

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Erdem v. O'Brien*,
2023 BCSC 1233

Date: 20230719
Docket: M192577
Registry: Vancouver

Between:

Orhan Erdem

Plaintiff

And:

Cian Merrigan and Sara Joanne OBrien

Defendants

– and –

Docket: M192581
Registry: Vancouver

Between:

Orhan Erdem

Plaintiff

And:

**John Doe, Jane Doe, and The Insurance
Corporation of British Columbia**

Defendants

Corrected Judgment: The text of the judgment was corrected at
paras. 337, 338 and 410 on December 21, 2023

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

S. Wheeldon
M. Zanic (A/S)

Counsel for the Defendants:

J.M. Brown
S. Hosenbocus

Place and Dates of Trial/Hearing:

Vancouver, B.C.
January 9-13, 16-18, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 19, 2023

I. INTRODUCTION

[1] Mr. Orhan Erdem sustained personal injuries in two motor vehicle accidents. The first occurred on the morning of February 2, 2018, when Mr. Erdem was driving to work and travelling north on the Ironworkers Memorial Bridge in Vancouver; his vehicle was struck from behind by the defendant, Mr. Cian Merrigan (“February 2018 Accident”). The second accident occurred shortly thereafter on March 13, 2018; while Mr. Erdem was travelling south on King George Boulevard in Surrey, his vehicle was once again struck from behind by a defendant that was never identified (“March 2018 Accident”). Liability is admitted in both the February 2018 Accident and the March 2018 Accident (together, “the Accidents”).

[2] The defendants admit the Accidents caused soft tissue injuries to Mr. Erdem’s right shoulder, left shoulder, neck and low back. The defendants also do not dispute that, following the Accidents, Mr. Erdem experienced headaches, sleep disturbance, low mood and anxiety. They accept that Mr. Erdem can no longer work as a scaffolder but submit he is able to work in other, more sedentary jobs. Mr. Erdem has not worked at all since the February 2018 Accident.

[3] The parties also agree that Mr. Erdem is entitled to special damages of \$8,294.41. However, Mr. Erdem claims additional special damages, which the defendants submits have not been proven.

[4] The issues before me are:

- i. the nature and extent of Mr. Erdem’s injuries arising from the Accidents, as well as any pre-existing conditions or vulnerabilities;
- ii. the credibility or reliability of Mr. Erdem’s evidence;
- iii. the nature and scope of non-pecuniary damages;
- iv. loss of past and future earning capacity;
- v. cost of future care; and
- vi. special damages.

II. BACKGROUND FACTS

[5] Mr. Erdem was born August 15, 1965 in Istanbul, Turkey. Like many Canadians, he immigrated to Canada as a young man looking to make a better life for himself and his future family.

[6] Mr. Erdem recalled that the military coups in Turkey in the late 1970's caused significant political unrest and economic upheaval in that country. His father's previously successful business went bankrupt and he was required to leave school in Grade 9 to get a job to help his family financially. His first job involved selling goods in a tourist shop. He explained that he could speak three languages at that time and he worked in the tourist industry for three-and-a-half years. He then completed one-and-a-half years in the army, a mandatory requirement for young men in Turkey.

[7] After serving in the army, Mr. Erdem moved to Greece and worked in a plastics factory where he learned to speak Greek but not, he explained, well enough to read a novel. Mr. Erdem was deported when Greek authorities discovered he did not have a valid work visa.

[8] With the assistance of some friends, Mr. Erdem obtained what he described as an "illegal passport" and then moved to London, England. He worked in London as a bus boy in a Greek cafeteria. Finding London too expensive a city to live in, Mr. Erdem immigrated to Canada, landing in Montreal in 1991.

A. Mr. Erdem's Time in Canada, Prior to the Accidents

[9] Mr. Erdem worked at various restaurants in Montreal as a dishwasher and chef's assistant for "about a year and eight months". He learned to speak and read French but stated he could not read a novel in the French language. He explained that he left Montreal after what he describes as a "terrible accident" when he slipped and fell while walking on snow. He then moved to Vancouver in January 1993, after his friends told him it was the "warmest place."

[10] Mr. Erdem is an avid coffee drinker. Drinking coffee with family and friends has always been an important past-time for him. He met his now ex-wife, Martha, at a Starbucks in Vancouver. As Spanish was Martha's first language, Mr. Erdem recalled he was able to speak broken Spanish to his wife when they met. The couple have two adult children.

[11] Mr. Erdem testified that his wife is on title to the apartment that she currently lives in, although he initially purchased it. Since last year, his son has been paying the mortgage. Prior to that, Mr. Erdem was paying the mortgage. His wife lives in the apartment with their son and daughter.

[12] Mr. Erdem testified he owned three properties, including a duplex "by [himself]", and that he rented an apartment.

[13] Since his marriage ended, Mr. Erdem has lived in a large one-bedroom basement suite that he shares with his mother. His niece has recently come to live with them. He sleeps in the living room while his mother and niece share a bedroom.

1. Mr. Erdem's Work Life Prior to the Accidents

[14] After the couple were married, Mr. Erdem worked at restaurants preparing and cooking meals as an assistant chef. Mrs. Erdem worked as a cleaning lady until their first child was born, after which she did not return to working outside the home.

[15] Mr. Erdem was not content working in restaurants and so obtained a job as a labourer at a construction project, at a higher rate of pay. After the construction project completed, Mr. Erdem recalled he had difficulty finding work. He heard Toronto was "booming," and moved to Toronto without his family.

[16] Shortly after moving to Toronto, Mr. Erdem found a job as a bricklayer, testifying that the "money was good." He sent money to his family in Vancouver and to his mother in Turkey. After two years, Mr. Erdem's wife and children joined him in Toronto. The couple purchased a house and, in 2003, Mr. Erdem sponsored his mother to immigrate to Canada.

[17] Mr. Erdem worked in Toronto for the same company for five-and-a-half years. When asked what he did for fun in Toronto, Mr. Erdem responded:

Work. My work was fun...and after work, having a strong coffee, and I was so tired, I had no fun.

[18] Mr. Erdem testified that, eventually, the company he worked for in Toronto had no further work for him and he could no longer afford to stay in Toronto. He heard that “Alberta was booming back then.” Mr. Erdem moved to Alberta and worked in a camp in the Alberta oil fields. His wife and children moved to Vancouver; he noted his wife had a sister living in Vancouver.

[19] In Alberta, Mr. Erdem learned the scaffolding and carpentry trades. He became a third-year apprentice carpenter and a journeyman scaffolder. He recalled that his wife “was not happy at all” that he was working in Alberta. The Erdem’s evidence is not clear as to when the marriage ended, although it was likely sometime around “2010 or 2011” or later but certainly before Mr. Erdem moved back to Vancouver in 2017.

[20] Mr. Erdem worked as a scaffolder for many years until the Accidents.

[21] As a scaffolder in Alberta, Mr. Erdem worked “24 days on, and 4 days off,” ten to 12 hours a day. Scaffolding became his vocation of choice. He testified that after eight hours, he would be paid “time and a half” and after ten hours he would be paid “double time”.

[22] Mr. Erdem described scaffolding as the “most dangerous work in the world.” He testified he worked at heights between “140 to 180 feet,” noting that safety is the “number one priority.” The work requires lifting “50, 55 pounds ... if you cannot lift up 50 pounds, you cannot work.” Mr. Erdem testified that scaffolders work in teams of six or more. It is testified it was a physical job, and adds:

...we bend over, grab material from next floor down below us, we lift them above shoulder... its climbing, lifting, bending, awkward positions...

[23] Mr. Erdem testified that he would lift a great deal of weight on a busy day of work: “thousand, thousand five hundred kilos, minimum and more.”

[24] Mr. Erdem also worked not only as a journeyman scaffolder but also as a foreman. His job as a foreman was less physical but still required climbing and inspecting the scaffolding.

[25] On his days off, he would drive from Fort McMurray to Vancouver to see his family or to Edmonton where he stayed with a friend. After the separation, on his days off, he would either stay in Vancouver with his mother or with a friend in Edmonton.

[26] When he stayed with his mother, he stated that he would help his mother with the dishes about twice a week and would also vacuum every day. When he stayed with his friend in Edmonton, he would sometimes travel around the areas.

2. Mr. Erdem's Income Prior to the Accidents

[27] Mr. Erdem's income was as follows between 2010 to 2017 (based on reported, total T4 earnings):

2010:	\$140,382
2011	\$161,550
2012:	\$125,036
2013:	\$120,703
2014:	\$149,627
2015:	\$156,127
2016:	\$175,506
2017:	\$127,779

3. Mr. Erdem's Future Work Plans Prior to the Accidents

[28] When Mr. Erdem moved to Vancouver in 2017, he continued to work as a scaffolder until the Accidents. For a short period prior to the Accidents both he and his son worked together as scaffolders.

[29] The evidence is inconsistent and is unclear on the question of whether Mr. Erdem planned to continue working with his son and whether he planned to work in Vancouver or elsewhere, other than Vancouver, after 2017:

- Q. Did you plan on working with your son ever again?
- A. It wasn't much hours. I didn't plan with this. I had different plans.

- Q. No, I meant in the future, did you ever plan to work with your son another time?
- A. Yes, of course. We had good plans before that.
- Q. What was your plan?
- A. Well, this was a transitory place for me, British Columbia. My plan was, I talk to my son, there's a few delays from Kitimat, we have to go there, any month, any weeks, any day, but we didn't –they delay that for – we had a plan to go to Kitimat, L&G plant, work there, fresh construction site.
- ...
- Q. Now prior to the break, you had suggested that being in Vancouver was a transitory place. In 2018, can you explain what your thinking was?
- A. Well, my thinking was come here for a short time of period. To go to work in Kitimat was transitive place for me, but that job site's been great for a couple times.
- Q. At your discovery, you suggested that you might go to — stay in Vancouver for a couple of years. Can you explain the inconsistency?
- A. Well, it was a bit confusing for me at time. I was confused. They say, "Job might start now, start later." So I stayed where my current work was there till the jobs ready to go. I had no choice to say about.

[30] In fact, Mr. Erdem continued to work as a scaffolder in 2018 in Vancouver, without his son, until the February 2018 Accident. His son testified he did not intend to work with his father as a scaffolder in 2018. Instead, he planned to return to school at BCIT.

[31] Mr. Erdem also testified he wished to work in Vancouver rather than elsewhere. He was cross-examined on his intentions in this regard:

- Q. Yesterday you indicated that you planned to move to Kitimat and start working on the LNG Project?
- A. Yes.
- Q. That's an industrial site job?
- A. That's a very clean, new construction industrial job, yes.
- ...
- Q. You had -- you actually had no intention of going to Kitimat prior to the accidents; isn't that correct?
- A. That is not true.
- Q. This is a new idea that you have brought to trial because you are trying to increase your wage loss?

A. No.

Q. Your plan was to continue in the Cargill Terminal Project until that project finished?

A. Normally they give me the jobs at least several times. I say as long as I have this work I keep working for the project finish.

[32] Mr. Erdem was also taken to his examination for discovery transcript where he testified his plans were to stay long-term in Vancouver:

Q. Did you have any plans before the accident of changing positions or at the time were you planning on staying in Vancouver and continuing with that project until it finished?

A. I was going to go to the -- that project finished, that was the best thing. I have one location. I was so happy, and the long projects, instead of going every couple of months here/there, it's steady place.

Q. So it sounds like your hope would have been long-term to stay in Vancouver and do local work rather than continue the camp jobs?

A. Absolutely, yes.

[33] In cross-examination, Mr. Erdem confirmed there was "a lot" of scaffolding work in the Vancouver area.

[34] Mr. Erdem also testified that he preferred commercial projects over industrial ones. He was taken to the following questions and answers from his examination for discovery:

Q. So, in the scenario that the accidents didn't happen, if you had your choice of what you'd be doing, your preference would be working commercial projects, Vancouver area, standard 40-hour work week?

A. Yes.

[35] Mr. Erdem confirmed that his previous two jobs, after he moved to Vancouver in 2017, were short in duration and were on commercial projects. He testified that his work at the Cargill Terminal Project in early 2018, prior to the Accidents, was set for a two-year period. He worked a 40-hour work week and was paid \$41.80 per hour. Mr. Erdem testified that the hourly rate for commercial jobs in 2020 ranged between \$35-40 per hour.

[36] There was some further confusion in Mr. Erdem's testimony regarding whether he would be paid overtime at the Cargill Terminal Project:

Q. Yesterday you indicated that there was going to be overtime in the Cargill Termin -- Terminal job, and that, if there wasn't, you would find new work?

A. Of course, I will apply next month or two.

Q. Okay. In truth, the Cargill Terminal job didn't have any opportunities for overtime, correct?

A. At the beginning they told us it's not going to be any overtime, but at the middle, the end of the terms we going to throw you guys a lot of overtimes. That's what the union represented and mentioned to us. I knew at the beginning we were going to be like zero overtime because we are all part of the union, so I thought new projects that for the help to cost [indiscernible].

Q. Okay. I'll take you to your discovery evidence, page 81.

...

Q. And at the time of the accidents you were earning 41.80 per hour; is that correct?

A. Yes.

Q. And then I assume there'd be some form of overtime or how did that work for the longer shifts, for the long periods of time that you were working?

A. That project was in Vancouver, North Vancouver, Cargill project. We had only 40 hours per week work. They didn't want to pay us overtime because we are unionized people, and I don't know.

Q. You were asked those questions and gave those answers?

A. Yes, correct.

Q. I even suggested to you in that question that you might be eligible to get overtime, and you said no, correct?

A. No, because they even told us at the beginning there's going to be no overtime. That was in my brain. I was there two and a half days. I knew that at the beginning, and then -- but when they told us at the union at the beginning you guys never expect any more than 40 hours a week. But at the middle term, at the end of the project finishing the close by they push up much, we going to have lots of overtime we've been told.

Q. So your evidence today is that that overtime would start near the end of the project?

A. Mid-term, end of the project is going to be lots overtime, mid-term is when we start the overtime, but the end of the project is going to be lots of overtime.

[37] Accordingly, Mr. Erdem testified that overtime pay was not available at the job he was working at when the Accidents occurred, but later testified he thought that it would be available.

4. Retirement

[38] Mr. Erdem was also cross-examined on his retirement plans. He testified that prior to the Accidents he planned to partially retire at 55 years of age and fully retire at 65. When he was partially retired he planned on collecting his pension and also working “six to nine months a year”.

[39] When it was put to Mr. Erdem that he had already been reducing his working time prior to the Accidents, he responded that he had not. However, he agreed that in 2017 he took nine weeks off. Also, prior to the Accidents, he had already planned to take two months off work in 2018 to travel to Europe with his son, which he did.

5. Mr. Erdem’s Travel and Recreational Pursuits Prior to the Accidents

[40] Mr. Erdem testified that he loves to travel, and enjoyed travelling with his children. He also stated that he enjoyed camping, fishing and hiking. He stated on cross-examination that he went fishing “two, three, four times” a year prior to the Accident.

6. Mr. Erdem’s Pre-existing Conditions Prior to the Accidents

[41] Mr. Erdem testified on direct-examination that he was healthy before the Accidents and had no physical or mental condition that compromised his health.

[42] Mr. Erdem was cross-examined on whether he had low back pain prior to the Accidents. While he acknowledged that he testified during direct-examination that he never experienced low back pain before the Accidents, Mr. Erdem agreed, after being taken to his discovery transcript, that he did in fact have low back pain prior to the Accidents “for sure twice a week.” He also acknowledged having headaches prior to the Accidents, “once a month for sure.”

[43] As regards Mr. Erdem's right shoulder injury arising from the Accidents, counsel for the defendants underscore that the expert witnesses who testified — Dr. Sangha, Dr. Regan, and Dr. Rickards — each agreed on cross-examination that Mr. Erdem likely had a pre-existing tendinopathy or a vulnerability in his right shoulder, as a result of the nature of his work as a scaffolder, repeatedly lifting heavy objects.

B. The Accidents

1. February 2018 Accident

[44] Mr. Erdem's testimony regarding the circumstances of this first accident stands in contrast to that of the defendant, Mr. Merrigan. I have addressed the evidence in some detail as it, in part, informs the issue of the reliability of Mr. Erdem's evidence.

[45] Mr. Erdem testified:

Q. On Ironworkers Bridge, how fast were you travelling?

A. To begin I was travelling 80 and then 60, 80, I don't remember.

Q. Okay. From your perspective, can you describe how the accident happened?

A. Oh, that day was a little rainy, but we were driving nonstop. We passed the middle of the bridge, everyone sudden stop, and I had to slam on my brakes, I stopped for the traffic going.

Q. Okay. Then what happened?

A. Then second or two, I heard the noise and then I got rear-ended that time.

Q. Can you describe the impact of this hit?

A. Impact, my whole body throw me forward, I hit my right -- right shoulder the steering wheel. I turn my head to my left and I was shocked.

Q. How long after you stopped did you get hit?

A. Less than two seconds.

Q. Had you come to a stop at any time on Ironworkers prior to this slamming on your brakes?

A. No. Before that it was so smooth traffic, everything was going smooth.

[46] On direct examination, Mr. Erdem then describes the impact of the collision as follows:

- Q. What did the impact feel like to you?
- A. Well, at the beginning, I was in shock, I was sweating, I was very hot my body. And my heart was pumping, pumping like crazy, and then I see the stars, I don't know after that, I was so panicky.
- Q. Did you feel any pain?
- A. Maybe a pain on my right shoulder. I thought that my whole body was -- my neck was killing to me during the same time. I didn't even [indiscernible] pain time, but I hit my -- right here, what is that bone here in my shoulder.
- Q. Mm-hmm.
- A. It was bad.
- Q. Can you describe the damage to your vehicle?
- A. Well, just the rear bumper visible damage.
- Q. Okay. Was there a lot of damage or a little damage?
- A. It was little bit damage, it was damaged little bit.

[47] Mr. Erdem described the conversation with Mr. Merrigan as follows:

- Q. Okay. What happened immediately following the accident?
- A. I lowered down my window, and the person who hit me came to me so – say, "How are you?" I say, "I'm okay, I'm very dizzy." I mean, and he told me, "Are you hang over?" I said, "No, I'm dizzy, I'm in shock. I'm sweating. I never drink anything in my life like alcohol." He says, "Oh, okay, can you wait? I have to call to my boss, report what happened, I'm going to be late for work." I said, "Do whatever, just give me a couple minutes." And then suddenly I get up, I tried tell him, "Listen, we have to exchange the plates and numbers, everything." And I went to my car. I said – I say, "We cannot block the traffic, somebody's going to come to hit us. We move to safest place." I say, "Can I breathe little bit, give me break." Soon as I start my car again, I drove to Dollarton Way for a safest place.
- Q. What happened after that?
- A. After that, I went to job site. I reported what happened, and safety guy say, "Well, we cannot drive you to emergency. Can you go to emergency?" I say, "Well, only emergency I know close to my house, St. Paul Hospital. I drove to emergency...."

