IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pannu v. Behnke,*
2024 BCSC 362

Date: 20240301
Docket: M221202
Registry: New Westminster

Between:

Varinder Singh Pannu

Plaintiff

And

Zachary Jordan Behnke

Defendant

-and-

Docket: M242617
Registry: New Westminster

Between:

Varinder Singh Pannu

Plaintiff

And

Nancy Wong

Defendant

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiff:	B. Yu
Counsel for the Defendant:	J.P. Bednard J. Li
Place and Date of Trial:	New Westminster, B.C. September 18-22, and 25-26, 2023
Place and Date of Judgment:	New Westminster, B.C. March 1, 2024

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I. INTRODUCTION

[1] Varinder Singh Pannu brings these two actions for damages arising out of two motor vehicle accidents. Liability for the first accident is admitted. Liability for the second accident is denied.

[2] Mr. Pannu alleges injuries to his back, neck and both shoulders, which he says were caused by the first accident and aggravated by the second accident. He seeks various heads of damages, including loss of future self-employment income earning capacity.

[3] The defendants argue that the injury to Mr. Pannu's left shoulder was caused by an unrelated slip and fall at work. They argue that Mr. Pannu cannot recover any damages arising out of the workplace incident, including any aggravation of an indivisible injury from the accident for which liability is admitted.

[4] The defendants also dispute the severity and duration of Mr. Pannu's accident-related injuries, as well as their consequences. They argue that Mr. Pannu has not met his burden of proof for the damages he seeks. Most significantly, they argue that he has not established a real and substantial possibility that his injuries will cause a loss of future earning capacity.

II. LIABILITY

A. Background

[5] The first accident occurred on March 8, 2018 on Highway 91. Mr. Pannu was driving at the speed of the traffic, approximately 70 km/hr. When the traffic slowed suddenly, the defendant Zachary Behnke ran into his car from behind. Mr. Behnke admits liability for the accident.

[6] The second accident occurred on February 20, 2020, near the intersection of Main Street and National Avenue in Vancouver. Mr. Pannu was driving south on Main in the middle lane. He testified that the defendant Nancy Wong pulled out from a parking spot in the curb lane and into his car. He testified that the collision occurred in the block north of the intersection with National.

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[7] Ms. Wong, on the other hand, testified that the collision occurred south of the intersection. She testified that she was not parked on Main, but rather turning right onto Main from National. She testified that she waited for the traffic on Main to pass, and then pulled into the right-most, or curb lane, going south on Main. She testified that she had driven about 15 meters in the curb lane when Mr. Pannu entered her lane from the middle lane and sideswiped her car.

[8] Ms. Wong denies liability for the second accident. The defendants argue that Mr. Pannu is 100% at fault for any aggravation of his injuries. Alternatively, they argue that Ms. Wong and Mr. Pannu are equally at fault.

[9] Mr. Pannu was also involved in a separate workplace incident. On November 14, 2018, he slipped, fell and sprained his ankle while at work as an electrician. A report was made to WorkSafeBC that he missed work on the day of the injury. He actually missed several days, although his employer paid him for the time off. WorkSafe allowed his claim for health care benefits.

[10] The defendants argue that Mr. Pannu cannot recover any damages arising out of the workplace injury, including any aggravation of the injuries for which Mr. Behnke admits liability.

B. The Workplace Injury

[11] There are two aspects of the defendants' argument concerning the workplace injury. First, they argue that the slip and fall at work caused the injury to Mr. Pannu's left shoulder, or, alternatively, aggravated a relatively insignificant injury to a significant injury that would eventually require surgery. This is a causation argument.

[12] Second, the defendants argue that s. 127 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1 ("*WCA*"), precludes a plaintiff in a personal injury action from recovering any damages that may be apportioned to a workplace injury, including the aggravation of an indivisible injury that was originally caused by the negligence of the defendant. This is a liability argument.

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[13] The defendants rely on *Pinch v. Hofstee*, 2015 BCSC 1888, for the proposition that a court must apportion liability for an indivisible injury between a tort defendant and a workplace injury, and limit the plaintiff's recovery to that portion of their loss or damage attributable to the tortious act of the defendant.

[14] In my view, *Pinch* is distinguishable and the apportionment principle relied on by the defendants has no application in this case.

[15] The starting point for any analysis of this issue is *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff in that case had a history of minor back problems and worked as an autobody shop manager. In 1991, he was involved in two motor vehicle accidents within months of each other in which he suffered back and neck injuries. He responded well to physiotherapy and subsequently his doctor recommended that he return to an exercise program, which he did. During mild stretching at the gym, he suffered a herniated disc and required surgery.

[16] The trial judge in *Athey* apportioned 25% of the plaintiff's damages from the disc herniation to the motor vehicle defendants. The Supreme Court of Canada held that the trial judge erred, and that the disc herniation was an indivisible injury that could not be apportioned. The Court held that any defendant found to have negligently caused or contributed to the injury was liable, and that apportionment between non-tortious and tortious causes is not permitted. A defendant does not escape liability, the Court held, merely because other causal factors for which he or she is not responsible also helped produce the harm (*Athey*, at paras. 19 and 23).

[17] In *Bradley v. Groves*, 2010 BCCA 361, the Court of Appeal confirmed that *Athey* requires joint and several liability for indivisible injuries. The Court held that, once a trial judge finds that an injury is indivisible, the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them (para. 32).

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[18] In *Pinch,* the plaintiff was injured in a 2010 accident with the defendant and a second accident in 2013 in which both drivers were driving in the course of their employment. The plaintiff brought an action in damages against the driver in the non-workplace accident. At trial, Justice Burnyeat found that the plaintiff's injuries from the two accidents were indivisible.

[19] Justice Burnyeat then held that, despite his conclusion the injuries were indivisible, the plaintiff could not claim damages against the defendant arising out of the injuries that were incurred as a result of the workplace accident.

[20] The Court found that the provisions of the *WCA* which establish that no damages are recoverable for loss or damage caused by the negligence of an employer or a worker in a workplace accident preclude damages arising from what are said to be indivisible damages in a tort action:

> [60] I conclude that the Legislature has made it clear that the principles set out in *Bradley*, supra, do not apply where there is a statutory bar to recovery of what may be found to be indivisible damages. Section 10(1) of the Act is but one example of the inability to recover indivisible damages arising out of a separate breach of duty of care. A further example might be illustrated by a situation whereby proceedings relating to a first tortious act were not commenced within the limitation period and a second tortious act occurred. In those circumstances, I cannot conclude that damages would be available where an action was not commenced relating to the first act, a subsequent act caused injuries which were found to be indivisible from the first act, and a claim was advanced against the second tortfeasor for damages for the injuries caused both by the first and the second tortious acts. Just as a claim for damages for a second tortious act could not "give life to" recovery of damages for a first act where a limitation period had expired so also s. 10(1) of the Act has taken away "any right and rights of action" available to Mr. Pinch and any recoverable "damages, contributions or indemnity" that might have been available to Mr. Pinch as a result of MVA #2.
>
> [61] I propose to deal with the damages suffered by Mr. Pinch as a result of MVA #1 as if MVA #2 had not occurred. However, despite finding that the damages suffered in the two accidents were indivisible, I will then assess separately those damages which I can attribute only to MVA #2. I do so in order to comply with s.10(7) of the Act which requires that I determine "...the portion of the loss or damages caused by...[the negligence of the driver in MVA #2]...although the...worker is not a party to the action". While it may seem inappropriate to determine the loss or damage caused by the driver involved in MVA #2 where a determination has been made that the damages arising out of MVA #1 and MVA #2 are indivisible, where the driver involved in MVA #2 is not a party to these proceedings, and where there has been no

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> finding of liability for MVA #2, I will nevertheless do so because that is what is required under s. 10(7) of the Act.
>
> [emphasis added]

[21] As can be seen from the underlined passages above, Justice Burnyeat proceeded on the basis of a "second tortious act" in the workplace accident or, put another way, negligence by the driver in the accident that occurred in the course of employment. The rationale for limiting the plaintiff's recovery was not simply that an injury occurred at work, but rather that claims in damages were barred for loss or damage caused by the negligence of the driver with statutory immunity. In these circumstances, a tort defendant cannot claim contribution or indemnity from a third party who may have aggravated the plaintiff's indivisible injuries.

