IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jindal v. Poulton,*
2023 BCSC 2157

Date: 20231206
Docket: M152806
Registry: Vancouver

Between:

Kasturi Jindal

Plaintiff

And

Brenda Ruth Poulton and Toyota Credit Canada Inc.

Defendants

- and -

Docket: M196011
Registry: Vancouver

Between:

Kasturi Lal Jindal

Plaintiff

And

Minh Tran

Defendants

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for the Plaintiff:	M.S. Randhawa
Counsel for the Defendants:	S.J. Kovacs
Place and Date of Trial/Hearing:	Vancouver, B.C. August 21, 23-25, 28, 29, 31; and September 1, 2023
Place and Date of Judgment:	Vancouver, B.C. December 6, 2023

Table of Contents

Introduction

[1] The plaintiff, Kasturi Jindal, claims damages for injuries and losses arising from two car accidents that occurred on August 15, 2013 (the "First Accident") and June 4, 2017 (the "Second Accident"). The defendants have admitted their liability.

[2] Mr. Jindal alleges the First Accident caused soft tissue injuries to his neck and his upper, mid and low back, resulting in ongoing symptoms that include headaches, neck and back pain, radiating pain into his arms and legs and disrupted sleep. He alleges the Second Accident exacerbated all of those symptoms and injured his knees.

[3] A taxi driver and insurance "producer" at the time of the First Accident, Mr. Jindal claims his ongoing symptoms have and will continue to prevent him from working nearly as much as he did prior to the First Accident. He also claim his symptoms prevent him from performing the household chores he did prior to the First Accident.

[4] In addition to past and future loss of earning capacity and past loss of housekeeping capacity, Mr. Jindal claims non-pecuniary damages, cost of future care, and special damages.

[5] The defendants dispute all of the damages claims, taking the position that Mr. Jindal's evidence was neither credible nor reliable, and other evidence shows he had largely recovered from the First Accident by some point in 2015.

[6] In addition to Mr. Jindal's testimony, the evidence includes the reports and testimony of several expert witnesses, clinical records, Mr. Jindal's tax returns and other documents. The expert witnesses for Mr. Jindal include physiatrist Dr. Cecil Hershler and neurosurgeon Dr. Ramesh Sahjpaul, as well as functional capacity and cost of future care evaluator Paul Pakulak. Mr. Jindal also relies on the testimony of his adult son Rajat Jindal. The defendants' only witness was retired orthopedic surgeon Dr. Stephen Maloon.

First Accident

[7] The First Accident occurred late in the evening on August 15, 2013 while Mr. Jindal was driving his taxi, a 2010 Toyota Prius, from the airport to downtown Vancouver. As he drove northbound on Granville Street in the far right lane, the traffic light at the intersection of West 57th Avenue was green. Suddenly a vehicle heading south on Granville Street turned left in front of him. Although Mr. Jindal attempted to brake, he could not stop in time and the front of the taxi struck the passenger side of the other vehicle.

[8] Mr. Jindal described the impact as very hard or severe. He recalled his neck and head hitting the head rest and then his body being pushed forward. Mr. Jindal was wearing a seatbelt, which he said, protected his forehead from hitting the dashboard.

Second Accident

[9] The Second Accident also occurred while Mr. Jindal was driving his taxi, this time a 2014 Toyota Prius, at about 11:15 a.m. on June 4, 2017. Again, he was driving toward downtown from the airport along Granville Street in the curb lane. Close to 26th Avenue a vehicle travelling beside him in the middle lane, suddenly entered the curb lane and hit and slid along the driver's side of the taxi. Mr. Jindal described the impact as moderate and not very hard or forceful. He recalled his body sliding slightly to the right side and being pushed a little bit forward and both of his knees colliding with the dashboard.

Pre-Accident Circumstances

[10] Born in Punjab, India, Mr. Jindal moved to Canada with his family in May 2009. He is now 62 years old.

[11] In India, after graduating from high school Mr. Jindal completed several post-secondary degrees including a bachelor's of science and education and master's degrees in public administration, economics, commerce and education.

[12] Before moving to Canada, Mr. Jindal taught science and math at the high school and then college levels.

[13] Married in 1991, he and his wife have two adult children, a daughter born in 1991 and Rajat, their son, born in 1995.

[14] Mr. Jindal has lived in Surrey, BC. since arriving in Canada.

[15] In 2009, he began taking insurance “courses”, which he completed in 2012. Before that, in 2011, he also completed a taxi host course.

[16] Mr. Jindal’s first job in Canada involved working for some months in 2009 as a clerk for a transport company. At the end of 2009 he started a job as an insurance sales representative.

[17] In 2010, Mr. Jindal worked full-time as a sales representative for two insurance companies, as well as two nights per week for a security company.

[18] The nature of his employment was the same in 2011 although he moved to a different insurance company and a different security company where he did security work two or three nights per week.

[19] Mr. Jindal’s work for the insurance company also started to include insurance producing, which involves doing home visits with clients to renew their car and home insurance.

[20] In 2012, Mr. Jindal worked for two insurance companies and two security companies.

[21] Mr. Jindal testified to becoming a taxi driver because he wanted to increase his income. In January 2013, he started driving a taxi for Delta Sunshine. After driving someone else’s cab for a few days, he said, he and a partner leased a taxi which they shared equally. In cross-examination, Mr. Jindal gave evidence he only had a taxi once in awhile in January 2013 and the lease did not start until February 2013.

[22] Mr. Jindal also gave evidence about working extremely long hours - 14 to 16 even 17 hours per shift - during his 15 days per month.

[23] He and his partner each paid $750 per month for the lease. They also had to pay a number of other expenses, such as dispatch, YVR and decal fees, as well as insurance, car maintenance and gas.

[24] Mr. Jindal also indicated that prior to the First Accident in 2013, he continued insurance producing on his days off, working two or three days per week four to five hours per day.

[25] Mr. Jindal and his family, now his wife and Rajat, have lived for many years in a three level house in Surrey with front and back yards.

[26] Mr. Jindal gave very little evidence about his pre-accident lifestyle. He referred to going to the local temple twice a week, meeting up with friends and going on weekend outings with his family, such as trips to the beach. Rajat gave similar evidence about family activities, mentioning visits to the beach, having a barbeque and camping “here and there”.

[27] Mr. Jindal testified in more detail about his household responsibilities before the First Accident, which involved a number of indoor and outdoor chores, including mowing the lawn, washing the cars, pressure washing the house, maintaining the front and back yards, vacuuming and deep cleaning the large appliances.

[28] Mr. Jindal testified that he was healthy and had no physical limitations before the First Accident. He denied any previous headaches and neck or back pain, other than low back pain, which began in April 2012 and was fully resolved by March 2013.

[29] Mr. Jindal identified three periods of low back pain during that time.

[30] After the low back pain started, he attended several chiropractic appointments which did not help, and then went to his family doctor, Dr. S. Singh, in May 2012. Dr. Singh prescribed pain medication and advised Mr. Jindal to do certain exercises

and use a heating pad. With that treatment, he said, he "significantly recovered". Mr. Jindal recalled experiencing a "little bit" of low back pain again at the end of 2012. After it resolved with much the same treatment 15 or 20 days later at the end of January or early February, once more he had a "little bit" of low back pain. He returned to Dr. Singh because, he said, he was experiencing a little bit of low back pain. Again after seeing Dr. Singh, Mr. Jindal said he was completely recovered by the end of March 2013.

[31] Mr. Jindal was cross-examined about Dr. Singh's clinical records during this period. His record dated February 12, 2013 states that Mr. Jindal reported several months of back pain and before that on November 2, 2012, longstanding back strain despite no heavy lifting or injury. Dr. Singh's clinical record for March 11, 2013, however, are consistent with Mr. Jindal's evidence: "[c]urrently back pain [is] under control". There are no subsequent references to back pain until after the First Accident.

Post-Accident Condition

[32] Asked in direct examination to provide a list of the symptoms he experienced after the First Accident, Mr. Jindal testified that when he got up the following morning he had a headache, a neck ache, upper back pain, mid back pain, low back pain, left arm pain and "sometimes right leg" pain also. He added that due to his pain symptoms, his sleep was extremely disturbed.

[33] Mr. Jindal was asked about the intensity and frequency of each symptom discretely: neck, upper back, mid back, low back, left arm, left/right leg and disturbed sleep, during a multitude of time frames up to August 2023, based on a zero to 10 pain scale. In other words, he was asked to provide detailed chronological evidence about each symptom, separate and apart from every other symptom.

[34] Although I would expect even a person with the most remarkable memory to find it next to impossible to actually recall the severity and frequency of any one symptom in a constellation of symptom over 10 years, Mr. Jindal gave detailed and specific evidence about each symptom and its trajectory.

[35] For example, starting with his neck, Mr. Jindal testified to having extremely severe neck pain, around a seven or eight, every day during the first week after the First Accident; neck pain every day continuously, around a three to four in the mornings but up to a seven or eight with activities, until the end of 2013; and the same intensity of pain, although sometimes it was temporarily relieved with medication in 2014. In 2015, he said, his neck pain was intermittent. It was a two to four in the mornings and a six, seven or even eight at its highest during the day. In 2016, he had neck pain everyday but it was not continuous. Again in the mornings his neck pain was less. During the day it went up to a six or seven. In 2017, before the Second Accident, he had neck pain but not every day. He experienced it whenever he worked. On his days off, he was without neck pain for one, two or three days. After the Second Accident he again experienced neck pain every day that was a three to four in the mornings and up to a seven or eight during the day.

[36] Mr. Jindal carried on providing this kind of specific evidence about the frequency and intensity of his neck pain for the balance of 2017, 2018, 2019 and every year after that until the start of the trial. In the same way, Mr. Jindal described ongoing continuous or intermittent pain that fluctuated in severity in each area of his back, (radiating) pain in left arm and legs and ongoing, quite frequent headaches that varied in severity depending on his neck pain.

[37] Regarding the pain that radiates into his left arm, Mr. Jindal testified to first feeling it about seven days after the First Accident. He rated its severity at a three to five initially and then three to four or three to five, and most recently two to four. He also indicated the pain occurs when he has a headache and his neck pain is exacerbated, and estimated the frequency at two to four times per week for most of the times periods, although in 2023, he said, it occurred three to four times per week.

[38] Cross-examined about the onset of his left arm pain, Mr. Jindal acknowledged telling Dr. Singh that he had no pain in his arms, as noted in the clinical record for

September 9, 2013. Dr. Singh's clinical record for October 10, 2013 noted pain in the left shoulder and trap, now going into left arm since the day before.

[39] Regarding pain radiating into or simply in the left and right legs, Mr. Jindal gave evidence that about two weeks after the First Accident he started experiencing a heaviness in his left leg, which he also described as pain, every one or two days and sometimes he had pain in the right leg too. He indicated that from the end of August 2013 to the end of that year, he had pain in his left leg most of the time and once or twice a week it would also "go into" his right leg. Mr. Jindal rated the initial severity of the pain in his left leg at a three to five and in the right at a two to four. In 2014, his left leg pain increased in frequency and severity to mostly daily and a five to seven. His right leg pain also became somewhat more severe at a three to five.

[40] In cross-examination, Mr. Jindal agreed he told Dr. Fan in March 2014, he had an "incident" of left leg pain that *started* a few days earlier but in general he did not have any leg pain. He also agreed he told Dr. Singh on October 30, 2015, that occasionally his low back pain went into the back of his left thigh. I note the first reference to leg pain in Dr. Singh's records, after the First Accident, was on April 17, 2014. It reads: "[p]ain in the lower back and going into the right leg. Still able to work." Mr. Jindal maintained, however, that he has leg pain that started in his left leg two weeks after the First Accident.

[41] Regarding sleep, Mr. Jindal testified to experiencing wonderful, sound sleep before the First Accident, profoundly disturbed sleep in the short term after each accident, and for the remaining periods, disrupted sleep due to pain up to three or four nights per week, one to three times per night.

