IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cohen v. Torrenueva,*
2024 BCSC 639

Date: 20240419
Docket: M150615
Registry: Vancouver

2024 BCSC 639 (CanLII)

Between:

Mitchell Cohen

Plaintiff

And

Justine Torrenueva and Elmer Torrenueva

Defendants

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:	D.V. Abreu F. Balandari
Counsel for the Defendants:	D. Gorgis I.A. Wiesel
Place and Dates of Trial:	Vancouver, B.C. November 14-17, 20-24, 27-30, December 1, 4-5, 8, 11-12, 15, 2023 January 22-26, February 15-16, 2024
Place and Date of Judgment:	Vancouver, B.C. April 19, 2024

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I. INTRODUCTION

[1] The plaintiff, Mitchell Cohen, was injured in a motor vehicle accident on May 27, 2014. Ten years later, he says he still suffers from a complicated combination of physical and psychological injuries that will leave him permanently disabled. Those conditions include pain in the jaw, neck, shoulder and arm, along with headaches and depression.

[2] The defendants admit liability for the accident, but they say that Mr. Cohen recovered long ago from relatively minor soft tissue injuries and his description of ongoing subjective symptoms is not credible. The defendants suggest he has tried to mislead both the Court and the medical professionals who have treated or examined him. If any of the problems he complains of actually exist, the defendants say they were not caused by the accident.

[3] The plaintiff seeks total damages of almost $3.5 million, including large awards for loss of past and future earning capacity and the cost of future care. The defendants say he is entitled only to less than $100,000 in non-pecuniary damages and nothing for lost income or care.

[4] I find that the evidence supports neither of those extremes, but the task of assessing fair and reasonable damages has been made more difficult by both parties' unwillingness to assist the Court with alternative submissions in case their main position is not accepted. Evidence of ways the plaintiff's present condition may be greatly improved was left incomplete or ignored. In their zeal to advance the positions most favourable to their respective clients, counsel were apparently not prepared to recognize that the Court is capable of considering positions taken in the alternative without interpreting them as concessions.

II. THE PLAINTIFF

[5] Mr. Cohen was 40 years old at the time of the accident and 49 at trial. He was born and raised in Toronto, then spent his early adult years in Florida. He obtained a bachelor of arts degree from the University of South Florida in 2002, then moved to

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BC later that year. During his first few years in BC, he lived what can be described, without any pejorative connotation, as a “ski bum” lifestyle. He lived in Cumberland, then Nelson, then the Whistler area—locations all chosen for their proximity to ski mountains. He worked at various jobs in construction and other fields while skiing or snowboarding as much as possible each winter. He hiked and mountain biked in the summers.

[6] That changed in 2008, when he moved to Vancouver and began training as an electrician. He completed his apprenticeship and received his “red seal” certification as a journeyman electrician in June 2012. He testified that he then began working for electrical contractors, but his goal was to open his own electrical company. He said that, by the time of the accident, he had begun doing some work as an electrical contractor and also did stone and masonry work, in which he had previous experience. But he was still not making enough money, so in January 2014, he accepted a part-time job teaching the electrical trade at Vancouver Career College. He said he was teaching 4 hours a day while working another five or six hours as an electrician.

[7] Mr. Cohen also says he obtained further certification as a master electrician in 2013 or 2014, but the only document in evidence that refers to that qualification is dated July 22, 2019.

III. THE ACCIDENT, INJURIES AND MEDICAL TREATMENT

[8] Mr. Cohen testified that the accident occurred while he was driving west on Canada Way in Burnaby. He said the defendants’ vehicle made a right turn into his lane and hit his minivan on the front passenger side. The damage to Mr. Cohen’s vehicle was sufficient for it to be written off. He gave evidence that upon impact, his right shoulder swung forward and hit his jaw, while his knees hit the dashboard.

[9] Two days after the accident, Mr. Cohen saw his family physician, Dr. Jeffrey Bell, with complaints of tightness and pain in his right shoulder, right side jaw pain, headache, and knee and ankle pain. He said the knee and ankle pain resolved relatively quickly, but the other problems have never gone away.

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[10] He testified that at some point after the accident, he also noticed intermittent numbness and weakness in his right arm and hand, including while using tools at work. He said the arm and hand symptoms appeared to be related to positioning and could be alleviated by changes of position.

[11] Dr. Bell recommended that Mr. Cohen take over-the-counter pain killers and muscle relaxants, including ibuprofen. But in October 2014, Mr. Cohen attended at Burnaby General Hospital with rectal bleeding. This was thought to have been caused by the amount of ibuprofen he was taking. He was advised to discontinue that medication and given a prescription for Percocet, an opioid painkiller.

[12] Meanwhile, Mr. Cohen's dentist referred him to Dr. Joel Epstein for treatment of his jaw pain. Dr. Epstein is a dental surgeon specializing in oral-facial pain and disorders of temporomandibular joint ("TMJ") in the jaw. He began treating Mr. Cohen in July 2014 and still treats him. Dr. Epstein's initial prognosis for Mr. Cohen's recovery was positive. By September 2016, however, Dr. Epstein concluded that Mr. Cohen's jaw pain and tenderness, along with related neck symptoms, had become chronic. MRI examination showed no structural jaw damage, and Dr. Epstein concluded that ongoing pain was muscular.

[13] Mr. Cohen testified that his neck, shoulder and jaw pain has continued, with some fluctuations and temporary responses to treatment, throughout the years since the accident. The same applies to headaches and arm numbness. He said he still needs medication, including opioids, for pain and sleep and that he requires weekly massages.

[14] At the time of the accident, Mr. Cohen said he was engaged to be married and was living with his fiancé. He said every aspect of the relationship was adversely affected by his condition following the accident, and the relationship ultimately ended.

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[15] In 2015, after the relationship ended, Mr. Cohen moved to Courtenay, BC. He began an electrical business there, but says he found himself unable to do some of the work and had to hire other electricians to assist him.