[22] In *Kallstrom v Yip*, 2016 BCSC 829, Justice Kent limited *Pinch* to its facts and the allegations of negligence on the part of the *WCA*-immunized driver (para. 373-374). Justice Kent noted that other decisions of this Court have treated a subsequent workplace accident aggravating a pre-existing injury as a situation of indivisible injury for which the defendant in the first accident remains 100% liable. For example, in *Kaleta v. MacDougall*, 2011 BCSC 1259, which involved an on-the-job injury while lifting heavy product and no allegation of third-party negligence, the defendant was held liable for the aggravation.

[23] I respectfully agree with Justice Kent. There must be an allegation and evidence of fault by a third party in the workplace accident before there can be any allocation of liability to a workplace injury. Under the *Negligence Act,* R.S.B.C. 1996, c. 333, liability is allocated between tortfeasors (or potential tortfeasors), not between injuries. Liability cannot be allocated to a non-tortious cause of the plaintiff's injuries.

[24] Section 127 of the *WCA* bars an action in damages founded on a breach of a duty of care or other cause of action in respect of a workplace injury. It does not bar damages against non-workplace defendants that include a non-tortious workplace aggravation of an indivisible injury they caused.

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[25] To take the proposition advanced by the defendants to its logical conclusion, the defendants in *Athey* would not have been liable for Mr. Athey's disc herniation if he had aggravated his back while stretching at work.

[26] In my view, the principle in *Pinch* applies to workplace injuries that could be the subject of a claim in damages, but for the statutory bar in the *WCA.* Non-tortious workplace injuries should be treated like all other non-tortious injuries under the principles in *Athey* and *Bradley.*

[27] In this case, there is no evidence of negligence in the workplace injury. The only evidence is that Mr. Pannu slipped from a pile of materials and sprained his ankle and may have also injured or aggravated his left shoulder. There is no basis in law or fact to apportion liability for the shoulder injury to the workplace injury.

[28] I will return the defendants' causation arguments below.

C. The Second Accident

[29] Mr. Pannu's evidence about the second accident was vague. He could not remember what time the accident took place, whether it was light or dark or what the weather was like. He could not remember if there was a traffic light at the intersection of Main and National. His only clear recollection was that he was driving his brother's car in the middle lane on Main north of National, and Ms. Wong pulled out of a parking spot in the curb lane.

[30] Ms. Wong had a specific recollection of the events. She remembered the time of day, where she was going, that she waited on National for the traffic on Main to clear, that she turned right into the curb lane on Main, the location on Main where the collision occurred, and key features of the streetscape including signage.

[31] Ms. Wong testified that she reported the collision to ICBC on the evening of the incident, which would have been February 20, 2020.

[32] Mr. Pannu called Kari Nomura, the customer service representative at ICBC to whom Ms. Wong reported the collision, to give evidence as part of the plaintiff's

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case. Ms. Nomura testified that part of her job is to take phone calls from people who have been in motor vehicle accidents and record the information she receives. Ms. Nomura authenticated the notes she created while speaking with Ms. Wong. She did not have any independent recollection of speaking with Ms. Wong.

[33] Ms. Nomura's notes date the report by Ms. Wong on February 26, 2020, which was six days after the collision, not the evening of the incident as testified by Ms. Wong. The notes, as interpreted by Ms. Nomura, record that Ms. Wong said: she was eastbound on National making a right turn on Main to go southbound; she checked that it was clear, and then turned directly into the middle lane southbound on Main; Mr. Pannu changed lanes into the middle lane and collided with the left rear quarter panel of her car.

[34] Ms. Wong testified that Ms. Nomura's notes are incorrect: Ms. Wong denied that she turned directly into the middle lane on Main, and she testified that the point of contact between the vehicles was on her driver's door near the mirror, not the left rear quarter panel. A photo that Ms. Wong took of Mr. Pannu's car appears to substantiate her evidence on the latter point.

[35] Mr. Pannu tendered Ms. Nomura's notes "for the truth of their contents" as a business record under s. 42 of the *Evidence Act,* R.S.B.C. 1996, c. 124.

[36] Section 42 provides that a statement of fact in a document is admissible as evidence of the fact if the document was made or kept in the usual and ordinary course of business, and it was in the usual and ordinary course of the business to record the fact at the time it occurred or within a reasonable time after that.

[37] Section 42(3) provides that the circumstances of the making of the record, including lack of personal knowledge by the person who made the record, may be shown to affect the statement's weight but not its admissibility.

[38] I am satisfied that Ms. Nomura's notes meet the requirements of a business record under s. 42 of the *Evidence Act.* However, it is important to recognize that

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Ms. Nomura had no direct knowledge of how the accident occurred. She was only able to record what she heard and understood Ms. Wong to say on the telephone.

[39] In my view, the notes can only be used to assess the credibility and reliability of Ms. Wong's evidence. I cannot give them any weight as evidence of how the accident happened. There are two main reasons for this.

[40] First, the notes contradict Mr. Pannu's sworn evidence about how and where the accident occurred. As plaintiff, Mr. Pannu cannot rely on two contradictory versions of the "the truth" to prove his case.

[41] Second, there is no evidence that Ms. Nomura read the notes back to Ms. Wong, asked any clarifying questions or otherwise confirmed their accuracy. Ms. Wong testified that she is hard of hearing and sometimes has difficulty on the telephone. She testified that she did not have an opportunity to verify the information Ms. Nomura took from her, either during the telephone call or in a written statement.

[42] That said, there are material inconstancies between Ms. Nomura's contemporaneous notes and Ms. Wong's evidence three and a half years after the accident, including the date of the report itself. Despite their evidentiary limitations, the notes raise a concern with the reliability of Ms. Wong's memory of the accident.

[43] On the evidence as a whole, it is very improbable that Ms. Wong pulled out of a parking spot on Main north of National. On this basis alone, I reject Mr. Pannu's evidence of how the accident occurred.

[44] Mr. Pannu argues that the car he was driving was "there to be seen" when Ms. Wong turned right onto Main. This begs the question of how Ms. Wong turned onto Main.

[45] Sections 165(1) and 165(5) of the *Motor Vehicle Act*, RSBC 1996, c. 318, state that a right-turning vehicle must turn into the lane closest to the curb. Section 151(a) states that a driver must not change lanes unless it is safe to do so.

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[46] If Ms. Wong turned directly into the middle lane, swung wide as she turned into the curb lane, or immediately changed lanes from the curb lane into the middle lane where Mr. Pannu was driving, she may have been at fault for the accident.

[47] On the other hand, if Ms. Wong turned into the curb lane and drove straight in that lane for several metres before Mr. Pannu switched into the curb lane, Ms. Wong lawfully gained the lane and Mr. Pannu ought to have pulled in safely behind her.

[48] As the plaintiff, Mr. Pannu has the onus of proof that Ms. Wong was negligent. I find that Mr. Pannu has not proven on a balance of probabilities that Ms. Wong breached her duty of care. There is no reliable evidence on which to find that Ms. Wong was at fault for the accident.

[49] For these reasons, the claim against Ms. Wong is dismissed.

[50] The defendants have the onus of proof in their claim of contributory negligence against Mr. Pannu. Given my concern with the reliability of Ms. Wong's memory of the accident, I find that the defendants have not proven on a balance of probabilities that Mr. Pannu was at fault for the accident.