[42] Mr. Jindal's evidence regarding his various symptoms in 2017 prior to the Second Accident was as follows:

- neck pain every day he worked that started at a two to three in the morning and then increased to a six to eight; but no neck pain whenever he had a day off;

- intermittent upper back pain that varied from a two to three up to a seven to eight;
- daily intermittent mid back pain that varied from a two to three up to six, seven or eight that sometimes he got relief from for up to three hours;
- daily intermittent low back pain that varied from a two to three up to a seven or eight that sometimes he got relief from;
- headaches two to four days per week from a three to four up to five;
- almost daily left leg pain that ranged from a five to seven;
- right leg pain one or two days per week that ranged from a three to five; and
- radiating arm pain two sometimes three days per week.

[43] Mr. Jindal was cross-examined about his discovery evidence, in February 2017, that he was only experiencing left arm pain once a week or less. He responded he may have said that, but generally he experienced it one to three times per week.

[44] Following the Second Accident to the end of 2017, Mr. Jindal testified his symptoms were as follows:

- neck pain every day that was somewhat more severe than before;
- continuous upper back pain every day that ranged from three to four up to a seven or eight;
- continuous mid back pain every day that ranged from a five to six up to eight;
- continuous low back pain every day with the same range, that reduced in severity after two months to a three to four up to a six to eight;

- daily headaches from a four to six in severity;

- almost daily radiating arm pain for two months followed by four to five days per week that range from a four to five and sometimes six; and

- daily continuous left leg pain that ranged from a five to eight.

[45] During cross-examination, Mr. Jindal denied telling Dr. Singh on June 19, 2017, that he had no pain in his left arm and leg but they were sometimes heavy, as noted in the clinical record. He agreed, however, that he did tell Dr. Singh on February 8, 2018 that he used to have pain in the whole left leg but now there was only a small patch. Mr. Jindal was also taken to Dr. Singh's record for June 26, 2018, which noted the pain in his "left leg and left shoulder back pain is gone".

[46] Mr. Jindal also gave direct evidence that four or five days after the Second Accident, he experienced continuous pain in both knees, worse on the left, that he rated at a four to five, sometimes a six. For the rest of 2017, he said, he had the same intensity of knee pain four or five days per week.

[47] In cross-examination, Mr. Jindal acknowledged he also had intermittent knee pain in 2015 and in 2016. Taken to Dr. Singh's clinical record for November 21, 2016, which referred to a seven day history of left knee pain after gardening for a few hours and right knee pain going up and down stairs and after inactivity, Mr. Jindal testified to trying to work in the garden and feeling pain two or three hours later, as opposed to gardening for a few hours. He also described trying to garden for half an hour but stopping when the knee pain started.

[48] Addressing his current symptoms, Mr. Jindal said he continues to have neck pain although not every day. It increases when he goes to work and "goes down" on days off. Asked about the severity of the pain, he said the mornings are fine – the level is a two or three – but during the day it increases to a six or seven, even up to an eight. He experiences headaches two, three, four and sometimes five days per week at the level of a three to five. Mr. Jindal also testified to ongoing daily upper and mid back pain that varies from a two to three up to a seven or eight and is

sometimes not there for up to three hours. His low back pain also remains daily. When he can rest it remains at a two or three but with activity or if he walks around, it goes up to a seven or eight.

[49] Mr. Jindal also said he continues to have radiating left arm pain two to four days per week at the level of a two to four, and daily continuous left leg pain that is more severe than it was even after the Second Accident. Also rating the left leg pain at a seven or eight, he added that since 2022 it has radiated all the way to the sole of his foot, which feels numb. Referring to it as fine, Mr. Jindal identified ongoing pain that radiates into his right leg pain two or thee days per week at the level of a three to five.

[50] Mr. Jindal also testified to ongoing left knee pain, three or four days per week at the level of a three to five and right knee pain, two to three days per week at the level of a two or three, sometimes four.

[51] Finally, because of his ongoing pain, he said, his sleep remains not good, meaning typically his sleep is broken three or four nights per week.

Treatment

[52] Mr. Jindal sought medical treatment at a walk-in clinic the day after the First Accident. He had an appointment with his family doctor, Dr. S. Singh, three or four days later. Dr. Singh prescribed pain killers, an ointment, advised rest and referred Mr. Jindal to physiotherapy. Mr. Jindal continued to see Dr. Singh for his accident related injuries, attending a total of 47 visits up to and including 2018. Dr. Singh's clinical records for 2019 onward show some visits related to renewing Mr. Jindal's prescriptions for Gabapentin and the onset of left leg and knee pain. According to his schedule for special damages, he had two accident related appointments with Dr. Singh in 2019, but none after that.

[53] Regarding pain medication, Mr. Jindal testified to taking Advil and Tylenol during the daytime, a muscle relaxant (Dolomed) that he bought in India, and 300 mg of Gabapentin, which Dr. Singh prescribed.

[54] Mr. Jindal attended physiotherapy at All Care Physio about twice per week from August 28, 2013 until April 11, 2014. He testified the treatments and the medication provided relief for two or three sometimes four hours.

[55] The evidence includes radiologist reports regarding imaging done since the First Accident, including imaging of the cervical spine in December 2013, an MRI of the cervical spine in January 2014, a CT of the lumbar spine in May 2014, a bone scan of the full length of the spine from February 2015, an MRI of the lumbar spine in November 2018, some or all of which were reviewed by the expert medical witnesses and the findings described somewhat differently.

[56] Referred by Dr. Singh, Mr. Jindal attended three appointments with physiatrist Dr. Anita Fan between March 2014 and June 2015. Her records and consultation reports are in evidence. During her first examination, she found Mr. Jindal had some moderate restrictions in his lumbar range of motion and he reported neck and low back pain with some movements. At the next appointment, in July 2014 she found moderate restrictions in most aspects of his cervical and lumbar range of motions and some tenderness with palpation. At the last appointment in June 2015, her range of motion findings were essentially the same, except his cervical flexion was good. Recognizing her opinions are not admissible for their truth, based on her review of cervical and lumbar spine imaging and her assessment of Mr. Jindal, she concluded his cervical spine pain had a component of soft tissue pain with underlying osteoarthritis, particularly at C6-C7. His lumbar spine pain was soft tissue/myofascial in origin, with only minimal lumbar spine osteoarthritis. Dr. Fan also diagnosed Mr. Jindal with trochanteric bursitis/iliotibial band syndrome, commenting that his left leg pain was musculoskeletal as well as the result of tight left hamstring muscles.

[57] Dr. Fan recommended ongoing physiotherapy to stretch the tight muscles on the left side of his cervical spine and lumbar spine, along with a cortisone injection into the bursa, which Mr. Jindal refused. She also recommended Mr. Jindal use Tylenol Arthritis “more regularly” and to “take the gabapentin” as it had been helping

him, as well as active rehabilitation to provide him with stretching exercises for his iliotibial band. Regarding the dose of Gabapentin, in a letter to Dr. Singh she wrote that it could be titrated upwards gradually as tolerated to a maximum of 3,600 mg per day.

[58] Mr. Jindal attended Revive Rehabilitation from November 26, 2014 until July 24, 2015, where he was taught stretching and strengthening exercises to do at home, which he said he did and still does mostly twice a day, also indicating the regime takes 35 to 45 minutes to complete.

[59] In cross-examination, Mr. Jindal struggled to identify how many exercises he does and to describe them. Eventually indicating there are only five in total, he went on to demonstrate them. Each involved gentle stretching. Mr. Jindal also testified that Dr. Singh provided him with a sheet of exercises and sometimes he will substitute one those exercises instead.

[60] Mr. Jindal attended more physiotherapy at Get Well Physiotherapy in 2018 and another clinic called Back in Motion.

[61] Mr. Jindal has also been seen by neurologist Dr. Cory Toth related to leg pain. His letter to Dr. Singh dated January 26, 2021 states that Mr. Jindal reported taking 300 mg of Gabapentin for pain and sometimes a higher dose without side effects.

[62] Dr. Toth prescribed two 300 mg Gabapentin daily for leg pain. Dr. Singh has been prescribing this same dose since February 2017. Pharmacare records show Mr. Jindal filled well below 720 tablets per year, the annual equivalent of his prescribed daily dosage, from a low of 180 in 2017 to a high of 694 in 2021. In 2022, 900 tablets were dispensed, which if taken would result in an average dose of 2.4 x 300 mg tablets per day.

[63] Mr. Jindal testified, however, that he has continued to take the same medications as before at a similar dosage, including Gabapentin, Tylenol and Advil if his pain increases at work, and a gel that he applies in the morning and evening.

Post-Accident Work

[64] After the First Accident, Mr. Jindal said he was not able to work at all for one week due to pain. Until November 2013, he continued to take a lot of time off. During that period, he worked one to four days per month and the length of his shifts varied from two to seven hours depending on his pain. After November 2013, Mr. Jindal stated, he tried to work all of his 15 shifts per month but he still missed one or two shifts each month and a lot of hours. But he also said if the pain was less he worked up to eight or nine hours per shift and once a month or so, if he felt quite well, he would work up to 12 to 14 hours.

[65] According to Mr. Jindal, the missed shifts and reduced hours continued in the same way until the Second Accident.

[66] Following the Second Accident, he said, he was absolutely not able to work for four or five days. After that, he worked very little until the end of July 2017. He recalled doing two or three shifts in six weeks and working a maximum of four to seven hours per shift.

[67] From August 2017 until the onset of the Covid-19 pandemic in March 2020, Mr. Jindal referred to returning to much the same schedule as from November 2013 until the Second Accident. He would miss one or two shifts per month, working five to seven or maybe eight to 10 hours per shift, but there were also many times when he worked 10 to 13 hours, depending on his pain level.

[68] Mr. Jindal began working as an Uber driver in 2020, he said, because of the flexibility it offered, indicating he can drive whenever his pain is less. Asked about his current schedule, he said he works four to five days per week and five to 10 hours per day depending on his pain. If the pains starts while he is working, he takes breaks for one or two hours. Sometimes, when the pain increases he stops after three or four hours and goes home. On average, he stated, he works seven to eight hours per shift. In some weeks he also misses days.

[69] Mr. Jindal described his job duties as an Uber driver as exactly the same as taxi driving. He said he refuses clients that require heavy lifting just as he could and did when he was driving a taxi.

[70] Asked how much he would have worked if he had not been injured, Mr. Jindal said “very easily” five days per week if not six, and “very easily” 10 to 13 hours per day.

[71] Mr. Jindal was cross-examined about telling a number of medical practitioners including Dr. Singh, that he had returned to working full-time starting in 2014. For example, the clinical record and initial assessment report of kinesiologist Paul Dhoot with Revive Rehabilitation dated November 25 and 27, 2014 state that Mr. Jindal was working full-time, approximately 50-54 hours per week before the First Accident; and he was working 50-54 hours per week currently, although outside of work he spends most of his day resting due to pain symptoms.

[72] Mr. Jindal denied saying he was working full-time and said there must have been a misunderstanding. He also testified that by full-time he meant he was trying to go to work everyday or all 15 shifts but the number of hours was not full-time and perhaps this had not been recorded.

[73] Dr. Tan actually noted these kinds of details in her records dated March 3, 2014. She wrote that Mr. Jindal was working full-time six to seven hours a day, sometimes eight to nine hours and sometimes with a break in between.

[74] Dr. Singh’s records for October 30, 2015 and July 12, 2016, however, simply referred to Mr. Jindal working full-time. In the latter, Dr. Singh also noted that Mr. Jindal complained of ongoing back pain, which gets better with Gabapentin. He also reported his neck pain was much better but he had on and off stiffness. Dr. Singh’s references to full-time work contrast with his record dated September 19, 2013, where he noted Mr. Jindal was working only a few hours per day. In a “CL19” report he prepared dated February 4, 2015, Dr. Singh answered yes to the question, “[a]re the MVA-related injuries preventing your patient from working full duties full

time”? He also wrote that persistent back/neck and left arm pain prevent Mr. Jindal from working effectively along with “[having] to take frequent breaks”.