[48] On cross-examination, Mr. Erdem was challenged on the discrepancy in his evidence at trial and at his discovery:

- Q. Okay. I'm going to ask you a few questions about the first accident on February 2nd, 2018. Yesterday you said that, after the accident occurred, the person who hit you approached your window, you rolled it down, he asked if you were okay, and then it was your idea to move the vehicles somewhere safe. That was your evidence yesterday?
- A. No.
- Q. No, that wasn't your evidence?
- A. That was -- that's what didn't happen. It wasn't safe. I roll up the window, he told me you have to move to safest place, he told me that. I say I'm going to sit and relax here. I'm afraid and scared to death. I was sweating, I was -- had a -- he -- he asked me to go there safest place, someone's going to come to hit us, he told me.
- Q. He asked you how you were?
- A. Oh, he asked me so what's wrong with you? I say I feel dizziness. He said are you hungover? I said I don't drink alcohol, and he say I'm going to call to my boss, I'm late for work. Oh, can you hold on for a second. He call to his boss, he was telling about his late, whatever. I was sitting there in the car, and after he came like why we're going to get hit, why don't we move to safest place, I followed his direction. So, okay, let me [indiscernible] and I drive [indiscernible] we park there, we talk a little bit.
- Q. Okay. Mr. Erdem, I'm confused, though, because you said that he did ask you how you were, then you said he didn't ask you how you were, so those are very different things.
- A. He say to me, are you okay? I say I'm a dizzy and I am sweating, I went I -- I'm in shock. He say after that he asked me another question, he asked me are you okay? I tell him I'm dizzy. He say are you hangover? I said I no drink in my life, and he start to call his boss. ...

[49] During his cross-examination, Mr. Erdem testified that he did not see the defendant approaching from behind. He just heard a "big noise, got hit, dust in my car." When asked how fast either vehicle was going, Mr. Erdem testified "we were going 80 to a hundred." At the time of impact, Mr. Erdem estimated the defendant was travelling "sixty plus for sure."

[50] During Mr. Merrigan's testimony he acknowledged that he rear-ended Mr. Erdem. He recalled it was a dark and very rainy day, early in the morning with "stop and go traffic" on the bridge. He testified he was travelling between 15 or

20 kph per hour at the time of the collision and miscalculated how much time and distance he needed to stop. He hit his brakes and the tires came to a full stop but the road was slippery. Mr. Merrigan described the impact as a slight impact or a “bump” into Mr. Erdem’s car.

[51] Mr. Merrigan recalled that he was concerned that, if they left their cars on the bridge deck, they might cause another accident. He suggested to Mr. Erdem that they move their cars to the Dollarton exit, which they did.

[52] Mr. Merrigan also recalled asking Mr. Erdem whether they should call the police. Mr. Erdem replied “no” and commented that he was late for work. He also asked Mr. Erdem if he wanted to call ICBC; Mr. Erdem responded he did not.

[53] Mr. Merrigan testified that when he got out of his car to talk to Mr. Erdem, Mr. Erdem did not seem hurt. He noticed some scratches on the bumper of Mr. Erdem’s vehicle and recalled that Mr. Erdem explained that there was previous damage on his car from “someone else.”

[54] Mr. Merrigan testified that they exchanged information, after which he understood they were both driving to their places of work.

[55] Mr. Merrigan testified there was no damage and no repairs needed on the vehicle he was driving, noting that it was his girlfriend’s car and that the two of them still drive the vehicle today.

[56] On cross-examination, Mr. Merrigan stated he did not ask Mr. Erdem if he was hung over, as Mr. Erdem had testified he had done.

[57] I found Mr. Merrigan to be a very forthright, clear and credible witness.

[58] Mr. Erdem testified he was wearing a seatbelt. The airbags did not deploy. Like Mr. Merrigan, Mr. Erdem also did not repair his vehicle.

2. March 2018 Accident

[59] The second accident occurred on March 13, 2018 around 6:00 p.m. Mr. Erdem testified that he had stopped his vehicle at the intersection of 76th Ave and King George Boulevard when he was rear-ended. Counsel for Mr. Erdem submitted that, “this time, it was a low impact collision.” Mr. Erdem testified the defendant in this second accident was travelling “probably 10 kilometers” per hour but that he had “no idea.”

[60] Mr. Erdem testified that he was not expecting the collision and that “It pushed [his] car forward.” He stated he “was in pain and sweating.” The other driver came to speak to him. He and the other driver agreed to meet in the parking lot nearby. Mr. Erdem stated that when he drove his car to the parking spot, the lady who rear-ended him had disappeared. He acknowledged there was no damage to his car from this second collision. Mr. Erdem testified that he was wearing his seatbelt and the airbag did not deploy.

C. Events and Symptoms After the Accidents

[61] After the February 2018 Accident, Mr. Erdem attended the emergency room at St. Paul’s Hospital. He was examined, x-rayed and was released about four hours later.

[62] Mr. Erdem testified that he suffered severe pain to his right shoulder, neck and back as a result of this first accident. He testified he could not “sleep at all” the first week after his accident and described himself as being “crippled”.

[63] When asked if he tried to go back to work, Mr. Erdem responded:

I called them. They say, "No, we cannot hire you back. You're on injury". And I couldn't go back to anything. I couldn't walk.

[64] In addition, Mr. Erdem described his other symptoms at that time as a “a severe pain” that was “worse” than a headache.

[65] After the March 2018 Accident, Mr. Erdem's son, Hakim, drove Mr. Erdem to Surrey Memorial Hospital. Mr. Erdem was examined, x-rays were taken of his right shoulder and neck and he was released after three or four hours.

[66] Mr. Erdem describe how right after the March 2018 Accident, he felt a "new" pain "in his left shoulder" and his lower back was "worse." He added: "that time [he] didn't sleep for a day or two."

[67] When asked in direct-examination if this second accident affected him psychologically, Mr. Erdem responded that it did and that he was depressed and had "so much anxiety."

[68] When asked in direct-examination to describe the next nine months or so after the March 2018 Accident, Mr. Erdem responded that "it wasn't good at all." He had a "hard time" getting up from bed, getting dressed, showering and taking a shower "because I have to use my right arm."

[69] Mr. Erdem testified that he "didn't do any house clean-up" or dishes and added he did not do any vacuuming in 2018, after the Accident. When it was put to Mr. Erdem on cross-examination that his mother did most of the dishes, he responded, "yes, of course". He also qualified his evidence by saying that he did some of the dishes, vacuumed and also helped clean the bathroom prior to the Accidents "when he came to Vancouver" while working in Alberta. He acknowledged he and his mother shared the bathroom cleaning.

[70] Mr. Erdem testified that he could only move his arm "half-way up" by the end of 2018, stating that his right arm was "weak", and that he could only lift "one or two pounds probably." Mr. Erdem testified in direct-examination:

- Q. What was your range of motion in your right shoulder at that time?
- A. That time, straight up, I could move it halfway.
- Q. And when you say halfway, what does that mean?
- A. Below my shoulder I mean. Below my shoulder level.
- Q. So if lifting your arm to your shoulder was 90 degrees, are you saying 45 degrees?

A. Yeah, 45, 50 percent, yes.

Q. Okay.

[71] Mr. Erdem testified that he had “steady pain, chronic pain, day and night” in his right shoulder. Mr. Erdem added:

... Even today, if I try to put my T-shirt, shirts, whatever, I put first my right arm and then with the help of my left arm

[72] Mr. Erdem stated that he is right handed. When asked in direct-examination what hand he uses to open doors, he responded: “always right hand.” However, after the Accident, because of his shoulder injury and associated pain, he stated he must use his left hand and open doors with his left hand because of his injury. He testified that this is particularly difficult for him as a Muslim, because using one’s left hand instead of one’s right hand is contrary to the Islam faith.

[73] In addition to his right and left shoulder pain, Mr. Erdem testified that he had neck pain in 2018. He could not move his head all the way to the left or right, but he could move his head up and down.

[74] When asked about his sleep in 2018, Mr. Erdem responded that it was “broken”. He had “sudden pain” that would wake him up, “like a hitting on the brain”. Mr. Erdem recalled that he was prescribed a muscle relaxant, cyclobenzaprine, which he only took at night, and naproxen, both for the first time after the Accidents.

[75] Later in his direct-examination, Mr. Erdem stated that he was “stressed out” in 2018 after the Accidents. He was “moody” and “negative”, worrying about his children, his health, his mother and the future.

[76] Mr. Erdem testified he also had headaches every other day after the Accidents. He took Tylenol for his headaches. In addition to his prescribed medications and Tylenol, Mr. Erdem went to physiotherapy “once or twice a week” in 2018; he has since continued to go to physiotherapy. In 2018, Mr. Erdem’s physiotherapy sessions also involved massages to his neck, shoulder and back.

[77] Mr. Erdem was asked on direct-examination whether he was driving shortly after the Accidents. He responded “that was very hard”, adding that he had a “problem” with his shoulder checks and he “had so much anxiety.” When asked whether he still had driving anxiety, her responded: “It’s lesser. I don’t have almost.”

1. Travelling in 2018

[78] Mr. Erdem had planned a summer vacation to Europe in 2018 with his son. He acknowledged that they went on this trip and travelled to “several countries” over the course of two months following the Accidents.

[79] Mr. Erdem testified that he found the plane ride, walking and touring difficult. He said he “was crippled” on the plane and that he was “torturing himself.” He and his son walked “short distances” and he could not carry much weight. He testified he went to physiotherapy and massage treatments in Europe, a total of 8 treatments that cost approximately \$550; no receipts from these treatments in Europe were tendered at trial.

[80] Mr. Erdem was asked about his back pain after the Accidents. He testified:

- Q. You mentioned a low back injury. Can you describe what that was like for you?
- A. It was sort of sharp pain coming and going, like a hitting in my brain. It was starting from the bottom to the top. It was different experience than the construction [back] pain.
- Q. Okay.
- A. Something different I never experienced before.
- Q. Did you have it all day or part of the day?
- A. Was – beginning was a whole day and then eased up slowly.
- Q. Over the course of 2018?
- A. At the end of the 2018 eased up, came calmer.

2. Mr. Erdem’s Symptoms in 2019 and 2020

[81] Mr. Erdem was asked a number of questions in direct-examination that concerned symptoms in the period of “2019 and 2020” as a unit of time.

[82] Mr. Erdem testified that his right shoulder was “the same” in 2019 and 2020, with no improvements; that he was taking the same prescription medications; and that he was continuing his physiotherapy and massage treatments. He also had two injections in his shoulder.

[83] Mr. Erdem testified that his lower back was “good” during this period and had “healed.” He added that before it resolved, the lower back pain after the Accidents was a different type of pain than the work-related lower back pain he experienced before the Accidents; he did not elaborate.

[84] Mr. Erdem testified that he still had some pain in his left shoulder in 2019 and 2020, but that it was not bad and was “very better.”

[85] Mr. Erdem testified that his sleep was “not good” in 2019 and 2020 and that it “wasn’t changed much” from 2018. He still had headaches but “they were better than 2018.” He added that his “headache is better now.”

[86] When asked about his psychological symptoms in 2019 and 2020, Mr. Erdem stated that they were “really bad.” He testified that he “had to see a counsellor” as he “had depression.” He testified he saw the counsellor either once a month or every three weeks sometime in 2018 or 2019 but could not recall for how long. He stated that he found the counselling helpful:

Q. Okay. Did you find the counselling helpful?

A. Yes, I was happier, which was very positive, help calm me down, change my mind. It was helpful and I liked it.

[87] When asked in his direct-examination why he did not return to work after the Accidents, Mr. Erdem stated that he “wasn’t fit for work.” He said he had a hard time sleeping and getting up, he was in pain “24/7”, and he was on medications.

[88] Mr. Erdem continued with his physiotherapy sessions in 2019 and 2020.

[89] In 2019, Mr. Erdem travelled to Germany. He described this trip as a “bad trip.” He could not carry “any clothes” and he had to buy his clothes “from the places [he] was travelling.”

3. Mr. Erdem's Symptoms since 2021

[90] When asked what his neck symptoms were like in the last two years, Mr. Erdem testified that "nothing has changed from my neck pain" and that he has "daily" neck pain. He described his neck pain as "severe" but agreed it was not as severe as his shoulder pain.

[91] When asked on cross-examination whether his neck pain was constant, Mr. Erdem responded as follows:

- Q. There's been times when your neck has improved and hasn't been an issue?
- A. Sometime it's so much pain to so severe, sometime it comes and goes. I mean, I cannot control my pain. It's always there. It's never left me, those pains.
- Q. So, I just want to clarify, are you saying it's always there or does it come and go?
- A. It's always there, when it comes it came worsens and I have more pains.
- Q. You told Mr. McNeil on your FCE report that your pain in your neck came and went?
- A. Yes.
- Q. And that was the truth?
- A. That was the truth, yes. What I mean by that, it came more, having -- the pain came more -- more and more and left, but I -- I was painful then. Since [indiscernible] I'm in pain on my neck, but it's not that hard. When I go to sleep, when I get up, it's getting worse and stiffness. It's kind of pain I have there sometime. Sometime it goes that big pain.

[92] When asked if his right shoulder pain has improved since 2021, Mr. Erdem testified that it had not.

[93] Mr. Erdem was asked to demonstrate how he puts on his shirt in the morning, and he attempted to explain:

- A. I put to my -- into my sleeves my right arm first, and then I hold my collar in my left arm, I pull everything in the back and I put my left arm inside.

[94] Counsel for Mr. Erdem asked whether Mr. Erdem could demonstrate how he did so. Counsel for the defendants did not object. Slowly and with apparent

difficulty, while on the witness stand, Mr. Erdem took off his suit jacket and put it back on. His movements were slow, awkward and appeared painful.

[95] Mr. Erdem stated that his mode of showering has not changed since 2021. That is, he “always uses his left arm everywhere, anytime I shower myself.”

[96] When asked again how his left shoulder has been the last two years, Mr. Erdem responded that: “it’s better now” but “once in a while” he still has pain and that it is manageable.

[97] When asked how his right shoulder has been in the last two years Mr. Erdem responded that his right shoulder is still painful and that he could move his arm up to shoulder level and can lift “three, four pounds” but “not for long periods.” Mr. Erdem testified that he can not reach “upper heights” with his right arm, such as a soup can on a shelf.

[98] Mr. Erdem’s evidence was not entirely consistent with regard to range of motion of his right shoulder. On cross-examination, Mr. Erdem agreed his range of motion in his right arm had significantly increased since the time of the Accident. Later in his cross-examination he stated that he was able to raise his right arm above shoulder height but “without weights.”

[99] When asked under cross-examination whether he could reach with his right shoulder above shoulder height, Mr. Erdem responded he could not. He testified that such movement throws his arm “right away down” and he could “not hold it more than the three/four seconds.”

[100] Mr. Erdem changed the evidence he gave on his direct-examination. During direct-examination Mr. Erdem testified that his right shoulder condition had not changed since the Accidents; he also testified that his right shoulder pain was constant. Mr. Erdem admitted initially on cross-examination that his right shoulder was “slightly better” since the Accidents and that he has “a little better” movement in his right arm. Yet, when it was put to Mr. Erdem that between August 2019 and

March 2021, his right shoulder condition had improved somewhere between 20% and 30%, Mr. Erdem agreed.

[101] Further, on cross-examination, Mr. Erdem was taken to a record of a physiotherapy treatment dated March 22, 2019, wherein his physiotherapist noted that Mr. Erdem reported having low back pain but no shoulder pain that day. When this passage was put to him, Mr. Erdem agreed that was true. He admitted his shoulder pain was intermittent.

[102] When asked on cross-examination whether he still used his right hand to carry coffee, Mr. Erdem responded: “No, I use most of the time my left hand to carry coffee.”

[103] Mr. Erdem testified that he “sometimes” used his right hand to use his phone. He agreed he could walk at a regular pace but testified he could not swing his right arm and added:

No. I put my right arm in my pocket most of the time when I walk. I don't swing.

[104] When asked on direct examination about the current condition of his low back, Mr. Erdem testified that he is “good” and “better”, confirming he does not “have any problem with my back pain, back, lower back.”

[105] With regard to his sleeping since 2021, Mr. Erdem testified:

A. Sleeping, I have a hard time to go back to sleep. I sleep late.

Q. Tell me about your nighttime routine.

A. Well, I take my medicine, puts me down, but 11 o'clock every night, and I laid on the bed for hour, hour 15 minutes, and after two hours, two and a half, and I fall asleep. Not easy to go right away put my head down and, boom, sleep. No, it won't happen like that.

Q. Okay. What medications are – if any are you taking now?

A. I'm taking naproxen and cyclobenzaprine. And sometime I take an Advil also, once in a while.

[106] On cross-examination, Mr. Erdem was asked about his headaches:

Q. You mentioned yesterday that your headaches have now resolved. When did that occur?

A. End of last year, I believe, but once in a while I still get headaches.

[107] When asked about his psychological symptoms over the last two years, Mr. Erdem testified that his “whole world [came] down”. He stated that he lost his appetite and described himself as a “vegetable.”

[108] When asked how his injuries affected his ability to shop, Mr. Erdem testified that he uses his left hand, as that he is left-handed now. He is not able to push a shopping cart. He carries groceries with his left arm. He does “small shopping”, not “whole shopping”.

[109] Mr. Erdem continued with his physiotherapy treatment in 2021 and 2022, and also had acupuncture treatments in June 2021. He confirmed he did not attend such treatments prior to the Accidents.

[110] When asked what forms of treatment he has undergone in the last six months, Mr. Erdem testified he has had physiotherapy (with massage) on his shoulder and neck.

[111] Mr. Erdem agreed that he sustained no injuries to his legs in the Accidents.

[112] Mr. Erdem confirmed on cross-examination that he has never been diagnosed with depression or an anxiety disorder. He agreed he never sought out medication for his depression or anxiety. He also agreed on cross-examination that his psychological symptoms improved in 2020 after he saw a counsellor.

[113] When it was put to Mr. Erdem that he was advised by Dr. Regan that physiotherapy had little value going forward, Mr. Erdem responded that he could not recall. He acknowledged that since he saw Dr. Regan, he has continued to attend physiotherapy regularly.

[114] He testified that, prior to the Accidents, he used to practice his daily prayers by raising his hands above his head, but “now [he] doesn’t do that anymore.”

[115] It was put to Mr. Erdem on cross-examination that he started running on a treadmill in his condo regularly in 2020, to which he responded “no, never”. He was

taken to an Occupational Therapy re-assessment Report dated January 20, 2020 that stated:

He reports he has not returned to running outdoors, but has started to use the treadmill in his apartment building's gym.

[116] When asked whether this refreshed his memory Mr. Erdem testified:

- A. No, I went to gym see what's going on and I didn't use anything. I came back after that.
- Q. So you just dispute that you ran on a treadmill?
- A. Yeah. We have a gym in our building where my son lives, but I didn't use it. I didn't do anything there.

[117] Mr. Erdem agreed on cross-examination that he told Dr. Sangha he became “unconscious” as a result of the February 2018 Accident. He admitted, however, that this was not the case and that he did not hit his head.

[118] Mr. Erdem agreed on cross-examination that he could “move around” or “move his body” without difficulty. He added that he cannot walk more than 15 or 20 minutes because he gets “really tired fast.” When asked whether he can sit in one place for long period, he responded: “Well, I can sit for 40/45 minutes, yes.”

[119] Mr. Erdem has a girlfriend. He explained his lack of income and his “bad mood” have negatively affected their relationship and their intimacy.

4. Past-times and Recreational Pursuits Post-Accidents

[120] When asked about current past-times and how he drinks coffee, Mr. Erdem testified:

- Q. Okay. How do you drink coffee these days?
- A. My coffee habit, that's the only one, my happiness. I drink twice or three times a day coffee, afternoon. I drink with my son twice a night, I'm happy. This only one happiness I have, I drink more coffee.
- Q. Okay. How do you – what hand do you use to drink your coffee?
- A. My left hand always. And whatever I carry, whatever, I use always my left hand.