III. CAUSATION

A. Background

[51] Mr. Pannu argues that Mr. Behnke's negligence in the first accident caused neck, back and shoulder injuries which were aggravated by the second accident, and that all of these injuries are indivisible.

[52] The defendants acknowledge that Mr. Behnke's negligence caused some degree of injury to Mr. Pannu's neck, back and right shoulder, although they submit that Mr. Pannu exaggerated the severity and duration of his symptoms. They acknowledge that the second accident aggravated the injuries to the neck and back, and that the injuries to those areas are indivisible between the two accidents.

[53] However, the defendants argue that Mr. Pannu's left shoulder injury is divisible. They argue that the left shoulder injury was caused by the workplace slip

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and fall, or alternatively, that, when he fell at work, Mr. Pannu aggravated a relatively insignificant left shoulder injury to a significant injury.

B. Legal Principles

[54] The basic rule of causation for negligence is that the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred: *Clements v. Clements*, 2012 SCC 32 at para. 13.

[55] Inherent in the "but for" test is a requirement that the defendant's negligence was necessary to bring about the injury - in other words, the injury would not have occurred without the defendant's negligence.

[56] It is not necessary for the plaintiff to demonstrate that the defendant's negligence was the sole cause of subsequent pain or limitations. There may be other tortious or non-tortious causes. So long as there is a substantial connection between the defendant's negligence and the plaintiff's injury, the defendant is liable for the damages: *Athey,* at paras. 13–17, 44; *Farrant v. Laktin*, 2011 BCCA, 336 at paras. 9–11.

[57] It is important to distinguish between causation as the source of the loss and the assessment of damages for that loss. The first step is to determine whether the defendant caused or contributed to the injury, thus making him liable. This determination includes a consideration of whether the plaintiff's injuries are divisible. Divisible injuries are those that can be separated so that their damages can be assessed independently. If the plaintiff's injuries are divisible, the defendant is only liable for those injuries or that part of an injury which he caused: *Athey*, at para. 24; *Bradley*, at para. 20; *Khudabux v. McClary*, 2018 BCCA 234, at para. 31.

[58] In other words, if the injuries are divisible, the defendant will not be not liable for the loss or damage that was caused by an independent intervening event such as a slip and fall.

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[59] If the injuries are indivisible, however, the defendant is fully liable for the plaintiff's loss or damages, or jointly and severally liable with any other tortfeasors (absent contributory negligence). As stated, liability for indivisible losses is not apportioned between tortious and non-tortious causes. The defendant is fully liable for the plaintiff's damages: *Athey,* at para. 19-23; *Bradley*, at para. 24, 32; *Khudabux*, at para. 33.

[60] The assessment of damages then requires the court to consider what the "original position" of the plaintiff would have been without the negligent act of the defendant. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Khudabux,* at para. 30.

[61] Independent intervening events are taken into account in the same way as pre-existing conditions. If the intervening event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's negligence will not be as great and damages are reduced proportionately. The defendant need not prove that the independent intervening event would have inevitably led to the plaintiff's current condition. Intervening events that might realistically cause or contribute to the loss claimed regardless of the negligence of the defendant are relevant to the assessment of damages. They are a contingency that should be accounted for in the award. Such a contingency does not have to be proven to a certainty. It should be given weight according to its relevant likelihood: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at paras. 36, 48; *Barnes v. Richardson et al*., 2008 BCSC 1349, at para. 96, aff'd 2010 BCCA 116.

[62] Past facts must be proven on a balance of probabilities. Hypothetical events or future events need not be proven on a balance of probabilities. The standard of proof of hypothetical or future events is a "real and substantial possibility". This is a lower threshold than a balance of probabilities, but a higher threshold than something that is only possible and speculative: *Athey,* at para. 31-33, *Gao v. Dietrich*, 2018 BCCA 372, at para 34.

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[63] Accordingly, damages for indivisible injuries may be reduced if the defendant proves on a balance of probabilities that an intervening event – such as a slip and fall - caused or contributed to the loss claimed regardless of the defendant's negligence (a past fact). Damages may also be reduced if the defendant proves a real and substantial possibility the plaintiff would have incurred the loss claimed in any event regardless of the defendant's negligence (a hypothetical contingency).

C. Mr. Pannu's Evidence and Medical History

[64] Mr. Pannu was 25 years old at the time of the first accident. He was fit and strong, and worked in a physically demanding job. He enjoyed working out at the gym, playing soccer and hiking. He had no pre-existing medical conditions, except for a chronic hernia condition that caused occasional pain in his right flank.

[65] Mr. Pannu testified that the force of the impact in first accident caused the left side of his body to collide with the driver's side window. He testified that his back seemed to seize up and would not allow him to move for a few seconds. He said he may have lost consciousness briefly.

[66] Both vehicles were badly damaged. Mr. Pannu's vehicle was not driveable, so he called his brother-in-law to pick him up. He testified that he immediately felt pain in his neck, back and shoulders. He did not go to the hospital; instead, he went home and saw his family doctor later that day.

[67] Mr. Pannu testified that both shoulders hurt immediately, but the right shoulder gradually improved over time, while the left shoulder got progressively worse.

[68] He missed five or six weeks of work. He testified that activities such as housework or exercising aggravated his back. When he returned to work, he had difficulty lifting heavy objects with both hands and could not look all of the way up. Around the house, he could not lift objects with his left arm.

[69] He was initially prescribed Naproxen for the pain, but it upset his stomach. He now takes Extra Strength Tylenol. The dosage depends on whether he is working.

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On days he is working, he takes four Tylenol, and one when he gets home. On days off, he takes two Tylenols during the day and one at night.

[70] Mr. Pannu attempted physiotherapy and chiropractic therapy; however, he testified, the physiotherapy made his pain worse and the chiropractic adjustments provided little relief.

[71] On November 14, 2018, as discussed, Mr. Pannu slipped and fell, and sprained his ankle at work. He missed several days of work.

[72] On May 9, 2019, Mr. Pannu underwent surgery to repair the hernia condition. The surgery was successful. He continued to experience pain in the area for several months, and worried that there might be something else wrong. However, his family doctor reassured him, and the post-operative pain eventually subsided.

[73] On November 22, 2019, an MRI of his left shoulder showed inflammation of the supraspinatus tendon and a small tear in the subscapularis tendon of the rotator cuff.

[74] Mr. Pannu received two or more corticosteroid injections to the left shoulder to treat the pain. He testified that the pain improved for two or three months after the injections, but then returned to baseline. He decided to discontinue the injections because they did not provide permanent relief and he did not want a long-term treatment that involved steroids.

[75] Mr. Pannu testified that, overall, his symptoms from the first accident had not improved much by the time of the second accident.

[76] The second accident was at slow speed, with minor damage to the vehicles. Mr. Pannu testified that the accident aggravated all of his symptoms for a few months, but did not cause any new injuries.

[77] On April 20, 2020, a further MRI of the left shoulder showed a small tear in the supraspinatus tendon of the rotator cuff.

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[78] Mr. Pannu underwent surgery to his left shoulder on August 14, 2023. Dr. Peter Zarkadas repaired the biceps tendon and removed the bursa sac. Dr. Zarkadas determined that the tear in the supraspinatus tendon did not require a surgical repair.

[79] Mr. Pannu testified that the immediate aftermath of the shoulder surgery was very painful. He was unable to shower or sleep properly due to the pain.

[80] Mr. Pannu was still recovering from the shoulder surgery on the date of trial. He was scheduled to see Dr. Zarkadas for a follow-up appointment and to begin physiotherapy.

[81] Mr. Pannu testified that his low back pain has improved over time, but persists. While initially he had to take many breaks to rest and sit during work, he now takes fewer breaks. However, he testified, activities such as heavy lifting, standing, driving or sitting for long periods of time, housework and yard work still aggravate his back.

