. Verma earned about the same income (arguably more) than he had the previous year in 2018. There is no evidence to ground any real and substantial possibility that Mr. Verma's reduced work hours caused him, or the Winks Store generally, any loss of income. In these circumstances, I can find no pecuniary loss in the First Period.

[176] I turn now to the Second Period. As I articulated earlier, I am satisfied the plaintiff suffered a past loss of income as a result of actual past events that he has proven, namely the loss of his capacity to work and eventual sale of his business. The end of Mr. Verma's work at his store has led to a pecuniary loss during the Second Period.

[177] As is usually the case with self-employed plaintiffs who are central to the operation and success of their business, assessing the value of this loss is inherently difficult.

[178] Various authorities discuss factors that may be considered and weighed when assessing the loss of earning capacity suffered by a self-employed plaintiff. A non-exhaustive list of these factors includes: (a) the plaintiff's education and training as it relates to the business in issue; (b) the plaintiff's employment history; (c) the plaintiff's earning history, both before the creation of the business and through the business; (d) the existence (or absence) of a business plan setting out how the plaintiff intended to develop the business; (e) actual steps taken to implement the

business plan; (f) the performance of similar businesses; (g) market conditions that might impact the business, both positively and negatively; and (h) existing and anticipated clients: *Rousta v. MacKay*, 2017 BCSC 644 at para. 102, aff'd 2018 BCCA 29, citing *Bricker v. Danyk*, 2015 BCSC 2404 at paras. 150–151.

[179] Other factors to consider may include the profitability, viability and value of the business before and after the accident: *Ponych v. Klose*, 2023 BCSC 1504 at para. 263, citing *Engel v. Salyn*, [1993] 1 S.C.R. 306 and *Coles v. Spriggs* (1998), 61 B.C.L.R. (3d) 228.

[180] I find there is a real and substantial possibility, with a very high likelihood, that Mr. Verma would have earned a gross annual income of \$40,000 from his business during the Second Period in the absence of the Accident. In assessing this amount, I rely upon several factual anchors.

[181] In 2017 and 2018, Mr. Verma paid himself a gross income, respectively, of \$31,000 and \$29,500 from the business. As well, the balance sheet for the company reflecting both the July 1, 2016 to June 30, 2017 and July 1, 2017 to June 30, 2018 fiscal years shows that while liabilities increased about \$9,000 between these years, shareholders' equity also increased by about \$30,000. This represents a net gain of approximately \$20,000 during this period, supporting the inference that not only was the business growing, but that the gross income Mr. Verma paid himself did not represent the entirety of the product of his capital asset.

[182] An annual gross income of \$40,000 is a rough representation of Mr. Verma's earnings in the closest fiscal years to the Accident, plus an additional amount to reflect his one-half of the increase in the business' shareholders' equity during that time. My factual findings about Mr. Verma's lengthy work history with operating businesses, his incredible work ethic, and that he had now found his dream business, all amply support a finding of a real and substantial possibility, with a very high likelihood, that he would have continued to earn at least this level of income from the business throughout the Second Period.

[183] Before consideration of contingencies, I would assess what Mr. Verma was likely capable of earning without the Accident in the Second Period at a gross amount of \$173,200 (\$40,000 x 4.33 years).

[184] I am satisfied there are negative and positive contingencies that are real and substantial possibilities on the evidence, but that no adjustment is necessary to reflect their relative likelihood because they balance one another.

[185] Regarding the specific negative contingency identified by the defendant, I have earlier concluded that the assertion that Mr. Verma would have developed disabling depressive or anxiety symptoms in any event of the Accident does not rise to the level of a real and substantial possibility. However, there is one specific negative contingency that arises on the evidence that must be taken into account.