[75] Mr. Jindal was cross-examined based on his examination for discovery evidence about how much he was working shortly after the First Accident. Asked about his hours of work five to seven days after the First Accident, he testified it varied depending on his health. The maximum was 12 hours, if “I am fine” and otherwise he would park the vehicle after seven or eight hours.

[76] Mr. Jindal gave evidence about his incomes from various jobs before and after the accidents based on his income tax returns, which show his gross and net (of expenses) incomes from insurance producing and starting in 2013 his gross and net (of expenses) incomes from taxi driving and then Uber driving. In general, his tax returns showed a steady increase in his income from both taxi driving and insurance producing work starting in 2015 except for 2020 (due to Covid-19).

[77] In 2013, Mr. Jindal’s gross income from taxi driving was $47,715 (net $14,638). Mr. Jindal testified that absent the First Accident he would have earned $65,000 or more gross from taxi driving in 2013, indicating he worked six or seven shifts in January, 14 to 16 hour shifts 15 days per month for 6.5 months from February to the date of the First Accident and only 15 to 20 days after the First Accident.

[78] During cross-examination about 2013 pre-accident income, Mr. Jindal acknowledged the taxi company provided him with monthly statements that would show his credit card revenue and all of the expenses charged by the company. Asked why the monthly statements had not been produced, Mr. Jindal changed his evidence, stating he did not think the company gave him monthly statements but instead they received a cheque with an explanation on it. He also testified that at the end of the year the company would provide consolidated statements that showed expenses for the whole year, apart from the lease, gas and maintenance costs, which are also not in evidence.

[79] Although Mr. Jindal agreed that he gave evidence at his discovery that he earned $2,000 per month net from taxi driving in 2013 before the First Accident, he later suggested he was confused and $2,000 per month is what he earned in 2012 as an employee.

[80] Cross-examined about earning a higher income as an Uber driver than he did driving a taxi, Mr. Jindal agreed. However, he disagreed that he now earns more than he was before the First Accident, referring to rate increase(s) of three to five percent each year, which after all these years would mean $65,000 equates to around $90,000.

[81] Mr. Jindal said little about engaging in insurance producing work after the accidents. In cross-examination, he testified that he gradually began phoning his clients again and estimated spending one and a half to two hours per week doing this work until the Second Accident. Then, he said, he “faced the same problem” and did not contact anyone for four or five days. After that, Mr. Jindal stated, the “same situation continued until now”. One day per week sometimes two, he meets with clients and friends for one or two hours. He does not spend any more time than that, he said, because he experiences pain after going out for two or three hours.

[82] Mr. Jindal agreed that his income from insurance producing work has consistently increased since the First Accident. He attributed the increases to more referrals as a result of his son’s graduation and his daughter’s wedding in 2017 and his wife working from home. Mr. Jindal also acknowledged receiving monthly commission statements regarding his insurance producing work. Asked why they had not been produced, he indicated “they” show in his income tax return and he produced whatever documents he was asked for. None of Mr. Jindal’s tax returns following the First Accident include the T4A commission statements that are included with his earlier returns.

Post-Accident Activities

[83] Mr. Jindal gave very little evidence about the impact of his injuries and symptoms on his activities, apart from saying he has hardly gone to the temple,

perhaps once a month and he only socializes with his family once a month or less, indicating he does not feel like going because of pain and he is not able to walk around much. Instead he spends his spare time trying to rest at home.

[84] Asked about the impact of his injuries on his household responsibilities, Mr. Jindal gave evidence that he has not been able to do any of his previous indoor or outdoor chores because pushing or pulling anything heavy or bending over exacerbates his pain. Asked about mowing the lawn, he said he tried two or three times but the lawnmower is heavy and moving or pushing it exacerbated his pain. He gave similar evidence about regular yard work, the spring and fall clean up, power washing the house, washing the cars, vacuuming and deep cleaning the appliances.

[85] Mr. Jindal also indicated his son has taken over responsibility for all of the chores he used to do.

[86] Rajat Jindal gave very similar although less detailed evidence regarding the indoor and outdoor chores Mr. Jindal did and stopped doing after the First Accident.

[87] Now 28 years old, Rajat has continued to live at home with his parents. Poised to finish his CPA articles, he works full-time.

[88] Rajat referred to his father as very active and hard working before the First Accident. Indicating Mr. Jindal vacuumed, cleaned appliances and did most of the outdoor chores – taking care of the lawn, prepping the yard in the spring and fall, washing the cars and pressure washing - Rajat also said he would help out his father sometimes.

[89] Rajat testified to performing all of Mr. Jindal's indoor and outdoor chores since the accidents. He also indicated the back yard is large, the family grows vegetables and he and his mother work in the garden.

[90] Asked about his observations of Mr. Jindal following the First Accident, Rajat said the next morning he was grimacing in pain. Rajat also noticed Mr. Jindal doing

stretching exercises, rubbing gel on his neck, back and hips and taking medication pretty much everyday. Rajat indicated his observations after the Second Accident were similar. The look of pain on his face was always there.

Expert Medical Evidence

[91] As indicated, Mr. Jindal relies on the expert opinion evidence of:

1. Neurosurgeon, Dr. Ramesh Sahjpaul who completed three reports dated February 26, 2019, November 3, 2021 and June 6, 2023; and

2. Physical medicine and rehabilitation specialist, Dr. Cecil Hershler who completed two reports dated June 10, 2015 and January 30, 2020.

[92] The defendants rely on the expert opinion evidence of now retired orthopedic surgeon Dr. Stephen Maloon. He examined Mr. Jindal on July 20, 2018 and completed a report dated the same day.

Dr. Sahjpaul

[93] In his first (2019) report, Dr. Sahjpaul noted that Mr. Jindal's current symptoms included headaches, typically when his neck pain is severe, daily neck pain that is worse with activities such as driving, ongoing mid and low back pain that is worse with sitting and bending over, intermittent discomfort in his left arm, mostly left, but sometimes right leg pain especially when sitting. Regarding his post-accident work schedule, Mr. Jindal reported working much shorter shifts, sometimes seven or eight hours per day.

[94] During his first examination of Mr. Jindal, Dr. Sahjpaul found mild restrictions in the neck range of motion and some restrictions in the lumbar range of motion, accompanied by complaints of pain or discomfort. There was no tenderness with palpation of the bones of the spine.

[95] Dr. Sahjpaul diagnosed Mr. Jindal with the following:

1. Cervicogenic headaches due to the First Accident.

2. Neck pain – myofascial with a lesser discogenic component due to the First Accident and aggravated by the Second Accident.

3. Left arm pain that is probably due to cervical radiculopathy from the C6-C7 disc osteophyte complex rendered symptomatic by the First Accident.

4. Myofascial mid back pain due to the First Accident and aggravated by the Second Accident.

5. Low back pain - myofascial with a lesser discogenic component due to the First Accident and aggravated by the Second Accident.

6. Lower left and right leg symptoms probably referred from the low back injury.

7. L4-5 annular tear due to the First Accident, contributing to back pain but to a lesser extent than the myofascial component.

8. Bilateral knee pain due to the Second Accident.

[96] Regarding the last diagnosis, Dr. Sahjpaul acknowledged he did not examine Mr. Jindal's knees and his opinion was based entirely on what Mr. Jindal reported.

[97] Turning to prognosis, Dr. Sahjpaul opined that Mr. Jindal's current symptoms will probably continue but aggravation is not anticipated, barring further injury.

[98] Dr. Sahjpaul also opined that Mr. Jindal's reduced hours of work were reasonable, writing vocations that require sitting and driving typically aggravate spinal pain conditions. Dr. Sahjpaul expressed the same opinion about Mr. Jindal's reported limitations with household "pursuits".

[99] Cross-examined about a range of issues, including how long it takes for a C6-C7 osteophyte complex to form, Dr. Sahjpaul indicated months to many years depending on the underlying cause, which can include degenerative changes and a traumatic event. Dr. Sahjpaul agreed that the January 2014 cervical MRI findings

were consistent with degenerative changes that likely pre-dated the First Accident, but also added that a progression in degenerative changes does not “correlate” with clinical symptoms for a majority of people. At the same time, he acknowledged an accident is not necessary for degenerative changes to become symptomatic.

[100] Agreeing the first reference to left arm pain in the clinical records was four months after the First Accident and symptom onset would “possibly” have been sooner if the First Accident caused the osteophyte complex, Dr. Sahjpaul maintained that Mr. Jindal’s arm pain was caused by the First Accident even if the osteophyte complex was already there because with trauma to the disc, it would start to impinge on the nerve. He also maintained that Mr. Jindal’s left leg pain was probably caused by the First Accident despite the 2015 onset, because it was referred from the low back and perceived by the brain as in the leg.

[101] Regarding the L4-L5 disc bulge, although Dr. Sahjpaul agreed it could have been present for years, he stated it was more likely related to the First Accident and contributing to Mr. Jindal’s post-accident back pain. At the same time, Dr. Sahjpaul acknowledged Mr. Jindal’s pre-accident low back pain could have been due to a pre-existing annular tear and from sitting long hours in a cab.

[102] Dr. Sahjpaul’s second November 2021 report indicates Mr. Jindal gave a more detailed account of his ongoing symptoms this time. With respect to his mid and low back pain, for example, he reported he could not sit for more than 20 or 30 minutes at a time because of worsening pain. Nor could he stand for any longer than that. Mr. Jindal reported that a year earlier he had to switch from driving a taxi to driving an Uber because the shifts are shorter. He also reported that prior to the First Accident he worked upwards of 60 hours per week but currently, when his symptoms allow for it, he can work at most 30 hours per week.

[103] During the second examination, with palpation, Mr. Jindal was moderately tender over the sacroiliac regions and surrounding soft tissues on both sides.

[104] Dr. Sahjpaul's diagnoses were unchanged. He also expressed the further opinions that the Second Accident resulted in a temporary, mild aggravation of Mr. Jindal's neck and back pain, he had a chronic pain syndrome and resolution of his symptoms was not anticipated.

[105] In his third report, Dr. Sahjpaul again provided the same diagnoses along with the opinion that meaningful improvement in his pain symptoms was unlikely.

[106] In terms of current symptoms, Mr. Jindal told Dr. Sahjpaul he had headaches most days, his other symptoms had not improved and there had been an increase in his left leg symptoms. Regarding mid and low back pain, he reported discomfort and pain in his mid and low back pain when he sat for more than 30 minutes, as well as with lifting and other movements.

[107] During his last physical examination of Mr. Jindal in May 2023, Dr. Sahjpaul found the range of motion again mostly close to normal, although extension in his lumbar region was reduced compared to previous examinations and this time Mr. Jindal had or reported mild tenderness with palpation of some parts of the lumbar/sacrolumbar region.

[108] Based on Mr. Jindal's report that he has not had any change in his "vocational capacity", Dr. Sahjpaul opined that he probably would not be able to return to his former work capacity as a taxi driver or doing insurance sales work.

[109] In cross-examination, Dr. Sahjpaul agreed that his opinions about Mr. Jindal's work capacity rested on what he reported about his inability to return to his pre-accident work hours and his ongoing significantly reduced work hours. Dr. Sahjpaul assumed Mr. Jindal was working half as much as he did before the First Accident. Asked if his opinion would be different if Mr. Jindal had told him he was working the same number of hours post-accident, Dr. Sahjpaul said it would depend on whether he was working with pain symptoms or not, indicating that working with symptoms is not sustainable. Dr. Sahjpaul acknowledged that his examination findings alone

would not allow him to confidently predict that Mr. Jindal was unable to work full-time.