[82] Mr. Pannu testified that his sleep is still affected by his injuries. He testified that he cannot sleep on his left side and wakes up and takes Tylenol for pain at least twice at night.

[83] Mr. Pannu also testified that he continues to experience fatigue from his injuries. He testified that he sometimes cannot focus at work; things like reading electrical drawings still bother him.

[84] Mr. Pannu further testified that his mood remains negatively affected by his injuries. He testified that he has missed what was once therapy for him of working out at the gym. Although he has returned to the gym, he is now restricted to lighter weights than before.

[85] The defendants argue that Mr. Pannu’s evidence of his symptoms and limitations should be rejected: they say he is not credible; his evidence shows a tendency to exaggerate; and his memory is not reliable.

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[86] While I agree that Mr. Pannu's memory is less than perfect and that he exaggerated some aspects of his testimony, I find that the basic narrative of his injuries, symptoms and limitations is credible and reliable.

[87] The defendants cite two instances in the record of where they say Mr. Pannu was dishonest in order to improve his personal position.

[88] First, they argue that Mr. Pannu made no effort to correct the report to WorkSafe that he had only missed work on the day of the slip and fall. Mr. Pannu testified that he went along with the inaccurate report out of a sense of loyalty to his employer, because they paid him for the time off, he believed their premiums might go up if he made a full claim and he wanted to please his bosses so that they would be less likely to lay him off if a work shortage arose.

[89] Second, the defendants argue that Mr. Pannu exaggerated his hernia pain to his family doctor in January of 2019 in order to obtain surgery sooner.

[90] In my view, these are minor lies that an otherwise honest person might make in the circumstances. Mr. Pannu acknowledged his dishonesty in these two instances under cross-examination. They do not justify rejecting his evidence under oath in court.

[91] The defendants also cited examples of where they say Mr. Pannu exaggerated his evidence, or else gave evidence that conflicted with the evidence from his examination for discovery, the contents of his clinical records or the histories he gave to the experts who prepared expert reports for his case.

[92] I will address the clinical records in detail below. In brief, I find that the defendants make too much of inconsistencies between shorthand clinical notes and sworn testimony at trial. I have considered the asserted inconsistencies and find that they do not impeach the core aspects of Mr. Pannu's testimony, although they cast some doubt on the veracity of his evidence of the severity and duration of his symptoms.

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[93] On the other hand, I agree with the defendants that there are material inconsistencies in Mr. Pannu's reports of his symptoms and abilities to the two experts: Dr. Zarkadas in August 2012, and Dr. Sangha in April 2023:

a) He reported to Dr. Zarkadas that his symptoms were low back and left shoulder pain, but reported to Dr. Sangha that his current complaints were headaches, neck pain, upper back pain, low back pain, and pain in both shoulders;

b) He reported to Dr. Zarkadas that his shoulder had improved 40% and his low back had improved 60%, but reported to Dr. Sangha that he had essentially no improvement in any of his symptoms;

c) He reported to Dr. Zarkadas that he was independent in housekeeping and home maintenance activities, but reported to Dr. Sangha that he needed to rely on his mother for the majority of housekeeping activities.

[94] The two experts have different areas of expertise: Dr. Zarkadas is an orthopedic surgeon, whereas Dr. Sangha is a physiatrist. They may have asked different questions. The two assessments were also 20 months apart. Notably, however, Mr. Pannu met with Dr. Zarkadas before he met with Dr. Sangha. I am troubled by the new reports of headaches, neck pain and upper back pain in Dr. Sangha's report, as I am with the statement to Dr. Sangha that Mr. Pannu essentially had not seen any improvement of any of his symptoms, which was not true.

[95] Mr. Pannu's evidence of his household tasks before and after the accidents also reflects an unfortunate tendency to exaggerate. He testified that, before the first accident, he was: sweeping the back yard three times a week for two hours; cleaning his room for one hour every day; cleaning his kitchen each day for 45 minutes; and cleaning his bathroom each day for 30 minutes. In my view, these time estimates are excessive.

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[96] Mr. Pannu also testified that since the first accident in 2018, he has not been able to do any household tasks other than basic cleaning of his room. Under cross-examination, he was confronted with his examination for discovery evidence that he was doing most of the cooking, cleaning and laundry. His evidence on this point was impeached.

D. Clinical Records

[97] The defendants rely on various clinical records to argue that Mr. Pannu's evidence of his symptoms and abilities is unreliable, and for their argument that the left shoulder injury was caused by the workplace slip and fall.

[98] While I agree somewhat with the former point, I disagree with the latter.

[99] There is no reference to left shoulder pain in Dr Tung's dictated note from Mr. Pannu's attendance on the day of the accident. On that date, March 8, 2018, Dr. Tung noted:

> Pain neck and pain, right shoulder
> Pain lower back and mid back
> Tenderness posterior cervical

[100] On April 11, 2018, about one month later, however, Dr. Tung noted pain in both shoulders:

> Pain neck and pain in both shoulders
> Pain lower back
> Physiotherapy has worsened pain

[101] Mr. Pannu next visited Dr. Tung on May 22, 2018. At that visit, Dr. Tung noted persistent lower back pain, but nothing about shoulder pain. Dr. Tung also made a note: "is working".

[102] Some time after this appointment, Mr. Pannu switched to a younger family doctor, Mandeep Gill. His first visit to Dr. Gill was on November 16, 2018. On the initial visit, at which they discussed the MVA injuries, Dr. Gill noted pain in the spine

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and a left shoulder sprain. He also noted a full range of motion and no pain in the neck.

[103] Mr. Pannu visited Dr. Gill three times after the hernia surgery in May of 2019. At each of these visits, Dr. Gill noted ongoing pain from the surgery. On May 27, 2019, Dr. Gill noted “back pain post surgery again due to prolonged sitting”.

[104] Dr. Gill’s first note after the second accident is dated April 30, 2020. The visit was likely by telephone, as Dr. Gill noted “telehealth”. Dr. Gill noted:

> Another mva in feb 20
> Shoulder and low back pain exacerbated.
> Prior to this was only 10% better

[105] Mr. Pannu received physiotherapy at Prana Physiotherapy from March 9, 2018, to July 18, 2019, and from June 2, 2022, to February 2, 2023. In an initial handwritten report dated March 9, 2018, the physiotherapist noted under the heading “subjective symptoms” right shoulder pain, with no reference to any pain in the left shoulder:

> Pain in the neck, upper, mid and low back, ® shoulder.

[106] Notably, however, in a more detailed handwritten assessment form of the same date, the physiotherapist noted bilateral pain in both shoulders.

[107] In the first typed clinical note of symptoms on March 12, 2018, the physiotherapist entered a note about pain in the right shoulder, with no mention of the left shoulder:

> Pain in the neck, upper, mid and low back, ® shoulder.

[108] This exact same phrase was included by the physiotherapist in the next eight clinical notes. The notes of the therapy changed from visit to visit, but the symptom notes appear to have been cut and paste from one appointment to the next,

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including the reference to the right shoulder. On March 28, 2018, the physiotherapist's clinical note included:

> Gradually improving in the neck, upper, mid back. Pain in the low back, ® shoulder.

[109] The exact same phrase was repeated in the next six clinical notes. On April 20, 2018, the physiotherapist's note included:

> Gradually improving in the neck, upper, mid back and ® shoulder, more pain in the low back.

[110] The same phrase, with small variations was included in the next 11 clinical notes. On May 9, 2019, the physiotherapist's note included:

> Gradually improving in the neck, upper, mid, low back and ® shoulder.

[111] The same phrase was repeated in the next six clinical notes. On January 3, 2019, the physiotherapist's note included:

> Patient reports that pain symptoms are much better than before. No new concern.

[112] The same phrase was repeated in the next four clinical notes. On June 13, 2019, the physiotherapist's note reverted to:

> Gradually improving in the neck, upper, mid, low back and ® shoulder.