[186] While I have assessed the relative likelihood that Mr. Verma would have continued to work at Winks throughout the entirety of the pre-trial period as very high, I find there is a real and substantial possibility that he would have taken more than the ordinary time out of the workforce during this time for extended trips to visit family in India and Sweden. This is what he, and his wife, have done (or expressed a desire to do) in recent years and I find there is a moderate likelihood he would have done so at some point during the pre-trial period. His extended times away would require him to rely on employees to a greater extent, thereby reducing the income available to him.

[187] I also consider that the usual general negative contingencies apply in this case. These include economic downturns and the possibility of leaving the workforce early due to unforeseen life events, such as injuries or illnesses that can affect us all.

[188] Balancing these specific and general negative contingencies is a specific positive contingency that arises on the evidence. I find there is a real and substantial possibility the Verma business would have continued to grow, generating more income to Mr. Verma than I have assessed. Given the evidence of both Mr. and Mrs. Verma about how they were able to make the businesses they operated more

profitable in the past, their plan to add lottery sales to Winks to increase revenue, their determination, and the profits they were generating before the Accident, I would assess the likelihood of this real and substantial possibility as relatively high.

[189] In the end result, I find the negative and positive contingencies in this case are balanced such that no adjustments are necessary to reflect their relative likelihoods.

[190] With the Accident, as I have found, Mr. Verma had no capacity to earn income in the Second Period and therefore did not earn any income. There is no real and substantial possibility that he could have earned any income during this time.

[191] Therefore, I assess his loss of income earning capacity in the Second Period at \$173,200 (gross), or \$138,560 (net). Rounded down, I find \$135,000 is a fair and reasonable net award for Mr. Verma's loss of income earning capacity in the pre-trial period.

### ***Future Loss of Earning Capacity***

#### ***Legal Principles***

[192] The assessment of an individual's loss of future earning capacity involves comparing the plaintiff's likely future had the accident not happened to their actual future after the accident. While this is an assessment that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment at issue, and is not a mathematical exercise, economical and statistical evidence can help determine what is fair and reasonable: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.

[193] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, Justice Grauer set out a three-step test that a trial judge must undertake when assessing a plaintiff's loss of future earning capacity. Justice Burke summarized the three steps in *Choi v. Ottahal*, 2022 BCSC 237 at para. 182.

[194] First, does the evidence disclose a potential future event that could lead to a loss of capacity? This step queries whether the plaintiff may hypothetically suffer from long-term health issues that may affect their ability to meaningfully gain employment or remuneration.

[195] Second, does the evidence demonstrate that there is a real and substantial possibility that the potential loss of capacity will cause a pecuniary loss? After establishing that the plaintiff may suffer from a long-term loss of capacity at the first step, the court here evaluates the likelihood that this loss of capacity will affect the plaintiff's ability to earn income.

[196] Third, what is the value of the possible future loss? After establishing a loss of capacity and resultant loss of capacity to earn income, the court should consider the appropriate basis for compensation, contingencies, and the relative likelihood of the loss occurring. The court should reduce the damages award based on the relative likelihood that the hypothetical future would not occur.

[197] The third step may involve one of the two accepted bases for compensation: the "earnings approach" or the "capital asset approach". The earnings approach is more appropriate where there is an identifiable loss of income at the time of trial, often because the plaintiff has an established work history and a clear career trajectory: *Ploskon-Ciesla* at para. 16. Where no loss of income has occurred at the time of trial, the capital asset approach is generally more appropriate. The capital asset approach allays the risk of under-compensation where the plaintiff lacks a settled career path by creating a more holistic picture of the plaintiff's potential future: *Ploskon-Ciesla* at para. 17.

[198] Justice Grauer, for the Court, discussed the third step in *Steinlauf v. Deol*, 2022 BCCA 96, as follows:

[55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:

...An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless,

the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8....

[56] Accordingly, as discussed in *Dornan* at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[199] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. discussed the role of contingencies in the analysis:

[92] In approaching this part of the appeal, it is useful to remember that we are dealing with specific contingencies, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):

46 ...[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.