[121] When asked why he has not gone travelling since the Accidents, despite travelling to Europe the summer after his Accidents in 2018, Mr. Erdem testified during direct-examination:

...I don't have enough money, and if I go there, I don't want to suffer again, crippled in the airport, airplane. It's [a] headache. It's not enjoyable any more.

[122] Yet, Mr. Erdem conceded on cross-examination that he was able to travel post- accident without much difficulty. After making this concession, he was shown an Occupational Therapy Re-assessment Report dated January 20, 2020 that was consistent with his revised evidence. This Report stated that Mr. Erdem “reports that he travelled post-MVA without difficulty.”

[123] Mr. Erdem acknowledged that since the Accidents he has not tried camping, fishing or hiking.

5. Housekeeping Currently

[124] Mr. Erdem testified that since the Accidents he has not been able to do the dishes, vacuum, or clean the bathtub at the apartment he shares with his mother. He stated that his mother’s friends assisted her with household chores.

[125] Mr. Erdem acknowledged on cross-examination his mother’s friends would also help with household chores prior to the Accident. He acknowledged that he did not have to cook or do the laundry before or after the Accidents.

[126] In response to a cross-examination question regarding other household chores such as “general tidying up, dusting and those sorts of thing”, Mr. Erdem described his mother as “a very healthy woman” and agreed that “most of the time” she did that sort of housework.

6. Mr. Erdem’s Language Skills

[127] On cross-examination, Mr. Erdem testified about his conversational fluency in five languages: Turkish. Arabic, Farsi, French and English:

- Q. So, in terms of languages you speak Greek, correct?
- A. Correct.

- Q. Turkish?
- A. Right. Correct.
- Q. Arabic?
- A. Yes.
- Q. Farsi?
- A. I understand.
- Q. English?
- A. Yes.
- Q. And then French?
- A. Yes.
- Q. And you're fluent in five of those six languages?
- A. Not -- I'm not influent on five languages. My mother tongue I'm fluent in.
- Q. Which languages are you fluent in?
- A. Turkish.
- Q. That's it?
- A. Only Turkish, yes.
- Q. You told Mr. McNeil on your FCE examination that you were fluent in five languages?
- A. Fluent in daily talk, yeah, like English is not fluent also for me. I can do daily talk. I feel like very confident to talk, but I'm not perfect.
- Q. So your evidence is that you're fluent in conversational language?
- A. Not that fluent. Fluent, yes. I can talk daily talks and little conversation here, there, but not more than that. Buying and selling items, I'm almost perfect. I know the numbers. I know "Good morning. Hi, you want to buy? You want to go? You don't want to buy?" and nothing is fluent for me.

7. Surgical Intervention and Treatment

[128] When asked whether he ever considered having surgery on his right shoulder, Mr. Erdem responded that he had initially decided to proceed with the surgery. However, he later changed his mind.

[129] In 2019, Dr. Erdem's family doctor referred him to a surgeon to assess his right shoulder condition. Dr. McGuffin, the surgeon who examined Mr. Erdem in the summer of 2019, recommended surgery. Mr. Erdem's surgery was in fact booked on September 24, 2019; it was to take place soon after his examination for

discovery. Mr. Erdem explained that after his surgery was scheduled, he did some research on Google, and decided not to proceed with the surgery after all because he felt it was “very risky.” He thought the surgery could make him “crippled”, or that he could be “paralyzed”, or left with “nerve damage”, “numbness forever”, “stiffness forever”, or suffer a stroke.

[130] On cross-examination, Mr. Erdem agreed that both Dr. McGuffin and the anesthetist explained the risks of the shoulder surgery before he initially agreed to proceed with it; he also confirmed Dr. McGuffin had recommended the surgery. The experts who subsequently testified at trial were unanimously of the view that the surgical risks in Mr. Erdem’s case were very low.

[131] On cross-examination, Mr. Erdem agreed that his family doctor referred him to Dr. McGuffin once again in 2020. Mr. Erdem agreed that he saw Dr. McGuffin in March 2021. When it was suggested to Mr. Erdem that Dr. McGuffin had once again recommended surgery in 2021, Mr. Erdem responded that he did not remember that. What Mr. Erdem remembered, however, was that Dr. McGuffin said “it’s your choice.”

[132] Mr. Erdem was examined by Dr. Regan in 2022, who is the orthopaedic surgeon tendered at trial by Mr. Erdem. On cross-examination, Mr. Erdem acknowledged that Dr. Regan advised him that the risks of shoulder surgery were minimal. Mr. Erdem also agreed that Dr. Regan advised him that surgery was most likely needed on his right shoulder.

[133] Mr. Erdem was also examined by Dr. Rickards, the orthopaedic surgeon tendered at trial by the defendants. When Mr. Erdem was asked on cross-examination whether he recalled Dr. Rickards telling him that the surgery he had recommended had an 80% chance of a successful outcome, Mr. Erdem responded he understood Dr. Rickards had recommended surgery and that Dr. Rickards was of the view he would have a successful outcome. He testified, nonetheless, that he had “no intention” of having surgery.

[134] When asked on direct-examination if he thought he could get back to work if he had shoulder surgery, Mr. Erdem responded “I don’t think about it.” This answer was not clearly heard by the Court or counsel (although it was documented in the trial transcript). Accordingly, Mr. Erdem was asked the question again:

Q. Did you think you could get back to your work if you had this surgery?

A. I thought about it.

Q. No, no. Did you think you would physically be able to work as a scaffolder if you had this surgery?

A. Never.

8. Employment Options After the Accidents

[135] When asked in direct-examination whether there is any work that he could do right now, Mr. Erdem responded: “Talking by the telephone sometime.”

[136] When asked whether he tried to do sedentary work after the Accident, Mr. Erdem confirmed he had not.

[137] When asked whether he tried to get a job as a foreman scaffolder after the Accident, Mr. Erdem did not answer the question directly. Rather, he explained that one can not just apply to be a foreman; it was the company’s choice, and employers hired foremen internally.

[138] Mr. Erdem confirmed that the foreman directs the scaffolding work and leaves the building of the scaffolding to the journeyman scaffolders, who also work with apprentices. When it was suggested to him in cross-examination that the foreman does not do physical work, Mr. Erdem disagreed and said that a foreman’s job was physical. For example, in addition to reviewing drawings and deciding where to put the scaffolding, the foreman has to climb the scaffolding and inspect it to ensure the safety of the structure and the workers. Foremen also, stated Mr. Erdem, help the apprentices load scaffolding materials on to the truck, and described foremen as part of the team.

[139] In regard to his evidence that a foreman's work is physical, Mr. Erdem was taken to his evidence at examination for discovery, where he stated that it was not:

- Q. Right. So, as a foreman, you're not involved in the actual constructing of the scaffolding, just when you're a regular journeyman?
- A. True. Show them the job, tell them be safe and keep watching under if they're safe or if something is wrong. I can stop the work or guide them and help them out. Nothing else, no physical work.

[140] Mr. Erdem reiterated that while the foreman does not build the scaffold, he must still be able climb the scaffolding to inspect it and ensure its safety.

[141] Mr. Erdem testified on cross-examination that he has not looked for work or alternate employment since the Accidents. He has not applied anywhere.

[142] Mr. Erdem confirmed on cross-examination that he had not applied for jobs involving phone sales because "I am not fluent in English," adding that "you need skills to speak." Mr. Erdem acknowledged on cross-examination that are many workers in Canada who have difficulty speaking English.

[143] Mr. Erdem also acknowledge that there are "many rental companies" who rent scaffolding components but stated that he would not be able to work in sales:

- Q. You mean in sales you have to be able to lift 50 pounds?
- A. For sales? No, but you have to show the items, walk around and go up and down the shelves. I cannot reach anything, my limitations.
- Q. Have you ever looked into the idea of maybe consulting in scaffolding, not doing the physical work, but being a consultant on projects of the best way to do things?
- A. No. I'm not that capable.

[144] Mr. Erdem added that his constant pain "stops" him from "doing anything."

[145] Mr. Erdem confirmed on cross-examination that he has no restrictions with his left arm. He can drive and talk on the phone, although he has not learned computer skills.

9. Surveillance Video

[146] On cross-examination, Mr. Erdem was shown a surveillance video, taken November 30, 2022, that is inconsistent with his evidence in a number of respects.

[147] Mr. Erdem agreed the video shows him reaching with his right arm over the roof of his car, above shoulder height and wiping snow off the roof of his car with his right arm.

[148] I note that, in the surveillance video, Mr. Erdem does not appear to be having any difficulty wiping the snow of the roof of his car with his right arm. His movements do not appear strained, halting or limited. Mr. Erdem testified it was fresh snow so he “could do that.” Nevertheless, Mr. Erdem closes the car door in the surveillance video with his right hand and arm, with apparent ease. He reaches over the roof of his car again and clears more snow off the roof of his car; he opens the door and reaches further into the top of the middle of the roof of his car, again using his right arm and hand.

[149] At one point in the surveillance video, Mr. Erdem puts on his coat with apparent ease; the movements are fluid, natural and smooth. The ease and fluidity of his movement when putting on his winter coat in the surveillance video are markedly different that the difficulty he exhibited on the witness stand while taking his suit jacket on and off. While on the witness stand, Mr. Erdem’s movement were slow and halting, indicating he was having difficulty taking his suit jacket off and putting it back on.

[150] The surveillance video also showed Mr. Erdem sitting, visiting and drinking coffee at Starbucks over the course of several hours, coming out of the coffee shop on occasion to smoke cigarettes. This video also shows Mr. Erdem carrying coffee with his right hand and using his cellphone with his right arm and hand. He swung his right arm back and forth freely while walking. He carried a pizza box with his right hand and smoked cigarettes using his right arm and hand. Mr. Erdem also reached into his car with his right arm and hand to pick up a flashlight. Mr. Erdem opened other doors with is right arm and hand in the video.

[151] Mr. Sharma is the private investigator who conducted the surveillance and took the videos. He testified that he spent the whole day on November 30, 2022, following Mr. Erdem. Mr. Sharma observed that Mr. Erdem seemed to have no difficulty moving his neck to speak to the person who was sitting at Mr. Erdem's right side at Starbucks. He also observed Mr. Erdem using both his hands and arms when speaking.

[152] Mr. Sharma testified that while he has witnessed some individuals during his past surveillance exhibiting physical limitations in their movements, no limitations in Mr. Erdem's movements were apparent to him while observing him during the course of the day.

[153] The surveillance video suggests that Mr. Erdem was not experiencing any difficulty moving his right shoulder, arm or hand; at least not on the day the video was taken.

10. Mr. Erdem's Earnings After the Accidents

[154] In 2018 Mr. Erdem's T4 earnings were \$8,598. He testified that this was income he earned prior to the February 2018 Accident and represented less than a month work, with overtime. Mr. Erdem confirmed he has not worked or earned income since February 2, 2018.

D. Lay Witnesses

[155] A number of lay witnesses testified on Mr. Erdem's behalf, including former scaffolding co-workers, his children and his wife. I have not summarized all their evidence in these Reasons for Judgment ("Reasons"), but I have reviewed and considered it all. Much of the evidence spoke to the strength of Mr. Erdem's relationship with these witnesses. They were clearly loyal to him and wished to assist him.

1. Mr. Erdem's Co-workers

[156] Mr. Erdem's co-workers testified to the physical nature of scaffolding work, their work schedule on industrial sites, their rate of pay, their overtime work, scaffolders' pensions, and the dangerous elements of scaffolding.

[157] Mr. Rondeau, does not recall Mr. Erdem having any physical limitations when they last worked together. He did not recall when they last worked together.

[158] Mr. Ramadanov lives in Edmonton and is a retired 74-year-old scaffolder and supervisor. As a foreman, he inspected scaffolds and monitored the performance of journeymen scaffolders. He also testified that scaffolding was a very physical job that required lifting and climbing ladders, including lifting heavy materials overhead.

[159] Mr. Ramadanov stated that Mr. Erdem performed well at work and did not have health problems. Mr. Ramadanov last worked with Mr. Erdem from 2005 to 2007.

[160] Mr. Tersigni is a scaffolder. In recent years, he reduced his hours of work, and currently works as a carpenter. He underscored the dangerous nature of scaffolding work, the very physical nature of the job, and the fact that "we work overtime." In Fort McMurray, Mr. Tersigni and Mr. Erdem worked 24 days on, with four days off; they got paid "time and a half" on Fridays and Saturdays and double time on Sundays.

[161] Mr. Tersigni testified that Mr. Erdem was "like a brother to me", describing him as a hard worker and a friendly person. They worked together for ten years and socialized together on their days off.

2. Mr. Erdem's Family

[162] Ms. Camilla Erdem, who I will respectfully refer to as "Camilla" for ease and clarity of reference, is Mr. Erdem's daughter. She is 28 years old and lives with her mother and brother in an apartment in Vancouver. She testified she has a "very close" relationship with her father. Camilla says they usually go to coffee shops or

on walks. She usually and regularly sees her father at her paternal grandmother's apartment, where he lives.

[163] Camilla and her father have travelled to Europe together; their last trip was in 2017. She recalled that they did "a lot of walking on these trips" and recalled her father was very energetic.

[164] Camilla testified that her father is right-handed but now "uses his left hand." She stated that since the Accident, he has a depressed mood, and he also sits when he prays, although he used to kneel before the Accidents.

[165] Camilla testified that her father pays for the mortgage for their apartment and paid for her clothes and a couple of courses "like English". Camilla is not working but "will be looking" into "studying more."

[166] She agreed that she has testified to help her father get the best results possible.

3. Hakim Erdem

[167] Mr. Hakim Erdem, who I will refer to respectfully as "Hakim" for clarity and ease of reference, is the plaintiff's son. He is 26 years old and lives in an apartment with his mother and sister. He described the apartment as a one-bedroom unit with a den.

[168] Hakim is also very close to his father. He described him as an "enthusiastic" man and while he did not see his father very much growing up, he believes his father did the best he could and was a "very good" father. His father taught him that family comes first and he made sure "we had something to eat at home."

[169] Hakim recalled that his father "was always working" when he was growing up and he "didn't really have the time to come visit as much."

[170] Hakim testified he went camping and fishing with his father prior to the Accidents, and also hiked the Squamish Chief. "Once in a while", they would go

fishing. On cross-examination, Hakim clarified he went camping with his father for two or three days, once a year.

[171] Hakim recalled seeing his father soon after the February 2018 Accident, and that his father slept in his bed that night. He testified that his father's face was "very pale like he saw something ... was almost close to a near-death experience I would say".

[172] Hakim testified he also went travelling with his father to Europe, including Germany, France, England and Switzerland. He went to Europe with his father and sister in 2014 and 2017 before the Accidents, and again with only his father in 2018 after the Accidents. His father was not as energetic and could not carry a pack-sack like he did before the Accidents. He recalled he was uncomfortable on the plane during their 2018 trip.

[173] Hakim testified that his father is very dependent on his left hand instead of his right hand, and that he relies on automatic doors and using his left hand to open doors. He added that his father "always depended, you know, on his right [hand] and now he depends on the door to automatically open for him."

[174] Hakim also testified that, since the Accidents, his father's "mental state" has not been "the best", adding that his father feels depressed and that he does his "best ... to cheer him up". Hakim also noticed when he spends the night at his grandmother's, he's noticed he father did not seem to sleep well, and that it was painful for his father to sleep on his right side.

[175] Hakim worked with his father as a scaffolder for a short period of time after his father moved to Vancouver in 2017 and before the Accidents. Hakim admitted on cross-examination that he has stopped working in scaffolding and wants to take prerequisite courses at Douglas College to pursue an education in criminology. Hakim finished his prerequisite courses but had to "take a break from school" to help his parents financially. Since 2021, Hakim has been on title to the condominium he shares with his mother and sister, and he pays the mortgage. Hakim works as a lot attendant at the Audi dealership in downtown Vancouver.

[176] On cross-examination, Hakim agreed he testified to support his father, so his father would have the best results possible from these proceedings.

4. Martha Erdem

[177] As noted earlier in these Reasons, Ms. Martha Erdem, who I will refer to respectfully as “Martha”, is Mr. Erdem’s former spouse. She was born in Mexico, and moved to Canada in 1990. Martha was not sure initially when she and Mr. Erdem separated. She stated at one point that Mr. Erdem still lived with them. On cross-examination, Martha confirmed that the parties separated in 2010. She and Mr. Erdem have remained close friends.

[178] Martha testified that Mr. Erdem “moved very slowly” after the Accidents. Before the Accidents, he would kneel and put his hands on the ground when he prayed, but now he sits when he prays. Martha added that Mr. Erdem is “sad right now” and that he cannot carry things with his right hand.

[179] Martha also agreed that she wanted to testify to help Mr. Erdem so that he could have the best result possible in this lawsuit.

E. Expert Evidence of Plaintiff

1. Dr. Sangha

[180] Dr. Harpreet Sangha was qualified as a physiatrist. He is a specialist in physical medicine and rehabilitation. Addressing shoulder problems represent 40% to 50% of his clinical practice.

[181] Dr. Sangha examined Mr. Erdem on March 28, 2022, and issued an expert report on April 24, 2022. Dr. Sangha begins his report by stating that it is based on the presumed truthfulness of the examinee, and on the accuracy of the documents he was provided. His report expressly provides that if there are distortion or inaccuracies in the examinee’s reporting, his diagnostic impressions and conclusions could be altered. He adds that any further information brought forward at a later date could alter his opinions.

[182] Dr. Sangha was not aware that Mr. Erdem had back pain two times a week prior to the Accidents.

[183] Dr. Sangha's report refers to his understanding, from his interview with Mr. Erdem, that Mr. Erdem suffered a loss of consciousness or at least a memory gap in the February 2018 Accident and that the collision occurred when Mr. Erdem's vehicle was travelling "at approximately 60-80 km/h when his vehicle was struck from behind". As indicated earlier in these Reasons, and having carefully reviewed the evidence, I find that Mr. Erdem was not travelling at a high speed at the time of the February 2018 Accident; rather, I accept Mr. Merrigan's evidence that the traffic flow was "stop and go" and the collision was a slight "bump." This is not to suggest, however, that Mr. Erdem could not have suffered injuries in a low impact collision; I find he was injured, as addressed later in these Reasons.

[184] Dr. Sangha also accepted Mr. Erdem's representation that he struck his right shoulder on the steering wheel in the February 2018 Accident. Dr. Sangha was not aware whether there was any damage to Mr. Erdem's vehicle from the March 2018 Accident.

[185] Dr. Sangha accepted Mr. Erdem's report that the February 2018 Accident was worse than the March 2018 Accident and that there were no new injuries in the second accident, but that the injuries in the February 2018 Accident were aggravated by the March 2018 Accident.

[186] Dr. Sangha noted "on informal observation" that Mr. Erdem had difficulty removing his jacket, sweater and shirt when examined on March 28, 2022, "because of his shoulder." Dr. Sangha reported Mr. Erdem's gait as being "unremarkable with normal cadence and symmetrical stride length and arm swing." Mr. Erdem was able to perform a full squat.

[187] Dr. Sangha noted "right sided trapezius pain at end range" with "discreet trigger points to the right as well as to the right levator scapula" and that Mr. Erdem was "mildly tender at the scalenes and the sternocleidomastoids on the right."

[188] Dr. Sangha observed that “at the shoulder, [Mr. Erdem] held his right arm far lower than the left (much more than would be expected for hand dominance)”. Mr. Erdem was also found to be “exquisitely tender to the right anterior rotator cuff interval structures”. Further, Dr. Sangha noted Mr. Erdem had significantly altered “scapulohumeral rhythm to the right on abduction and only 90 [degrees]”, and Dr. Sangha found that “attempts to bring him beyond this passively were met with significant pain.” Dr. Sangha found that, similarly, Mr. Erdem could only bring his arms into 100% flexion “and the internal rotation of the right shoulder was only to his SI joint.” He also noted, among other observations, pain in the anterior shoulder following a “Speed’s maneuver.”