[110] Dr. Sahjpaul was not able to identify any factual basis for his opinion about Mr. Jindal's inability to do insurance sales work, indicating they did not even discuss it.

Dr. Hershler

[111] Dr. Hershler's first report, from June 2015, indicates that Mr. Jindal reported persistent pain and stiffness more on the left side of the neck that referred across the left shoulder and into the upper left arm, and in the left lower back referring into the left leg, as well as occipital headaches, since the First Accident.

[112] Regarding his examination findings, Dr. Hershler identified the movements of Mr. Jindal's entire spine as generally "tight and stiff (muscle resistance)", and approximately 20% loss of range. Dr. Hershler also noted tender points bilaterally with palpation of the neck, shoulders and the lumbar paraspinals, which involved Mr. Jindal withdrawing involuntarily from pressure and reporting pain.

[113] In reviewing the medical records, Dr. Hershler referred to the January 2014 MRI of Mr. Jindal's cervical spine showed a mild to moderate broad-based posterior disc osteophyte complex at C4/5 and the same although moderate, at C6/7. He described the May 2014 CT scan of the lumbar spine as showing a "large" disc bulge at L4/5 but no significant spinal stenosis and mild facet joint osteoarthritis.

[114] Dr. Hershler diagnosed Mr. Jindal with the following:

- Musculo-ligamentous and discogenic injuries to the cervical and lumbar spine (lumbar-sacral junction), characterized by tender points in muscle structures and lumbar paraspinals respectively;

- Musculo-ligamentous injury to the upper and mid back (with reference to muscle tenderness on the left side of the upper and mid back); and

— headaches that are likely cervicogenic.

[115] Referring to the January 2014 MRI and the May 2014 CT scan, Dr. Hershler further opined it was more likely than not that the First Accident caused the C4/5, C6/7 and L4-L5 disc “injuries”. In cross examination he acknowledged it was not possible to know when the disc bulge(s) arose. In any event, he also expressed the opinion that the cervical spine, lower back and hips were rendered symptomatic by the First Accident.

[116] Cross-examined about the cause of Mr. Jindal’s pre-accident low back pain which included referred pain to the right leg, Dr. Hershler testified there were a number of possibilities. What was important is that the low back pain was time limited. He also testified that episodes of back pain that resolve in weeks to months are pretty common. Dr. Hershler also agreed however, it was possible the disc bulge was present and injured muscles in the low back or nerve irritation could have caused the referred pain before the First Accident.

[117] Addressing the duration of Mr. Jindal’s post-accident symptoms, almost two years, and prognosis, Dr. Hershler wrote that in his practice, 80% of patients with similar injuries take three years to recover (meaning their symptoms diminish to tolerable levels), another 10% take five years and 10% have permanent symptoms.

[118] In cross-examination, he reiterated these rates and time frames for recovery from soft tissue injuries, explaining he does not see acute soft tissue injuries very often in his practice.

[119] Dr. Hershler examined Mr. Jindal again on January 29, 2020. His second report includes much the same examination findings, except Mr. Jindal’s range of movement in his neck was only 50% to the left and 80% to the right. Further, when sitting cross-legged, Mr. Jindal experienced tenderness to pressure in the left iliotibial band.

[120] Mr. Jindal reported no significant change in his pain and stiffness levels over the “last two years”, indicating they were still predominantly on the left side and worse in the low back, radiating into the left leg.

[121] Dr. Hershler’s diagnoses remained the same. He wrote the symptoms and findings were caused by the First Accident and aggravated by the Second Accident, which also caused soft tissue injuries to his knees that have improved.

[122] Given it had been over five years since the First Accident and his earlier prognosis, Dr. Hershler opined that Mr. Jindal’s symptoms were now probably permanent.

[123] Indicating that Mr. Jindal reported he had continued working but reduced shift/hours, Dr. Hershler predicted Mr. Jindal would probably be able to work at his current reduced capacity. In other words, he would probably continue to miss time from work and find it difficult to sustain work or do other extra work, due to the toll that pain takes on his endurance. In cross-examination, Dr. Hershler said he understood Mr. Jindal’s work hours had shrunk rather than increased and he was working only six to eight hour shifts on alternate days.

[124] Concluding in his report that Mr. Jindal had a permanent partial disability, Dr. Hershler wrote that given the “severity, chronicity and permanence” of his symptoms and the diminishing ability to tolerate pain as one ages, Mr. Jindal would likely not be able to sustain his employment to the age of 65 or be able to work to his intended retirement age of 70.

[125] Asked to identify the basis for his opinion about the effect of aging on pain tolerance, Dr. Hershler said this was a general medical understanding and most doctors would agree. He also testified that tissues become less resilient and more fragile with age although he agreed it does vary from person to person.

[126] In his second report, Dr. Hershler recommended:

- Massage and/or physiotherapy at least twice per month to help with pain relief;
- assistance with heavy homemaking activities (2-4 hours per week);
- continuing the existing exercise program;
- continuing the existing work schedule (three 6-8 hour shifts a week on alternate days);
- continuing to take medication and stretch prior to work shifts;
- a handheld massage device or chair equipped with a massage mechanism for home use to help with tight muscles and tender points; and
- a prescription for topical anti-inflammatory/muscle relaxant cream.

[127] Dr. Hershler also suggested a work capacity evaluation to further assess the impact of Mr. Jindal's ongoing symptoms.

[128] Asked about the significance of Dr. Sahjpaul's findings regarding Mr. Jindal's near normal range of motion, Dr. Hershler stated among other things that they indicated the injury is in the muscle.

[129] Similar to Dr. Sahjpaul, Dr. Hershler readily agreed that he assumes the patient provides an accurate history and is trying to be cooperative.

Dr. Maloon

[130] Dr. Maloon's report includes the same components as those of Dr. Hershler and Dr. Sahjpaul.

[131] Dr. Maloon sets out that Mr. Jindal reported:

- ongoing neck pain that varies from a three or four out of 10 to occasionally as high as a nine or 10, which occasionally radiated into his right arm;
- the neck pain was aggravated by prolonged driving and relieved by resting and doing gentle strengthening and stretching exercises;
- no neck pain at night and no change in his neck pain since the First Accident;
- continuous low back pain that varies from three or four out of 10 to occasionally as high as a seven or eight, which radiates into his left leg and occasionally into his right leg;
- like his neck pain, his low back pain is more severe than his leg pain; and
- aggravated by prolonged sitting, driving and walking, his low back pain was relieved by the same exercises.

[132] Mr. Jindal rated his level of pain at a three to four out of 10 on the day of the assessment and presented as experiencing no obvious discomfort during the interview.

[133] During Dr. Maloon's examination, Mr. Jindal reported mild tenderness when his cervical and lower lumbar spine areas were palpated. Dr. Maloon did not observe any muscle spasm, an objective finding that neither Dr. Sahjpaul nor Dr. Hershler addressed. Dr. Maloon identified the reported tenderness as really vague, subjective and not at all diagnostic. Mr. Jindal also reported discomfort throughout the range of motion of the lumbar spine. Extension and lateral flexion were slightly decreased, but Dr. Maloon noted normal lumbar "spinal rhythm", when Mr. Jindal was bending forward which puts pressure on the discs of the lower back. The range of motion in Mr. Jindal's cervical spine was globally reduced and he expressed feeling discomfort at the extremes of movement, especially extension, which Dr. Maloon testified was

suggestive of fairly significant wear and tear in the joints of his neck. Dr. Maloon observed no muscle wasting but also no non-organic findings.

[134] In preparing his report, Dr. Maloon reviewed clinical records that did not extend beyond November 2016 and imaging from 2012 to April 2015. He referred to imaging of the cervical spine in December 2013 as showing mild narrowing of the C6, C7 and T1 discs and severe degenerative changes on the left of C6 and C7; the January 2014 MRI of the cervical spine as showing a range of age appropriate degenerative changes that were most marked in the facet joints; a 2015 CT of the thoracic spine showing degenerative changes in all of the thoracic discs with decreased disc space and vertebral endplate osteophytes. Dr. Maloon also referred to a 2018 CT angiogram as also showing degenerative changes in the thoracic spine.

[135] In terms of diagnosis, Dr. Maloon opined that Mr. Jindal "probably" sustained mild soft tissue strains to his neck and possibly also his lower back during the First Accident. Dr. Maloon identified the normal, expected healing time for soft tissue injuries is six to eight weeks. Based on this, he writes he would have expected Mr. Jindal to be partially disabled for four to six weeks.

[136] Because soft tissues heal, when pain persists, Dr. Maloon testified, there may be another cause. He also testified that when a patient perceives pain and it does not improve they may continue to perceive pain, suggesting he does not consider ongoing subjective pain as casually related to a preceding soft tissue injury.

[137] Cross-examined about chronic pain, Dr. Maloon responded that he did not like the term. He emphasized that pain is a symptom, not a diagnosis. Asked to agree that chronic pain can be partially or completely disabling, Dr. Maloon indicated that would depend on how the patient reacts to pain. However, he categorically rejected the suggestion that the prognosis for chronic pain is very poor after five years according to the authoritative medical literature. Dr. Maloon testified that chronic pain can be treated once a proper diagnosis has been made.

[138] Regarding Mr. Jindal's ongoing complaints of neck and back pain radiating to both his arms and legs, Dr. Maloon's report states that his clinical evaluation failed to reveal objective evidence of injury to the musculoskeletal or the neurological components of the spine, trunk or limbs. Dr. Maloon also described Mr. Jindal's pain symptoms as vague, nonspecific, inconsistent with musculoskeletal injury and more consistent with mechanical or activity-related neck and back pain, which usually results from wear and tear changes in the joints of the neck and back. Dr. Maloon noted that the imaging he reviewed showed age appropriate degenerative changes in Mr. Jindal's neck and back joints, which in cross-examination he identified as the cause of Mr. Jindal's ongoing pain.

[139] Also in his report, Dr. Maloon commented that the multitude of clinical visits Mr. Jindal had attended for "vague, non-specific musculoskeletal and abdominal symptoms", suggested a "hypochondriacal tendency". Challenged on this opinion and whether he was qualified to offer it, Dr. Maloon insisted he was and maintained his view adding Mr. Jindal had instigated being over evaluated and over treated.

[140] In terms of recommendations, Dr. Maloon's report indicates he attempted to reassure Mr. Jindal that he can safely continue with all of his normal work and other activities. Dr. Maloon stressed the importance of maintaining the strength of the muscles supporting his neck and back, through a home based strengthening and stretching program. Dr. Maloon advised against ongoing passive therapies, writing that generally they have not shown any long-term benefits and may serve to perpetuate symptoms. He also opined that Mr. Jindal was way beyond the need for actively supervised rehabilitation program.

[141] Dr. Maloon did not consider the Second Accident, although his report was completed about one year later. In cross-examination, he said he did not know about the Second Accident at the time. All of the clinical records he received predated it and according to Dr. Maloon, when he asked him, Mr. Jindal denied being involved in any other accidents.

Other Expert Evidence

[142] Mr. Jindal also relied on the expert opinion evidence of Paul Pakulak an occupational therapist and functional capacity evaluator. He prepared a functional capacity evaluation and cost of future care report dated December 6, 2021 based on his assessment in September 2021.

[143] Mr. Pakulak expressed the opinion that Mr. Jindal's overall capacity to compete for work in an open job market has been reduced due to his ongoing physical limitations and he did not demonstrate the capacity to work full-time at a competitive or sustainable level as a taxi or Uber driver. Classified as light to medium strength work, based on Mr. Pakulak's own experience and the job demands Mr. Jindal reported, he described taxi or Uber driving as requiring multiple limb coordination, work intensive sitting, occasional standing and occasional walking.