[Emphasis added.]

[93] The process, then, as discussed above at paras 63–64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of

assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.

[200] Therefore, the application of a specific contingency, whether positive or negative, engages the “real and substantial possibility” analysis, and not simply the “relative likelihood” analysis that follows. “If the contingency is a real and substantial possibility, the process becomes one of assessing its relative likelihood”: *Boal v. Parilla*, 2022 BCSC 2075 at para. 166.

[201] The burden of proof in establishing that a contingency should apply lies on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39

[202] Following this three-step test, the court must determine whether the proposed damages award is fair and reasonable: *Lo* at para. 117.

#### ***Positions of the Parties***

[203] The plaintiff seeks an award of \$300,000 for his loss of future earning capacity. He submits that the first step of the test has been met as there is clearly a potential future event that could lead to a loss of capacity. He is not working and has chronic, permanent psychological injuries. He was unable to work at the time of trial and will remain unable to work, at any job, into the foreseeable future.

[204] Mr. Verma submits that the second step of the test is also met. He has says the evidence establishes there is a real and substantial possibility that, because of his injuries (which have rendered him incapable of earning any income), he will suffer an economic loss.

[205] In terms of assessing his loss, Mr. Verma relies upon the earnings approach. He asks me to ground the assessment with the same gross annual income figure of \$40,000 used in the pre-trial loss assessment, and argues the evidence establishes real and substantial possibilities that he would have continued working in his business, at that income level, until the reasonable retirement age of 65. Applying the discount rate used to calculate the present value of future income losses and the appropriate multiplier found in Appendix E of the *Civil Jury Instructions*, he asks me



to assess his award under this head at \$300,000. He submits this is a fair and reasonable award.

[206] The defendant submits the plaintiff has not satisfied any of the three steps in the analysis. He says that Mr. Verma has not put forward sufficient evidence to establish an injury arising from the Accident that has rendered him unable to work and has failed to establish any real and substantial possibility of future income loss. The defendant emphasizes Mr. Verma's limited and general evidence about his inability to work and why he sold the store, as well as his failure to make any attempts (other than one inquiry) to return to work, at any job. He again emphasizes the lack of expert evidence about Mr. Verma's functional and vocational capacity.

[207] However, if I find steps one and two are met, the defendant urges me to use the capital asset approach to assess Mr. Verma's loss. He says a fair and reasonable award can be derived by taking Mr. Verma's immediate pre-Accident T4 earnings and awarding him the equivalent of one years income, or \$31,000.

### ***Discussion***

[208] I am satisfied that Mr. Verma has met the first two steps of the test. The evidence overwhelmingly discloses a potential future event that could lead to a loss of capacity. For all of the reasons I outlined in the previous section, I am satisfied on the evidence that Mr. Verma will most certainly suffer from long-term psychological health issues arising from the Accident.

[209] I am also satisfied these psychological health issues will most certainly continue to affect his ability to gain employment or remuneration in the future. In other words, the evidence demonstrates that there is a real and substantial possibility that this loss of capacity will cause a pecuniary loss in the future.

[210] As I explained in the previous section, Mr. Verma's psychological injuries are chronic and likely permanent. His capital asset has clearly been impaired by his psychological injuries, in all of the ways discussed in *Brown*. Because of these injuries, Mr. Verma was unable to work, in any capacity, at the time of trial. He will

continue to suffer from the symptoms related to these injuries for the foreseeable future. The whole of the evidence, including the medical evidence, supports the conclusion that Mr. Verma is not only incapable of operating his own business as he had planned, he is less capable overall of earning income from all types of employment as a result of his injuries for the foreseeable future.

[211] Mr. Verma's psychological injuries have also rendered him less marketable or attractive as an employee to potential employers. He has difficulty with many basic skills, such as holding conversations, staying focussed, and retaining information. He is not psychologically capable of functioning in a job interview, much less a work setting.