[189] Mr. Erdem’s lumbar spine and lumbar sacral musculature or structure were normal and without tenderness, with “full functional range in all planes without pain.”

[190] Dr. Sangha did not find any injuries or issues with Mr. Erdem’s left shoulder, nor did he find any issues with his elbows, wrists or hands. He did not find any neurological impairment.

[191] Dr. Sangha found that there were no signs of pain when Mr. Erdem was swinging his arms in the examination room.

[192] Dr. Sangha characterized Mr. Erdem’s “impairment state” as a result of as follows of the Accidents as follows:

- (1) Right shoulder strain resulting in:
 - (a) Rotator cuff impairment;
 - (b) Impingement;
 - (c) Altered scapulohumeral rhythm;
 - (d) Possible Labral tear – query;
- (2) Cervical Strain – resulting in myofascial pain syndrome most predominantly in the right trapezius;
- (3) Lumbosacral strain – resolved;
- (4) Cervicogenic headaches (coming from the neck);
- (5) Disordered sleep; and
- (6) Psychoemotional distress.

[193] Dr. Sangha candidly acknowledged that he is not an expert in psychological diagnoses or treatment. However, he was of the view that the occupational therapy treatment recommended by Mr. McNeil (to be addressed later in these Reasons) was reasonable and medically indicated. Dr. Sangha initially opined that he was skeptical that Mr. Erdem could maintain employment with his current skill set and impairments. On cross-examination he agreed Mr. Erdem could do some types of sedentary work; Mr. Erdem would have to “work around his symptom complex”, which could improve with treatment.

[194] Along the same vein, while Dr. Sangha initially opined that the nature of Mr. Erdem’s injuries and the long-lasting duration of his problems were “negative prognostic indicators” and he did not expect that Mr. Erdem’s condition would substantially improve, Dr. Sangha agreed on cross-examination that Mr. Erdem could have “symptomatic recovery” and that his shoulder function could improve with surgery, which could change his vocational abilities.

[195] Dr. Sangha also agreed in cross-examination that it is not surprising that someone in their 50s would have tendinopathy and he would expect that years of scaffolding could contribute to tendinopathy.

[196] Dr. Sangha agreed that if the Mr. Erdem indicated that his headaches have resolved, his opinion regarding his cervicogenic headaches would change. Mr. Erdem indicated that his headaches from the Accident had resolved.

[197] As regards future treatment, Dr. Sangha opined that he expects Mr. Erdem will have “flare-up of pain and dysfunction depending on the tasks he attempts to perform.” He states that, at such times, “appropriate therapies such as physical therapy, chiropractic, and/or massage would be reasonable to hasten symptom resolution and functional recovery to prevent maladaptive postures and behaviours.”

[198] Dr. Sangha also recommended a home exercise program to strengthen “the deep neck flexors and mid-scapular stabilizers while stretching the upper trapezii and levator scapula.” Further, he recommended that Mr. Erdem continue with

postural techniques and rotator cuff strengthening, along with suprascapular nerve blocks and prescription medications.

[199] Dr. Sangha agreed on cross-examination that Mr. Erdem could do some sedentary jobs.

2. Dr. Regan

[200] Dr. William Regan was called by the plaintiff. He was qualified as an orthopedic surgeon, with a specialty in shoulder surgeries capable of diagnosing and managing the treatment of shoulder injuries. Dr. Regan performed an independent medical assessment of Mr. Erdem on January 24, 2022 and authored his report on January 26, 2022.

[201] He diagnosed Mr. Erdem with:

- (a) myo-fascial, para-cervical muscles;
- (b) scapulo-thoracic/gleno-humeral dyskinesia with SICK scapula syndrome;
- (c) acromioclavicular arthritis and rotator cuff tendinopathy, right shoulder with arthro-fibrosis right shoulder secondary to diagnosis 1,2, and 3.

[202] Dr. Regan assumed that Mr. Erdem “had a direct blow to the front of his right shoulder” when his right shoulder struck the steering wheel in the February 2018 Accident. Dr. Regan found that Mr. Erdem’s right shoulder injury in the March 2018 Accident did not result in any additional injury, but rather aggravated the injury Mr. Erdem sustained in the February 2018 Accident.

[203] Of note, Dr. Regan referenced and relied upon the functional capacity evaluation of Mr. McNeil, which was dated approximately two years before his assessment.

[204] On cross-examination, Dr. Regan confirmed that Mr. Erdem reported to him during his examination on January 24, 2022 that he had lost the ability to raise his right arm at or above shoulder height.

[205] Dr. Regan acknowledged that, in his 2019 examination, Dr. McGuffin found that Mr. Erdem's passive range of motion was near normal, and noted Dr. McGuffin did not note any scapular winging or any pain on palpation of the soft tissues.

[206] Dr. Regan agreed that, as a scaffolder, Mr. Erdem had “a higher than normal chance” of developing shoulder pain even without the Accidents as compared to someone who had a desk job. He agreed that arthritis develops with age, as it is a degenerative disease, and that tendinopathy develops through repetitive actions, such as those of a scaffolder. Dr. Regan agreed that shoulder symptoms could get worse with use and age. As such, Mr. Erdem would have a higher than normal likelihood of developing shoulder pain as compared with someone with a desk job. Dr. Regan added that rotator cuff disease is also a “degenerative state”:

... so that as one ages “the tendons get weaker and weaker and finally tear.” It's a question about whether or not it becomes symptomatic with pain. So, for example, I will often see someone who's had a very small trauma to their shoulder, I don't know, they – they slipped and they grabbed onto a railing coming down the stairs at work and have incredible shoulder pain. Nothing really happened. And you look at their MRI and they've got a complete rotator cuff tear that's retracted, and now they have pain and dysfunction. Well, they had the problem before that, but they were asymptomatic. When you get – when they're older, they're asymptomatic but they have this mild traumatic event, and the theory is that you disrupt all the muscles around the shoulder which results in the ability of the rotator cuff, which is abnormal, to function, and so they develop pain from bursitis, but they had it there before. So there's an example of what – what we're talking about...

[207] When asked about surgical intervention, Dr. Regan testified:

... we operate on people with their current symptoms... we're not conjecturing how they got there; right? You're just trying to help them from a surgical perspective. And so everybody that presents with shoulder pain and has a rotator cuff tear, we of course begin with conservative management, physiotherapy, injection therapy, etc. And if they fail that, then they become a candidate for surgery if they want it. That's the algorithm.

- Q. Are you able to give a percentage of how many of your patients in your practice go on to have surgery?
- A. I'd say probably – approximately 50 percent.

[208] When asked whether he would recommend patients to follow the recommendations of their orthopedic surgeon over a source on Google, Dr. Regan responded:

Yes, but I believe that the patient's questions have to be addressed, and so if there is a question that a patient has, and I don't know where you're going with this, counsel, I would – I usually have to address it myself with them, whether I think it is faulty information or not,

[209] Dr. Regan opined that that conservative care for Mr. Erdem consisting of physiotherapy, and other modalities “is going to be of limited value moving forward.” Dr. Regan stated that “further injection therapy and imaging is indicated.” “CT guided injection” to “confirm what percentage of pain emanates for the scapulo-thoracic articulation” and an “image guided injection under ultra sound guidance” to rule out “long head biceps as a significant pain generator. In this light, Dr. Regan concluded that there is more than a 50% chance that surgical intervention would be required to manage Mr. Erdem’s shoulder, which is consistent with Mr. Erdem’s evidence on what Dr. Regan had advised him.

[210] Dr. Regan opined he would first give Mr. Erdem injections (covered by MSP) first, to help with the diagnosis, “because there's a lot of pathologies that produce anterior shoulder pain”; and, second, because injections include “a steroid which may therapeutically help him as well.”

[211] Dr. Regan opined that if these injections helped Mr. Erdem and he was to regain use of his shoulder, that may be all that is required without the need for surgery. Notably, Mr. Erdem acknowledged he has had injections in the past, but the pain relief did not last.

[212] Dr. Regan testified that if the injections help temporarily and the pain worsens back to pre-injection levels, then surgical intervention would be indicated, “likely in in the form of orthoscopic subacromial decompression and rotator cuff repair,

plus/minus biceps tenodesis right shoulder.” Dr. Regan testified that such a procedure holds about a 5% risk of complications such as shoulder stiffness and continued pain. Dr. Regan characterized the risk of neurologic injury, which Mr. Erdem indicated he was particularly concerned about, as very remote.

[213] Dr. Regan agreed on cross-examination that if the injection to the long head bicep was determined to be a source of the pain, one would do a bicep tenodesis to correct that issue. Dr. Regan also confirmed on cross-examination that the arthroscopic subacromial decompression and rotator cuff repair, plus or minus bicep tenodesis, was the same surgery that Dr. McGuffin recommended to Mr. Erdem in 2019.

[214] Dr. Regan also agreed that in this type of surgery it would be general practice to visualize the other structures of the shoulder to identify potential other issues, including the inspection of the labrum. Dr. Regan opined he would not debride or remove the tear in the labrum but, rather, “leave it alone.”

[215] With regard to recovery time from surgery, Dr. Regan testified:

Well, if that was an isolated problem, right, he didn't have all this periscapular dysfunction and that was -- that's what you're doing, I would say that surgery is accompanied by six weeks of sling and only passive use of the arm, and then about five months of rehabilitation, so total of a little over six months to recover from that...But like everything else in life, it's a bell curve though.

[216] A five-month rehabilitation following surgery would involve physiotherapy, two sessions a week.

[217] Dr. Regan opined that there “may be some positive spill-over effects following shoulder surgery” that would improvement the symptoms in Mr. Erdem’s neck. He also confirmed that other than Mr. Erdem’s right shoulder and neck, he did not find any other areas that were problematic or an issue

[218] Dr. Regan agreed that while full resolution of symptomology is unlikely given the passage of time after the Accidents, it is still possible where there are treatment options that have not yet been accessed.

3. Mr. Russell McNeil

[219] Mr. McNeil was tendered as an expert witness by the plaintiff and was qualified as an occupational therapist capable of vocational assessment, future care evaluation and cost of future care.

[220] By the time of trial, Mr. McNeil's report was rather dated. He assessed Mr. Erdem on January 20, 2020, and prepared his report on April 20, 2020.

[221] Mr. McNeil testified that Mr. Erdem was capable of working in sedentary occupations, but not as a scaffolder. His assessment indicated that he could lift 10 lbs occasionally, and that Mr. Erdem struggled with sitting or prolonged static spinal positions, as well as restricted range of motions relating to both his left and right shoulders. Mr. McNeil opined that Mr. Erdem's sitting tolerance was restricted and he "required accommodations to manage increased pain."

[222] As well, Mr. McNeil opined that Mr. Erdem was:

... severely restricted using his right arm for any static and dynamic horizontal reaching he could manage reaching on a rare basis with accommodations to manage pain.

[223] Mr. McNeil opined that Mr. Erdem had the capacity to manage working but would be "restricted in his capacity to maintain a competitively employable work pace, and the need for accommodation will adversely affect his ability to compete for work in the open market."

[224] Mr. McNeil opined that Mr. Erdem could perform translator or interpreter services on a part-time basis.

[225] Mr. McNeil based his functional capacity assessments on Mr. Erdem's complaints of low back pain, neck pain, left and right shoulder pain and headaches. He did not complete his testing of Mr. Erdem's right arm due to pain reports.

[226] On cross-examination, Mr. McNeil asserted Mr. Erdem would need to be reassessed to determine whether his opinion of functional capacity and cost of future care would change if Mr. Erdem, and no longer experienced low back pain, left

shoulder pain or headaches. Similarly, Mr. McNeil acknowledged a re-assessment of Mr. Erdem's functional capacity would be required following surgical intervention.

F. Expert Evidence of Defendants

1. Dr. Rickards

[227] The defendants called Dr. Rickards, who was qualified as an expert in general orthopedic surgery, with a subspecialty in pain management, who is able to give opinion evidence on the diagnosis and treatment of musculoskeletal injuries. He conducted an independent medical assessment of Mr. Erdem on July 8, 2022, and authored his expert report on July 28, 2022.

[228] Dr. Rickards diagnosed Mr. Erdem with possible cervical facet joint syndrome and probable labral tear of the right shoulder.

[229] Dr. Rickards opined that while the symptoms in Mr. Erdem's neck suggest irritation of the facet joints in the posterior of the cervical spine, he found no evidence to suggest injury to nerve structures, discs, or bony structures in the neck area.

[230] In regard to Mr. Erdem's right shoulder, Dr. Rickards testified that the symptoms and clinical findings suggest an intra-articular (i.e., within the joint) problem. He opined that the clinical findings and the mechanism of injury from the Accidents "are most suggestive of a tear of the labrum of the shoulder."

[231] Dr. Rickards testified that "imaging studies note evidence of wear and tear (tendinopathy) and inflammation (bursitis) but no evidence to suggest an acute injury to the tendons of the shoulder itself."

[232] The prognosis for the probable facet joint syndrome in Dr. Rickards view was that, "with appropriate treatment including a structured exercise regime and addressing the right shoulder difficulties symptoms in the neck will likely resolve with no permanent difficulties."

[233] Dr. Rickard testified that the majority of patients with a facet problem, whether it is in the neck or low back, do improve with non-interventional treatment, including a structured exercise regime to build up muscles and stamina of the neck and shoulder areas, as well as the use of anti-inflammatories on a limited basis, especially when they start to exercise. If symptoms are persistent and disabling, there are injectables around the neck that can be useful.

[234] As regards the diagnosis of a probable labral tear in the right shoulder, Dr. Rickards opined:

Further investigation is indicated. Specifically repeat MRI scan with injection [gadolinium] would be required in order to confirm the presence of a labral tear. If indeed a labral tear was present, surgical correction will usually result in full permanent resolution of the shoulder difficulties.

[235] As regards the issue of causation, Dr. Rickards opined that the relationship in time between the Accidents and the onset of neck and right shoulder symptoms “suggest that these two events are related in a cause-effect relationship.”

[236] In regard to future treatment, Dr. Rickards recommended a structured and well-participated exercise regime focusing on building muscles of the neck and shoulder girdle as the “cornerstones” of treatment. If the MRI scan with gadolinium confirmed a labral tear is present, then an arthroscopic surgical treatment will likely resolve symptoms on a permanent basis.

[237] In regard to the impact of Mr. Erdem’s injuries on his ability to work and his recreational and homemaking capacity, Dr. Rickard’s opined that, “given current right shoulder difficulties, any lifting or forward reaching and especially any overhead reaching activities would be painful, preventing the plaintiff from carrying out these activities.”

[238] Dr. Rickards was asked to address the issue of whether Mr. Erdem had carried out appropriate treatment to date and responded:

It is my understanding that arthroscopic acromioplasty of the right shoulder had been recommended but that the plaintiff to date has delayed this surgical intervention. This procedure would not be unreasonable, provided that the

surgeon would also visualize beneath the rotator cuff itself [labrum], and, under the same anaesthetic address a labral tear, if indeed one were present.

[239] In regard to the possibility of the 2019 surgery with Dr. McGuffin, Dr. Rickards testified that Dr. McGuffin could have visualized the labrum to determine if a tear was present. Dr. Rickards was of the view that, if Mr. Erdem did have a labral tear, it is likely that Mr. Erdem would have fully recovered after the surgery.

[240] It is noteworthy that Dr. Regan and Dr. Rickards disagree on the course of surgical treatment *if* a labral tear were discovered during surgery. Dr. Regan would not debride or remove the labrum, while Dr. Rickards would do so.

[241] Dr. Regan testified, however, that a rotator cuff surgery would be appropriate if other forms of treatment were unsuccessful. In his rebuttal report, Dr. Regan opined that:

one would not fix a labral tear on a gentleman of 56 years but rather perform either biceps tenodesis or tentotomy, and the goal of surgery would be for him [to] live a more normal life for activities of daily living and to have better sleep.

[242] In his rebuttal report, Dr. Regan disagreed with Dr. Rickards' prognosis that a structured exercise program would largely resolve Mr. Erdem's symptoms, and also disagreed that addressing Mr. Erdem's right shoulder pain would also resolve his neck pain, given his long-standing symptoms. However, as noted previously, Dr. Regan acknowledged in his first report that addressing Mr. Erdem's shoulder issues through surgical intervention could have a "positive spill-over effect" in regard to his neck symptoms.

[243] Dr. Rickards noted that Mr. Erdem has already received two shoulder injections and that Mr. Erdem had a period of relief from the injections, which he opined, means one can be "95% sure" the pain is coming from the shoulder joint. He was of the view that orthoscopy was warranted in such circumstances and that surgery would be helpful. While he confirmed that surgery is "always a last resort," he was nevertheless of the view that the risks of surgery in this case were very low and surgery could resolve his shoulder problems permanently.

[244] Dr. Rickards recommended that before proceeding to surgery, Mr. Erdem should follow an “aggressive program to increase range of motion pre-surgery”. Following surgery, Dr. Rickards noted that Mr. Erdem would also require post-surgical physiotherapy and would return to normal shoulder function within four to six months.

III. CREDIBILITY AND RELIABILITY

[245] Having carefully reviewed the evidence as whole, I have significant concerns about the reliability of Mr. Erdem’s testimony as it related to both the scope, severity and duration of his symptoms, as well as his evidence regarding his future work plans. These concerns inform both the quantum of his non-pecuniary damages and the reliability of the expert opinions that relied on Mr. Erdem self-reports: see *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186.

[246] The evidence supports the conclusion that Mr. Erdem suffered injuries to his shoulders, neck and lower back as a result of the Accidents. The evidence also supports the conclusion that Mr. Erdem suffered associated headaches, low moods and anxiety for a time. However, I am unable to conclude that the severity and duration of his injuries were as asserted by Mr. Erdem and his counsel.

[247] There are a significant number of inconsistencies between Mr. Erdem’s evidence at trial and his sworn evidence at his examination for discovery on July 21, 2020, as well as inconsistencies between his evidence and that of other witnesses. These inconsistencies suggest Mr. Erdem had a tendency to confabulate, and that his memory of his symptoms was unreliable at times.

[248] For example, Mr. Erdem testified that he was travelling at 60 or “80 to a hundred” kilometers per hour and “we were driving non-stop” and the traffic was smooth.” Mr. Erdem stated he had to “slam on [his] brakes.” By contrast, Mr. Merrigan, who I found to be a forthright and credible witness, testified it was “stop and go traffic” on the bridge. He testified he was travelling 15-20 kph at the time of the collision, before he applied his brakes. Mr. Merrigan accepted responsibility for the Accident, noting he miscalculated the time and distance he

needed to stop on a rainy day. Again, Mr. Merrigan described the impact with the rear of Mr. Erdem car as a “bump,” which I have accepted.

[249] I have accepted Mr. Merrigan’s recollection of events in its entirety; his evidence need not be repeated here as it has been described earlier in these Reasons. Mr. Merrigan’s testimony reveals other discrepancies between his evidence and that of Mr. Erdem.

[250] Mr. Merrigan’s recollection of events was not shaken on cross-examination, and it was consistent and plausible. By contrast, Mr. Erdem’s versions of his interaction with Mr. Merrigan were different in his direct examination, cross-examination and examination for discovery. Mr. Erdem testified, for example, that Mr. Merrigan did not ask him how he was at the scene of the accident, but Mr. Erdem also testified Mr. Merrigan did ask him if he was alright.