[16] Neil Bjorndahl is a former electrician who says he met Mr. Cohen in 2016 or 2017 and was subcontracted to help Mr. Cohen with certain jobs. Mr. Bjorndahl said that Mr. Cohen did not ordinarily work with him on jobs, but when they did work together he could see Mr. Cohen struggling with certain tasks and Mr. Cohen would complain about neck pain.

[17] Mr. Cohen described electrical work as physically demanding, requiring work in a variety of positions, demolition of old installations, moving of heavy materials and the use of power tools. By 2019, Mr. Cohen said he became increasingly depressed because, when working with other electricians, he realized he could not perform all of the required tasks. He said he realized he had been lying to himself about his ability and became terrified about his future.

[18] Throughout this period, Mr. Cohen was using Percocet for pain. Dr. Epstein had begun to prescribe it regularly in early 2015. Mr. Cohen testified that, at one point, he was using up to 15 pills a day. In 2019, he began seeing Dr. Scott Manktelow, a family physician in Courtenay.

[19] Dr. Manktelow was concerned about the amount of Percocet that Mr. Cohen was using and told him he would not prescribe enough of the drug to allow him to use that much. Dr. Manktelow said he and Mr. Cohen reached an agreement under which Dr. Manktelow would be the only prescriber of Mr. Cohen's medications. Mr. Cohen says he now only uses five and a half Percocet tablets a day, along with gabapentin (which he understands to be for nerve pain) and muscle relaxants.

[20] In 2017, Dr. Epstein began treating Mr. Cohen with Botox trigger point injections to the jaw, cheeks, head and neck. Each session involves multiple injections.

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[21] Initially, those injections were given approximately every three months. Mr. Cohen told Dr. Epstein that pain reduction lasted about 6 to 8 weeks after each round of injections. The frequency of injections has recently been increased to monthly, which Mr. Cohen said has helped by providing more consistent pain relief and allowing greater use of his jaw. He said his headaches have decreased, and his use of sleep medications has been reduced. Dr. Epstein said the injections cost $15 per unit of drug, and he has recently been using up to 100 units each time.

[22] Mr. Cohen has been having regular physiotherapy and/or massage therapy at various clinics since April 2015. It is agreed that from that time through 2023, he attended more than 100 sessions.

[23] Mr. Cohen moved back to Vancouver in 2019, but has continued to see Dr. Manktelow in Courtenay as his family physician. In 2020, he began teaching future electricians at Sprott Shaw College and at BC Institute of Technology (“BCIT”). Despite teaching being generally more sedentary than practicing as an electrician, Mr. Cohen says he still has some difficulty with parts of that job because it sometimes requires him to demonstrate physical tasks. He was on stress leave at the time of trial.

[24] Mr. Cohen said his injuries have ended or limited many of his former recreational activities. He described himself as having been an expert and aggressive snowboarder before the accident, doing much of his snowboarding in the back country. That was confirmed by two witnesses, Martin De’Ath and Jeffrey Kornblum, who had skied with Mr. Cohen while he snowboarded at various times. Mr. Cohen testified that he can still snowboard but can no longer do the kind of extreme and back country boarding he used to. He estimated that he has snowboarded about 30 times in the last three years, staying on designated runs.

[25] Mr. Cohen said he can no longer play golf or disc golf, and he can no longer swim. He said he can still hike, but he can no longer do so on the kind of challenging terrain he formerly went on, and his hiking is now more of a leisurely activity. He has been able to vacation in Colombia and Thailand.

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[26] Mr. Cohen testified that he owned a motorcycle before the accident and would ride distances as far as Vancouver to Kelowna with his former fiancé on the back. He says he can now only ride for shorter distances and for much shorter times. He has had to replace his motorcycle with one that allows him to ride in a more comfortable position and cannot carry a passenger.

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A. MEDICAL EXPERTS

[27] In a medical legal report dated September 7, 2017, a few months after he began the Botox injections, Dr. Epstein said:

> The prognosis is guarded as symptoms have persisted and represent chronic regional pain that includes TMD (temporomandibular disorder) with headaches that are related to the neck and the jaw and when severe progressing to migraine pain.

[28] In a report dated October 30, 2021, Dr. Epstein described Mr. Cohen's oral and facial symptoms as "severe and persistent," with only "limited duration" benefit from Botox injections." He said:

> My final prognosis related to jaw related symptoms is guarded. I do not anticipate complete recovery and he will require management to maintain his current status with respect to jaw function and headache.

[29] In a further report dated September 8, 2023, Dr. Epstein said: "Mr. Cohen's presentation represents chronic pain and TMD, including central and peripheral sensitization." In testimony, he explained that means with persisting pain, the "pain pathways can magnify pain."

[30] On cross-examination, Dr. Epstein agreed that Mr. Cohen needs multidisciplinary evaluation by a chronic pain clinic. Dr. Manktelow referred Mr. Cohen to such a clinic, and Mr. Cohen had an initial virtual interview in October 2020. The clinic notes indicate that Mr. Cohen was asked to attend in person for further evaluation, but there is no evidence he ever did or that he followed up in any way.

[31] Dr. Maziar Badii is a rheumatologist who assessed Mr. Cohen in September 2022 and again in May 2023. Dr. Badii's opinion is that Mr. Cohen suffered

whiplash-associated soft tissue injuries in his neck, shoulder and upper back. He believes those injuries have become chronic and have developed into chronic myofascial pain syndrome ("CMPS"). He defined CMPS as a painful condition that affects the muscles and the muscle linings (fascia). CMPS includes the presence of trigger points within the muscles that are tender to touch, and it can produce both localized pain and referred pain to other areas of the body.

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[32] Dr. Badii believes the accident caused Mr. Cohen's pain symptoms, based on both the temporal relationship between the accident and the onset of symptoms and the "medical plausibility" of those injuries occurring in the type of accident Mr. Cohen experienced.

[33] A further aspect of Dr. Badii's opinion relates to the Percocet that Mr. Cohen has been prescribed, primarily for the TMJ pain. He believes Mr. Cohen has become dependent on narcotic pain medications and every effort should be made to wean him off of them.