[212] Mr. Verma's injuries have also rendered him less valuable to himself as a person capable of earning income in a competitive labour market. This is a person who strongly identified with his work and took pride in running his own business. He has now lost this critical piece of his identity. Rather than feeling pride at the life he built, he now has thoughts of self-loathing and self-harm.

[213] Mr. Verma's injuries have also dramatically, if not totally, reduced his ability to take advantage of all job opportunities which might have otherwise been open to him. He gave an actual example of this loss when he testified about wanting to return to work in 2019. When Mr. Verma returned to Canada, he identified a new business he wanted to operate. This opportunity was promising as it had an actual location and a motivated seller, but Mr. Verma could not pursue it as a result of his psychological symptoms. Even if future treatment options were available and proved helpful, there is a real and substantial possibility that he would have significant difficulty re-entering the labour force given his time away from the workforce and his age.

[214] For all of these reasons, I find there is clearly a real and substantial possibility, with a near certain likelihood, the loss of capacity Mr. Verma has suffered from his psychological injuries will cause him a pecuniary loss in the future.

[215] The third step is valuation of the future loss. This may be done using either the “earnings approach” as Mr. Verma suggests, or the “capital asset approach” as the defendant suggests. In *Ploskon-Ciesla* at paras. 16–17, the Court of Appeal described when it is appropriate to use each of these tests:

[16] ...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.

[216] This is not a situation where, at the time of trial, Mr. Verma continued to earn income at or above his pre-Accident level such that the capital asset approach is preferred. Mr. Verma had a well-established work history and very clear career trajectory. He has not worked in his business, or at all, since the end of 2018. There was an identifiable loss of income at the time of trial. I find that it is appropriate in these circumstances to use the earnings approach to assess Mr. Verma’s loss of future earning capacity.

[217] I think that to use the capital asset approach and assess Mr. Verma’s loss of future income as the equivalent of what Mr. Verma paid himself the year before the Accident, as the defendant urges, would grossly under-estimate Mr. Verma’s loss here.

[218] As I move to the assessment of the future loss of earning capacity, I again remind myself that my central task is to compare the likely future of Mr. Verma’s working life if the Accident had not occurred with his likely future working life after the Accident: *Steinlauf* at paras. 56, 71; *Dornan* at para. 156.

[219] I start by considering what Mr. Verma likely would have earned absent the Accident.

[220] I begin by finding there is a real and substantial possibility that, but for the Accident, Mr. Verma would have remained working at Winks until the reasonable retirement age of 65, another eight years post-trial. I find the relative likelihood of this possibility is very high, based upon Mr. Verma's work ethic and work history, his stated goals of owning and operating a business such as this, the growth Winks saw in its first two years of operation, and the Vermas' mutual desire to continue to grow the business together.

[221] In the section on past loss of earning capacity, I found that \$40,000 was a reasonable estimate of Mr. Verma's likely without-Accident gross annual income to the time of trial. For the same reasons, I find this is also a reasonable and appropriate baseline upon which to assess his likely future income as well. Therefore, the starting point, before consideration of contingencies, of Mr. Verma's likely without-Accident future earnings is \$40,000 per year, for eight years.

[222] As I found in the previous section, I am satisfied there are negative and positive contingencies that are real and substantial possibilities on the evidence, but that they balance one another, such that no adjustment is necessary to reflect their relative likelihood.

[223] In terms of negative contingencies, I have earlier concluded that the specific negative contingency that Mr. Verma would have developed disabling depressive or anxiety symptoms in any event of the Accident does not rise to the level of a real and substantial possibility. However, I am satisfied that one specific negative contingency must be taken into account. While I have assessed the relative likelihood that Mr. Verma would have remained working in his business until the reasonable retirement age of 65 as very high, I find there is a real and substantial possibility that in the last eight years of pre-retirement life, he would have taken more than the ordinary time out of the workforce at various points for extended trips to visit family in India and Sweden. This is what he, and his wife, have done (or expressed a desire to do) in recent years and I find there is a moderate likelihood he would have done so again over the post-trial period until retirement. His extended times away would

require him to rely on employees to a greater extent, thereby reducing the income available to him.