[113] The exact same phrase was repeated in the next five clinical notes.

[114] In a handwritten reassessment report to ICBC dated June 13, 2019, the physiotherapist noted <u>initial pain in the left shoulder</u> and low back, current pain in the left shoulder and renewed pain in the low back:

> Initial pain – in neck, Ⓛshoulder + low back on [visual analogue scale]- 9/10 for sh, neck – 7/10 + back – 8/10.
>
> Current pain - Ⓛsh. pain not changed much (will see specialist). Neck is better than before low back got better, had hernia sx last month + low back pain came back.

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[115] There is then a gap in the physiotherapy records to June 8, 2022, when the physiotherapist's note of the symptoms included reference to pain in the left shoulder:

> Gradually improving in the neck, upper, mid, low back and Left shoulder.

[116] This exact same phrase is repeated in the last two clinical notes.

[117] Mr. Pannu testified that the physiotherapist's clinical notes are incorrect. He testified that he reported pain in both shoulders from the beginning of his treatment. He denied that his injuries were gradually improving by March 28, 2018.

[118] Mr. Pannu also saw a chiropractor at Prana Physiotherapy, Palwinder Bisla. On the first visit on June 30, 2018, Dr. Bisla noted:

> …[A]t the time [of the accident] felt in shock and shoulder was bad and physio fixed it and ok now".

[119] Mr. Pannu denied that he told Dr. Bisla that physio fixed his shoulder.

[120] Mr. Pannu's primary complaint, according to Dr. Bisla's notes, was his lower back, which he said was locked up and painful.

[121] In a discharge report of November 5, 2018, Dr. Bisla wrote that Mr. Pannu's complaints were of pain in the low back, which Dr. Bisla had diagnosed as thoracic and lumbar strain or sprain. Dr. Bisla noted that Mr. Pannu said his symptoms had improved, but he tended to have flare-ups due to work.

[122] On January 11, 2023, a different chiropractor at Prana Physiotherapy noted left shoulder pain: "L shoulder consistent pain."

[123] The defendants argue that the clinical records of Dr. Tung, Dr. Gill and Prana Physiotherapy show that the first time Mr. Pannu reported left shoulder pain was on November 16, 2018, two days after the slip and fall, after which he increasingly reported left shoulder pain. The defendants ask the Court to infer from this timing that the slip and fall caused the left shoulder injury.

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[124] Clinical records of statements made by a patient, including a description of his symptoms, are admissible as evidence of the fact the patient made the recorded statements on those occasions: *Edmondson v. Payer*, 2011 BCSC 118 at para. 29 [*Edmondson BCSC*]. Where the recorded statements are inconsistent with the plaintiff's evidence at trial, they may be used in cross-examination to impeach his credibility: *Edmondson BCSC* at para. 29. The plaintiff's statements may also be tendered by the defence as admissions by the plaintiff for the truth of their content: *Edmondson BCSC* at para. 30.

[125] However, there are limits on the use to which the clinical records can be put, whether as admissions or as prior inconsistent statements. As Justice Smith explained in *Edmondson BCSC* at paras. 34–37:

> [34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.
>
> [35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:
>
> > ...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.
>
> [36] <u>While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything.</u> For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.
>
> [Emphasis added.]

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[126] On appeal from the trial decision in *Edmondson BCSC*, the Court of Appeal clarified that what Justice Smith said about the absence of a clinical record does not amount to a legal principle applicable in every case but, rather, reflects a common-sense response to an argument that the absence of a reference in the clinical records is decisive: *Edmondson v. Payer,* 2012 BCCA 114 at para. 30 [*Edmondson BCCA*].

[127] The clinical records on which the defendants rely in this case are brief and inconsistent. They are not reliable as decisive evidence as to how and when Mr. Pannu injured his left shoulder.

[128] While some of the records seem to support the defendant's theory, other records substantiate Mr. Pannu's testimony that both shoulders hurt immediately after the collision and the right shoulder got better over time, while the left shoulder got progressively worse.

[129] On the day of the accident Mr. Pannu reported right shoulder pain to Dr. Tung (assuming the doctor's notes were accurate and complete). However, just one month later, he reported pain in both shoulders to Dr. Tung. This was more than a year before the slip and fall.

[130] The physiotherapy records are inconsistent. In my view, the handwritten assessment reports are more reliable than the typed clinical notes. The clinical director testified that the handwritten assessments are done by interviewing the patient and recording subjective and objective symptoms, whereas the typed clinical notes are based on a brief update from the patient for the purposes of that day's treatment, and may be copied from one visit to the next if there is no material change.

[131] On the initial handwritten physiotherapy assessment, Mr. Pannu seems to have reported pain in the right shoulder and pain in both shoulders. In the handwritten reassessment report dated June 13, 2019, the physiotherapist noted

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significant left shoulder pain as part of Mr. Pannu's initial pain (presumably meaning pain in March 2018 when he initially attended for treatment).

[132] The defendants are correct that the first contemporaneous reference to the left shoulder specifically in the clinical records is Dr. Gill's note on November 16, 2018, two days after the slip and fall. However, the defendants are incorrect in their assertion that Mr. Pannu first reported left shoulder pain on November 16, 2018.

[133] Moreover, the appointment with Dr. Gill appears to have been for the purpose of following up on the motor vehicle accident, not the work injury. Dr. Gill's notes make no reference to a fall at work or a sprained ankle.

[134] For these reasons, I decline to infer from the clinical notes either that the slip and fall caused the left shoulder injury, or that Mr. Pannu would have injured his left shoulder in the slip and fall regardless of his involvement in the first accident.

E. Expert Evidence

[135] Mr. Pannu tendered reports from two expert witnesses. The defendants did not call any expert evidence.

[136] Dr. Harpeet Sangha was qualified as an expert in the field of physiatry, able to provide a diagnosis and prognosis for physical injuries. In his evidence, Dr. Sangha clarified that he is not an expert in the diagnoses of psychological conditions. Dr. Sangha also said that he would defer to an orthopedic surgeon on surgical treatments and prognosis of orthopedic injuries.

[137] Dr. Sangha diagnosed the following injuries that in his opinion were caused by the first accident and aggravated by the second accident: chronic neck pain, a left shoulder tear, headaches, chronic low back pain, disordered sleep, psychoemotional distress and post-traumatic weight gain as a result of the collisions.

[138] I consider the diagnosis of psychological distress and post-traumatic weight gain outside the area of Dr. Sangha's expertise.

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[139] Dr. Sangha listed the following limitations which in his opinion could reasonably be expected to derive from the collision related impairments: prolonged sitting or standing; lifting, carrying and reaching overhead, in particular with the left hand; activities that involve full truncal mobility for the neck and back; and activities that place a strain through the neck and back, including lifting, bending, carrying pushing and pulling.

[140] Dr. Sangha provided numerous treatment options. In his report, Dr. Sangha opined that Mr. Pannu's limitations are permanent, outside of some possible improvement in the left shoulder, on which Dr. Sangha said he would defer to the surgeon's opinion. Under cross-examination at trial, however, Dr. Sangha testified that he would expect Mr. Pannu to experience improvements in his pain levels and ability to function if he follows the treatment recommendations.

[141] I accept Dr. Sangha's opinion on causation. The weight I can give his prognosis, however, is limited by my concern that Mr. Pannu exaggerated some of his symptoms to Dr. Sangha.

[142] Dr. Zarkadas was qualified as an expert in orthopedic surgery, able to provide a diagnosis and prognosis of orthopedic injuries, and in particular, shoulder injuries. In his report, delivered before the shoulder surgery, Dr. Zarkadas diagnosed mechanical lower back pain and left shoulder impingement, pain and stiffness. He did not identify neck or upper back pain.

[143] In Dr. Zarkadas' opinion, the lower back and left shoulder pain were likely caused by the first accident and aggravated by the second accident. He noted that Mr. Pannu reported 40% improvement in his left shoulder symptoms and 60% improvement of his low back by the time of the assessment.