[144] More generally, Mr. Pakulak opined that Mr. Jindal demonstrated a functional capacity for light strength tasks, in addition to identifying body position limitations related to prolonged and repetitive overhead work, prolonged and repetitive positioning of the neck and shoulders in front of the body, prolonged and repetitive below waist level work, sitting and standing. Given Mr. Jindal's response to testing (significant increases in reported pain levels during and after the assessment and a reduction in speed and capacity over the course of the assessment), Mr. Pakulak anticipated prolonged activity above the light strength level or without provision for his limitations would adversely impact his productivity.

[145] Mr. Jindal told Mr. Pakulak he worked 14 to 18 hour shifts every other day driving a taxi and eight to ten hours per week doing insurance producing before the First Accident. Mr. Jindal also estimated his longest sustained period of driving before the accidents at 1.5 hours (Abbotsford to YVR). He described his current work schedule with Uber as five to seven hours per day, five days per week. Mr. Jindal also told Mr. Pakulak he continued to work as an insurance producer but nothing about the hours involved.

[146] Mr. Jindal reported daily intermittent pain in his neck, upper, mid and low back and left buttock/leg. He said his lower back pain tends to come on and is worse with longer periods of sitting, driving, standing, bending and lifting. Mr. Jindal rated his low back pain, at the time, at a two out of 10 according to a functional pain scale. He also indicated his highest and lowest levels of low back pain in the preceding 30 days were a five and zero out of 10. Mr. Jindal reported the same for left buttock/leg pain. Regarding neck and upper/mid back pain, Mr. Jindal described it coming on with prolonged and repetitive positioning of the neck and shoulders. At the assessment, he rated it at a zero, and his highest and lowest levels of pain over the 30 days prior, as a three and zero out of 10.

[147] On the functional pain scale, a rating of zero means no pain or discomfort. Ratings of .25 - 2.75 mean pain or discomfort is present but not at a level where it limits performing the activity. At three, pain is starting to affect a person's ability to perform the activity. At five, pain is very disabling, meaning it causes great difficulty moving or applying any strength through the painful area. At this level, a person is unable to complete the activity.

[148] Mr. Pakulak concluded Mr. Jindal's testing results and his reports of pain and disability were reliable. All distraction tests were negative. Mr. Pakulak also indicated that Mr. Jindal's reports of increased pain during the course of the assessment were consistent with his observations and the substantive test results.

Physical Demands	Frequency	Force Required	Demonstrated Capacity	Comments
Sitting	Constant		Restricted	
Standing	Occasional		Able	
Walking	Occasional		Able	
Reaching Out	Constant		Restricted	
Gripping/Pinching	Constant		Able	
Handling	Constant		Able	
Bending/Stooping	Occasional		Able	
Crouching	Occasional		Able	
Lifting	Occasional	35 lbs.	Restricted	
Carrying	Occasional	35 lbs.	Restricted	

[149] In his report and during cross-examination, Mr. Pakulak indicated Mr. Jindal's maximum walking and standing tolerances were not assessed. Regarding his sitting tolerance, Mr. Pakulak relied on his observations during the clinical interview and two simulations test which are completed sitting. Mr. Jindal was able to sit casually during the interview for about 68 minutes in two blocks of time although he reported low back and left buttock/leg pain and during the second block, he took three breaks to stand. In addition during the simulation tests, Mr. Jindal reported increases in his back pain, changed position and took four breaks to stand. Mr. Pakulak concluded Mr. Jindal demonstrated the capacity to sit on an occasional basis and requires the flexibility to move about and change positions to manage his symptoms.

[150] Cross-examined about Mr. Jindal reporting he could sit for extended periods but he has to move about and take breaks due to increased pain, Mr. Pakulak indicated he considered Mr. Jindal's perceptions of his ability to sit only in terms of their consistency with the testing results. He did not ask Mr. Jindal for more information about how long he could sit. Significantly, Mr. Pakulak also testified there is no standardized test for assessing sitting tolerance, driving is one of the hardest jobs to simulate in a clinical setting, and although his clinic has a driving simulator, it was not working or available that day.

[151] Mr. Pakulak's assessment and recommendations related to the cost of future care are discussed below under that head of damages.

Other Medical (Fact) Evidence

[152] Pursuant to the parties' document agreement, the examination findings of doctors in their clinical records are admissible for their truth, some of which I have already set out.

[153] Dr. Singh's clinical records include examination findings made during over 40 accident related appointments between August 30, 2013 and March 27, 2019. As early as November 26, 2013, Dr. Singh found Mr. Jindal's neck range of motion normal (although it felt stiff in all planes) and his lumbar range of motion almost normal. At the next appointment, December 12, 2013, his lumbar range of motion

was normal, although he reported or experienced tenderness with palpation in the paraspinal area. After that, Dr. Singh noted mostly normal ranges of motion with some but not many exceptions and intermittent tenderness in different areas to palpation. The day after the Second Accident, Dr. Singh found Mr. Jindal had normal range of motion in his neck and shoulders and knees as well as no swelling, but slight tenderness over the quadriceps. At the next appointment, June 19, 2017, Dr. Singh also found normal range of motion in the lumbar spine. During the March 27, 2019 appointment and the five appointments in 2018, all of the range of motion findings were normal, although in February and June 2018, Mr. Jindal complained of some tenderness in specific areas.

Credibility and Reliability

[154] I turn now to consider the credibility and reliability of Mr. Jindal's evidence.

[155] The parties are far apart on this critical issue. Mr. Jindal argues his evidence as a whole was credible and reliable, submitting he presented as forthright and candid throughout, he did not over emphasize or embellish his symptoms and any inconsistencies were minor. He also points to his ongoing and apparently much increased use of Gabapentin, as corroborating his testimony regarding ongoing significant pain symptoms and their impact on his functioning.

[156] In contrast, the defendants take the position that the "vast majority" of Mr. Jindal's evidence should not be accepted because it is not reliable or credible. They express incredulity regarding his professed ability to recall the intensity and frequency of various pain symptoms during multiple specific periods of time. Suggesting there was no air of reality to this evidence, the defendants also emphasize that Mr. Jindal did not explain how he came up with the various numbers for his pain symptoms. We are left not knowing, they submit, what he means by any particular number. In addition, the defendants point to a number of inconsistencies between Mr. Jindal's testimony and accounts of his symptoms and findings in clinical records, his discovery evidence and, regarding loss of income, his income tax returns. Further, they rely on Mr. Jindal's comfortable appearance during his

testimony and the absence of evidence that could and ought to have been adduced as undermining his credibility and his claims.

Legal Principles

[157] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, can be mistaken about what they recall and observed. Further, credibility and reliability are not all-or-nothing concepts. A trial judge may believe some, all, or none of a witness's evidence and attach different weights to different parts of their evidence, based on an assessment in light of the evidence as a whole: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93.

[158] The proper approach to assessing the credibility of any interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.…

[159] The factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 also inform the assessment of whether the evidence of a witness is both credible and reliable:

- the capacity and opportunity of the witness to observe the events at issue;
- the witness's ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling those events;

- inconsistency in the witness's evidence, meaning did their testimony change between direct and cross-examination, or inconsistencies between prior statements, discovery evidence and their evidence at trial;

- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;

- whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and

- the witness' demeanour, meaning the way they presented while testifying.

[160] Regarding the last factor, *Chorny* and other authorities have discussed the dangers of relying on demeanour to determine credibility, recognizing the risk of preferring the testimony of the better actor, and conversely, misinterpreting the poor presentation of an honest witness as deceptive (see *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18).

Analysis

[161] Applying these principles in assessing Mr. Jindal's evidence, I largely share the defendant's view about his credibility and reliability .

[162] As I have indicated, I too am firmly of the view Mr. Jindal's specific account of each of his multiple symptoms over time is not reliable. Again, I am not able to accept that anyone could accurately recall, as he purported to, the frequency and intensity of a variety of different pain symptoms discretely across multiple time periods. Although I am less concerned about the reliability of his evidence regarding his current symptoms and those that he experienced after each of the accidents, which provide anchors for his memory, Mr. Jindal's willingness to provide so much unreliable evidence undermines his credibility generally.

[163] In reviewing various aspects of his testimony, I have already highlighted inconsistencies between his evidence about his symptoms, some of his discovery evidence, and his reported symptoms in various clinical records. There are also

some inconsistencies between the less serious ongoing pain symptoms Mr. Jindal reported to Mr. Pakulak in September 2021; his testimony about his current symptoms and what he reported to Dr. Sahjpaul in May 2023; as well as what he reported to Dr. Sahjpaul and Mr. Pakulak in November 2021 and September 2021 about his sitting tolerance, which is a significant issue in this case;

[164] The number, extent and nature of the inconsistencies also ground my view that Mr. Jindal's evidence is not credible or reliable. In reaching this conclusion, however, I have considered the need for caution in relying on and drawing inferences from the account of a party's statement in a clinical record as proof of what they said and did not say: *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114. Noting that prior inconsistent statements of a party may also be treated as admissions and accepted for the truth of their content, Justice N. Smith observed they are brief summaries or a paraphrase of what or part of what the plaintiff actually said, which they are unlikely to recollect. For this very reason, I place less weight on other inconsistencies between Mr. Jindal's evidence about his limited post-accident work schedule and the references to him working full-time in Dr. Singh's clinical records. I remain concerned, however, about the inconsistency between this same evidence and Mr. Dhoot's precise recording of the number of hours involved in his post-accident work schedule.

[165] Regarding the credibility of Mr. Jindal's work related evidence specifically, I have noted the marked inconsistency between his testimony that he continued to work a much reduced work schedule and the trajectory of his annual income from taxi/Uber driving starting in 2015 and from insurance producing work starting in 2016 and more significantly from 2017 onward.

[166] My assessment of Mr. Jindal's credibility was also affected by the inconsistencies between his testimony about his ongoing pain symptoms and the impact of sitting and my observations of him during his testimony. As the defendants have pointed out, Mr. Jindal showed no signs of pain or discomfort while he sat in the witness box for over three days. Although his testimony was not continuous, he

did sit for up to one hour and 15 minutes and perhaps as long as one hour and 30 minutes at a time. At odds with Rajat's evidence, although I watched Mr. Jindal carefully, I never saw an expression of pain on his face. Nor did he change or adjust his position or behave in any way that would suggest he was experiencing pain or discomfort. On the contrary, he appeared entirely comfortable, very alert and highly focused. Appreciating he could have taken additional medication to minimize pain symptoms while testifying, he did not give this evidence or any evidence about the effect of sitting during his testimony.

[167] Although the defendants suggest Mr. Jindal's failure to produce income related documents also reflects a lack of credibility, I have considered it instead as an issue of proof. However, the change in Mr. Jindal's evidence when cross-examined about not producing or adducing the taxi company's monthly statements does undermine his credibility. The suggestion that they did not provide him with documents specifying all the revenues he generated and the expenses charged, or the length of time he drove each shift for that matter, is simply not believable.

[168] Regarding Mr. Jindal's assertion his use of Gabapentin corroborates his evidence about ongoing pain, I would not go so far. While his continued use of the medication substantiates that he experiences some ongoing pain, the prescribed dosage has remained much the same for many years. Again in 2015, Dr. Tan recommended that his daily dose be titrated upwards as tolerated to a maximum of 3,600 mg. As hearsay evidence this is not admissible for its truth but it is admissible to show what she recommended approximately eight years ago. Since February 2017, Dr. Singh has been prescribing Mr. Jindal 600 mg per day or two 300 mg tablets and before that one per day. More recently in 2021, Dr. Toth prescribed the same dose based on Mr. Jindal's reported leg pain, which for reasons I will come to, I do not accept was caused by the accidents, a finding that undermines the significance of an apparent increase in Mr. Jindal's use of Gabapentin in 2022, to 900 tablets or 2.4 x 300 mg per day.