[224] I also consider the usual general negative contingencies apply in this case. These include economic downturns and the possibility of leaving the workforce early due to unforeseen life events, such as injuries or illnesses that can affect us all.

[225] A specific positive contingency also arises on the evidence. I find there is a real and substantial possibility the Vermas' business would have continued to grow, generating more income to Mr. Verma into the future, than I have assessed. Given the evidence of both Mr. and Mrs. Verma about how they were able to make the businesses they operated more profitable, their plan to include lotteries in their store to increase revenues, their determination, and the profits they were generating before the Accident, I would assess the likelihood of this real and substantial possibility is relatively high.

[226] I find the specific and general negative contingencies in this case are countermanded by this specific positive contingency such that no adjustments are necessary to reflect their relative likelihoods.

[227] Having assessed Mr. Verma's likely future income without the Accident, I turn now to consider his likely future with the Accident.

[228] For all of the reasons I articulated in the section of past loss of earning capacity and earlier in this section, I am satisfied there is a real and substantial possibility that Mr. Verma will have no ability to earn income in the future as a result of his psychological injuries. The relative likelihood of this possibility is very high.

[229] Mr. Verma's prognosis is guarded and poor. He has been out of the workforce as a result of these injuries for several years. Even if future treatment options, including those recommended by Dr. Kroeker, were available and proved helpful, which seems very unlikely, there is a real and substantial possibility (with a high likelihood) that Mr. Verma would have significant difficulty re-entering the labour force given this time away and his age. In all of the circumstances, I assess Mr.

Verma's with-Accident future earning capacity at 0% of his without-Accident future earning capacity.

[230] The present value of Mr. Verma's future losses can be determined by applying a discount rate of 1.5% required by s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 to identify the appropriate present value multiplier found in Appendix E of the *Civil Jury Instructions* in the absence of expert evidence: *MacGregor v. Bergen*, 2019 BCSC 315 at para. 116, footnote 1.

[231] Mr. Verma turns 65 on August 13, 2031, roughly eight years post-trial. Using the discount rate of 1.5% and applying the present value multiplier of 7.4859 to an annual loss of \$40,000, I assess Mr. Verma's future loss of earning capacity at \$300,000. I find this is a fair and reasonable award.

### **Mitigation**

[232] A plaintiff in a personal injury action has a positive duty to mitigate, or take reasonable steps to limit their loss. The defendant has the burden of proving that a plaintiff failed to mitigate: *Pearson v. Savage*, 2020 BCCA 133 at para. 74.

[233] The defendant argues that any amount awarded for past or future loss of earning capacity should be reduced to account for Mr. Verma's failure to pursue options that could have allowed him to keep his store and/or failed to pursue other lines of work that could be pursued in spite of his injuries. He points to *Parypa v. Wickware*, 1999 BCCA 88, where the Court stated:

[67] These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence. However, in calculating such likelihoods, the plaintiff is not entitled to compensation based solely on the type of work she was performing at the time of the accident. There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work. If the plaintiff claims she is not able to mitigate by pursuing other lines of work or by retraining, she must prove this on a balance of probabilities. The requirement for mitigation is addressed by this court in *Palmer*, supra, at 59:

A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job".

What the respondent proved in this case was that he had lost his capacity to follow the sort of occupation he was pursuing at the time of the accident. But that did not prove, on a balance of probabilities, that he could not earn by pursuing some other sort of occupation, as much as before.

[234] In *Porter v. Feizi*, 2023 BCSC 491 at para. 44, Justice Lamb dealt with a similar argument, and concluded it was more appropriate to take this into account in assessing past and future loss of earning capacity, based on the real and substantial possibilities established by the evidence, adjusted for contingencies. Justice Hughes took a similar approach in *Arvanitis v. Cleave*, 2023 BCSC 672 at para. 312. I agree with these approaches.