[144] I accept Dr. Zarkadas' opinion on causation.

[145] The defendants' counsel asked Dr. Zarkadas in cross-examination if it would change his opinion if he knew Mr. Pannu had a fall at work and first reported left shoulder pain two days later. Dr. Zarkadas acknowledged that the shoulder injury

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could have been caused or aggravated by the slip and fall, but said he would need to look at the clinical records and consider the extent of the trauma.

[146] I do not put any weight on Dr. Zarkadas' answer the shoulder injury could have been caused or aggravated by the slip and fall. He was not taken to any clinical records of the slip and fall. Moreover, the premise of the question – that Mr. Pannu first reported left shoulder pain two days after the slip and fall – was incorrect.

[147] Dr. Zarkadas recommended that Mr. Pannu undergo a left shoulder arthoscopy and subacromial decompression, which he subsequently did, followed by physiotherapy. Dr. Zarkadas opined that Mr. Pannu can expect improvement with the shoulder surgery, although not full resolution.

[148] The records that Dr. Zarkadas produced in relation to the surgery indicate that the surgery was performed as anticipated, and that a follow-up appointment indicated a good recovery on schedule.

[149] Dr. Zarkadas recommended that Mr. Pannu not work as an electrician for about three months (or roughly to mid-November). According to Dr. Zarkadas, the generally expected timeframe for a noticeable improvement in Mr. Pannu's shoulder is four to six months (or roughly to when these reasons are issued).

F. Findings on Injuries and Causation

[150] On the evidence as a whole, I find that the injuries to Mr. Pannu's neck, back and both shoulders were caused by the first accident.

[151] I find that the slip and fall aggravated a left shoulder injury that was originally caused by the first accident. I find that the injury to the left shoulder is indivisible – in other words, it is not possible to assess damages for the aggravation separately from the original injury.

[152] As stated, the clinical notes do not establish that the slip and fall caused the left shoulder injury There is no evidence of any trauma to the left shoulder in the slip and fall. There is no evidence that Mr. Pannu was carrying anything or landed on his

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left shoulder. The only evidence is that he slipped on a pile of materials, fell to the ground and sprained his ankle, and then reported left shoulder pain two days later in the context of an appointment with a new family doctor to follow up on the motor vehicle accident injuries.

[153] Other circumstantial evidence suggests that Mr. Pannu injured both shoulders in the motor vehicle accident: he described being thrown against his left side in the impact and immediately feeling pain in both shoulders; he was active in the gym before the accident, but stopped lifting weights after the accident; his co-worker, Mr. Bassi, saw Mr. Pannu struggling to lift objects at work after the accident.

[154] The MRI report on November 22, 2019, which found inflammation and a small tear in the rotator cuff of the left shoulder, is equally consistent with an injury in the accident that got worse over time, as it is with an injury in the slip and fall.

[155] I find that the defendants have failed to prove on a balance of probabilities that the slip and fall caused the left shoulder injury.

[156] Mr. Pannu could conceivably have injured his left shoulder in the slip and fall without having been previously involved in a motor vehicle accident. However, the defendants' theory that he would have experienced significant pain and required shoulder surgery in any event of his injuries in the accident is no more than speculation based on inconsistent and unreliable clinical notes.

[157] Accordingly, Mr. Behnke is fully liable for the damages resulting from the injuries to Mr. Pannu's neck, back and both shoulders.

[158] I find that the injuries to the neck and right shoulder resolved by the end of 2018. The back pain improved gradually, but then flared up again following the hernia surgery in 2019. The left shoulder pain was aggravated by the slip and fall in November 2018. Both injuries were aggravated by the second accident.

[159] The lower back pain is now chronic, with a moderately positive prognosis if Mr. Pannu follows through with the recommended treatment.

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[160] The left shoulder pain is also chronic, but with a good prognosis for improvement following the surgery in August 2023 if Mr. Pannu completes the necessary physiotherapy. Based on Dr. Zarkadas' evidence, I expect that Mr. Pannu will continue to have some pain and impingement in the left shoulder, especially with overhead activities and repetitive use.

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IV. DAMAGES

A. Background

[161] Mr. Pannu seeks: general non-pecuniary damages for pain and suffering; damages for past income loss; loss of future earning capacity; loss of housekeeping capacity; cost of future care; and special damages for medical and therapeutic expenses.

B. Non-Pecuniary Damages

[162] Non-pecuniary damages (or damages for pain and suffering) are assessed based on a non-exhaustive list of factors set out by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34. In *Stapley*, Justice Kirkpatrick described the factors as follows:

> [46] The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and

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

[163] More recently, in *Callow v. Van Hoek-Patterson,* 2023 BCCA 92, the Court of Appeal instructed that determining an appropriate range of non-pecuniary damages "entails ascertaining the upper and lower range for damage awards in the *same class of case*" (emphasis in original): at para. 19. Given no two cases are alike, defining the class is "a generalized exercise that takes place at a high level of abstraction": *Callow* at para. 19.

[164] In *Callow,* the Court described the plaintiff's situation as follows at para. 22:

> A person in their 20s who sustained moderate soft tissue injuries to their neck, back, and shoulders which, despite treatment, remained symptomatic for years. Although their condition has improved, they will continue to experience some pain flare-ups and the likelihood for future improvement is poor. With caution, can continue to participate in previous activities while monitoring physical exertion for pain.

[165] Based on this description, and after reviewing a number of comparable decisions, the Court found that the range of non-pecuniary damages for the same class of case was $50,000 to $60,000, and determined that the mid-point was a fair result (at para. 23).

[166] At the high level of abstraction recommended by the Court of Appeal, Mr. Pannu's situation is comparable to the class of case for which the Court awarded $55,000 in *Callow*.

[167] I would add that Mr. Pannu suffered the pain and inconvenience of a surgical procedure to his left shoulder, for which I would add $10,000.

[168] I would also include in the award of non-pecuniary damages a provision for the discomfort Mr. Pannu experiences with housework. With the exception of the immediate aftermath of the first accident and recovery time from the shoulder surgery, Mr. Pannu has been able to do most of his own cooking, cleaning and laundry. His back and shoulder injuries have made these tasks more difficult.

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However, for the reasons discussed, I do not accept his evidence of the amount of household work he did prior to the accident or the extent of the difficulty he experienced after the accident. In my view, $10,000 is adequate compensation.

[169] Accordingly, I award $75,000 as non-pecuniary damages.

C. Employment History

[170] Mr. Pannu was working as an apprentice electrician at Bridge Electric at the time of the first accident. He had worked there since 2016. His main duties were roughing, framing, and installing conduits. It was a physical job which required a lot of walking and lifting heavy cables and pipes.

[171] He was also working as a security guard on weekends. He worked eight hours on Saturdays, and Sundays at least once a month.

[172] In addition, he was attending Thompson Rivers University to upgrade his electrician's training. As an apprentice, he was sponsored by his employer and permitted to take 10 weeks off to attend the course.

[173] Mr. Pannu testified that he missed at least six weeks of work after the first accident. However, Dr. Tung noted a return to work on April 13, 2018, on an ICBC form, which would have been just under five weeks.

[174] When he returned to work, Mr. Pannu was placed on light duties for a few months. He testified that his neck, back, and left shoulder still caused him pain. When he returned to regular duties, he could not lift the big cables, which generally required both hands. Mr. Bassi saw him struggling and assisted him.

[175] Mr. Pannu missed work for a few days after the slip and fall on November 14, 2018. After returning to work, he was on light duties again for two weeks.

[176] In April 2019, Mr. Pannu was laid off by Bridge Electric due to a shortage of work. It would have been possible for him to work part time, but he decided to take

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the time to address the hernia condition. He had surgery to repair the hernia on May 9, 2019, and required several months to recover from the post-operative pain.