[251] Further examples of inconsistencies in Mr. Erdem’s evidence include the following:

- (1) Mr. Erdem would not agree during his cross-examination that his vehicle was not damaged in the March 2018 Accident. When taken to his examination for discovery transcript, Mr. Erdem agreed he had acknowledged at his discovery that his vehicle was not damaged in that Accident.
- (2) Mr. Erdem testified on direct examination that before the Accidents, he was planning to move to Kitimat for work. This evidence is inconsistent with his evidence at his examination for discovery, where he testified that he planned to stay and work in Vancouver.
- (3) Mr. Erdem testified that his son also planned to work with him in Kitimat. His son testified that after working with his father for a short time in Vancouver in 2017, his plan was to return to school and not pursue scaffolding work at all.
- (4) Mr. Erdem testified during his direct examination that his plans prior to the Accidents were to work 9 to 10 months a year once he turned 55 years of age. At his discovery, Mr. Erdem testified that his plan prior to the Accidents was to work six months of the year. Mr. Erdem then changed his evidence on cross-examination, stating he planned to work 6-9 months a year after he turned 55.
- (5) Mr. Erdem testified that he was to receive overtime pay in the scaffolding job he had in Vancouver just before the Accidents and, if he did not, he would look for other work. This evidence conflicts with his evidence at discovery, when he stated that overtime work was not

- available at this job and that he planned to work at the project until its completion.
- (6) Mr. Erdem testified on direct examination that his right shoulder had not improved since the Accidents. On cross-examination, he agreed that his right shoulder had improved 20% to 30% by March 2021. He also advised Dr. Regan his shoulder had improved 20%.
 - (7) During his direct examination, Mr. Erdem did not mention having pre-existing back pain. During cross-examination he stated he had back pain "once in a blue moon." However, at his examination for discovery, Mr. Erdem stated that he had low back pain "for sure" twice a week prior to the Accidents.
 - (8) Mr. Erdem testified at trial that he still is required to do a lot of lifting and physical work as a foreman scaffolder. At discovery, Mr. Erdem testified that the foreman's position required "no physical work" other than climbing.
 - (9) Mr. Erdem was rather argumentative at times; for example, when questioned about whether one could apply for the position of a foreman scaffolder if not working at the company, he testified that one had to be hired from within the company. When showed a job posting for such a position, he conceded that was possible. He also refused to acknowledge that his memory of his symptoms would have been better at the time of various treatments in earlier years (e.g., 2021 or earlier) as compared to his memory at trial. Mr. Erdem testified he had a "short" memory, but he also testified he had a very good memory.
 - (10) Mr. Erdem evidence at trial regarding his inability to use his right arm, and the manner in which he took off his jacket and put it back on while on the witness stand, was very different than what was apparent in the surveillance video. In the surveillance video, Mr. Erdem easily took off his coat and put it back on; he repeatedly cleared snow of the roof of his car with his right arm and hand; he carried coffee and a pizza box with his right hand; and he opened doors with his right arm and hand. Mr. Erdem said he could not freely swing his right arm, but he did so in the surveillance video; furthermore, Dr. Sangha stated in his report and under cross-examination that Mr. Erdem was able to swinging his arms.
 - (11) Mr. Erdem testified in direct that his neck pain was severe and constant. He agreed on cross-examination that he told Mr. McNeil during his functional capacity evaluation in 2020 that his neck pain "comes and goes" and that he was telling the truth when he said this to Mr. McNeil. Mr. Erdem attempted to explain this inconsistency during his cross-examination, which I found unpersuasive.
 - (12) Mr. Erdem testified his right shoulder pain was constant but then admitted it was intermittent on cross-examination.
 - (13) Mr. Erdem testified on cross-examination that he did not apply for sales jobs after the accident because he "was not fluent in English". He also testified in cross-examination that he did tell Mr. McNeil during his functional capacity evaluation that he was fluent in five

languages including English, and acknowledged that this was the truth. Mr. Erdem added: "Fluent in daily talk, yeah, like English is not fluent also for me. I can do daily talk. I feel like very confident to talk, but I'm not perfect."

- (14) Mr. Erdem testified that he had difficulty travelling after the Accidents because of his injuries. He also testified he did not have difficulty travelling after the Accidents.

[252] These are examples of the evidence that caused the Court considerably difficulty in accepting all of Mr. Erdem's evidence. In reviewing Mr. Erdem's testimony at trial and the excerpts presented from his examination for discovery, I was mindful that English is not Mr. Erdem's first language. Nevertheless, respectfully weighing the evidence through this lens does not resolve the considerable inconsistencies and contradictions in his evidence, particularly when viewing the evidence as a whole. I found his evidence at this examination for discovery generally more consistent with the evidence as a whole.

[253] Mr. Erdem presented as a very able and intelligent man who is aware of the issues at stake. Nevertheless, his evidence presents considerable challenges in proving the nature, scope and duration of his injuries, and the appropriate quantum of damages.

IV. NATURE AND SCOPE OF MR. ERDEM'S INJURIES

[254] In light of the entirety of the evidence before me, including the expert evidence, I find that Mr. Erdem suffered the following injuries as a result of the Accidents: right shoulder injury, left shoulder injury, neck injury, low back injury, and headaches. I also find that Mr. Erdem suffered from some sleep disturbance, anxiety and a depressed mood. However, the evidence does not support the conclusion that Mr. Erdem suffers from clinical or debilitating depression.

[255] I have satisfied that, while the Accidents did not involve a large impact or a serious collision, the evidence of both Dr. Regan and Dr. Rickards support the conclusion that Mr. Erdem had a pre-existing vulnerability in his right shoulder, such that even a relatively minor incident could cause an asymptomatic condition to manifest into a symptomatic injury. I am satisfied that this is what occurred in this

case and that the Accidents exacerbated Mr. Erdem's shoulder condition. This, in my view, is the only rational conclusion in light of the evidence. The Accidents were minor collisions with little impact, but in light of the experts' evidence, Mr. Erdem most likely had a pre-existing right shoulder vulnerability given his line of work, such that even a small impact or "bump" could have made his previously asymptomatic condition painful.

[256] Mr. Erdem acknowledged on cross-examination that his back injury resolved in 2019.

[257] I have considered the evidence in its entirety regarding Mr. Erdem's headaches, including his evidence that his headaches "are better" and his acknowledgement that he also suffered from headaches prior to the Accidents. I am not persuaded on a balance of probabilities that Mr. Erdem currently has headaches beyond his pre-Accident level.

[258] Mr. Erdem acknowledged during his examination for discovery in July 2020 that his left shoulder issues resulting from the Accidents were getting better. Dr. Regan examined Mr. Erdem on January 24, 2022, and reported that his "left shoulder was also irritated" following the Accidents but has "subsequently settled at the present time." Dr. Sangha did not find any issues with Mr. Erdem's left shoulder when he examined him on March 24, 2022.

[259] Based on the evidence as the whole, I find that Mr. Erdem's left shoulder injury has substantially resolved.

[260] Each of the experts diagnosed Mr. Erdem with myofascial neck pain arising from the Accidents. Dr. Regan opined that, "generally speaking, there is a reasonable range of motion of his cervical spine and no neurological sequela right upper extremity." Dr. Rickards found Mr. Erdem suffers from neck pain. Based on the evidence as a whole, I find that Mr. Erdem continues to suffer from neck pain. Mr. Erdem testified his neck is not as painful as his right shoulder.

[261] I accept Dr. Rickards' opinion that the majority of patients with a facet problem (e.g., in the neck) will improve with non-interventional treatment such as a structured exercise regime to build up muscles and stamina of the neck and shoulder areas, as well as the appropriate use of anti-inflammatories, especially when they start to exercise. I also accept his evidence that injections to relieve pain can be useful to relieve pain and improve function. However, I accept the expert evidence of Dr. Regan that suggests Mr. Erdem's neck symptoms are unlikely to resolve completely in the future: see *Dorman v. Silva*, 2021 BCCA 228.

[262] The evidence in its entirety establishes that Mr. Erdem's right shoulder injury was his most significant injury. However, the experts were not in agreement as to the appropriate diagnosis and treatment plan. Both Drs. Regan and Rickards recommended further steps to identify the source of the right shoulder dysfunction. Moreover, both agreed that once further steps were taken to properly diagnose Mr. Erdem's shoulder dysfunction, surgery would likely be required. Both these experts agreed the risks of surgery to Mr. Erdem was very low or remote, and that surgery should improve function and outcome. In short, on the whole, the evidence supports the conclusion that surgical intervention with a positive outcome is a real and substantial possibility in Mr. Erdem's case, should Mr. Erdem be willing to accept the evidence of the experts that the risks of surgery were very low. Notably, Mr. Erdem agreed on cross-examination that he was advised by Dr. Regan that surgery was on his right shoulder was likely needed.

[263] Also of note, both Drs. Regan and Rickards agreed that Mr. Erdem required an exercise regimen to strengthen his right shoulder. Dr. Regan and Dr. Rickards both agreed that Mr. Erdem's condition could improve with treatments that have not yet been accessed.

[264] As regards Mr. Erdem's difficulties with sleep, low mood and anxiety, I find that these, more likely than not, have improved with the improvement of his various symptoms as discussed above. I accept that the "flare-ups" Dr. Sangha identified, coupled with Mr. Erdem's unresolved neck and right shoulder pain, negatively effect his sleep and mood. However, the evidence before me does not establish that these

symptoms are debilitating. Further, I find that Mr. Erdem's driving anxiety has dissipated substantially.

[265] As regards his housekeeping capacity, I am satisfied that his continuing shoulder and neck pain have affected his ability to do some housework. I also accept that these injuries have limited his recreational activities to some degree.

V. DAMAGES

[266] A key principle underpinning the proper assessment of damages is, so far as is possible, to restore a plaintiff to the position he, she, or they would have been in, absent the defendant's negligence. In properly assessing damages, the Court is mindful of considering both the pre-accident and post-accident circumstances of the plaintiff, as articulated in the following, often-cited passage in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 32:

...The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[Emphasis in original]

[267] Accordingly, tortfeasors must take their victims as they find them. However, a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event and in the absence of the defendant's negligence: *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 at para. 78.

[268] Where it is necessary to assess hypothetical or future events, such as how Mr. Erdem's life would have proceeded in the absence of the defendants' negligence, it is well settled that the standard of proof is not a balance of probabilities but, rather, whether there is a real and substantial possibility that an

event would have occurred. Accordingly, a future possibility may be properly taken into consideration by the Court where it “is a real and substantial possibility and not mere speculation”: *Athey* at para. 27. This analysis is to be distinguished from assessing past events, which must be proven on a balance of probabilities. Once proven, such past events are “treated as certainties”: *Athey* at para. 28.

[269] Where it is established that a future or hypothetical event is a real and substantial possibility and not mere speculation, it is to be given weight according to its relative likelihood. In *Athey*, the court provides the following example, at para. 27:

... if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation... *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.)

[270] In *Dornan v. Silva*, Grauer J.A. of our Court of Appeal reasons that once it is established that a contingency or risk is a real and substantial possibility, the trial judge must then assess its relative likelihood. Furthermore, he affirms that the court's assessment of positive or negative contingencies, which are specific to the circumstances of the plaintiff, must be grounded in the evidence before the trial judge. At para. 92, he relies on the following passage in *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.):

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

[emphasis added]

[271] In *Lo v. Vos*, 2021 BCCA 421 at para. 39, the Court of Appeal clearly stated that the onus of establishing a real and substantial possibility is on the party asserting it.

[272] Accordingly, once a court concludes that there is a real and substantial possibility of a future event and it is in the process of assessing its relative likelihood,

a party must be able to point to the evidence before the court which supports the contingency in question. Further, in reaching its conclusion, the court must ground its reasons and conclusion on the contingency's relative likelihood having regard to that evidence. In *Dornan*, Justice Grauer reasons:

[134] There is no doubt that the task of the trial judge in circumstances such as these is not easy. By definition, we are dealing with possibilities, and there is no one right answer. But the law provides one right process, which, of course, must be tethered to the evidence, not to averages and approximations based on imprecise evidence.

[273] The following analysis is informed by these principles.

A. Non-pecuniary Damages

[274] Non-pecuniary damages are intended to compensate plaintiffs for their past and future pain, suffering, disability, and loss of enjoyment of life: *Javorovic v. Booth*, 2021 BCSC 336 at para. 54. In determining non-pecuniary damages, each case must be assessed based on the particular facts before the court: *Trites v. Penner*, 2010 BCSC 882 at paras.188-189. When making that assessment, the following factors delineated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 are key considerations:

[46] The inexhaustive list of common factors cited in *Boyd* 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 arguably are 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 (B.C.C.A.).

[275] Further, as noted by the Court of Appeal in *Moskaleva v. Laurie*, 2009 BCCA 260, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to “make life more endurable” and should be seen as compensating for more than just a plaintiff’s direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

Thus, the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual’s loss is the key and the “need for solace will not necessarily correlate with the seriousness of the injury.” In dealing with an award of this nature it will be impossible to develop a “tariff.” An award will vary in each case “to meet the specific circumstances of the individual case.”

[276] Thus, an appreciation of Mr. Erdem’s particular loss is key. His award has been tailored to meet the specific circumstances of his individual case.

1. Appropriate Quantum of Non-pecuniary Damages

[277] Counsel for Mr. Erdem submits the non-pecuniary or general damages in the amount of \$195,000. Counsel relies on the decisions in the following cases, suggesting a range of approximately \$157,000 to \$215,000.

- (a) *Grant v. Ditmarsia Holdings Ltd.*, 2020 BCSC 1705, involving an award of \$140,000 or \$156,572, accounting for inflation; Mr. Erdem submits he is entitled to more than this;
- (b) *Slater v. Gorden*, 2017 BCSC 2265, involving an award of \$135,000 or \$158,339, accounting for inflation; Mr. Erdem submits he is entitled to more;
- (c) *Hauk v. Shatzko*, 2020 BCSC 344, involving an award of \$150,000 or \$167,750, accounting for inflation;
- (d) *Nottle v. Bartosch*, 2018 BCSC 766, involving an award of \$170,000 or \$196,107, accounting for inflation;

- (e) *Pololos v Cinnamon-Lopez*, 2016 BCSC 81, involving an award of \$180,000 or \$215,000, accounting for inflation.

[278] Counsel for Mr. Erdem submit that his injuries merit the high end of the range presented, underscoring Mr. Erdem's continuing symptoms, as well as their chronicity. They also emphasize the effect of his symptoms on his work as a scaffolder and note the large number of treatments he has taken to date.

[279] Counsel for the defendants submit that the proper range of non-pecuniary damages is between \$80,000 and \$120,000. They argue that \$90,000 adequately compensates Mr. Erdem for his non-pecuniary loss. The defendants rely on the following cases:

- (a) *Mir Tabatabaei v. Kular*, 2015 BCSC 295, involving an award of \$75,000;
- (b) *Furlan v. The Owners, Strata Plan BCS3202*, 2016 BCSC 213, involving an award of \$80,000;
- (c) *Mocharski v. Ngo*, 2016 BCSC 1165, involving an award of \$80,000;
- (d) *Sidhu v. Panasar*, 2021 BCSC 890, involving an award of \$80,000;
- (e) *Fines v. Johnson*, 2020 BCSC 386, involving an award of \$110,000.

[280] I have examined each of the factors in *Stapley* and our Court of Appeal's functional analysis in *Moskaleva* in light of the circumstances before me and considered my findings, including those relating to the nature and scope of Mr. Erdem's injuries and subsequent symptoms, and his degree of improvement and level of recovery as discussed earlier in these Reasons. Furthermore, I have considered the authorities relied upon by both parties, giving due consideration to what guidance they offer and their relative comparability to the facts before me, keeping in mind that the compensation awarded must be fair to both parties. I have considered the symptoms Mr. Erdem has suffered or will likely suffer as a result of these injuries and how they have impaired her physical health, moods, sleep, anxiety, recreational abilities, as well as his general lifestyle including the impact on his capacity to work. I have also provided an allowance for Mr. Erdem's loss of

capacity to perform housekeeping tasks as a result of his injuries: *McKee v. Hicks*, 2023 BCCA 109 at paras. 93-114; *Ker v. Sidhu*, 2023 BCCA 158 at 21-32; *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 101.

[281] As I had discussed earlier in these Reasons, I did not find Mr. Erdem's claim regarding the severity and duration of his symptoms to be entirely reliable or persuasive. Further, I am mindful that his self-reports, in turn, shaped the opinion of the experts to some degree. Nevertheless, the objective evidence of the experts, when coupled with Mr. Erdem's evidence and that of his family, have persuaded me that he sustained injuries in the Accidents, which have impacted his personal, recreational and vocational life.

[282] In this light, considering the entirety of the evidentiary matrix, I conclude that a fair and reasonable assessment of Mr. Erdem's non-pecuniary damages is \$120,000, subject to deductions based both on a failure to mitigate, as well as the presence of a pre-existing vulnerability or tendinopathy in Mr. Erdem's right shoulder.

2. Mitigation

[283] Counsel for the defendants argue that Mr. Erdem failed to mitigate his damages. They rely on the decision in *Naidu v. Mann*, 2007 BCSC 1313; *Chiu (Guardian ad litem of) v. Chiu*, 2002 BCCA 618; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; and *Hauer v. Clendinning*, 2010 BCSC 366. The defendants have the onus to prove that Mr. Erdem could have avoided some of his loss. Our Court of Appeal in *Chiu*, reasoned as follows:

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

[284] The defendants rely on para. 176 of *Naidu v. Mann*, where the Court refers to the reasons of Rowles J.A. in *Graham v. Rodgers*, 2001 BCCA 432, that mitigation limits recovery based on an unreasonable failure of the injured party to take reasonable steps to limit and avoid some part of their loss.

[285] In *Naidu*, the Court also addressed the issue of whether a plaintiff's refusal to undergo surgery to correct injuries could amount to a failure to mitigate. In doing so, it considered the Supreme Court of Canada's decision in *Janiak v. Ippolito*, 1985 CanLII 62 and reasoned:

[179] On the issue of determining whether a plaintiff's refusal to undergo surgery is unreasonable in the face of differing medical opinions, Wilson J., writing for the Court, noted at paras. 27-31 that the plaintiff should be considered to have acted reasonably, provided that he follows any one of several courses of treatment recommended by his medical advisors. Among the factors to be considered in determining reasonableness, a court should consider the degree of risk to the plaintiff of the surgery, the gravity of the consequences of refusing it and the potential benefits to be derived from it. The onus of proving a failure to mitigate is on the defendant. The approach to valuing the consequences of a failure to mitigate (at para. 40):

... is to determine what damages are avoidable by assuming that the plaintiff has agreed to an operation which has not yet been performed... the courts would normally take account of any "substantial possibility" of failure and the amount by which full compensation would be discounted -- in this case 70 per cent -- would represent his avoidable loss.

[180] The plaintiff's damages are, therefore, to be discounted by the amount of the plaintiff's avoidable loss, as assessed by the prospective likelihood that the surgery would be successful in ameliorating his or her injuries.

[286] Having carefully considered the evidentiary matrix, along with the expert evidence, I am satisfied that Mr. Erdem failed to mitigate his damages by not proceeding with surgery in 2019. I agree with counsel for the defendants that a reasonable person would have followed the recommendations of their treating specialist and pursued surgery. I also find there is a real and substantial possibility, and a high likelihood, that right shoulder surgery would have improved Mr. Erdem's right shoulder pain and functioning. The evidence as a whole supports the conclusion that it is most likely that surgery would have yielded a beneficial result for Mr. Erdem and would have improved his pain and right shoulder function. I found Dr. Rickard's evidence persuasive in this regard.