[235] In my assessment of past loss of earning capacity, I found there was no real and substantial possibility that Mr. Verma could have engaged in any employment in the pre-trial period as a result of his injuries. I also found it was reasonable, in light of his injuries and in all of the circumstances, to have sold his store. Doing so mitigated his loss. In my assessment of future loss of earning capacity, I found there is no real and substantial possibility that he could engage in any form of employment in the future. As such, there is no basis upon which to make any reduction sought by the defendant under the failure to mitigate claim.

### ***Future Care Costs***

#### ***Legal Principles***

[236] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the injured plaintiff to the position they would have been in had the accident not occurred. The award is based on what the medical evidence shows to be reasonably necessary to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33.

[237] The test for determining the appropriate award is an objective one based on medical evidence. For an award of future care, claims must be reasonable and have a medical justification: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63, citing *Milina* at 84. Generally, there must also be evidence that the plaintiff is likely to incur these costs in the future: *Montazamipoor v. Park*, 2022 BCSC 140 at para. 112.

[238] Awards for the cost of future care may be adjusted for positive or negative contingencies depending on the plaintiff's specific care needs. The court may decrease an award based on the chance of the plaintiff's condition improving, or increase one based on the chance that the plaintiff will need additional care. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

#### ***Positions of the Parties***

[239] Mr. Verma seeks an award of \$20,000 here. He submits that Dr. Kroeker's recommendations are reasonable and medically justified. Although there is no evidence about what any of Dr. Kroeker's recommendations would cost, whether such services would be available to Mr. Verma in India or Canada, or whether Mr. Verma would undertake some or all of them, he submits that the lack of such evidence should not preclude him from recovering the compensation that is reasonably necessary to promote his mental and physical health. Dr. Kroeker recommends that he engage in psychotherapy, cognitive screening tests, sessions with an occupational therapist, a comprehensive sleep study, sessions with a speech therapist, Duloxetine at 60 mg daily, Benzodiazepine or Clonazepam, and Pregabalin at 300 mg daily. Mr. Verma argues that a modest award of \$20,000 would be fair and reasonable to both parties.

[240] The defendant submits that Mr. Verma has failed to meet his burden here. Not only is there insufficient evidence about Mr. Verma's treatment needs, the defendant emphasizes the absence of evidence in key areas: anticipated costs,



whether such services and/or medications are available to Mr. Verma and, if so, whether Mr. Verma would actually avail himself of those services and medications.

### ***Discussion***

[241] Dr. Hussain, in his First Assessment, recommended that Mr. Verma obtain regular treatment through a psychiatrist and that he would benefit from some medication adjustments. Mr. Verma followed these recommendations when he was seen by a psychiatrist in October 2019, attended a clinic in India for a time and then began seeing Dr. Sharma since March 2021. There is no evidence about the cost, if any, of these psychiatric treatments, nor is there any evidence about their anticipated frequency into the future.

[242] Dr. Hussain did not make treatment recommendations in his Second Assessment. Dr. Kroeker made many recommendations in his report, as I have outlined above. I am satisfied these recommendations are medically justified as a result of the Accident.

[243] Mr. Verma did not provide the court with any cost estimates for any of Dr. Kroeker's recommendations. He asks me, essentially, to "ballpark" a figure, as has been done in other cases, such as *Flores v. Burrows*, 2018 BCSC 334. I am aware that the court is to "do the best it can" to assess damages so as not to "relieve the wrongdoer of the necessity of paying damages": *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242 at para. 26. I am also aware that there are occasions where courts will "ballpark" a figure. However, in this case, there is simply no evidentiary basis in which I could even attempt to "ballpark" an award. Not only is there no evidence about anticipated costs of the recommendations made by Dr. Kroeker, there is no evidence about whether any of the services recommended by Dr. Kroeker would be available to Mr. Verma, and no evidence that even if such services were available, Mr. Verma would incur the costs, if any.