[169] Mr. Jindal also relies on his evidence about performing daily exercises to manage his pain symptoms as corroborative. Again, what he demonstrated, during his testimony, a handful of gentle stretching exercises, was inconsistent with his testimony about following a 35 to 45 minute routine of strengthening and stretching exercises that he was taught in active rehabilitation. In other words, what he demonstrated undermined the credibility of his evidence about the nature of his exercise regime.

[170] Ultimately, I conclude that Mr. Jindal was not a credible or reliable witness and his evidence must be approached with significant caution. Not only am I concerned that he significantly exaggerated various ongoing pain symptoms and their impact on his functioning and his ability to work, I am also concerned he tailored his evidence about various circumstances, such as, for example, the timing of the onset of (referred) leg pain, to align with his interest in the outcome of this case.

Causation Findings

[171] Mr. Jindal must prove, on a balance of probabilities, that the accidents caused his alleged injuries and his ongoing symptoms. The test for causation, is the "but for" test, which requires Mr. Jindal to establish it is more likely than not that but for the accidents, he would not have suffered the injuries and symptoms underlying his claim: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17. Mr. Jindal does not have to show, however, that the accidents were the sole cause. So long as he proves that the defendants' negligence is part of the cause of an injury beyond the "*de minimus*" range, they will be fully liable for the harm suffered. Even where are other non-tortious causal factors, such as a pre-existing condition, contributed to the harm, the law does not excuse the defendants from liability: *Athey*; *Blackwater v. Plint*, 2005 SCC 58; *Resurfice Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32; and *Farrant v. Laktin*, 2011 BCCA 336.

[172] In light of my credibility and reliability findings, I attach less if not little weight to the opinions of Dr. Hershler and Dr. Sahjpaul that rely on the accuracy of what Mr. Jindal reported about his symptoms and their impact on his functioning.

[173] Only Dr. Maloon's opinions appear to be largely unaffected by what Mr. Jindal told him.

[174] Mr. Jindal argues however, that the expert evidence of Dr. Maloon should be rejected as biased based on his history of earnings from ICBC, which I have not discussed but was raised in cross examination. While I would not agree with this assertion, I would give limited weight to his core opinions because his evidence lacked balance or objectivity. This problem was reflected for example, in the certainty Dr. Maloon expressed about the healing time for soft tissue injuries, his reactivity during cross-examination about chronic pain, his response to being asked about Dr. Fan's opinions, which again I have not discussed, and his apparent conflation of subjective pain with an absence of a causal connection.

[175] Regarding the prognosis for soft tissue injures and the issue of chronic pain, I prefer the opinions of Dr. Hershler who has far greater experience and expertise in treating serious soft tissue injuries associated with ongoing pain.

[176] I was also concerned, however, by the limited explanation offered in support of some of Dr. Hershler and Dr. Sahjpaul's opinions, as well as Dr. Sahjpaul's willingness to offer opinions that had no and or very little factual basis.

[177] Although the defendants ask me to accept Dr. Maloon's opinion that degenerative changes in Mr. Jindal's spine that may pre and post date the First Accident cause his ongoing pain, their primary argument is that Mr. Jindal's pain symptoms had greatly improved by some time in 2015 and any ongoing pain is not daily or significant.

[178] In contrast to Dr. Maloon, Dr. Hershler and Dr. Sahjpaul suggested that various findings based on imaging of the cervical and lumbar spine may be accident related, although both acknowledged essentially that their timing could not be

determined. Whether pre-existing or accident related, both expressed the view that Mr. Jindal's ongoing pain symptom are largely myofascial or soft tissue in nature. During cross-examination, Dr. Hershler seemed to go further and offer the opinion that Mr. Jindal's pain is muscular, based on Dr. Sahjpaul's near normal range of motion findings. This opinion would appear to be further supported by Dr. Singh's multitude of normal range of motion findings over time, which also provide critical context for Dr. Hershler's own findings, as well as the other examination findings of Dr. Sahjpaul and those of Mr. Pakulak.

[179] Ultimately, I found all of the expert opinion evidence related to the condition of Mr. Jindal's spine and the significance of its condition unclear and therefore unhelpful when considered within the framework of the but for test of causation.

[180] I am not able to decide whether Mr. Jindal had degenerative changes that pre-dated the accident and would have become symptomatic in any event, or that the First Accident caused injuries to the spinal components that may be contributing to his ongoing pain symptoms.

[181] Turning to the expert opinions of Mr. Pakulak, which have a firmer objective foundation than those of Dr. Hershler and Dr. Sahjpaul, I largely accept his conclusion that Mr. Jindal's testing results and reports of increased pain during testing were reliable. It is difficult to reconcile, however, Mr. Jindal's reported increases in back pain and changes of position while sitting during the evaluation, with his ability to sit while testifying on three different days. Also given the absence of formal testing for maximum sitting tolerance and Mr. Pakulak's evidence that driving jobs are the most difficult to simulate, I am not able to accept his opinion that Mr. Jindal does not have capacity for sustainable full-time work as a taxi or Uber driver. This conclusion is reinforced by my findings below related to Mr. Jindal's increases in income from taxi driving starting in 2016, which indicate that since that time he has been working full-time if not more.

[182] Although Mr. Jindal's lack of credibility prevents me from making precise findings, based on my assessment of the evidence as a whole, I accept the First

Accident caused soft tissue injuries to his neck and back which resulted in ongoing pain symptoms in his neck, upper, mid and low back and referred pain into his left arm. I also accept that the First Accident caused ongoing headaches associated with neck pain. I do not accept the First Accident caused the referred leg pain, based on the inconsistencies between Mr. Jindal's evidence about its early onset after the First Accident and his much later reporting to Dr. Singh and Dr. Fan and the inconsistencies between his evidence and what he reported about the intensity, nature and persistence of the leg pain.

[183] I also do not accept that any of Mr. Jindal's accident related pain symptoms have been nearly as severe or as frequent as he has alleged, except for a period of time after the First Accident. Largely because he has continued to take Gabapentin and over the counter pain medication and Mr. Pakulak's opinion about the reliability of Mr. Jindal's testing results and increased symptoms during testing in 2021, I am satisfied that he continues to experience some ongoing intermittent accident related pain that is not daily and never severe. Relying also on the trajectory of his gross earnings and taking into account his reports of increased leg pain which are not accident related, I am also satisfied that Mr. Jindal's accident related symptoms decreased significantly by 2015 and pain medication has been and remains effective in managing his ongoing pain.

[184] Finally, I am not able to accept the Second Accident caused anything more than a mild and temporary exacerbation of Mr. Jindal's ongoing pain symptoms and at most, very minor and temporary pain in both knees.

Non-pecuniary Damages

Legal Principles

[185] Non-pecuniary damages are awarded to compensate a plaintiff for the pain and suffering, loss of enjoyment of life and loss of amenities caused by a defendant's negligent conduct.

[186] The nature or seriousness of the plaintiff's injuries is not the only factor that is considered in determining the amount of the award. Additional factors include the plaintiff's age; the severity and duration of the pain; disability; emotional suffering; the impact on family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An appreciation of the plaintiff's loss is key: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at para. 637.

[187] Although the non-pecuniary damages awarded in comparable cases provide helpful guidance, because no two cases will ever be identical, it is the specific circumstances of the individual plaintiff that ground the award (see *Trites v. Penner*, 2010 BCSC 882 at para. 189).

Discussion

[188] Mr. Jindal asks for $140,000 in non-pecuniary damages. He relies on the following cases as comparators:

- *Majer v. Beaudry et al*, 2002 BCSC 746 ($95,000 awarded in non-pecuniary damages);
- *Slocombe v. Wowchuk,* 2009 BCSC 967 (25 year old plaintiff; $125,000 awarded in non-pecuniary damages);
- *MacKenzie v. Rogalasky*, 2011 BCSC 54 ($100,000 awarded in non-pecuniary damages);
- *Sekihara v. Gill*, 2013 BCSC 1387 (29 year old plaintiff; $130,000 awarded in non-pecuniary damages);
- *Benson v. Day*, 2014 BCSC 2224 ($110,000 awarded in non-pecuniary damages);
- *Bellaisac v. Mara*, 2015 BCSC 1247 (29 year old plaintiff; $140,000 awarded in non-pecuniary damages);

- *White v. Wiens*, 2015 BCSC 188 ($100,000 awarded in non-pecuniary damages);
- *Arletto v. Kin*, 2016 BCSC 77 ($110,000 awarded in non-pecuniary damages);
- *Slater v. Gorden*, 2017 BCSC 2265 ($135,000 awarded in non-pecuniary damages); and
- *Chawla v. Lambright*, 2017 BCSC 1884 (29 year old plaintiff (at the time of the accident); $125,000 awarded in non-pecuniary damages).

[189] The defendants submit an award of $60,000 would provide appropriate compensation. They argue Mr. Jindal's cases are distinguishable because they involve plaintiffs who were much younger or their injuries had much more significant long term impacts. I largely agree. In *Slater*, for example, the plaintiff was a police officer who was left permanently unable to return to general police duties. Similarly, the plaintiff in *Majer* lost the ability to work in his chosen career and the plaintiff in *MacKenzie* could not pursue his chosen career. The plaintiff in *Slocombe* was not only 25 years old, but also unable to earn a living.

[190] I would also note that in *Benson*, the scope of the plaintiff's injuries included ongoing anxiety and some mild cognitive issues that affect his memory, in addition to soft tissue injuries and chronic pain. In *Arletto*, five years after the accident, the plaintiff was left with permanent myofascial pain syndrome, disc herniation which increased his pain, an annular tear and other difficult symptoms including vertigo and tinnitus. He worked reduced hours with pain and other symptoms.

[191] In support of their position, the defendants rely on:

- *Sangha v. Read*, 2019 BCSC 1761 ($60,000 awarded in non-pecuniary damages); and

- *Kular v. Bajaj*, 2019 BCSC 2140 ($55,000 awarded in non-pecuniary damages).

[192] In *Sangha*, like Mr. Jindal, the plaintiff was a taxi driver who was involved in two accidents. He was 61 years old at the time of the first accident. The trial occurred about five years later. The first accident caused myofascial “strain” to his shoulder, neck and mid back causing pain and headaches. His neck pain and headaches gradually improved. Before the second accident the plaintiff’s headaches were infrequent and he had less frequent neck pain. His mid back pain resolved shortly after the first accident. The second accident aggravated his symptoms for a period of time and caused injuries to his chest and abdomen that resolved in less than a month.

[193] In my view, Mr. Jindal’s soft tissue injuries from the First Accident were more serious and have resulted in more significant ongoing pain. On the other hand, Justice Matthews found Mr. Sangha’s injuries significantly impacted his family relationships and affected his behaviour, consequences Mr. Jindal has not experienced. They also caused Mr. Sangha to retire early and changed his lifestyle in other ways.

[194] In *Kular*, the plaintiff was involved in three accidents. Also a taxi driver, he was 40 years old at the time of the first accident. In addition to soft tissue injuries to the neck, shoulder, lower back and left hip, he developed an anxiety disorder that included fear of driving. Despite the addition of psychological “injuries” Mr. Kular’s ongoing pain symptoms and their functional impact were less than those in this case.

[195] Addressing the *Stapley* factors, Mr. Jindal was 51 at the time of the First Accident and is now 62. He suffered soft tissue injuries to his neck and back that have left him with some intermittent fluctuating pain symptoms that will likely continue, but do not prevent him from working full-time. At the same time, Mr. Jindal experienced significant and partially disabling pain for a period of time after the First Accident. He has now been living with some pain symptoms for ten years, which he

manages with medication (and very minor stretching). Unlike several of the plaintiffs in the comparator cases, there is no suggestion that Mr. Jindal's ongoing symptoms have impacted him emotionally or psychologically or his family relationships. Although he testified to a negative effect on his social life and his participation in family activities, apart from a period after the First Accident, I do not accept that Mr. Jindal's accident-related condition has prevented him from engaging with his family or in social activities as much as he did before the First Accident.