[34] Dr. Rui Zhang is a physiatrist—a specialist in physical medicine and rehabilitation—and a specialist in interventional pain medicine. She examined Mr. Cohen and prepared a report in December 2021.

[35] Dr. Zhang diagnosed Chronic Regional Pain Syndrome ("CRPS") affecting the right face and head along with CMPS in the right shoulder and neck. She believes these conditions were "triggered or contributed to" by direct trauma in the accident, along with subsequent poorly controlled pain and deconditioning. She also diagnosed rotator cuff tendinopathy, which she attributed to Mr. Cohen's deconditioning and poor body mechanics that resulted from the accident.

[36] Dr. Zhang defines CRPS as a chronic pain condition characterized by "regional pain that is disproportionate in magnitude or duration to the typical course of pain after similar tissue trauma." She described CMPS as "regional pain, sometimes with referred pain, often accompanied by increased tension and decreased flexibility."

[37] Because of the time that has elapsed since the accident, the challenges in treating chronic CRPS and unaddressed mental health concerns, Dr. Zhang said Mr. Cohen will likely to continue to have ongoing symptoms “in some form”, although it is possible to alleviate symptoms with proper treatment. She referred to a number of interventional procedures that might be considered and also recommended a multidisciplinary care approach. She said:

> Effective treatment should be functionally focussed, centering around physical and occupational therapy designed to normalize use of the affected body part and mitigate problems related to disuse. Inclusion of an exposure therapy component to target fear of pain and fear of using the affected limb may also help.

[38] Although Dr. Zhang’s recommendations include physiotherapy centred on activating the affected areas, she does not recommend continuation of “passive” therapy such as massage or dry needling, which she says are generally useful only in the early stages of an injury.

[39] Dr. Zhang also noted that while Mr. Cohen has not been completely sedentary since the accident, he “has not implemented a sufficient regular therapeutic exercise regime.” She recommends a therapy program with specific treatments geared to CRPS.

[40] Because Botox injections have been effective for facial pain and headaches, Dr. Zhang said these should continue but did not say how long a continuation would be appropriate. She said such treatments are generally short term and often made unnecessary by proper therapeutic exercise and correct body mechanics.

[41] Dr. Zhang provided a second report dated August 14, 2023, in which she added a further diagnosis of thoracic outlet syndrome affecting Mr. Cohen’s right arm. Unlike her first report, Dr. Zhang’s second report is based on a virtual assessment rather than a direct physical examination. To the extent the second report adds a diagnosis of an additional condition, I find it cannot be given the same weight as the first report.

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[42] However, Dr. Zhang's second report repeated her earlier diagnoses. She remained of the opinion that Mr. Cohen will likely continue to have symptoms, but there is room for improvement with appropriate therapy.

[43] The fundamental treatment for myofascial pain syndrome, Dr. Zhang said, is ongoing strengthening and stretching of the relevant muscles and proper body mechanics. That echoes a portion of her first report, which said:

> Implementing remedial (proper exercises and body mechanics) and adaptive strategies (activity modification) into his daily routine is a key component of active self-management of the ongoing chronic pain symptoms. Self-management provides patients with skills and techniques to allow them to live with a chronic condition…In the chronic pain population, self management has been shown to increase function, decrease disability, and increase the overall quality of life.

[44] The most significant barrier to improvement, she said, comes from Mr. Cohen's mental health concerns:

> Significant mental health disorders are always negative prognostic factors in any physical injury recovery or life in general. Uncontrolled depressive or anxiety symptoms pose a substantial obstacle for active treatment participation and self management, leading to poor resilience.

[45] Dr. Zhang also said that because electrical work involves overhead activities and prolonged neck extension, Mr. Cohen's shoulder, neck, and arm symptoms will likely be aggravated by full time work as an electrician.

[46] In cross-examination, Dr. Zhang was directed to various inconsistencies in Mr. Cohen's description of his symptoms as they were recorded in clinical records of other practitioners. She said patients commonly have difficulty remembering all aspects of their history and her opinion was based upon her own clinical findings.

[47] Dr. Shahzad Shahmalak is a psychiatrist who assessed Mr. Cohen in August 2023 and diagnosed him with somatic symptom disorder and major depressive disorder. Dr. Shahmalak said that when psychiatrists talk about somatic symptom disorder, they are essentially talking about the same thing other specialists call

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chronic pain syndrome—pain that continues beyond the normal time for an individual's diagnosis and includes psychosocial dysfunction.

[48] Dr. Shahmalak said psychological factors contribute to Mr. Cohen's experience of physical symptoms, resulting in a perception of disability and functional limitations that physical assessments may not explain:

> Essentially, we have a situation where Mr. Cohen is caught up in a physical symptom-anxiety-depression cycle whereby persistent physical symptoms result in decreased activity, which in turn result in depressogenic and catastrophic thinking which in turn results in increased perception of physical and activity impairment, thereby fueling and maintaining a vicious cycle.

[49] Dr. Shahmalak recommends cognitive behavioural therapy, either on its own or as part of a multidisciplinary pain program, further optimization of anti-depressant medications, avoidance of opioids and regular, frequent care by a psychiatrist who specializes in mood and anxiety disorders. But based on the persistence of symptoms, Dr. Shahmalak says the "prognosis for psychiatric recovery is guarded."

[50] Dr. Navraj Heran is a neurosurgeon and assessed Mr. Cohen in May 2022. In his opinion, injuries resulting from the accident included myofascial injuries to the neck and upper torso, with extension toward the right side, probable mechanical neck pain arising from the facet joints and cervicogenic headaches.

[51] Dr. Heran also said Mr. Cohen's right arm and hand are affected by neurogenic thoracic outlet syndrome ("TOS"), carpal tunnel syndrome and cubital tunnel syndrome, all of which are caused by nerve compression or irritation. On cross-examination, it was suggested to Dr. Heran that any symptoms of arm or hand numbness could not be related to the accident because, according to medical records, Mr. Cohen did not mention them until about two years later. Dr. Heran replied that chronic myofascial pain leads to restricted range of motion, with shrinking and constriction of the damaged tissues. That same constriction impinges on nerves, but symptoms related to that do not arise immediately.