[287] Considering the evidence as a whole, I am satisfied that a contingency deduction of 20% for non-pecuniary damages is fair, reasonable and warranted. I am mindful that in the context of this case, Mr. Erdem's "right to choose" whether to proceed with the surgery must also be considered in light of the relative risks of surgery and his duty to mitigate his damages. The evidence before me is clear that the risks of complications from arthroscopic shoulder surgery are very low. In any event, I have considered the attendant risks as a factor in assessing the appropriate contingency deduction in this regard. Accordingly, Mr. Erdem's non-pecuniary damages will be reduced by 20%, yielding an award of \$96,000 prior to factoring in his pre-existing condition.

3. Pre-existing Condition

[288] It is well established law that a tortfeasor is not required to return a plaintiff to a better position than they would have found themselves if the tort had not occurred in the first instance: *Blackwater* at para. 78. The defendants are not required at law to put Mr. Erdem in a better position than his original one and are not obliged to compensate him for damages he would have suffered in any event: *Athey* at para. 32.

[289] The medical opinion evidence of Dr. Sangha, Dr. Regan, and Dr. Rickards regarding the effect of heavy lifting, coupled with that of Mr. Erdem that he regularly lifted heavy materials, establishes a real and substantial possibility and a high likelihood that Mr. Erdem had a pre-existing right shoulder condition, unrelated to the Accidents.

[290] Dr. Sangha, Dr. Regan, and Dr. Rickards, each agreed that Mr. Erdem had a pre-existing tendinopathy or vulnerability in his right shoulder. The evidence is summarized earlier in these Reasons. For present purposes, as Dr. Regan expressly opined, Mr. Erdem's years of work as a scaffolder created "a higher than normal chance" of developing shoulder pain even without the Accidents as compared to someone who worked a desk job. Furthermore, Dr. Regan opined that tendinopathy of the shoulder develops through repetitive actions, such as those of a

scaffolder. In a similar vein, Mr. Erdem underscored the physically demanding nature of his work and the heavy lifting involved.

[291] Furthermore, Dr. Regan also testified that the arthritis in Mr. Erdem's shoulder develops with age, as it is a degenerative disease, and that shoulder symptoms could get worse with use and age. Dr. Regan added that Mr. Erdem's diagnosed rotator cuff disease is also a degenerative state.

[292] In addition, Dr. Regan testified that he will "often see someone who's had a very small trauma to their shoulder", such as simply slipping and grabbing on to a railing while coming down stairs, "have incredible shoulder pain... they had the problem before that, but they were asymptomatic."

[293] This evidence not only supports the conclusion that there of a real and substantial possibility that Mr. Erdem would have developed a painful left shoulder condition even without the Accidents, but also indicates that it is highly likely this would be the case: see *Dornan v. Silva* at paras. 93-95. This finding is supported by Dr. Regan's evidence that a minor incident "often" triggers a very painful condition in the case of pre-existing conditions, as well as Mr. Erdem's evidence regarding the dangerous nature of a scaffolder's work. As such, I am of the view that an additional 20% contingency deduction of \$24,000 is warranted in regard to Mr. Erdem's non-pecuniary damages, yielding a final award of \$72,000 (that is, \$120,000 - \$24,000 - \$24,000).

[294] I have considered whether a further contingency deduction should be applied regarding Mr. Erdem's regular back aches, prior to the Accidents. The evidence before me is insufficient to warrant a further contingency deduction. I note, in any event, that Mr. Erdem's back pain has substantially resolved.

B. Past Loss of Earning Capacity

[295] It is axiomatic that compensation for past loss of earning capacity is based on the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[296] As discussed previously, a plaintiff is not required to prove hypothetical losses of past earning capacity on a balance of probabilities. The question is whether there is a real and substantial possibility of the loss. A future or hypothetical possibility may be considered if it is a real and substantial possibility, and not mere speculation: *Athey*, at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[297] The assessment of loss follows the same three-step analysis, whether the issue is past loss or “pre-trial” loss of earning capacity, or future loss of earning capacity. In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the Court described the steps in this analysis as follows:

[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*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dorman* at paras. 93–95.

[298] Further, compensation for past loss of earnings is based on the plaintiff’s past net income loss: *Hudniuk v. Warkentin*, 2003 BCSC 62 at para. 40; *Shogi v. Lin*, 2019 BCSC 1818 at para. 303; s. 98 of *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[299] I have considered the lay and expert evidence, including that of Mr. Erdem, in relation to the loss of his past income earning capacity. First, the nature and scope of his injuries, including their persistent nature, have led me to conclude that Mr. Erdem has suffered a loss of capacity. The expert evidence substantiates this conclusion.

[300] Second, the evidence supports there is a real and substantial possibility that, from the time of the Accidents until the time of trial, the Accidents interfered with and compromised Mr. Erdem’s capacity to work in his chosen field, as a scaffolder, causing a pecuniary loss.

[301] Third, I am satisfied that Mr. Erdem suffered a loss of income as a result of the Accidents.

[302] Accordingly, Mr. Erdem is entitled to be compensated for this past loss of income earning capacity. The challenging aspect of this assessment is, of course, discerning the proper quantum of damages.

1. Submissions of the Parties on Past Loss of Earning Capacity

[303] Mr. Erdem simply submits that since he has lost his career as a scaffolder and he has not earned any income since the Accidents, his damages for loss of past earning capacity should be the net income he would have earned as a scaffolder from the time of the Accidents to the time of trial.

[304] Mr. Erdem notes that his average income over the eight years prior to the Accidents was \$144,516. His counsel asserts Mr. Erdem was not satisfied with annual earnings of \$128,000, and, prior to the Accidents, he had just received a job that paid him a comparable hourly wage to what he earned in Alberta.

[305] Noting that he has been off work for five years prior to trial, Mr. Erdem asserts that he has lost \$722,580. Accounting for his average tax rate of 28%, his net past income would be \$520,000 (rounded down). Counsel for Mr. Erdem adds:

To account for any risks, as slim as they may be, we have excluded the \$6.78 union contribution during this period mentioned by Mr. Rondeau and Mr. Tersigni.

[306] Accordingly, Mr. Erdem claims the amount of \$520,000 for past loss of earning capacity.

[307] The defendants submit the common method of assessment is to project the income Mr. Erdem would have earned up to the date of trial if the Accidents had not occurred, taking into account all real and substantial contingencies. They submit the appropriate award is the difference between the projected income and the actual income the plaintiff did earn or was capable of earning: *Sidhu v. Panasar*, 2021 BCSC 890 at para. 66. While the defendants admit that the injuries caused by the

Accidents have resulted in Mr. Erdem being unable to continue working as a scaffolder to the time of trial, there are significant contingency deductions that must be assessed and applied to Mr. Erdem's net income during this period. Having reviewed the evidence and submission of the parties, I agree with this submission.

[308] The defendants assert that the following propositions inform the quantum of damage for loss of past earning capacity:

- (1) *Mr. Erdem would have continued to work as a journeyman scaffolder for Safway Services Canada Inc. until the Cargill Terminal Project was complete. He earned \$41.80/hr in this position. He gave evidence that this project was meant to continue for at least two years. Upon a review of the facts, including Mr. Erdem's own evidence, I agree this is a real and substantial possibility and that the likelihood of him doing so is relatively high.*
- (2) *Following completion of the Cargill Terminal Project, Mr. Erdem would have obtained work in the Vancouver area on commercial projects, earning between \$35 and \$40 per hour, and would have worked a standard 40-hour work week. I agree. This is a real and substantial possibility and that the likelihood of Mr. Erdem doing so is relatively high. Again, this is supported by Mr. Erdem's testimony at his examination for discovery, which I find to be more persuasive in light of his evidence as a whole.*
- (3) *Mr. Erdem would have continued working at commercial projects in the Vancouver area until his fifty-fifth birthday, at which time he would have partially retired. I agree this is a real and substantial possibility and that the likelihood of this possibility is substantial and high.*
- (4) *As regards the number of months per year that Mr. Erdem would work once he reached the age of 55, the defendants submit he would work six months of the year. The evidence indicates this is a real and substantial possibility but, as I discuss later in these Reasons, I am of the view that it is most likely that he would have worked more than 6 months a year from the age of 55 to 65.*
- (5) *Mr. Erdem has the capacity currently to earn a living in a sedentary job. The evidence clearly supports this conclusion.*

[309] Counsel submit that each of the above scenarios are the most likely. I agree, with the exception that I do not agree it is most likely that Mr. Erdem would have only worked 6 months a year from ages 55-65.

[310] The defendants assert that the most likely scenario, had the Accidents not occurred, would be as follows:

(1)	Cargill Terminal Project (employed by Safway Canada Inc)– \$41.80/hr (Ex.5, p.2) x 40 hrs/wk x 52 wks/yr = \$86,944 x 2 years	\$173,888
(2)	Commercial projects until 55 - \$37.50/hr x 40 hrs/wk x 26 weeks (6-months of 12)	\$39,000
(3)	Commercial projects from 55 until trial - \$37.50/hr x 40 hrs/wk x 26 wks/yr x 2.5 years	\$97,500
	LOSS:	\$310,388

[311] I accept the defendants' submissions that a fair and reasonable assessment of Mr. Erdem's earning capacity, if the Accidents had not occurred, should be based, initially, on Mr. Erdem working at the Cargill Terminal Project for a period of two years (after the Accidents), at a salary of \$41.80 per hour, 40 hours a week.

[312] I also accept that after this two-year period, Mr. Erdem would most likely have worked at commercial projects in the Vancouver area. Using the midpoint hourly wage of what Mr. Erdem would have earned at a commercial project in Vancouver (that is, \$37.50 per hour) is reasonable in light of Mr. Erdem's own testimony at his examination for discovery that commercial projects paid between \$35-\$40 per hour. I find Mr. Erdem's evidence at his examination for discovery credible and more persuasive than his evidence during his direct examination, particularly in light of the evidence as a whole. However, as I discuss below, I am of the view that some additions and deductions are necessary to properly complete the assessment of Mr. Erdem' past earning capacity loss.

[313] Counsel for the defendants also submit that the Court must consider, but not necessarily accept, various possibilities. These include:

- (i) whether Mr. Erdem would have worked in Kitimat on the LNG Project as a scaffolder;

- (ii) whether he would have sought out employment in Vancouver where overtime was available; and
- (iii) whether would have worked more than six months per year after age 55.

[314] The defendants argue that the prospect of Mr. Erdem working at the Kitimat project does not constitute a real and substantial possibility. They note that he had just started working in Vancouver to be close to his family, had committed to a two-year term of employment at that Cargill Terminal Project, planned for and had started to spend more time with his children, and was settling into and enjoying his new life in Vancouver. The defendants add that Mr. Erdem's son, Hakim, testified he had quit scaffolding to return to post-secondary school, indicating that he was not going to Kitimat with his father, as Mr. Erdem had suggested in his direct testimony.

[315] I find that Mr. Erdem's evidence at trial on the question of whether he would move to Kitimat is inconsistent with his own evidence at discovery, contradicted that of his son, and was rather vague. The evidence in its totality does not support the conclusion that the possibility of Mr. Erdem moving to Kitimat is a real and substantial one, or a likely one. Mr. Erdem's evidence is unpersuasive in this regard.

[316] The defendants concede there is a real and substantial possibility that Mr. Erdem would work and earn some overtime pay as a scaffolder at some point in the future at commercial projects, although not at the Cargill Terminal Project.

[317] I found Mr. Erdem's evidence inconsistent, confusing and, at best, unpersuasive on the question of whether he would earn overtime working at the Cargill Terminal Project. He testified at discovery, for example, that he was not going to earn overtime on the Cargill Terminal Project and, further, that he planned to complete that two-year project. He contradicted this evidence at trial. The lack of clarity and cohesiveness in Mr. Erdem's testimony in this regard, stemming from its contradictory nature, falls short of establishing a real and substantial possibility that he would earn overtime at the Cargill Terminal job or, for that matter, that there was

a real and substantial possibility that he would quit that job in order to seek another position that paid overtime.

[318] The defendants concede that beyond the two-year time duration of the Cargill Terminal Project (where he was working when the Accidents occurred), there is a substantial possibility that Mr. Erdem would choose to work overtime. I am mindful that in the past, Mr. Erdem did pursue opportunities to work overtime. However, the evidence supports the conclusion, and I so find, that when he moved back to Vancouver in 2017, he made a lifestyle choice to settle near his family and work in the Vancouver area, rather than working in camps (where he regularly worked overtime). Mr. Erdem affirmed at his examination for discovery (replicated earlier in these Reasons) that when he moved to Vancouver he preferred to work a 40-hour week and to stay in Vancouver, noting he was “so happy” to be in Vancouver and not go to camps “here and there”. He appreciated the opportunity of living in the same city as his family, and to spend more time with his children.

[319] Mindful of the guidance in *Athey*, at para. 27, that damages may be increased by a percentage amount based on the likelihood of a future event, I am of the view that the relative likelihood of Mr. Erdem working overtime and receiving overtime pay is very low considering the factual matrix before me. As such, the adjustment to account for possible future overtime work should be assessed at 5%.

[320] In their calculations, the defendants do not take issue with Mr. Erdem working the entire two-year period without extended holidays and calculate their loss submissions on that basis. They submit, however, that Mr. Erdem would continue working ten months a year from the date of the accident to his 55th birthday, noting he worked less than ten months in 2017 and had already planned a two-month trip to Europe for 2018. Nevertheless, the defendants concede that there is a real and substantial possibility that Mr. Erdem would work up to nine months per annum after the age of 55. However, they argue the likelihood is low and the adjustment in his damages would be nominal.

[321] Mr. Erdem’s evidence could have been clearer in regard to how many months he would work annually, after the age of 55. He testified that after the age of 55 he

would work six months, but he also testified he would work up to nine months a year. Nevertheless, the possibility of Mr. Erdem working more than six months a year, had the Accidents not occurred, amounts to a real and substantial one on the evidence before me, when the evidence is considered in its entirety. However, I agree with the defendants that the likelihood of Mr. Erdem working nine months a year is low, given Mr. Erdem's variable and unclear evidence on this topic, as well as his lifestyle choice to work less after 55, and his desire to travel (had he had not been injured) and to be around his family to a greater degree in the future.

[322] I am of the view that Mr. Erdem's past earning capacity, after he turned 55 years of age, ought to be based on the midpoint between 26 weeks (i.e. six months) and 39 weeks (i.e., nine months) of work, which is 7.5 months or 32.5 weeks (i.e. 365.24 days in a year divided by 7.5 = 32.5 weeks). I am of the view that this approach would be the fairest and most reasonable assessment of loss after Mr. Erdem turned 55 years of age until the date of trial.

[323] Further, I am of the view that, for the one-year period after the two-year term at the Cargill Terminal Project would have completed, but before Mr. Erdem turned 55 years of age, he would have work *more* than 32.5 weeks. That is, I find that Mr. Erdem would most likely have worked ten months a year (or 43.33 weeks) for that one-year period.

[324] Therefore, I find that in the absence of the Accidents, Mr. Erdem would have earned \$360,758. This assessment uses the same calculations of \$44.80 per hour and a 40-hour week for the two years Mr. Erdem would have worked at the Cargill Terminal Projects. I have given Mr. Erdem the benefit of the doubt on the number of months he would have worked during this two-year contractual period, by assuming he would have worked the entire period given his contractual commitment. I have then added to that figure, the modified numbers of weeks Mr. Erdem would most likely have worked per year at a commercial project both before and after he turned 55, and also added the income he would most likely have earned after the age of 55 to the date of trial (before accounting for overtime pay).

[325] Accordingly, the figure of \$360,758 comprises the period from the dates of the February 2018 Accident to the date of trial, as follows: (1) the two-year income of \$173,888 at the Cargill Terminal (Safway) Project (i.e., \$41.80/hr x 40 hrs/wk x 52 x 2 yrs= \$173,888; (2) \$64,995 at a commercial project until the age of 55 (i.e., \$37.50/hr x 40 hrs/wk x 43.33 weeks (ten months) = \$64,995); and (3) an additional \$121,875 (i.e., \$37.50/hr x 40 hrs/wk x 32.5 (7.5 months) x 2.5yrs).

[326] The sum of \$360,758 must also be modified to account for my finding that Mr. Erdem's loss must be increased by 5% to account for the real and substantial possibility, although low likelihood, that he would work overtime while working at commercial projects in Vancouver, prior to trial. The 5% contingency for overtime applies- to the amount projected to be earned at commercial projects (but not at the Cargill Project) before and after 55 years of age to the date of trial, which is \$186,870 (i.e., \$64,995 plus \$121,875), and increases Mr. Erdem's past earning capacity loss assessment by \$9,343.50 to \$370,101.50.

2. Residual Earning Capacity

[327] The defendants submit Mr. Erdem has a residual capacity to earn income and that he would have been able to earn at least a minimum wage doing sedentary work, by at least the time of his 55th birthday on August 15, 2020, which was well over two years after the Accidents. They submit that Mr. Erdem failed to mitigate his loss by not working according to his residual earning capacity.

[328] The defendants submit that before his 55th birthday, Mr. Erdem had decided that he would not be proceeding with surgery on his right shoulder. The defendants also underscore that Mr. McNeil's opined that Mr. Erdem had capacity to work in sedentary positions; they emphasize his report is dated April 10, 2020, and that his vocational assessment occurred on January 30, 2020. The defendants submit that the August 15, 2020 date, as the commencement of the time to work in order to mitigate his loss, would allow Mr. Erdem a four-month period to find alternate employment after Mr. McNeil's report was released. Yet, the evidence establishes that Mr. Erdem made no attempts to find alternate employment whatsoever.

[329] The defendants also submit that Mr. Erdem would have been able to work in more than sedentary level positions by the time his left shoulder and low back injuries resolved prior to trial, and he would therefore be able to earn more income. They point to Mr. McNeil's evidence on the definition of light and medium capacity work and also to the evidence that Mr. Erdem no longer has any restriction in his low back or left shoulder. Light work requires lifting of 20 lbs occasionally, 10 lbs frequently, and negligible weight constantly. The defendants submit that Mr. Erdem could certainly satisfy those requirements with his unrestricted left arm.

[330] For purposes of assessing Mr. Erdem's loss, including his earning capacity, the defendants rely on the minimum wage rate in British Columbia as follows:

- (a) June 1, 2019 – May 30, 2020 - \$13.85
- (b) June 1, 2020 – May 30, 2021 - \$14.60
- (c) June 1, 2021 – May 30, 2022 - \$15.20
- (d) June 1, 2022 – to date of trial - \$15.65

[331] The defendants assert that it would be reasonable to deduct at least \$78,000 for Mr. Erdem's residual earning capacity to account for the period from August 15, 2020 to present for his failure to mitigate his damages by not pursuing alternate employment (i.e., sedentary minimum wage job at \$15/hr x 40 hrs/wk x 52 wks/yr x 2.5 yrs = \$78,000). Counsel note that the Court in *Sidhu* took a similar approach at para. 81.

[332] The evidence as a whole establishes that Mr. Erdem was capable, at least by his 55 birthday, to work at least in a sedentary job. Calculating Mr. Erdem's residual earning capacity at the minimum wage level likely underestimates his true residual income earning capacity. However, I am prepared to accept an assessment based minimum wage, as suggested by the defendants.