[196] Also considering the limited guidance provided by the parties' cases, I conclude a non-pecuniary damage award of $75,000 is fair and reasonable.

Loss of Earning Capacity

General Legal Principles

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

[198] The plaintiff is required to demonstrate that the injuries and symptoms caused by the accident(s) have impaired their capacity to earn income, resulting in a past or future pecuniary loss. While actual past events must be proven on a balance of probabilities, hypothetical events including what would have happened in the past had the accident not occurred, and what would have and will occur in the future, will be considered where there is a real and substantial possibility they would occur. A hypothetical event is then given weight according to its relative likelihood and compensation is awarded based on an estimation of the chance the event would have occurred or will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17; *Grewal v. Naumann*, 2017 BCCA 158, at para. 44-48.

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

Loss of Past Earning Capacity

Additional Principles

[200] Compensation for past loss of earning capacity is based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. Put another way, a claim for past loss of income or income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe* at para. 30.

[201] As Justice Warren observed in *Searle v. Xie*, 2023 BCSC 1716, a common approach to assessing this value involves projecting the income the plaintiff would have earned from the accident to the trial had the injury not occurred, and to award the difference between the projected income and the actual income earned during this period, considering all realistic contingencies.

Discussion

[202] This is essentially the approach urged by Mr. Jindal for 2014 onward. There was never any suggestion that he was prevented from pursuing or even considered any work other than taxi/Uber driving and insurance producing after the First Accident. Neither Mr. Jindal nor the defendants addressed potential realistic contingencies.

[203] Mr. Jindal's income tax returns show the following gross and net (of business expenses) incomes for 2012 onward:

Year	Driving Gross	Driving Net	Insurance Gross	Insurance Net
2012	(T4 - $27,992)		$4,727	$2794
2013	$40,739	$14,638	$5,976	$4,173
2014	$32,436	$13,115	$4,692	$4,692
2015	$55,419	$21,255	$5,022	$3,199

2016	$67,193	$25,327	$7,599	$2,953
2017	$71,476	$28,939	$7,382	$4,568
2018	$77,917	$35,746	$10,363	$3,748
2019	$68,418	$31,540	$13,542	$3,540
2020 [COVID]	$44,534	$26,865	$15,801	$6,680
2021	$62,356	$44,148	$15,504	$9,566
2022	$88,420	$56,927	$16,230	$11,936

[204] Addressing what he would have earned from taxi driving but for the accidents, Mr. Jindal relies on his evidence that for 6.5 months starting in February 2013 he worked 15 shifts per month, 14 to 16 hours per shift, until the First Accident. Based on this schedule, he estimates without accident taxi driving of 52.5 hours per week. To this, he adds 12.5 hours per week (five hours two to three days per week) for insurance producing work.

[205] However, Mr. Jindal also presents his claim for past loss of earning capacity related to insurance producing work as a “global loss of opportunity”, and proposes a global award of $5,000.

[206] Annualizing his 2013 gross without accident income from taxi driving at $65,000, Mr. Jindal argues his income loss from taxi driving for 2014 onward should also be calculated based on adding an annual increase of four percent up to the date of trial.

[207] However, for 2013, Mr. Jindal claims a loss of $16,148 based on the difference between his net earnings in 2012 ($30,786) and 2013 ($14,638) describing 2013 as a “transition year”, although there is no dispute his primary source of income changed to taxi driving at the start of 2013.

[208] Absent any evidence about Mr. Jindal’s rate of pay or monthly earnings as a taxi driver in 2013 before the First Accident, it is not possible to determine precisely how much of his gross annual earnings in 2013 of $40,739 were earned before as opposed to after. Mr. Jindal’s evidence about how much he worked driving a taxi in January 2013 varied somewhat. Although there is no dispute Mr. Jindal was

experiencing low back pain until mid-March 2013, the defendants did not challenge his evidence about working 14 to 16 hours shift 15 days per month each month from February until the First Accident on August 15, 2013. I also note there is less external inconsistency related to Mr. Jindal's pain symptoms and their impact of his work schedule prior to late 2014. I have no trouble accepting that Mr. Jindal's soft tissue injuries and related pain symptoms would have prevented him from working at all for one week and for the balance of 2013 continued to limit his ability to drive the taxi. I also accept that by late 2013 Mr. Jindal was trying to work every one of his 15 shifts but he was not able to work long shifts.

[209] The defendants rely on Mr. Jindal's discovery evidence that he earned $2000 net per month from taxi driving in 2013 before the First Accident, in proposing net past loss of income in 2013 of $9,362. Although Mr. Jindal asserted $2,000 was his net monthly income for 2012, and he would have earned at least $65,000 gross in 2013 from taxi driving absent the First Accident, the above table indicates that Mr. Jindal's annual net incomes are approximately 40% of his gross incomes, a figure he himself relies on in calculating his (net) past loss of earnings for 2014 onward. An annual net income of $24,000 accords with about $60,000 gross.

[210] Given all of this, I view the defendant's proposed award of $9,362 (before tax) as a reasonable assessment of the difference between what Mr. Jindal would have earned but for the First Accident and what he actually earned from taxi driving in 2013.

[211] Before I turn to consider his past loss of income from taxi/Uber driving for 2014 onward, I would note that Mr. Jindal provided no explanation for his bare assertion in cross-examination about annual rate increases. There is no supporting documentary evidence or any evidence at all about how or to what extent a rate increase translates into an increase in gross income for him. Further, because he started taxi driving in 2013, his prior tax returns do not assist in showing any year over year increase. I conclude therefore that Mr. Jindal has not established there is a real and substantial possibility that his without accident earnings would have

increased by three to five percent each year. Considering any increase absent some evidentiary foundation would be merely speculative.

[212] Appreciating Mr. Jindal worked somewhat less in January 2013 than the 15 shifts per month he worked from February to the date of the First Accident, I would assess his without accident gross earnings for 2014 based on 15, 15 hour shifts per month as $63,000, which results in an estimated net annual income of $25,000. His actual net earnings from taxi driving in 2014 were $13,115 resulting in a loss of $11,885.

[213] Using the same gross and net income figures for his without accident earnings in 2015 and his actual net income of $21,255, I assess his past loss for that year at $3,745.

[214] Starting in 2016, a comparison of Mr. Jindal's without accident earnings of $63,000 (net $25,000) to his actual gross and net annual earnings shows annual increases in his incomes. There is a drop in 2019 relative to 2018 but his income remains well above $63,000 gross. His income also drops significantly in 2020 due to Covid-19, but Mr. Jindal makes no claim for that year.

[215] Mr. Jindal began driving for Uber in or about September 2020. His income for 2021 is a fraction below $63,000, but based on my findings about his injuries and improvements in his condition and the increases in 2019 and 2022, I do not accept that his accident related ongoing pain symptoms resulted in any loss of earnings in 2021. In other words, I do not accept that his income for 2021 reflects a past loss of earning capacity.

[216] Turning to consider Mr. Jindal's claim for past loss of opportunity related to his insurance producing work, I note that Mr. Jindal's gross income from this work actually increased in 2013. Although I accept that his injuries and pain symptoms for the balance of 2013 significantly impacted his ability to work as a taxi driver, that is not my view with respect to the insurance producing work, involving as it does short drives, brief meetings with clients and minimal paper work. Put another way, his

injuries and pain symptoms did not impair his ability to do insurance producing work, in part because the work itself is not physically taxing but also because he was not working very much as a taxi driver. I do not accept therefore that Mr. Jindal suffered any loss related to his insurance producing work in 2013.

[217] My view is slightly different for 2014 and 2015. In 2014, his gross earnings from insurance producing work were about $1,300 less than in 2013 and about $900 less in 2015. Starting in late 2013 as I have said, Mr. Jindal returned to working every taxi shift for as long as he could tolerate, given his ongoing pain symptoms. I accept his ability to pursue insurance producing work was probably impacted by his increased taxi driving schedule, his need to rest and his participation in physiotherapy and then active rehabilitation. For 2014 and 2015, I assess Mr. Jindal's loss of earnings at $2,000 gross.

[218] From 2016 onward, Mr. Jindal has earned a much higher and steadily increasing income from insurance producing work, while also working full-time driving a taxi. Given the findings I have already made, I do not accept his capacity to earn past income from this work was impaired beyond 2015.

[219] In summary, Mr. Jindal is entitled to $26,992 (gross) for loss of past earning capacity. I leave it to counsel to calculate the net (after tax) amount.

Loss of Future Earning Capacity

Additional Legal Principles

[220] *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 7–10, recently restated the general principles that govern the assessment of loss of future earning capacity, articulated in *Dornan v. Silva*, 2021 BCCA 228, *Rab v. Prescott*, 2021 BCCA 345, and *Lo v. Vos*, 2021 BCCA 421:

> [7] The assessment of an individual's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a plaintiff's injuries and the nature of the anticipated employment in issue: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Despite this lack

of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstances": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21, citing *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity.

[10] Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:

> [47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown* [*v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

First Step

[11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

> [36] … are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
>
> [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

> [13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
>
> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> 4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity,. This is where the second step comes in.

Discussion

[221] Based again on a view of the seriousness of Mr. Jindal's ongoing pain symptoms and his evidence that he continues to work much less than he did before the First Accident, both of which I have rejected, as well as the assertion he would have continued to work more than full-time until he retired at 70, Mr. Jindal proposes an award of $205,000 for loss of future earning capacity. The defendants take the position that no award should be made, arguing he has not made out the first step of the three steps articulated in *Rab*.

[222] Turning to the first step and the question does the evidence disclose a potential future event that could lead to a loss of capacity, this is one of those less clear cut cases, where there is no loss of income at the time of the trial. Again, I have found Mr. Jindal's ongoing symptoms have not impaired his capacity to earn income from taxi driving and insurance work since 2016. In this circumstance, the *Brown* factors "come into play". I would put some weight on Mr. Pakulak's opinion that Mr. Jindal's overall capacity to compete for work in the open job market has been reduced by ongoing physical limitations, unrelated to sitting or leg pain/symptoms. I have also found that Mr. Jindal has some ongoing intermittent pain that is likely to continue. Further, in assessing his future care award, discussed

below, I accept his ongoing pain symptoms in combination with his full-time work schedule interfere with his ability to perform some of the heavy or physically demanding outdoor chores he used to perform before the First Accident.

[223] As a result, I accept Mr. Jindal is less capable overall of earning income for all types of employment and is less valuable to himself as a person capable of earning income in a competitive labour market generally. Consequently, there has been an impairment of the capital asset: *Rab* at paras. 36 and 60.

[224] Turning to step two, which asks whether there a real and substantial possibility that the future event in question, will cause a pecuniary loss, I conclude the answer is no because Mr. Jindal has failed to establish a real and substantial possibility that the impairment of his capacity will lead to a future loss of income in his particular circumstances. Again, there is no indication that he intends to do anything other than continue with Uber driving and insurance producing work until he retires. Again, Mr. Jindal has not experienced any loss of income from taxi driving or insurance producing since 2016.

[225] Although Dr. Hershler's opinion that pain tolerance diminishes with age could substantiate a real and substantial possibility that Mr. Jindal's loss of capacity could result in a future pecuniary loss, the reasons for his opinion were not persuasive. More importantly, it was part of or subsumed by the broader opinion that Mr. Jindal likely would not be able to sustain his employment to the age of 65 or beyond, given the "severity, chronicity and permanence" of his symptoms. Dr. Hershler's understanding of the severity of Mr. Jindal's symptoms relies on his account of ongoing and largely unchanged headaches, neck, upper back (with intermittent pain in the left arm, mid back, and low back pain (radiating predominantly into the left leg) in 2020. Dr. Hershler also accepted that Mr. Jindal's symptoms had continued to limit his ability to work to approximately half the hours he did before the First Accident. Based on my findings, Dr. Hershler's opinion about Mr. Jindal's inability to sustain his work over the longer term loses force. At a minimum, I am left not

knowing what Dr. Hershler's opinion on this point would have been had his factual assumptions aligned with what I have found.