[52] Dr. Sujay Mehta is dentist with a practice focussing on facial pain. Dr. Mehta examined Mr. Cohen on behalf of the defendants. In a report dated December 22,

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2021, he said that jaw muscular pain usually has a good prognosis with appropriate treatment such as physiotherapy combined with appropriate medications. He states in the report that Mr. Cohen's jaw pain is most likely related to his neck, shoulder and arm complaints. He agreed on cross examination that these are neighbouring areas of pain referral.

[53] Dr. Mehta's report refers to "confounding" aspects of Mr. Cohen's presentation. While Mr. Cohen had limited jaw opening on his examination, Dr. Mehta said normal jaw opening was noted on some of the earlier records that he reviewed. While it is possible that muscle pain can reduce range of motion over time, he said he does not understand why that would be the case while Botox injections are relieving other symptoms. He also said some of Mr. Cohen's complaints of referred pain did not make anatomical sense, with light touch in the area of one nerve producing complaints of pain in the distribution of a different nerve.

[54] Dr. Mehta agreed that TMD can result in pain referral and that he has treated patients with oral facial pain that continued for many years. He said a 10-year history is not unusual in his practice and the longest case in his experience continued for more than 20 years.

[55] Dr. Mehta's initial report gives no clear diagnosis and, while he doesn't say so explicitly, it appears that he simply did not believe some of Mr. Cohen's pain complaints.

[56] Dr. Paul Stacey is a physiatrist who examined the plaintiff on behalf of the defendants in December 2021. In his opinion, the accident caused strain or sprain in the neck and right shoulder—soft tissue injuries that should have resolved within a year. He acknowledges that the neck injuries have progressed to chronic myofascial pain, but he says pre-existing and ongoing degenerative changes in the neck are impacting his recovery. He also says Mr. Cohen has "pain focus" that is "contributing to his perceived symptoms."

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[57] He recommends a focused program of “active rehabilitation” and a comprehensive exercise program. He explained in testimony that many patients with pain try to protect themselves from further pain, and such guarding can make the situation worse: “We try to get people to move again.”

[58] In a subsequent report responding to Dr. Zhang’s opinion, Dr. Stacey said he and Dr. Zhang appear to agree that “non-physiatric pathology” affects Mr. Cohen’s perception of pain. Although he believes Mr. Cohen’s will continue to have soft tissue pain, the prognosis for improvement is good.

[59] In response to questions on cross-examination, Dr. Stacey said chronic pain requires a multidisciplinary approach, including management of comorbid mood disorders and the patient “learning to live with it in a healthy way.” He said a multidisciplinary program would include various physical therapies, social work, psychology and treatment of comorbid conditions.

[60] The opinions of Dr. Zhang and Dr. Stacey are very similar in their diagnosis and treatment recommendations. The major difference is that Dr. Stacey appears more optimistic about the success those recommendations will likely have.

[61] Dr. Inderveer Mahal practices in the Change Pain clinic, to which Mr. Cohen was referred by Dr. Manktelow. She described the clinic as a multidisciplinary chronic pain clinic that includes physicians, physiotherapists and psychiatrists, as well as other practitioners.

[62] She did an initial interview in October 2020, but that was done virtually due to the COVID-19 pandemic. Although Dr. Mahal’s clinical notes indicate that Mr. Cohen would be seen in the clinic for further evaluation, there is no evidence that ever occurred. Dr. Mahal was not called to provide an expert opinion.

[63] She said the Change Pain “core program” that is recommended to most chronic pain patients lasts 12 weeks, but it can be followed by further treatment for up to a year and perhaps longer if the patient requests it.

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[64] Dr. Philip Teal, a neurologist, examined Mr. Cohen on July 26, 2023. In his opinion, the accident caused a "Grade I to II cervical strain." He said a grade II strain is defined as "neck complaints and musculoskeletal signs that may include decreased range of motion and point tenderness."

[65] While headaches after the accident likely were associated with neck and jaw pain, Dr. Teal said Mr. Cohen's current headaches are now more likely due to overuse of medication, including opioids. In addition to its effect on headaches, Dr. Teal said medication overuse has generally made it difficult to determine how much pain Mr. Cohen would otherwise have.

[66] Dr. Teal does not agree with Dr. Zhang's diagnosis of CRPS affecting the face and jaw. He said CRPS in that location is rare, and Mr. Cohen does not meet the established diagnostic criteria for that condition. However, he agreed that patients can subjectively have pain without meeting the diagnostic criteria for a specific condition.

[67] While saying generally that the issue of TMD is outside his area of practice, Dr. Teal noted that he found Mr. Cohen's jaw opening to be restricted when specifically measured but apparently normal when observed in conversation. He said he sometimes sees patients with atypical facial pain syndromes. In such cases, diagnosis can be challenging, and misdiagnosis and mismanagement are common.

[68] He described Dr. Epstein's treatment of Mr. Cohen's face and jaw pain, including use of Percocet and long-term Botox injections, as "unusual." He believes there is "no role for ongoing use of opioid medication", and it will be impossible to determine Mr. Cohen's potential for recovery from facial pain until he is weaned off those medications.

[69] Dr. Teal also disagrees with Dr. Heran's diagnosis of TOS. He said records of nerve conduction tests and other investigations show no objective evidence of nerve involvement, and the physical test Dr. Heran used for the diagnosis is, in isolation,

non-specific. He also said that any hand and arm symptoms developing two years after accident are unlikely to be accident-related.

B. ALLEGED PRE-EXISTING CONDITIONS AND CAUSATION

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[70] Although Mr. Cohen worked in jobs involving heavy work before the accident and admits to frequent falls while snowboarding, there is no evidence that he suffered from neck or shoulder pain before the accident and no evidence of any previous injury to those areas. Dr. Stacey refers to “pre-existing and ongoing degenerative changes in the neck,” but Dr. Teal describes the changes shown on CT and MRI scans as “mild,” commonly seen in people over 40 and often seen in people who have no symptoms.