[244] I am mindful that there was some limited evidence about Mr. Verma's current medications. He indicated that he currently takes Clonazepam prescribed by Dr. Sharma for his panic attacks. There is some evidence regarding the recommended

doses for a number of Mr. Verma's medications at pages 8 and 9 of Dr. Kroeker's report. However, there is no evidence about the recommended dosage or costs, if any, of this medication. In these circumstances, to "ballpark" a figure for any future costs would require me to make many uncertain assumptions, not grounded in any evidence. This would not be fair or reasonable to either of the parties. On the state of the evidence, I find I am unable to make any award for this claim.

### ***In-Trust Claim***

#### ***Legal Principles***

[245] In personal injury cases, an award may be made for services provided by a family member (often a spouse) beyond what would be expected from the nature of the relationship, and which would otherwise have to be done by a hired third party. These types of claims are referred to as "in-trust" claims.

[246] Claims for household duties and other services rendered by immediate family members are allowable where the plaintiff demonstrates the need for such services as a consequence of the injuries sustained. The plaintiff must satisfy the court, on a balance of probabilities, that the family member providing the services suffered a direct pecuniary loss (because of the time and effort put into those services) or that the family member's efforts replaced housekeeping expenses that would have otherwise have been incurred: *Ellis v. Star*, 2008 BCCA 164 at para. 17.

[247] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124 at para. 180, Madam Justice D. Smith (as she then was) summarized the factors to be considered in the assessment of such claims:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;

- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[248] Justice Burke summarized the assessment in *Popove v. Attisha*, 2019 BCSC 1587 at para. 59:

[59] Cases in which awards have been made for in-trust services involve care provided to seriously injured plaintiffs or support services beyond what might normally be expected in a familial relationship. In assessing the appropriateness of an in-trust claim, standard compassion and care of relatives are not to be compensated. The compensation is for the *extra* services provided by the family member at a reasonable cost.

#### ***Positions of the Parties***

[249] Mr. Verma makes an in-trust claim of \$250,000 for his wife's caregiving of him from the time of the Accident to his age 80. He submits that the care she has provided to him, and will continue to provide to him, is over and above what would be expected from a family relationship. He emphasizes that Mrs. Verma gave up her job, at the age of 51, to care for her husband. She spends all of her time around him, listening to him and caring for him, because she has concerns that if she does not, he will commit suicide. When Mrs. Verma had to be away from Mr. Verma to visit her daughter and grandchild, she arranged for a caregiver.

[250] Mr. Verma submits that his wife has given up her entire livelihood in order to care for him, her partner who has developed a substantial mental illness as a result of the defendant's negligence. This is not the usual "give and take" between family members, and an award in the range he submits should not be deemed excessive.

[251] Mr. Verma submits the assessment of this claim should be based on a modest two hours per day, seven days per week, of caregiving provided by Mrs.

Verma. At the current minimum wage of \$16.75 per hour for the period of his age at the time of the Accident to age 80 (rounded down, a 28-year period), the claim is approximately \$340,000. Applying a 25% negative contingency to account for general negative contingencies relating to divorce or earlier death of either Mr. or Mrs. Verma, he submits an award of \$250,000 is appropriate.

[252] The defendant submits that the plaintiff has not established the basis for an award for an in-trust claim. He argues that Mrs. Verma's contribution to her husband's care has not been above and beyond what would reasonably have been provided by a family member where there is love and affection between them.

[253] The defendant emphasizes that Mrs. Verma has always been a loving and caring wife. Prior to the Accident, she shared her husband's goals and motivations to move to Canada, as well as his dreams of owning their own business. They worked together during their various business ventures. She stayed and conversed with him for awhile during their shift change in the afternoon and later brought him dinner and provided coverage for him while he ate dinner. They shared their work, family and social lives. Prior to the Accident, the pillar of their relationship was companionship.