[333] The defendants do not advance an assessment of residual earning capacity that accounts for any reduction in Mr. Erdem's residual income level, even though he testified he would work fewer months of the year between 55 and 65 years of age. As I have found earlier in these Reasons, this is the most likely outcome.

Accordingly, I am of the view that his residual income earning capacity should be assessed on the basis that Mr. Erdem would have worked 32.5 weeks a year, rather than 52 weeks a year. This assessment is, in my view, the most likely scenario and the fairest assessment, yielding an income of \$48,750 [that is, \$15/hr x 40 hrs/wk x 32.5 wks/yr x 2.5 yrs (55 years of age to the date of trial is about 2.5 years) = \$48,750)]. This residual income would reduce Mr. Erdem's loss of past earning capacity from to \$370,101.50 to \$321,351.50 (i.e., \$370,101.50 – \$48,750).

[334] I have already found earlier in these Reasons there is a substantial possibility Mr. Erdem would work overtime in Vancouver but for the Accidents, although the likelihood was very low at 5%. However, I do not think there is a really and substantial possibility that Mr. Erdem would work overtime after he sustained his injuries, while working at a sedentary job. The likelihood would be so low as to be insubstantial and speculative, as it relates to past income loss.

[335] The defendants correctly point out that, pursuant to s. 98 of the *Insurance Motor Vehicle Act*, R.S.B.C. 1996, c. 231, Mr. Erdem is only entitled to net past income loss. They submit that the net income assessment should be reduced by 25% to account for this deduction. I agree; 25% of \$321,351.50 is \$80,337.88, reducing the damages assessment to \$241,013.62.

[336] Further, I must also account for the necessary contingency deduction for Mr. Erdem's pre-existing right shoulder condition. I am of the view that the factual matrix before me supports a 15% reduction for this pre-existing injury as it relates specifically to past income loss. While there is a high likelihood that Mr. Erdem would have experienced his right shoulder symptoms due to his pre-existing right shoulder condition, as articulated earlier in these Reasons, the 15% assessment (rather than a 20% contingency, for example) also reflects the uncertainty regarding the timing of such an eventuality. As such, Mr. Erdem's past earning capacity loss will be reduced by a 15% contingency of \$241,013.62, or \$36,152.04, reducing his award to \$204,861.58.

[337] I have considered the defendant's argument that I should also reduce this award further in light of Mr. Erdem's failure to mitigate his loss by following his

specialist's recommendation that he have surgery on his right shoulder. This is a difficult assessment. The recommendation for surgery was being considered in 2019 and 2020, yet the expert evidence establishes that before such surgery was to take place, Mr. Erdem would need to engage in an exercise program and physiotherapy to strengthen and condition his right shoulder, followed by a period of convalescence after the surgery, and a further period of physiotherapy and physical conditioning. This treatment plan and surgery (as envisioned by Dr. Rickards, for example) would take time and would impact Mr. Erdem's ability to work and his income level. I am of the view that, when considering the preparatory physical conditioning prior to the surgery, as well as Mr. Erdem's period of convalescence and time off work after surgery, the deduction for failure to mitigate in the context of past income loss would be offset to some extent by time missed from his work and wage loss as a result of the surgery. This would, in the final analysis, lead to a lower contingency deduction. I am of the view that a 10% contingency deduction failure to mitigate by unreasonable declining a beneficially surgery is fair and reasonable, resulting in a total loss of \$180,760.22 (i.e., \$241,013.62 - \$36,152.04 [15%] - \$24,101.36 [10%]).

[338] In summary, considering the evidence as a whole including the real and substantial possibilities discussed in these Reasons, and after weighing the negative and positive contingencies, I find that the sum of \$180,760.22 is the most reasonable and fair assessment of Mr. Erdem's past loss of earning capacity.

C. Future Loss of Earning Capacity

[339] In assessing Mr. Erdem's loss of future earning capacity, I must consider whether there is a substantial possibility that his earning capacity will be impaired by the injuries arising from the Accidents. If so, I must assess the quantum of compensation that should be awarded for the resulting financial harm that will accrue over time: *Rab v. Prescott* at para. 47; *Simmavong v. Haddock*, 2012 BCSC 473 at para. 95.

[340] In *Pololos v. Cinnamon-Lopez*, Justice Voith, as he then was, conveniently summarizes the applicable first principles relating to future loss of earning capacity as follows:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37;
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[341] The approach in *Brown v. Golaiy*, (1985), 26 B.C.L.R. (3d) 353 will be more useful when the loss is not easily measurable on an earnings approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32; see also *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and *Romanchych v. Vallianatos*, 2010 BCCA 20 at para. 14. I agree with counsel for Mr. Erdem that the earnings

approach is appropriate and preferred in this case. Mr. Erdem worked for years as a scaffolder before the Accident and his income stream, but for the Accidents, is more readily discernable.

[342] The defendants accept that Mr. Erdem has established a future loss of earning capacity. They agree it is unlikely (in the absence of corrective surgery) that Mr. Erdem would be able to work as a journeyman scaffolder given the physical demands of that work and his right shoulder injury.

[343] I agree that the evidence satisfies steps 1 and 2 of the *Rab v. Prescott* analysis. First, the evidence discloses a potential future event that could lead to a loss of capacity (e.g., Mr. Erdem has continuing right shoulder pain). Second, there is a real and substantial possibility that Mr. Erdem's right shoulder injury will cause a future pecuniary loss.

[344] I also agree that this assessment requires a consideration of what is necessary to put Mr. Erdem in his pre-Accidents position. This exercise necessary involves weighing of the relative likelihood of real and substantial possibilities and applicable positive and negative contingencies, as contemplated by the third step in *Rab v. Prescott*.

[345] I should note, given the complexity of this particular case, that while it was not strictly necessary, the opinion of an economist on the loss of future earning capacity would, nevertheless, have been of considerable assistance to the Court, particularly in light of the various specific contingencies that must be addressed in this case.

1. Positions of the Parties on Loss of Future Income Earning Capacity

(a) Mr. Erdem's Submissions and Discussion

[346] Mr. Erdem relies on the higher income earned at a worksite in Kitimat, British Columbia to calculate his future loss, as compared to the income earned as a scaffolder at commercial projects in Vancouver. Counsel for Mr. Erdem point to Mr. Erdem's evidence where he stated that he planned to work in the LNG project in Kitimat. However, Mr. Erdem also testified at discovery, as discussed earlier, that

he did not want to travel to camps “here and there” and wanted to work on commercial projects in the Vancouver area.

[347] Counsel underscore the evidence of Mr. Erdem’s son, Hakim, to the effect that he had planned to work with his father as a scaffolder in Kitimat. I note that Mr. Erdem also responded to the following testimony at is examination for discovery:

Q. So it sounds like your hope would have been long-term to stay in Vancouver and do local work rather than continue the camp jobs?

A. Absolutely, yes.

[348] In cross-examination, Mr. Erdem also testified there was “a lot” of scaffolding work in the Vancouver area and indicated he preferred commercial projects over industrial ones. He was taken to the following questions and answers from his examination for discovery:

Q. So, in the scenario that the accidents didn't happen, if you had your choice of what you'd be doing, your preference would be working commercial projects, Vancouver area, standard 40-hour work week?

A. Yes.

[349] I note that this plan for Mr. Erdem and his son to work in Kitimat together never materialized. Both Hakim and his father testified the project had been delayed. Also, as previously addressed in these Reasons, Hakim testified he did not wish to work as a scaffolder, but instead planned to go back to school instead.

[350] Counsel for Mr. Erdem assert that Hakim’s evidence regarding the plan to work in Kitimat was not challenged on cross-examination and should have been. They specifically note that Hakim was never challenged on the following evidence:

- (1) Hakim discussed moving to Kitimat with his father (counsel asserts that “the hearsay exception of recent fabrication and present intentions apply to that testimony”);
- (2) Hakim knew his potential salary in Kitimat;
- (3) Hakim knew there was overtime available at this project; and
- (4) Hakim planned on moving with his father to Kitimat.

[351] Counsel for Mr. Erdem submit that it was incumbent on the defendants to challenge Hakim's testimony through cross-examination. They assert that Hakim may have had additional corroborating information on his plan and that "this is a precise example of why the rule in *Browne and Dunn* exists."

[352] Counsel for Mr. Erdem rely on the evidence of Mr. Rondeau that the Kitimat project was looking for scaffolders, as well as that of Mr. Tersigni who testified he was of the view that Mr. Erdem could get hired there. Counsel submits that "between Mr. Erdem's evidence, his son's intention, and the evidence from Mr. Rondeau and Mr. Tersigni ... the court should find that the plaintiff [would] follow through with his plan."

[353] Mr. Tersigni's evidence provided, in part, that:

- (1) he has been working the night shift at the LNG plant in Kitimat, 12 hours a day, as what he described as "a scaffold carpenter" for the past eight months;
- (2) he earns \$47.95, plus 12% holiday pay, plus overtime;
- (3) he receives overtime pay "after 10 hours", in the amount of \$90.95 an hour;
- (4) he belongs to Union 1525 in Edmonton, and the Union collects approximately \$6 of his hourly wage as part of his pension which he can collect at 60 or 65 years of age;
- (5) his schedule comprises working 14 days in a row followed by 7 days off ("14-7 Schedule"); and
- (6) he estimates making \$150,000 in 2023.

[354] Notably, Mr. Tersigni is 66 years old and lives in Edmonton. While he has worked as a scaffolder for many years, he is currently working with scaffolders as a carpenter about nine months of the year. He explained that working as a carpenter in this capacity was "easier" than being a scaffolder: he "does not have to climb"

scaffolds or “pull up material” such as planks. That is, he is not a part of the “scaffolders chain” that requires moving heavy materials up the scaffolding.

[355] Regarding counsel for Mr. Erdem’s submissions on *Browne v. Dunn*, I do not take issue with Hakim’s truthfulness. I accept that there were likely discussions between him and his father about working in Kitimat. I also accept that Hakim changed his mind about going to Kitimat to work as a scaffolder, as well as Mr. Erdem’s testimony on discovery that he planned to work locally in Vancouver.

[356] Counsel for Mr. Erdem anticipated the defendants would argue that Mr. Erdem would likely work less, and earn considerably less, than his previous tax returns. They submit this position ignores Mr. Erdem’s own evidence, his earnings history, and the evidence of the lay witnesses that characterized him as a hard worker. They submit that Mr. Erdem “felt that earning \$127,779 in 2017 was inadequate” and that this evidence was not challenged by the defendants. They submit that his evidence supports the conclusion “that he would only work less than 12 months a year if he made \$140,000 or \$150,000 dollars a year.” Counsel for Mr. Erdem underscored that this is both his average income and the amount mentioned by Mr. Tersigni. They add that, practically speaking, the schedule at the LNG project in Kitimat was a significantly reduced workload than the last 12 years of his working career. They also submit that Mr. Erdem typically worked a “24-4” schedule which equates to taking off 52 days a year. The 14-7 Schedule equates, they submit, to about 121 days off a year.

[357] Again, the difficult with this submission, as I have addressed earlier in these Reasons, is that Mr. Erdem testified that he moved to Vancouver with the intention of working locally and not going to remote work camps. Mr. Erdem also took significant amounts of holiday time and was an enthusiastic traveller.

[358] Counsel for Mr. Erdem underscore that Mr. Erdem’s work “had been heavy duty labour” during most of his life. They also rely on the following passage from Mr. McNeil’s report:

The plaintiff did not demonstrate the capacity to perform light work. Further, he is barely able to perform sedentary work and likely not at a competitive level.

[359] While I am mindful of counsel for Mr. Erdem's able submissions on this issue, as I have discussed earlier in these Reasons, I have difficulty with the applicability of Mr. McNeil's report as it relates to the severity of Mr. Erdem's functional disabilities. By the time of trial, Mr. McNeil's report was outdated. Mr. McNeil did not have the benefit of hearing the evidence at trial, including Mr. Erdem's admissions, which informed my findings regarding both the improvements in Mr. Erdem's symptoms following Mr. McNeil's assessment on January 2020, and my concerns about the reliability of Mr. Erdem's evidence regarding the severity of his symptoms.

[360] Counsel for Mr. Erdem underscore Dr. Sangha's opinion that he was "somewhat skeptical as to whether he would be able to return to the workforce given his limitations in function in the context of his presentation and age" and that he did not believe Mr. Erdem would be competitively employable or considered acceptable to a reasonable employer "even if he was offered employment and then attempted to return to work". However, I note that Dr. Sangha agreed on cross-examination that Mr. Erdem could do some sedentary jobs. Dr. Sangha also agreed on cross-examination that Mr. Erdem could have "symptomatic recovery" and that his shoulder function could improve with surgery, which could change his vocational abilities. I would also add that Dr. Sangha did not have the benefit of hearing all the evidence led at trial, as I did.

[361] Counsel for Mr. Erdem assert that he is 57 years old and will turn 65 on August 15, 2030, leaving over 7.5 years of work before his planned retirement age. Referring to s. 56(2)(b) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Law and Equity Regulation*, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, they assert the discount rate used to calculate the present value of future income losses is 1.5%. They also refer to Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2017) (loose-leaf 2019 update) ("CIVJI"). Counsel submit that the multiplier for the period

of seven years at 1.5% is 6.5982 and the multiplier for the period of eight years is 7.4859.

[362] Accordingly, they submit the present value of the wage loss at \$150,000 for seven years under the CIVJI multiplier is \$989,730, and the present value for eight years is \$1,122,885. They assert the midway point is \$1,056,307 and Mr. Erdem seeks \$1,000,000 for loss of future earning capacity.

[363] In the alternative, Mr. Erdem submits that taking three months off a year would yield an income of \$124,000. They note that this amount is less than the \$127,779 Mr. Erdem earned in 2017. Counsel for Mr. Erdem submit that the present value of \$124,000 at seven years is \$818,152, and at eight years the present value is \$928,251. Accordingly, Mr. Erdem submits, in the alternative, an assessment of \$875,000 for loss of future earning capacity.

[364] Counsel for Mr. Erdem argue that the instant case does not support a contingency deduction on the basis of a pre-existing right shoulder vulnerability. They refer to the reasons in *Lo v. Vos* at paras. 71-80, distinguishing cases such as *Zacharias v. Leys*, 2005 BCCA 560, where the plaintiff, who had sustained a knee injury in the accident in question, had a pre-existing history of osteoarthritis in the knee. I address this contingency, later in these Reasons.

[365] Counsel for Mr. Erdem take issue with Mr. Erdem's ability to work as a translator, notwithstanding that he can speak five language on a conversational level. Mr. McNeil opined that Mr. Erdem had physical abilities to perform this work on a part-time basis, with accommodations, "as a reasonable alternative." Counsel for Mr. Erdem assert this assessment of their client's skillset is problematic: they submit Mr. Erdem is not a certified translator and the last time he engaged in language skills was while "haggling over prices" as a salesperson in the 1980s.

[366] Having reviewed the evidence before me, I agree with Mr. Erdem's counsel that Mr. Erdem's level of fluency in various languages is likely not at the skill level required of a translator. Nevertheless, I am also of the view that his ability to converse in several languages is an important skillset, and an asset that will most

likely enhance his employability, should he pursue employment. Again, when assessed as a whole, the evidence does not establish that Mr. Erdem's current symptomology prevents him from working at a full-time sedentary job.

(b) The Defendant's Submission on Loss of Future Earning Capacity and Discussion

[367] The defendants assess Mr. Erdem's loss of future earning capacity at \$100,000, after generally accounting for his residual earning capacity and various positive and negative contingencies.

[368] The defendants further submit, that if the Accidents had not occurred, there is a real and substantial possibility that Mr. Erdem would likely have worked as a journeyman scaffolder on commercial projects in the Vancouver area. He would have worked a standard 40-hour work week, six months per year, until full retirement at age 65.

[369] The defendants argue the evidence supports the conclusion that Mr. Erdem had saved at least \$284,000, between his savings account and RRSPs, by the time of the Accidents. Further, he received nearly \$200,000 from his pension, is entitled to CPP, and has an interest in a condo in downtown Vancouver. They submit his expenses were only \$3,500 a month, despite paying for most of the expenses for his family. Counsel also submits there is no financial opinion in evidence that his retirement plans were unreasonable.

[370] Counsel for the defendants rely on the evidence of Mr. Erdem regarding the earnings of scaffolders on commercial projects in the Vancouver ranging between \$35 to \$40 per hour, and submit the following pre-accident position for Mr. Erdem's future earnings:

$$\begin{aligned} & \$37.50/\text{hr} \times 40 \text{ hrs/wk} \times 26 \text{ wks/yr} = \$39,000 \text{ per year} \times 7.5 \text{ yrs to} \\ & \text{age 65} = \$292,500 \end{aligned}$$

[371] Notably, this calculation is based on a six-month work year.

[372] I have already found earlier in these Reasons that the midpoint between working six to nine months a year is the most likely possibility and the fairest basis for assessment. The 7.5-month (i.e., 32.5 weeks) period is more likely than either the six month or nine month periods argued by the parties. Accordingly, based on the 32.5-week annual work period, I find that Mr. Erdem's pre-accident future earnings annually would be would most likely be \$48,750 (i.e., \$37.50 x 40hrs/wk x 32.5 wks/yr). I must also add a sum for overtime.

[373] The defendants concede there is a real and substantial possibility that Mr. Erdem would earn some overtime in the future, had he not been injured in the Accidents, but argue that this likelihood is so low as to be nominal. They assert my assessment of likelihood should be informed by Mr. Erdem's lifestyle choice to work a 40-hour week, and his desire to "take it easy" after moving to Vancouver.

[374] My earlier analysis regarding the likelihood that Mr. Erdem would work overtime in Vancouver is also applicable in assessing future capacity loss. I am of the view that a modest percentage assessment of 5% should apply to increase Mr. Erdem's projected income had the Accidents not occurred. A 5% increase in Mr. Erdem's projected earnings per annum, or \$2,437.50, yields an annual income of \$51,187.67 working 7.5 months a year. However, I must also consider Mr. Erdem's residual earning capacity, working at a sedentary job.

[375] Counsel for the defendants continue to submit that Mr. Erdem is capable of earning at least minimum wage in a sedentary line of work into the future. As I have discussed earlier in these Reasons, found Mr. Erdem is currently able to work at a sedentary job. I also agree this is the most likely, and a highly likely, possibility into the future.

[376] Specifically, I agree with the defendants assertion that there is a high likelihood that Mr. Erdem is now able to work in at least light work positions given that his low back, left shoulder and headaches have resolved. I also note there has been some improvement in Mr. Erdem's right shoulder condition over time and accept Dr. Rickards' opinion that with further exercise and conditioning, his right shoulder condition would improve.

[377] Counsel for the defendants argue there are a multitude of employment options available for Mr. Erdem in his current state, some of which include, but are not be limited to, the following:

- (i) *Driver* – Mr. Erdem is able to drive. He is able to sit for at least periods of 90 minutes at a time. Although he indicated he has some difficulty shoulder checking, there is no evidence that this aggravates his symptoms or prevents him from driving on a repeated basis. This work could include short distance delivery company driver, taxi driver, or contract work as an Uber driver or in food delivery. Such positions, counsel submit, would give Mr. Erdem freedom to make his own hours and the flexibility to stretch between deliveries/rides.
- (ii) *Tourism Industry* – Mr. Erdem speaks a number of languages and loves travel and exploring. This could take the form of arranging trips and tours for tourists coming to the Vancouver area. Alternatively, it could take the form of a travel agent arranging trips and accommodation for individuals travelling (particularly to Europe). Mr. Erdem has demonstrated the ability to plan and arrange such trips. This would be sedentary work and much of it could be done over the phone.
- (iii) *Construction/Scaffolding sales and rentals* – Mr. Erdem has over 20 years in the construction industry. His knowledge and expertise in these areas would be a very strong asset in this type of position.
- (iv) *Store front sales/store clerk/stock clerk* – Mr. Erdem currently has unrestricted use in his left arm and low back. The condition of his right shoulder is likely to improve with appropriate treatment. There is no evidence that Mr. Erdem cannot work in this capacity now or in the future.