[71] I find that Mr. Cohen suffered soft tissue injuries in the accident and has developed chronic pain in the jaw, neck and shoulder. I find his current pain was caused by the accident. The evidence does not support any conclusion that would link this pain to any pre-existing or subsequently developed condition.

[72] The only evidence of any pre-accident physical health problem is that Mr. Cohen had periodic gout attacks, which he said primarily affected his big toe. The first such attack was in 2007, and medical records indicate they occurred on average about once a year thereafter. When experiencing a gout attack, Mr. Cohen took indomethacin, an anti-inflammatory medication, and on at least some occasions was prescribed Percocet for pain. The last and longest gout attack prior to the accident was in the summer and fall of 2013, and it lasted about three months.

[73] In cross-examination of the plaintiff and the medical experts he called, defence counsel frequently pointed out that Mr. Cohen regularly failed to disclose his history of gout to medical experts or treating physicians. Counsel appeared to suggest that Mr. Cohen deliberately concealed that history and that his reported shoulder, neck and jaw symptoms could be caused by gout spreading to other joints.

[74] Mr. Cohen’s previous gout attacks were confined to his foot. I do not find it surprising that a person suffering from acute jaw, neck and shoulder pain might not

remember or consider it relevant to mention a history of periodic foot pain. The theory of gout affecting the upper body was raised only by defence experts prior to trial. There is no evidence Mr. Cohen could have previously been aware of such a theory or that he would have felt any need to deliberately conceal his history of gout.

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[75] In a supplementary report prepared after reviewing additional medical records, Dr. Mehta said Mr. Cohen's history of gout "helps better understand Mr. Cohen's complex orofacial pain history, presentation, examination findings, and response to treatments." However, he said gout is not a usual cause of TMJ pain, and he would defer to a rheumatologist on issues relating to gout. Similarly, Dr. Stacey says more joints are being affected by gout attacks but recommends review by a rheumatologist.

[76] The only rheumatologist who provided an opinion in this case, Dr. Badii, specifically rejected the theory that Mr. Cohen's pain is caused or aggravated by gout. In addition to the fact that gout rarely affects the jaw or shoulder, Dr. Badii said gout attacks are self limiting, usually lasting for a few days or weeks, and it is "highly unlikely" that gout would cause ongoing pain lasting years. He also said that if Mr. Cohen were having very rare manifestations of gout in areas like the shoulder or jaw, he would expect that to be accompanied by constant flare ups of gout in the big toe where he had previous attacks. "It would be extremely unusual for gout to spare the common area (i.e. toes), but cause constant pain in the TMJ or shoulders".

[77] In their trial brief, the defendants listed a rheumatologist among their anticipated expert witnesses, but no opinion from that doctor was put into evidence.

[78] The defendants did not press the gout theory in argument, and I find there is no evidence to support it. Even in the absence of Dr. Badii's opinion, I would have found it an unlikely coincidence that gout previously confined to one foot would suddenly spread to the upper body only after the accident.

[79] A number of doctors believe Mr. Cohen's condition is complicated by overuse of opioid pain medications, and the defendants put considerable effort into trying to portray Mr. Cohen as having been a drug addict before the accident.

[80] The defendants rely on the opinion of Dr. Maire Durnin-Goodman, a family physician with additional qualifications and expertise in addiction medicine. Based on her assessment of Mr. Cohen and review of his medical records, Dr. Durnin-Goodman believes that he has an addiction to opioid pain killers, primarily Percocet, that pre-dates the accident. While agreeing that Mr. Cohen likely feels pain, she said that may be a symptom of opioid withdrawal.

> In my opinion Mr. Cohen is in a recurring cycle of short-term pain/discomfort relief from taking Percocet, followed by withdrawal symptoms including muscle aches and dysphoria, for which he is taking more Percocet.

[81] Similarly, she says chronic, long-term opioid use can cause or aggravate symptoms of depression, and Mr. Cohen's depressive symptoms are consistent with withdrawal.

[82] From a review of clinical records, Dr. Durnin-Goodman noted that Mr. Cohen received Percocet and/or Oxycodone to treat gout at least four times in 2007, twice in 2008, at least once in 2009 and again in 2012.

[83] At trial, she was referred to a single page record from a medical clinic in Nelson, dated April 4, 2011, that had not been available when she wrote her report. The clinical note indicates that Mr. Cohen reported a gout attack and said he was "using some Percocets his father a GP gave him for the pain." When asked about that document, Mr. Cohen denied making that statement. By that date his father, who had not been a doctor, was long-dead. Mr. Cohen did not recall the clinic visit in question, but said if he had been taking Percocet at the time, it would likely have been left over from a prior prescription for gout. The doctor who saw him on that date did not prescribe any more Percocet.

[84] Dr. Durnin-Goodman relied in part on that record to conclude that Mr. Cohen was in the habit of obtaining Percocet on the illicit market. Medical experts provide

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opinions based on their clinical findings and review of medical records. It is for the Court to draw inferences of fact about what plaintiffs may or may not have done outside the clinical setting. With respect, I find that Dr. Durnin-Goodman's evidence on that point crosses that line between proper expert opinion and the role of the Court.

[85] Dr. Durnin-Goodman recommended a formal addiction treatment program but said she couldn't be more specific about what that would involve because she didn't believe Mr. Cohen had been forthcoming about the degree of his substance abuse, including his use of alcohol and cannabis in addition to Percocet. She said the cost of treatment programs varies widely, depending on the treatment centre, but a 28-day program at the recovery centre where she works costs roughly $16,000 to $17,000.

[86] After reviewing Dr. Durnin-Goodman's report and the additional records she referred to, Dr. Shahmalak agreed that Mr. Cohen suffers from opioid use disorder in addition to the conditions he previously diagnosed and agreed that Mr. Cohen should enter treatment.

[87] However, Dr. Shahmalak believes the accident at least contributed to Mr. Cohen's opioid use disorder:

> I note that his use of Percocet was relatively low until 2015 (after the May 27, 2014 accident) and has gradually increased over the years. Therefore, it is more likely that the pain from the accident significantly contributed to the increase in his use of Percocet over time.