[177] From August to October 2019, Mr. Pannu attended Level 2 training courses to become a construction electrician. There are four levels in total in this training program. Mr. Pannu's plan was to take all four levels before sitting for the exam to obtain a Red Seal designation.

[178] A Red Seal designation allows the holder to work on any electrical work: industrial, commercial, high voltage, etc. Unlike an apprentice, a Red Seal electrician does not require supervision.

[179] The courses went online during the COVID-19 pandemic. Mr. Pannu heard from a friend that the online classes were not useful. Instead of taking Levels 3 and 4 online, he decided to study on his own and challenge the exam. In November 2020, he passed the exam and earned his Red Seal designation.

[180] Mr. Pannu was rehired by Bridge Electric in August of 2020. After his return, he was assigned more skilled work because he had obtained more qualifications. However, he testified, he continued to struggle to lift heavy cables and pipes, and continued to require assistance from Mr. Bassi.

[181] In January 2021, Mr. Pannu left Bridge Electric and started to work for Houle Electric. He made the move primarily because Houle Electric was a unionized company and he wanted to take advantage of the pension benefits. However, he testified, his injuries were also a factor in the decision to change jobs. He testified that he worried about the future when someone might not be around to assist him with the heavy lifting.

[182] At Houle Electric, he was no longer required to lift heavy cables and pipes. He was assigned some more supervisory duties, which provided him an opportunity to put in some overtime.

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[183] In August 2022, Mr. Pannu earned his Master Electrician designation. The Master Electrician designation allows him to obtain permits to work on his own projects.

[184] In June 2023, Mr. Pannu left Houle Electric and started to work for Seaspan. He testified that he found Houle Electric to be a fast work environment, which was hard on his body. He testified that he noticed an increase in his symptoms in 2023 when he was working on a new project that required heavier physical labour, and that was the reason he left Houle Electric.

[185] On the other hand, Mr. Pannu told Dr. Sangha that he had the option of lighter work at Houle Electric. This inconsistency is notable, given that Dr. Sangha's report is dated June 22, 2023, which is around the time that Mr. Pannu left Houle Electric.

[186] Mr. Pannu's ultimate goal is to run his own business. He testified that having his own business would be far more lucrative than working as an employee for an electrical company. To this end, he incorporated a business called CMF Electric Ltd. in August 2023.

[187] His former co-worker, Mr. Bassi, also owns his own business, which Mr. Bassi operates on top of his regular job. Mr. Pannu and Mr. Bassi have worked on a few projects together, after work or on weekends. Mr. Bassi pays Mr. Pannu 25% of his net profit, in cash.

[188] Mr. Pannu testified that he has struggled with the duties that Mr. Bassi assigns to him on these jobs. He testified he takes twice as long as Mr. Bassi. Some duties, he testified, he cannot do at all, such as installing an AC unit.

[189] Mr. Bassi testified that he tries to assign Mr. Pannu the lighter, more technical work. Nonetheless, Mr. Bassi testified, he helps Mr. Pannu with his duties almost every day.

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[190] In addition to working with Mr. Bassi, Mr. Pannu does some projects on his own. On the largest project to date, he made $2,100 profit. On the smallest, he made $600. Mr. Pannu testified that the $2,100 job took him four days to finish, whereas he estimated that an electrician without injuries could do it in one and a half or two days.

[191] Mr. Pannu testified that he has received 15 calls for projects, and that he has turned down 10 or 11 of them due to his accident-related injuries.

[192] Mr. Pannu has been inconsistent in his reporting of his work with Mr. Bassi and his own work. At his examination for discovery, Mr. Pannu testified that his 2022 income tax returns showed only income from work at Houle Electric. At trial, he said that he believed his work with Mr. Bassi was reflected on his tax returns. Similarly, at his examination for discovery, he said that he did not do any work other than for Houle Electric or Seaspan in 2023, but at trial, he identified several jobs he had done through his new company.

[193] Mr. Pannu testified about one specific, recent opportunity in Sicamous on which he testified that he anticipated making $300,000 in profit. He discussed bidding on this project with Mr. Bassi. He and Mr. Bassi contacted wholesalers and obtained pricing for the materials, but ultimately did not bid on the project.

[194] Mr. Pannu testified that he was ready to relocate to Sicamous for the job, but decided not to proceed because of his physical limitations.

[195] Mr. Bassi testified that he was sure that he would have been successful if he had bid on the project in Sicamous, because he was told by the prospective client that he was the only candidate willing to relocate and they wanted him for the project.

[196] I do not put any weight on the Sicamous opportunity. In my view, it is far too speculative to provide meaningful evidence of Mr. Pannu’s current self-employment potential. It would have been a much larger and more complicated project than anything Mr. Pannu had done on his own or with Mr. Bassi. It would have also

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required Mr. Pannu to relocate to Sicamous, leave his job at Seaspan, set up a job site and hire employees. He and Mr. Bassi never completed a bid on the project. The evidence that the client wanted to hire them is inadmissible hearsay.

[197] At the time of the trial, Mr. Pannu was off work recovering from the shoulder surgery in mid-August 2023. As stated, Dr. Zarkadas recommended that Mr. Pannu not work as an electrician for approximately three months after the surgery.

D. Past Income Loss

[198] A claim for “past income loss” is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the accident: *Rowe v. Bobell Express Ltd.,* 2005 BCCA 141*, at para. 30.*

[199] This loss may be measured in different ways, including actual earnings the plaintiff would have received: *Rowe* , at para. 30.

[200] As discussed, past events must be proven on the balance of probabilities, while hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) must be shown to be real and substantial possibilities, which the court must weigh according to their relative likelihood: *Gao* at paras. 34-40.

[201] Mr. Pannu was off work between March 8, 2018 and around April 15, 2018. He has made out a loss for five weeks off work as a result of the accident injuries.

[202] The records of Bridge Electric show that, in the two weeks before the accident, Mr. Pannu earned $1,118.33 in gross pay. In the pay period ending May 5, 2018 (the next full pay period for which there are clear records), Mr. Pannu earned $1,289.60. Each pay period was two weeks. For five weeks off work, his loss was approximately $3,000.

[203] Mr. Pannu testified that his training to obtain a Red Seal designation was delayed as a result of the accident. However, he mitigated the loss by studying on

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his own and successfully challenging the exam. He acknowledged that he would have obtained his Red Seal designation at about the same time, with or without the accident injuries.

[204] Mr. Pannu testified that he struggled with his employment duties and switched jobs twice at least in part because of his injuries. However, he does not allege that he lost employment income because of these struggles (other than the initial time of work).

[205] Instead, he relies on his evidence that he has turned down self-employment jobs that he says he was unable to accept because they would have required tasks such as heavy lifting that he cannot perform.

[206] The defendants seek an adverse inference from the fact that Mr. Pannu has not produced any documents in support of this claim, citing *Walek v. Guardian Storage Inc.*, 2010 BCSC 365 at para 46.

[207] The burden of proving a modest claim of this nature should not be overly complicated or burdensome. If documentary evidence is lacking, Mr. Pannu may rely on his recollection of the side jobs he says he has turned down. While his evidence must be scrutinized for credibility, as the trial judge, I am entitled to draw reasonable inferences from evidence that is less than certain or precise.

[208] Mr. Pannu seeks $13,500 based on his evidence that he turned down 10 or 11 jobs. I find this evidence overestimates the likely profit per job. At this early stage of operating his own business, I expect that Mr. Pannu would mostly be taking smaller jobs regardless of his injuries. I would allow $10,000 for this aspect of his claim.

[209] As stated, there is insufficient evidence to establish a real and substantial possibility of realizing the Sicamous job, with or without the accident injuries.

[210] Mr. Pannu underwent shoulder surgery on August 14, 2023. The evidence establishes that he would be off work for three months following the surgery.