- (v) *Forklift driver* – This requires limited training and Mr. Erdem's experience in construction and safety would be a strong asset in obtaining such a position.

[378] I find counsel for the defendants' submissions in this regard reasonable and compelling in light of the evidence before me.

[379] Counsel for the defendants add that if the plaintiff only has the residual earning capacity to earn minimum wage it would still result in the following future residual earning capacity:

$$\begin{aligned} & \$15.65/\text{hr} \times 40 \text{ hrs/wk} \times 52 \text{ wks/yr} = \$32,552 \times 7.5 \text{ yrs (65 years} \\ & \text{old)} = \$244,140 \end{aligned}$$

[380] Counsel for the defendants acknowledge that Mr. Erdem would have to work the full year to earn the residual future income they advance. They submit that working a shorter yearly work period should not be accounted for under this head of damages, and should instead be properly assessed as part of his "non-pecuniary damage/loss of enjoyment of life."

[381] In the circumstances of this case, I do not agree that the approach of accounting for the likely number of weeks Mr. Erdem would have worked per annum, in relation to his residual earning capacity, should form part *only* of the nonpecuniary award.

(c) Court's Assessment of Loss of Future Earning Capacity Considering Residual Earning Capacity and Other Deductions

[382] The case law addressed earlier in these Reasons is clear: the proper and fair assessment of loss of future earning capacity should consider Mr. Erdem's earning capacity if the Accidents had not occurred compared to his earning capacity after the Accidents. This latter assessment requires that I assess what he would have most likely earned, given his residual earning capacity, if he had properly mitigated his damages.

[383] As discussed earlier in these Reasons, I have found that Mr. Erdem's pre-accidents future earning capacity, with overtime, would most likely yield a projected annual income of \$51,187.67, working 32.5 weeks a year. I have concluded that the 32.5 weeks per year working schedule is the most likely possibility, and both a fair and reasonable assessment in light of the evidence discussed above. Coupled with Mr. Erdem's residual earning capacity, and using a minimum wage approach, Mr. Erdem would earn \$20,345 per year (i.e., 15.65/hr x 40hrs/wk x 32.5 wks).

[384] Given my earlier assessment of Mr. Erdem's pre-accident annual future earnings assessment of \$51,187.67 per year, deducting my assessment of his potential residual earning capacity (at minimum wage) of \$20,345 per year, results in an annual loss of \$30,842.67 before considering other contingencies.

[385] Counsel for Mr. Erdem note that the CIVJI multiplier for the period of seven years, at the 1.5% discount rate, is 6.5982, and the multiplier for the period of eight years is 7.4859. Accordingly, the present value of the wage loss of \$30,845.67 for seven years under the CIVJI multiplier is \$203,506.11, and the present value for eight years of wage loss is \$230,907.60. The midway point is \$217,206.86, which is a reasonable assessment for loss of future earning capacity before considering contingency deductions.

(d) Possible Contingencies

[386] Counsel for the defendant addressed the following "negative contingencies", which they acknowledge could potentially favour an increase in Mr. Erdem's loss of future earning capacity:

- (1) *Whether Mr. Erdem will never be able to return to work of any kind.* The defendants submit this contingency is not a real and substantial possibility. I agree for the reasons I have already articulated. At the time of trial, most of Mr. Erdem's symptoms had either resolved or had improved, such that he was capable of working at a sedentary job.

- (2) *Whether Mr. Erdem's condition will deteriorate.* Having considered the evidence as a whole, I am not able to conclude there is real and substantial possibility that Mr. Erdem's condition will deteriorate, as it relates to the symptoms caused by the Accidents. I find that there is a real and substantial possibility, and a high likelihood, that Mr. Erdem has also not reached maximal recovery and it is likely that he will still gain function and his pain will decrease with proper conditioning. I accept the expert evidence of Dr. Rickards, outlined earlier in these Reasons, that an exercise regime and further appropriate treatment (apart from surgery) would result in Mr. Erdem's current symptoms likely improving.
- (3) *Whether Mr. Erdem will not be able to return to work as a journeyman scaffolder.* Based on the opinion of Dr. Regan, this is a real and substantial possibility. The evidence, taken as a whole, suggests this is a strong possibility. I have assessed Mr. Erdem's future loss accordingly.
- (4) *Whether Mr. Erdem will be unable to work for six months following surgery.* I find this is not a real and substantial possibility as it relates to future wage loss. Mr. Erdem was very clear that he does not intend to have surgery. He considered the recommendation that he have surgery in 2019 and 2020, and in 2023 made it clear once again at trial that he would not have surgery.
- (5) *Whether Mr. Erdem would have worked more than six months per year some years, but for the Accidents.* Counsel for the defendants concede this is a real and substantial possibility and I have taken this contingency into account in my assessment of damages.
- (6) *Whether Mr. Erdem would have worked on the Kitimat project.* I have already found that this is not a real and substantial

possibility on the facts before me. My earlier Reasons address this contingency and need not be repeated here.

[387] The defendants assert that the following potential contingencies, should also be considered, and form the basis for lowering Mr. Erdem's award for future loss of earning capacity:

(1) *Whether Mr. Erdem will be able to return to work as a foreman.*

Counsel for the defendants argue this is a real and substantial possibility. I accept the evidence of the experts that Mr. Erdem is no longer able to work as a scaffolder, particularly given the dangerous nature of the work. While I accept that the evidence also indicates that a foreman scaffolder's job is much less physical than the work of a journeyman scaffolder, it still involves climbing. Although counsel for the defendant has noted that there is no expert opinion evidence before me indicating that Mr. Erdem will be unable to work as a foreman scaffolder, an expert report on this particular question is not necessary in this case. The evidence as a whole simply does not present a real and substantial possibility that Mr. Erdem will be safely able to climb scaffolds and work as a foreman scaffolder.

(2) *Whether Mr. Erdem will be able to work as a carpenter or carpenter's apprentice.* Counsel for the defendants submit that he is able to do so. They note that Mr. Erdem is a level 3 carpenter apprentice and he has also worked in the construction industry since the 1990s. They refer to the evidence of Mr. Tersigni that he switched from scaffolding to carpentry because the latter is a less physical job. They point out that Mr. Tersigni no longer needs to climb scaffolding or carry or pull components up the scaffolding. Counsel adds that there is no expert opinion indicating that Mr. Erdem is unable to work in

carpentry now or in the future. They point out that Mr. Tersigni indicated that he is earning \$47.50 per hour as a carpenter at the LNG Project at Kitimat and he could get Mr. Erdem a job. I have already found that it is not a real and substantial possibility that Mr. Erdem would move to Kitimat to work at the LNG Project there. Further, there is no evidence before me of what a carpenter earns in the Vancouver area and, as such, settling on an hourly rate would be speculative. Further, there is an insufficient evidentiary basis upon which I can find that there is a reasonable possibility that Mr. Erdem has the physical capacity now or in the future to work as a carpenter.

- (3) *Whether Mr. Erdem will recover fully and have no continuing loss following surgery and rehabilitation.* The defendants submit that the opinion of Dr. Rickards supports a real and substantial possibility of a full recovery. Following a careful review of the evidence as a whole, I am of the view that if Mr. Erdem underwent surgery, there is a real and substantial possibility, and a very likely one, that the condition of his right shoulder would improve, with the proper conditioning and physiotherapy before and after surgery. I am unable to conclude, however, that the evidence supports the conclusion that it is highly likely Mr. Erdem's right shoulder would completely recover or be restored to its pre-Accidents condition, and I have considered this factor in assessing nonpecuniary and pecuniary damages. Nevertheless, I am of the view that Mr. Erdem failed to mitigate his damages when it was recommended he have right shoulder surgery in the 2019-2020 period; he refused to do so and, further, has continued to do so.

[388] Earlier in my Reasons, I discussed the jurisprudence and evidence that supported my conclusion that Mr. Erdem failed to mitigate his damages by not following the recommendations of his medical specialist to have corrective surgery

on his right shoulder. I also addressed the necessary consequential contingency deductions. Those Reasons need not be repeated here. Suffice it to say that I am satisfied that Mr. Erdem had ample opportunity to mitigate his future loss of earning capacity through surgery, and that a 15% contingency deduction is warranted, under the circumstances. A 15% deduction of the \$217,206.86 assessment is \$32,581.03.

[389] Finally, I must consider the contingency arising as a result of Mr. Erdem's pre-existing shoulder vulnerability. On the whole of the evidence, I am satisfied that an additional 15% deduction of \$32,581.03 is warranted for this pre-existing condition.

[390] As such Mr. Erdem's award for loss of future earning capacity is assessed at \$152,044.80.

D. Cost of Future Care

[391] The principles and analytic framework that inform the assessment of future cost of care is well-established. In *Pang v. Nowakowski*, 2021 BCCA 478 at para. 56, the Court reasons:

[56] The legal framework relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.

[57] Several additional principles are relevant:

- i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.

- ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
- iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.

[58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

[392] The defendants take issue with regard to the cost of future recommendations in Mr. McNeil's report as follows:

- (i) *Body pillow*. Mr. Erdem has indicated that he has tried one and that he did not receive benefit from it. Mr. McNeil and Dr. Sangha indicated they would not recommend continued use.
- (ii) *TENS machine*. Mr. Erdem has had the opportunity to try one, or purchase one over the past three years since Mr. McNeil's assessment, but has not done so. Moreover, this is a common item used during physiotherapy and Mr. McNeil also recommended physiotherapy and the defendants have agreed to some physiotherapy treatment. Dr. Regan does not recommend continued use of passive modalities. Dr. Sangha only recommends them for flare-ups. Lastly, replacement every five years is speculative and excessive argue the defendants.
- (iii) *Occupational therapy*. Mr. Erdem has already had some occupational therapy sessions from 2019 into 2020 (after

Mr. McNeil's assessment). The defendants believe that a few further sessions would not be unreasonable, but the 24 hours of sessions recommended by Mr. McNeil are unsupported at this point. They submit that four one-hour sessions, at \$112/hr, totalling \$448, would be reasonable.

- (iv) *Ergonomics*. All these items are for a workstation which Mr. Erdem does not have and likely would not use, as he does not have a home computer.
- (v) *Pain management program*. Mr. Erdem has had three years of time, since Mr. McNeil's assessment, to engage in a pain management program, or to put his name on a waitlist for one, but has not attempted to do so. Accordingly, the defendants submit that this indicates he is unlikely to do so in the future. They point out that Dr. Rickards indicated that these pain management programs are covered by MSP; the waitlist is long, but there is also no evidence that Mr. Erdem has taken steps to be put on a waitlist. Such a program, the defendants note, also includes a team of professionals including psychiatrists and psychologists, although Mr. Erdem has indicated that he has no interest in seeing a psychiatrist or psychologist. It also would include occupational therapy sessions similar to the sessions Mr. Erdem has already had, along with the passive modalities which Dr. Regan did not recommend.
- (vi) *Exercise/kinesiology*. The Defendants agree that this is necessary given Dr. Regan and Dr. Rickards' opinion that Mr. Erdem's neck and shoulder girdle need targeted strengthening. Mr. McNeil indicated 24 sessions would cost \$1,872 and the defendants agree to this amount.
- (vii) *Massage therapy and physiotherapy*. The defendants noted that these are passive modalities and are not recommended by Dr. Regan on a continuing basis. The defendants add that

Mr. Erdem agreed, during cross-examination, that he has never attended massage therapy sessions and prefers attending physiotherapy (where he has received massages). The defendants also argue that if the Court finds that Mr. Erdem will get surgery on his shoulder, physiotherapy twice a week for six months is indicated. Mr. Erdem's physiotherapist charges \$81 per session (Agreed Statement of Facts, para. 51). This would result in approximately 48 sessions at \$81, which would total \$3,888.

- (viii) *Psychological counselling.* Mr. Erdem had counselling sessions following Mr. McNeil's assessment, and his symptoms of low mood and anxiety improved as a result. Mr. Erdem has stated that he does not want to see a psychologist in the future.
- (ix) *Vocational rehabilitation.* The defendants dispute that this item is medically necessary. The defendants also assert that Mr. Erdem has demonstrated that he has no intention of looking for alternate employment.
- (x) *Medication and pain-relieving substances.* The defendants concede that the cost of continued medication is supported by the expert evidence, but they assert it may not be the cyclobenzaprine indicated in Mr. McNeil's report. Mr. Erdem has also not reached maximal recovery, making a reduction of medication in the future likely. Annual cost of medication is estimated to be \$240.90 per year (Mr. McNeil's Report, Ex 2, Tab 3A, p.19, para. 101). It provided for a period of ten years; the cost, argues the defendants, would be \$2,409.

[393] Mr. Erdem seeks the following cost of future care, taken from Mr. McNeil's report. Notably, he is not seeking the cost of ergonomic accommodations, vocational counseling, job coaching, and occupational gradual return to work costs (Mr. Erdem claims the latter cost is too remote):

<u>Area</u>	<u>Item</u>	<u>Amount</u>	<u>Frequency</u>
Household chores	Occupational therapy sessions	\$2,688.00	12 Sessions
Rehab/Health	Pain management program	\$10,000.00 to \$15,000.00	Once
	Kinesiologist	\$1,872.00	24 sessions
	Massage therapy	\$1,080.00	12 Sessions/year
	Physiotherapy	\$1,080.00	12 Sessions/year
	Naproxen	189.80	Yearly
	Cyclobenzaprine	\$51.10	Yearly

[394] Mr. Erdem asserts a “one-time award of \$17,500, based on the costs of a private pain clinic, kinesiology sessions, and “occupational therapy to assist with household chores.” In addition, Mr. Erdem seeks an annual award of \$2,400 for massage, physiotherapy and medications.

[395] Counsel for Mr. Erdem note that the cost of future case items “use the 2.0% interest under CIVJI” and the CIVJI multiplier for 20 years is 16.3514. They submit the ongoing care has a value of \$39,243.

[396] Counsel for Mr. Erdem conclude that “the total of the one-time payment” plus the present day value of the annual payments sought equals \$56,743. However, counsel asserts that because this “head of damage should be an assessment rather than math, the plaintiff seeks \$50,000 for future care.”

[397] The following represents a summary of the cost of future care expenses that the defendants say are reasonable in this case:

(1)	Occupational therapy – 4 additional sessions	\$448
(2)	Kinesiologist/active Rehabilitation – 24 sessions	\$1,872
(3)	Physiotherapy (if surgery will be done) – 48 sessions	\$3,888
(4)	Medication and pain relieving substances – 10 years at \$240.90 per year	\$2,409
	TOTAL:	\$8,617

[398] There is merit in the submissions of both parties.

[399] I do not accept Mr. Erdem's argument that a private pain management program is necessary. He had ample time to enroll in a free MSP-funded pain management program over the years and has not done so.

[400] Mr. Erdem has already had some occupational therapy sessions, and I agree with the defendants that four more session at a cost of \$448, is ample to address his doing household chores.

[401] Mr. Erdem seeks 24 kinesiology treatment sessions, at a cost of \$1872, and the defendants agree. I also agree these sessions will assist in strengthening and conditioning his neck and shoulder girdle, as recommended by Dr. Rickards, to improve his neck and shoulder symptoms.

[402] I am of the view that physiotherapy sessions will also be of assistance to Mr. Erdem, even if he does not have surgery (he is adamant he will not), when he experiences flare-ups in his symptoms, as noted by Dr. Sangha. I am not of the view, however, that Mr. Erdem will require the frequency or regular sessions he has requested in light of my previous finding of facts, his level of improvement since the Accidents, and my view that it is likely his symptoms will improve with further physical conditioning. While difficult to assess, 6 rather than 12 sessions per year is more consistent with my findings and the medical evidence, which I have addressed earlier in these reasons. This would amount to an annual cost of \$540.

[403] I am not of the view that massage therapy as a separate and additional yearly cost item, is a reasonable or medically supported future cost. This is a passive modality that Dr. Regan found to be unhelpful. Moreover, Mr. Erdem never actually attended separate massage therapy treatments; rather, he acknowledges he was massaged at his physiotherapy sessions.

[404] I agree with the parties that the cost of medications is a necessary cost of future care and one supported by the evidence. However, I am not persuaded by the cost assessment advanced by Mr. Erdem, primarily because I have not entirely

accepted his evidence on the severity and duration of his symptoms and also because he has made some important concessions in cross-examination in this regard (as I have addressed in detail earlier in these submissions). Nevertheless, I am satisfied that this is a legitimate cost of future care and that an annual cost of \$100 is reasonable.

[405] The one-time cost of the four occupational therapy session at \$448 plus the kinesiology/ active rehabilitation sessions at \$1872 is \$2,320. The additional annual costs of physiotherapy at \$540 and medication at \$100 is \$640. Using the 2.0% discount rate and the CIVJI multiplier for 20 years, as counsel for Mr. Erdem did, yields a present value for annual future care costs of \$10,464.90. Adding the one-time “upfront” cost of \$2,320 and the present value sum of \$10,464.90 yields a cost of future care award of \$12,784.90.

[406] However, I must also account for Mr. Erdem’s pre-existing vulnerability in his right shoulder. I find that a 15% contingency deduction is in order in this regard, with the effect of reducing this award by \$1,917.74 to \$10,867.16.

[407] I must also account for Mr. Erdem’s failure to mitigate. I am of the view that a 15% contingency deduction is also appropriate due Mr. Erdem’s failure to mitigate his loss by not pursuing the recommended surgery, reducing Mr. Erdem’s cost of future care award by an additional \$1,917.74 to \$8,949.42.

E. Special Damages

[408] The parties have agreed to special damages of \$8,294.41 to the date of trial. However, Mr. Erdem claims he also paid \$550 for eight treatments when he travelled to Europe in 2018. The plaintiffs therefore seek \$8,844.41 in special damages. The defendants underscore that Mr. Erdem has failed to prove these additional claimed expenses and no receipts confirming these treatments were ever introduced into evidence. The onus rests with Mr. Erdem to prove this additional loss. He has not done so.

[409] Mr. Erdem is entitled to \$8,294.41 for special expenses. From this amount, a contingency deduction of 15% is warranted in light of the pre-existing vulnerability in

his right shoulder, reducing his damages by \$1,244.16. An additional 15% contingency deduction of \$1,244.16 is necessary, in light of Mr. Erdem's failure to mitigate by not pursuing the recommended surgery. The two contingency deductions together result in a special damages award of \$5,806.09.

VI. DISPOSITION

[410] Mr. Erdem is entitled to the following damage awards, after various contingency additions and deductions, my finding that he has failed to mitigate his damages:

<u>No.</u>	<u>Item</u>	<u>Amount</u>
1.	Non-pecuniary Damages:	\$72,000.00
2.	Loss of Past Earning Capacity:	\$180,760.22
3.	Loss of Future Earning Capacity:	\$152,044.80
4.	Cost of Future Care:	\$8,949.42
5.	Special Damages:	\$5,806.09
	TOTAL:	<u><u>\$419,560.53</u></u>

[411] Subject to any submissions, the parties may wish to make on the question of costs, and absent any circumstances of which I am unaware, Mr. Erdem is entitled to his costs at Scale B.

“MORELLATO J.”