[88] Dr. Durnin-Goodman also acknowledges an increase in use of Percocet after 2015 and believes that increase should have been addressed sooner:

> Had Mr. Cohen's use of Percocet been addressed and discontinued prior to his escalating pattern of use in 2015 or again in late 2016/early 2017…it is my opinion that Mr. Cohen's use/abuse of Percocet could have been mitigated.

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[89] She also says that by 2020, Mr. Cohen’s use of Percocet, combined with alcohol and cannabis, would likely have resulted in cognitive and perhaps physical impairments that do not appear to have been present before 2019.

[90] Dr. Durnin-Goodman’s reference to increased use of Percocet in 2015 coincides with Dr. Epstein beginning to prescribe it at that time. From that point forward, there is no evidence of Mr. Cohen receiving Percocet other than by prescription from Dr. Epstein or later Dr. Manktelow.

[91] While Dr. Durnin-Goodman disagrees strongly with the use of Percocet or Oxycodone to treat chronic pain, the defendants have not gone so far as to allege that the amount prescribed to Mr. Cohen was a negligent breach of the applicable standard of care. Mr. Cohen was entitled to rely on the licenced medical practitioners who were treating him. Even if other medical practitioners disagree about the appropriate treatment, the patient is not expected to know about that debate or the applicable standard of medical care.

[92] The case law is clear that a defendant who puts a plaintiff in the position of needing medical help assumes the risk of errors in diagnosis or treatment, unless the treatment is so negligent as to be a new intervening act that would give the patient a remedy against the doctor: *Scarff v. Wilson* (1986), 10 B.C.L.R. (2d) 273, 1986 CanLII 745 (S.C.) at para. 84 and the authorities cited therein; *Thompson v. Toorenburgh*, [1972] 6 W.W.R. 119 at 611 and the authorities cited therein, 1972 CanLII 981 (S.C.). If the defendants had wanted to formally allege that Mr. Cohen’s injuries were caused by negligent medical treatment, it was open to them to raise the issue in third party proceedings where the treating doctors would have had the opportunity to respond to that allegation.

[93] Although Mr. Cohen clearly used opioid pain killers before the accident, there is no evidence that he was using them in the quantities he has used since the accident, or that his use of them had progressed to an addiction or opioid use disorder. Since the accident, all of the opioids he has used have been prescribed by medical practitioners. Notwithstanding Dr. Durnin-Goodman’s suspicion, there is no

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reliable evidence of him illegally obtaining Percocet, either before or after the accident.

[94] In short, I accept Dr. Durnin-Goodman's evidence that Mr. Cohen has an opioid use disorder that requires treatment, but I accept Dr. Shahmalak's evidence that any dependence Mr. Cohen may have had on opioids before the accident was worsened and progressed to a diagnosed opioid use disorder only after, and as a result of, the accident.

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C. CONCLUSION ON THE PLAINTIFF'S INJURIES AND MITIGATION

[95] There is ample evidence that Mr. Cohen suffers from a chronic pain condition involving genuine subjective perception of pain that is out of proportion to any objectively identifiable physiological injury. In that regard, I accept the evidence of Drs. Zhang, Badii and Shahmalak, which is in many ways consistent with evidence of defence witnesses such as Dr. Stacey. The effects of that chronic pain condition are complicated and magnified by accident-related depression and opioid use disorder. I agree that Mr. Cohen is caught in a vicious cycle of muscular pain, depression and opioid dependence, all feeding off and magnifying each other.

[96] I do not accept the defence submission to the effect that Mr. Cohen has simply lied about his pain for most of the last 10 years. Mr. Cohen is clearly an intelligent man, but I do not believe he has the medical knowledge to know what symptoms to report and what history to conceal in order to manipulate doctors into making his desired diagnoses.

[97] That said, I find Mr. Cohen has become unduly focussed on his symptoms, and has overestimated the limitations they present. I believe that is what Dr. Stacey and others refer to as "catastrophizing." I am also not persuaded that Mr. Cohen suffers from any condition, such as TOS, caused by specific nerve involvement.

[98] Mr. Cohen's own expert witnesses have recommended treatments they say are capable of alleviating symptoms and putting Mr. Cohen in a better position to live with, and adapt to, any symptoms that remain. These include multidisciplinary pain

care, psychiatric treatment and drug addiction treatment. Although those experts continue to say their prognosis is "guarded," they all point to the potential benefits of these treatments.

[99] In that context, I take the word "guarded" to mean no more than that the recommended treatments may or may not be successful to varying degrees. If those experts could offer more precise evidence about the likely impact of those treatments, based on such knowledge as the historical success rate of various programs or their own patients' experience with them, they were not asked to provide that opinion.

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[100] Although there is some uncertainty, the experts do not say, and I do not believe, that Mr. Cohen needs to live with the level of pain and disability he now reports.

[101] Mr. Cohen has not failed to mitigate his losses to date. Plaintiff's counsel relies on *Chiu v. Chiu*, 2002 BCCA 618, which states at para. 57:

> [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.

[102] That passage refers to a defence based on an alleged failure to mitigate damages. It presumes that the plaintiff has otherwise met the onus of proving an injury and loss, including the likelihood or risk of future losses. The issue of mitigation is most relevant when assessing the plaintiff's condition at trial, and I do not find that Mr. Cohen failed to mitigate his loss to date. Despite poor conditioning following the accident and missing a follow up evaluation with the chronic pain clinic, I find Mr. Cohen has generally taken reasonable steps to follow recommended treatment.

[103] But in assessing the risk of future loss, the Court must assume the plaintiff will reasonably pursue appropriate treatments that have been identified and must weigh the possibilities for success. Nothing in the authorities on mitigation suggests that a plaintiff, having not yet had recommended future treatment, would reverse the normal onus of proof and require the defendant to prove that an injury is not permanent.