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[211] Mr. Pannu produced two paystubs from Seaspan, his current employer. In the first biweekly pay period, Mr. Pannu earned net income of $2,336.53 and in the second, $2,513.55. Three months at an average net biweekly pay of $2,400 would be a loss of $14,400.

[212] Mr. Pannu testified that he has applied for Employment Insurance benefits. If Mr. Pannu receives any benefits for August to November 2023, they will be deductible from this aspect of his claim.

[213] Accordingly, I award $27,400 for past wage loss.

E. Loss of Future Earning Capacity

[214] In *Rab v. Prescott*, 2021 BCCA 345, at para. 47, Justice Grauer set out a three-step process for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial:

> …The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown 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* [*v. Silva*, 2021 BCCA 228] at paras 93–95.
>
> [Spaces added for readability.]

[215] As a final step, the Court must be satisfied that the award is fair and reasonable to both parties: *Lo v. Vos,* 2021 BCCA 421*,* at para. 117.

[216] It is therefore necessary to assess the consequences of Mr. Pannu's injuries on his future income earning potential. This assessment requires a comparison between his future if the first accident had not happened and his likely future with his accident-related injuries and aggravations. That assessment necessarily involves a consideration of hypothetical events, both negative and positive. The parties are not

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required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is "a real and substantial possibility and not mere speculation". *Dornan v. Silva,* 2021 BCCA 228, at para. 156-157; *Rab*, at paras. 29 and 48; *Lo,* at para. 97-104.

[217] The evidence demonstrates a potential future event that could lead to a loss of capacity. Mr. Pannu's on-going back pain and left shoulder pain and impingement may limit his ability to work as an electrician, making him less capable of earning income in a trade for which he is qualified.

[218] There is a real and substantial possibility that Mr. Pannu's limitations will be permanent. There is also a real and substantial possibility his current level of functioning will improve with successful rehabilitation from the shoulder surgery and appropriate treatment for his back as recommended by Dr. Sangha. Most likely, he will be left with only a partial disability as a result of the accident injuries and aggravations.

[219] Mr. Pannu acknowledged that his current job at Seaspan is within his physical limitations. As he gains experience, he will likely move into more supervisory positions, and do less and less of the heavy work that was a challenge at work following the first accident.

[220] Instead, the focus of Mr. Pannu's claim is on the loss of future self-employment income earning capacity. Working on his own or with partners like Mr. Bassi, Mr. Pannu is less able to accommodate his accident-related limitations. If he cannot lift heavy objects or reach overhead, that will limit the jobs he can accept.

[221] I expect that Mr. Pannu will see improvements in his pain and level of function. I also expect that, going forward, he will be able to focus on technical work and hire apprentices to help with heavy lifting or overhead work. However, the evidence establishes a real and substantial possibility that he will never reach the same level of productivity in his self-employment he would have without the accident.

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[222] Assessing the value of this future loss involves the use of one of two approaches: the earnings approach or the capital asset approach. Generally, the earnings approach is appropriate where the with- and without-accident earnings trajectories can be assessed reliably and the loss measured by taking the difference between the two. The capital asset approach, which is based on a multiple of years of pre-accident earnings, is appropriate only when the evidence does not allow the court to reliably assess the future earning streams. *Perren v. Lalari*, 2010 BCCA 140 at paras. 31–33; *Johal v. Fazli*, 2021 BCSC 1896, at para. 225.

[223] Mr. Pannu seeks to use Mr. Bassi as a comparator. He argues that but for his accident-related injuries, he would be earning what Mr. Bassi does. The defendants argue there is insufficient evidence to assess Mr. Pannu's earnings on this basis. They note that Mr. Bassi has spent several years building his business to its current level, which is something Mr. Pannu has not yet done.

[224] I agree with Mr. Pannu that Mr. Bassi provides an appropriate comparator. Mr. Bassi and Mr. Pannu started at about the same place. They were both hard-working, ambitious and physically strong young men. Mr. Bassi obtained his Red Seal and Masters about one year before Mr. Pannu. The only real difference I can see in their career paths is the accident in which Mr. Pannu injured his back and shoulders. Mr. Bassi's head start is modest in my view. Given his obvious work ethic, Mr. Pannu would have quickly caught up with Mr. Bassi. The differences in their incomes would have quickly disappeared.

[225] Assessing the value of Mr. Bassi's self-employment income is difficult. There is no evidence of Mr. Bassi's work hours, employment income or his tax returns. There is very limited evidence of his self-employment earnings, only a few scattered invoices and his broad estimate that he earns between $100,000 and $150,000 working on the side.

[226] Nonetheless, I find that the lower end of Mr. Bassi's estimate provides a fair and rational basis for estimating Mr. Pannu's without-accident earning trajectory.

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[227] Assuming Mr. Pannu will work until age 65, the appropriate multiplier in Appendix E of the Civil Jury Instructions is 26.4817, based on a discount rate of 1.5% and 34 years of future earnings. Accordingly, the estimate of the present value of his expected lifetime self-employment earnings is $2,648,170.

[228] Mr. Pannu has only suffered a partial disability. Considering all of the evidence and assessing the likelihood of the various possibilities occurring, I find that he has suffered a 20% loss of his self-employment earning capacity.

[229] My assessment that Mr. Pannu has suffered a 20% loss in capacity yields an economic loss in the amount of $529,634.

[230] There should be a 20% general contingency deduction to the future loss of earning capacity award in this case. Mr. Pannu is a young man just starting out in his own business. His future income will depend on his continued good health apart from his injuries. There is a real and substantial possibility of a future disability or early retirement unrelated to the subject accident: *Gray v. Lanz,* 2022 BCSC 2218, at para. 92 – 93.

[231] Accordingly, I award $423,707 for loss of future earning capacity. In my view, this award is fair and reasonable to both parties.

F. Loss of Housekeeping Capacity

[232] Mr. Pannu claimed past and future loss of housekeeping capacity as a separate head of damages. The evidence I accept is more in keeping with a loss of amenities than a true loss of capacity and is therefore dealt with under the head of non-pecuniary damages: *Devito v. Watson*, 2020 BCSC 1106, at para 73 – 75.

[233] To the extent that housekeeping is more difficult or painful for Mr. Pannu since the accident and after his surgery, the loss is non-pecuniary in nature. I have taken his pain and discomfort into consideration in determining that $10,000 should be added to the award of general damages.

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[234] Accordingly, I decline to make a separate pecuniary award for loss of housekeeping capacity.

G. Cost of Future Care

[235] Future care cost awards are intended to compensate a plaintiff for expenses that are reasonably necessary for their future medical care. These expenses must be reasonable and they must be medically justified: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.).

[236] Dr. Zarkadas recommended physiotherapy for a minimum of six months: $80/session x 3x / week x 26 weeks = $6,240

[237] Dr. Sangha recommends a TENS machine, medications, and occupational therapy support. OT support: 12 weeks at $112 = $1,344

[238] Mr. Pannu claims $10,000 for Tylenol. In the absence of any supporting evidence, this is in my view an unreasonable claim. I would allow $5,000 for medications.

[239] Accordingly, I award $12,584 for future cost of care.

H. Special Damages

[240] The defendants agree that Mr. Pannu has proven special damages totaling $1,583.

V. CONCLUSION

[241] The action against Ms. Wong is dismissed.

[242] Mr. Pannu is awarded damages against Mr. Behnke totalling $540,274 as follows:

a) $75,000 in non-pecuniary damages;

b) $27,400 for past wage loss;

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c) $423,707 for loss of future earning capacity;

d) $12,584 for the cost of future care; and

e) $1,583 in special damages.

[243] If the parties wish to make submissions on costs, they may do so in writing. Their submissions should not exceed five pages in length and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

[244] Unless the Court orders otherwise following submissions, Mr. Pannu is entitled to costs of the action against Mr. Behnke.

"Elwood J."

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