[254] Post-Accident, the defendant submits that the Vermas' relationship remains one of supportive, loving companionship. Mrs. Verma sleeps in a separate room to allow Mr. Verma to sleep. She gives him massages and accompanies him when he goes outside of the home. Essentially, the defendant says that nothing has changed.

### ***Discussion***

[255] I am satisfied Mr. Verma has established that the assistance Mrs. Verma provides to him as a result of his psychological injuries arising from the Accident goes well beyond the standard compassion and care she would provide her husband regardless of whether the Accident occurred. While the two spent much time together and Mrs. Verma showed her husband many kindnesses before the Accident, the assistance she now provides is nothing like what she once did, what they once shared.

[256] Mrs. Verma suffered a direct pecuniary loss because of the time and effort she gave, and continues to give, to her husband's caregiving. She gave up her job, foregoing her income, at the age of 51, in order to care for a partner who developed significant mental illnesses as a result of the defendant's negligence. Mr. Verma is seriously injured. He is no longer independent. His injuries are chronic and most likely permanent. The nature of the Verma's relationship changed significantly as a result of these injuries. The care and companionship she now provides him goes beyond what they had before the Accident and well beyond what is expected in the usual spousal relationship.

[257] Mrs. Verma is her husband's main support system. She spends all of her time with, and around, him. She does so much more than sleep in a separate room, do his laundry and give him massages. She listens to him, walks with him, accompanies him when he is able to go out in public. She helps him through his panic attacks. She encourages him. Each day, she makes herself available to him at all times because she has legitimate concerns that if she does not, he will harm himself or commit suicide. When Mrs. Verma had to be away from Mr. Verma to visit her daughter and grandchild, she arranged for a caregiver for him. Mrs. Verma's services are necessary for her husband's care as a result of his injuries. Her services are over and above what would be expected from the spousal relationship. They go far beyond the companionship and care she provided Mr. Verma prior to the Accident.

[258] Turning to quantum, I find it is fair and reasonable to assess the value of Mrs. Verma's services as Mr. Verma suggests, on the basis of two hours per day, seven days per week at current minimum wage (\$16.75 per hour) from the time of the Accident until Mr. Verma's reasonable life expectancy age of 80. It is also appropriate to apply a 25% reduction to account for general negative contingencies relating to the real and substantial possibilities of divorce or earlier death of either the plaintiff or Mrs. Verma.

[259] Mrs. Verma has endured a significant economic cost for the care she provides her husband, her employment. I find an award of \$250,000 reflects the true and reasonable value of Mrs. Verma's services considering her time, the quality and nature of those services, and that she gave up a similar income in order to perform those services.

### ***Special Damages***

[260] Special damages must be both reasonable and necessary. While not every expense needs to have been recommended by a healthcare professional, there must be a medical justification for each expense claimed: *Taylor v Peters*, 2021 BCSC 2444 at para. 86, aff'd 2023 BCCA 391.

[261] The parties agree Mr. Verma has incurred \$1,532.30 that are compensable as special damages. I award that amount.

### **Summary of Orders**

[262] In summary, I make the following awards:

Non-Pecuniary Damages:	\$210,000.00
Pecuniary Damages – Past Loss of Earning Capacity:	\$135,000.00
Pecuniary Damages – Future Loss of Earning Capacity:	\$300,000.00
Future Care Costs:	0
In-Trust Claim:	\$250,000.00
Special Damages:	\$1,532.30
<b>TOTAL:</b>	<b><u>\$896,532.30</u></b>

### **Interest and Costs**

[263] The plaintiff is entitled to pre-judgment interest at the prevailing rate and costs. If the parties are unable to agree on costs, they may speak to the issue. All that remains is to thank counsel for their presentations.

“S.A. Donegan J.”

DONEGAN J.