[104] I therefore find that, although Mr. Cohen will likely have some ongoing pain and discomfort in the future, appropriate treatment will likely result in substantial improvement from his present condition and greatly improve his ability to function, both in work environments and in daily life. I agree with Dr. Teal and others that Mr. Cohen must first be weaned off opioid medications, which will likely require specific treatment for his drug dependence. After that, both his chronic pain and his depression will likely be addressed more effectively by a multi-disciplinary approach that includes appropriate physical therapy and mental health care. While there is certainly a risk that some or all of these treatments will be ineffective or only partially effective, I find it likely that Mr. Cohen will eventually become much less disabled than he is now.

IV. PAST LOSS OF EARNING CAPACITY

[105] Aman Rangi, occupational therapist, performed a functional capacity evaluation of Mr. Cohen in July 2023. Based on his tests, he concluded that Mr. Cohen is not capable of working as an electrician "in standard electrical roles." Areas of limitation include sustaining difficult body positions and overhead or forward reaching.

[106] Mr. Rangi says Mr. Cohen is capable of working as a teacher, although he may have some pain in the hands-on demonstration aspects of his electrical instruction job. He notes that the occasions involving hands-on work as a teacher are shorter than what would be required of a working electrician.

[107] The defence obtained a report from Louise Craig, a functional capacity evaluator who did not directly assess Mr. Cohen but reviewed and commented on

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Mr. Rangi's report. She says Mr. Cohen doesn't appear to have reached the limit of his tolerance in Mr. Rangi's testing. She also notes that he has not worked as an electrician in some time and could gain further capacity "through work hardening, either formally in a therapeutic setting or by working on the job to incrementally increase his work tolerance."

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[108] Ms. Craig concludes that, with the benefit of an appropriate exercise program to increase flexibility, muscular endurance and strength, combined with a gradual return to work, Mr. Cohen will be capable of at least part-time electrical work.

[109] I find that Mr. Cohen has pain and other limitations that have prevented him from working as an electrician, or at least from doing so at full ability, but I accept Ms. Craig's evidence that the kind of specifically targeted exercise and conditioning program she and other experts refer to would likely improve his ability to do that work to some extent. There is no evidence such a program was previously recommended to him, so his failure to engage in one to this point cannot be treated as a failure to mitigate damages.

[110] I therefore find that Mr. Cohen has likely experienced some past loss of income, but the amount of that loss is difficult to quantify. This Court discussed the principles applicable to loss of past earning capacity in *Engelhart v. Day*, 2022 BCSC 224 at paras. 113-114 and the authorities cited therein.

[111] Tax information for 2013—the first full year after he obtained the red seal certification—shows that Mr. Cohen earned employment income of only $7,457. That was approximately 10 percent of what he earned in the previous year, when he had been an apprentice until almost halfway through the year. His tax return for 2013 also shows gross business income of $23,500, but it also shows a net business loss of almost $13,000 and employment insurance benefits of $22,000. In 2014, the year of the accident, he had gross business income $29,307 and a net loss of $3,590, while earning $61,268 at his teaching job.

[112] Mr. Cohen's income in the years following the accident was summarized by the plaintiff's actuarial expert, Anita Mohan. The income from Mr. Cohen's electrical contracting business varied widely after his move to Vancouver Island in 2015. The company had net profit of $10,195 in 2015, which was offset by a net loss of $12,242 the following year. Its best year was 2017, with a net income of a little more than $100,000. The net income then declined to $32,976 in 2018 and $21,832 in 2019. Although it is not possible to determine how much of that decline was related to local market conditions, I find likely that it was at least partially related to Mr. Cohen having to hire other electricians to perform work that he would otherwise have done himself.

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[113] In 2020, Mr. Cohen returned to teaching and earned a total of almost $135,000 teaching at three different colleges. In 2021, teaching at two colleges, he earned almost $137,000. Mr. Cohen testified that he was able to earn unusually high amounts teaching in those years because classes were conducted virtually due to COVID-19. He said that allowed him not only to teach at multiple locations, but also to be paid for some hours when he was online while other teachers were addressing the class.

[114] In 2022, Mr. Cohen began teaching exclusively at BCIT and earned $83,765. In the first eight months of 2023, he was paid $51,321.

[115] At the time of trial, Mr. Cohen was under contract with BCIT but on stress leave. Ted Simmons, the chief instructor in the electric trades program at BCIT, said there is a high demand for the program and instructors are needed. Robert McEachern is a campus director for Sprott Shaw College, one of the other institutions where Mr. Cohen taught. He testified that he has tried on several occasions to convince Mr. Cohen to return.

[116] Ms. Mohan prepared a calculation that compares Mr. Cohen's actual income from the date of the accident through August 2023 with the average wages of industrial electricians. The difference from the date of the accident to the date of trial is $333,000, and counsel for Mr. Cohen submits that amount should form part of an

award for past loss of income. The defence submits Mr. Cohen is entitled to no award.

[117] For the reasons set out below, I find that Mr. Cohen's past accident-related income loss must be based on a much shorter period than submitted by his counsel, and I must quantify it as best I can without the benefit of alternate submissions.

[118] Contrary to the assumption used by Ms. Mohan, Mr. Cohen's evidence is that, but for the accident, he would not have been employed as an industrial electrician but would have operated his own electrical contracting company. That is what he in fact did when he moved to Courtenay in 2015.

[119] The company made a small profit in 2015, which was offset by a small loss in 2016. Mr. Cohen was starting a new business in a community where he had not previously worked as an electrician. It would be expected that such a business would not be immediately profitable, and there is no evidence from which I can determine the extent, if any, that Mr. Cohen's condition contributed to the poor performance in those years.

[120] By 2017, the company was able to earn net income of a little more than $100,000. That appears to have been the source of the $86,600 that Mr. Cohen was able to pay himself as salary in 2018.

[121] Corporate net income declined to $32,000 in 2018 and $21,000 in 2019, after which Mr. Cohen closed the company and moved back to Vancouver. Mr. Cohen drew personal income of $12,000 from the company in 2019 and nothing the following year. I accept that the decline in corporate income after 2017 was likely due, at least in part, to Mr. Cohen's physical limitations and a corresponding need to hire electricians to assist him. Mr. Cohen's ability to pay himself from the company was reduced accordingly.