[226] Ultimately, I am not persuaded there is a real and substantial possibility that Mr. Jindal's ongoing pain symptoms will prevent him from working as much as he would have but for the accidents. Accepting his unchallenged evidence that he intended to retire at 70, I do not accept his related evidence that he would have worked 12 hours a day five days a week until age 70 if not more, which is patently self-serving and speculative. Further such a schedule would amount to more than his own estimate of 52.5 hours per week for his pre-accident taxi driving 10 years ago. Appreciating Mr. Jindal had a need to maximize his earnings, this remains the case. Since some point during 2015, Mr. Jindal has demonstrated the ability to work as much as he did before the First Accident. I find it difficult to accept however, that fifteen hour shifts would be safe and sustainable for taxi/Uber drivers over the long term, let alone up to the moment of retirement, regardless of intermittent ongoing pain, given the obvious potential problem and risk from significant fatigue. I have also considered, as discussed below, the benefit of my award for many additional exercise training sessions with a kinesiologist, which will serve to maximize Mr. Jindal's function and pain management over the long term.

[227] His claim for loss of future earning capacity is therefore dismissed.

Cost of Future Care

Legal Principles

[228] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore them to their pre-accident condition, insofar as that is possible, and to preserve and promote their mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at para. 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29–30.

[229] The test for assessing an appropriate award is an objective one based on the medical evidence. An item of future care must be reasonable and medically justified, not medically necessary, to be recoverable: *Milina* at para. 212.

Discussion

[230] In support of his claim, Mr. Jindal relies on Mr. Pakulak's cost of future care recommendations, which are based on his own assessment of Mr. Jindal's capacity for "avocational activities" and the recommendations of Dr. Hershler. Again, in his second report, Dr. Hershler recommended that Mr. Jindal continue with his existing exercise program (as taught during the active rehabilitation program) and at least two sessions per month with a massage therapist and/or physiotherapist for further assistance with pain, a mechanical handheld massage device or chair equipped with massage mechanism for home use and a prescription anti-inflammatory/muscle relaxant cream.

[231] In his own report, Mr. Pakulak writes that Mr. Jindal demonstrated the capacity to complete some of the "lighter" household chores and yard work provided he is able to pace himself. He also writes that Mr. Jindal demonstrated limitations related to the more physically demanding household chores and yard work in concluding he would benefit from assistance with "these types of tasks". However, Mr. Pakulak's related cost of care recommendation are limited to outdoor chores.

[232] In summary all of his cost of care recommendations are as follows:

1. 12 – 15 exercise therapy sessions with a kinesiologist to review his present program to ensure he is maximizing his exercise efforts at a cost of $936 to $1,275;

2. An annual pass to recreational facility to facilitate his ongoing participation in regular exercise program at a cost of $523.75 to age 59 and then $392.75 for age 60 and over;

3. 24 sessions per year of physiotherapy and massage therapy at a cost that ranges from $1,800 to $2,800 per year based on $75 per session for physiotherapy and $110 - $120 for massage therapy;

4. Handheld massage tool at cost of $429 to be replaced every five to seven years depending on use;

5. Lawn mowing and edging every other week for seven months every year at a cost of $630 to $812;

6. Gardening assistance with fall and spring clean up and one to two hours every other week during the spring and summer for 36 to 49 hours per year at an annual cost of $1,440 to $1,960;

7. Pressure washing the yard surfaces twice a year for a total annual cost of $250;

8. Gabapentin 300 mg two tablets per day based on his current use at an annual cost of $160; and

9. Phlojel (prescription cream) at a cost of $138 per 100 gram. Mr. Pakulak was not able to predict an annual cost because it will depend on use.

[233] Mr. Jindal asks for an award based on total annual cost of $7,000 to age 75. Applying the cost of care multiplier set on in the economist's report, he calculates the present value of the annual items at $83,174. Adding the one time cost of kinesiologist at $1,300 plus the massage tool replaced every five to seven years, he seeks a total award of $85,000.

[234] The defendants takes the position that the award for the cost of future care should be limited to the annual cost of Gabapentin. In opposing an award for physiotherapy or massage therapy, they rely on Dr. Maloon's opinion and Mr. Jindal's evidence that physiotherapy only provided very short term relief along with the fact that he has not engaged in any treatment since 2018.

[235] Although the defendants suggest Mr. Jindal's evidence about following a 35 to 45 minute exercise routine is not credible, based on his other evidence that the exercises relieve his symptoms, they argue against awarding an amount for kinesiology sessions.

[236] The defendants made no submissions about the cost of care recommendations related to outdoor household chores, although their opposition to an award for past loss of housekeeping capacity makes it clear that they view Mr. Jindal as capable of performing his previous chores.

[237] In my view, the recommended exercise therapy sessions and their cost are medically justified and reasonable. I share the defendants' concern about Mr. Jindal's evidence that he performs exercises as instructed based in part on the limited stretching exercises he was able to identify and then demonstrate in court, however, I have found that Mr. Jindal experiences some ongoing pain symptoms and will continue to do so. Although he is able to work full-time, I accept he sometimes works with pain and as I will come to, pain has and continues to interfere with his ability to complete heavy and some posture intensive or physically demanding outdoor chores given his full-time work schedule. Absent a mitigation argument and because I accept that proper performance of appropriate exercise will maximize Mr. Jindal's function and pain management, I award the cost of twelve sessions with a kinesiologist in the amount of $936.

[238] I am not satisfied however the test is met for the annual cost of a recreational facility pass. Mr. Jindal gave no evidence about attending a gym to perform exercises in the past or having any interest in doing so. Absent any evidence that an appropriate routine cannot be adequately performed at home, I decline to award this item.

[239] Again a care item must be reasonably necessary to preserve and promote a plaintiff's health to be recoverable. Despite Dr. Hershler's recommendation, in my view awarding the cost of further physiotherapy and or massage therapy after five

years of no treatment and in light of the minimal benefit Mr. Jindal said he received from physiotherapy, is not reasonable.

[240] I am also not satisfied Dr. Hershler's recommendation regarding a hand held massage tool for relief of tender points in the muscles is medically justified, given the weight of the evidence about near normal and normal examination findings.

[241] Regarding the balance of the care items for outdoor household tasks, which flow from Mr. Pakulak's own assessment of Mr. Jindal, while I accept he will find it difficult to complete heavy or physically demanding outdoor tasks so long as he continues to work full-time, I also accept that his son was already providing some assistance before the First Accident. I also infer that Mr. Jindal's wife did and does some work in the garden. Further, in my view, bi-weekly gardening or yard work is not a heavy or demanding task, as opposed to fall and spring clean ups and lawn mowing.

[242] Accordingly, until Mr. Jindal reaches age 70, when he expects to retire, I accept the cost of the following are medically justified and reasonable:

- lawn mowing for four months of the year ever other week (eight services at a cost of $50 per service or $400 per year;
- gardening assistance with fall and spring clean up (10 hours per year at a cost of $40 per hour or $400; and
- pressure washing twice per year ($250 per year).

[243] Finally, I award the cost of Gabapentin as estimated by Mr. Pakulak to age 75, based on the likelihood that Mr. Jindal's ongoing accident-related pain symptoms will persist ($160 annually).

[244] I trust counsel can agree on the present value calculations for reoccurring items and the inclusion of requisite taxes.

Loss of Housekeeping Capacity

Legal Principles

[245] An award for loss of housekeeping capacity provides compensation for the value of the housekeeping the plaintiff would have done but was, or will be, incapable of performing because of the injuries caused by the accident. Granting an award does not depend on replacement costs actually being incurred.

[246] Loss of housekeeping capacity reflects the loss of personal capacity, an asset, and is therefore compensable as a pecuniary loss. Where the plaintiff's loss is more in keeping with a loss of amenities it may instead be compensated by a non-pecuniary award.

[247] *Kim v. Lin*, 2018 BCCA 77, considered how to properly characterize and value a loss of housekeeping claim:

> [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
>
> [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[248] In *Kim*, the Court of Appeal went on to consider the cautionary approach to loss of housekeeping awards suggested in *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.) and concluded:

> [37] In fact I see the above framework I described as entirely consistent with this Court's admonition above that "[i]t will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of

> compensation commensurate with the loss." So long as the award is justified on the basis of evidence of the plaintiff's incapacity it will be commensurate with the plaintiff's loss.

[249] In *Liu v. Bains*, 2016 BCCA 374, the Court of Appeal explained that like other loss of capacity claims, loss of housekeeping capacity is a matter of assessment, not mathematical calculation: at paras. 25-29.

Discussion

[250] Mr. Jindal seeks an award of $25,000 or $2,500 per year for 10 years, relying on his evidence and the evidence of Rajat that he had no limitations with respect to performing heavy household and all of the outdoor chores before the First Accident and since then, Rajat has taken over his responsibility.

[251] The defendants argue Mr. Jindal's evidence that he stopped doing any chores should not be believed and no award should be made. In the alternative, they take the position any loss should be addressed in the award for non-pecuniary damages.

[252] In my view, a much smaller pecuniary award than Mr. Jindal proposes is justified. Initially significant and disabling, Mr. Jindal's pain symptoms gradually but significantly improved by some time in 2015. He was left, however with some ongoing intermittent pain symptoms. I accept that coupled with full-time work, those symptoms interfered with his ability perform heavy and more physically demanding outdoor chores (not car washing and regular gardening) and perhaps extensive vacuuming. Again, while I accept that Rajat assisted Mr. Jindal to some degree before the First Accident, I also accept that he has performed most of Mr. Jindal's previous chores since then although Mr. Jindal's wife have also done some gardening.

[253] Based on my findings and given Mr. Jindal's proposed award is not based on the replacement cost, I award $12,000 for past loss of housekeeping capacity. This amount recognizes his limitations were greater until in or about 2015 and, as reflected in my analysis of the cost of care, would have lessened in 2020 when he

worked much less due to Covid-19 and therefore had a greater capacity to perform for household chores.

Special Damages

[254] As with other claims for damages, special damages are subject to the fundamental principle of *restitutio in integrum,* that is the plaintiff is to be restored to the position they would have been in had the accident not occurred: *Milina*.

[255] Special damages include the plaintiff's expenses resulting from the injury or loss up to the date of trial.

[256] For each item in dispute, Mr. Jindal must prove on a balance of probabilities both the amount and the fact that the expenditure arose as a consequence of the accident. Otherwise he is not entitled to an award for that particular item: *Harris v. Xu*, 2013 BCSC 1257. In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies made the following helpful comments:

> [128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.

[257] Mr. Jindal seeks special damages in the amount of $7,008.13.

[258] The defendants dispute some aspects of his claim, including medication expenses that are not supported by receipts and mileage related to attending independent medical examinations ("IME").

[259] Mr. Jindal claims $250 for Tylenol and Advil and $250 for gel, based on an estimate of their cost over the past 10 years. I allow this as part of his claim, accepting that Mr. Jindal has continued to take all three over the counter medications for pain symptoms since after the First Accident and the actual cost would not exceed the estimate.

[260] Regarding the disputed mileage expenses, I note that in *Devilliers v. McMurchy*, 2013 BCSC 730, at paras. 72 and 75, Justice Saunders concluded claims for mileage related to attending appointments for a cost of future care and physical capacity evaluation as well as an independent medical examination were claimable as disbursements, rather than as special damages.

[261] On this basis, I would disallow the mileage expenses related to attending appointments with Mr. Jindal's own experts. Absent evidence that Mr. Jindal received conduct money to attend the IME with Dr. Maloon, I allow that part of the disputed mileage claim.

"Fleming J."