[122] I find that when the company began to fail in 2018, Mr. Cohen would have had, but for his injuries, the opportunity to work as an employed electrician. The tables in Ms. Mohan's report include the average income of an industrial electrician,

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net of labour market contingencies, for each year and provide Mr. Cohen's actual income for comparison. For example, in 2022, the average electrician's income was a little less than $102,000, while Mr. Cohen made only about $84,000 teaching at BCIT. However, the online instruction made necessary by the COVID-19 pandemic had given Mr. Cohen the opportunity to work for more than one employer in 2020 and 2021, giving income in those years in excess of what he might have earned as an electrician.

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[123] The difference between the average earnings of an industrial electrician in the years 2018 through 2023 and Mr. Cohen's actual income is approximately $72,000, and I find that amount represents Mr. Cohen's past loss of earning capacity.

[124] Mr. Cohen's counsel seeks a further award to represent the loss of a specific employment opportunity Mr. Cohen says he was forced to refuse because of his physical condition.

[125] Russell Anderson is mechanical superintendent for RAM Consulting, a project management and design firm that does major projects both in Canada and abroad. One such recent project was construction of a fuel tank farm at Vancouver International Airport. As general superintendent, Mr. Anderson said he is responsible for hiring trades, including electrical and mechanical contractors.

[126] Mr. Anderson testified that he met Mr. Cohen in June 2021, and he was impressed with Mr. Cohen's electrical knowledge and resume. He said he believed Mr. Cohen had the credentials to work on major projects as an electrical superintendent, which would include being responsible for code compliance, dealing with building inspectors and ensuring any problems were corrected. Such a position, he said, would require some climbing of ladders and working in tight spaces.

[127] Mr. Anderson said he offered Mr. Cohen a job, but Mr. Cohen was unable to accept because of the physical component. However, Mr. Anderson also said he did not check references on Mr. Cohen's resume but understood that had been done by

someone else in the company. He said the company does not offer contracts to potential employees or independent contractors until references are confirmed.

[128] The resume that Mr. Cohen provided to Mr. Anderson was clearly exaggerated and would not have allowed anyone to contact the relevant references. Mr. Anderson's attention was particularly caught by a reference in the resume to Mr. Cohen having worked at the TRIUMF nuclear research facility at the University of British Columbia. He described that as a project that would involve very sophisticated electrical work. In his resume, Mr. Cohen described himself as having been "electrical superintendent/chief engineer" at TRIUMF, supervising a crew that decommissioned and commissioned the main particle accelerator.

[129] In fact, Mr. Cohen was never employed by TRIUMF. He worked on its site for only about three months in 2013 as an employee of an electrical subcontractor called Entec Systems Inc. ("Entec"), earning about $6,000. William Richert, the chief engineer at TRIUMF, said Entec did electrical installation work, but on smaller projects than the major upgrade of power systems that took place in 2013. He added that there was no decommissioning of the particle accelerator at that time, although there was an annual maintenance shutdown for which Entec provided some electrical support services.

[130] Mr. Richert said his dealings with Entec were through the principal of that company, a Mr. Krajic, who has apparently since died. Mr. Richert does not know Mr. Cohen, and there is no record of Mr. Cohen ever having been employed by or directly contracted to TRIUMF.

[131] Mr. Cohen's resume makes no mention of Entec. If anyone checking references based on the resume had contacted TRIUMF, they would have obtained no information about Mr. Cohen. Although I accept that Mr. Anderson seriously considered hiring Mr. Cohen, I find it would have been impossible for the company to verify the information on his resume. I therefore find that Mr. Anderson must be mistaken in his recollection that matters progressed to a formal job offer. I make no award for that alleged lost opportunity.

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[132] I award Mr. Cohen damages of $72,000 for past loss of income.

V. LOSS OF FUTURE EARNING CAPACITY

[133] The consideration of a claim for loss of future earning capacity requires the three-step process set out in *Rab v. Prescott*, 2021 BCCA 345:

> [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…
>
> [Italic emphasis in original.]

[134] I have found that Mr. Cohen suffers primarily from a chronic pain condition, depression and a substance abuse disorder, all of which were caused or contributed to by the accident. Those conditions have a synergistic and aggravating effect on one another, and the conditions still prevent Mr. Cohen from returning to work as an electrician.

[135] But for most of the last four years, Mr. Cohen has been able to work as an electrical trades teacher. At the time of trial, he was on stress leave. That stress leave was originally given for a 30-day period but had continued a few days beyond that by the time Mr. Cohen gave evidence. During argument, his counsel submitted that because there was no evidence of when Mr. Cohen will return to work, it was not open to me to find that he will ever be able to do so. With respect, I find that submission absurd.

[136] Experts on both sides have referred to treatments that Mr. Cohen has not yet had the benefit of, but are capable of addressing his pain complaints, his mental health issues and his drug dependence. Those include attendance at a multidisciplinary pain clinic, a targeted exercise and fitness program, psychiatric care and treatment for drug dependence.

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[137] Applying the three-part test from *Rab*, I find that there is a risk that the various treatments recommended will not be wholly successful, leaving Mr. Cohen with some degree of chronic condition that could lead to a loss of earning capacity. I find that risk results in a real and substantial possibility that he will be unable to work as an electrician. Considering the fact that he has been able to teach for most of the last four years, the likelihood of even minimal success in the treatments and the possibility of workplace accommodation, I do not find any risk that Mr. Cohen will be prevented from returning to and continuing in his teaching job.

[138] The third step, assessing the value of that future loss with reference to its relative likelihood, is the most difficult on the state of the evidence here. I have considered the possibility that the recommended treatments will not be successful enough for Mr. Cohen to resume the difficult physical tasks required of an electrician.

[139] Ms. Mohan calculates the present value of work as an industrial electrician from now to Mr. Cohen's age 70 to be $1,339,460. The present value of Mr. Cohen's continued income in his current job at BCIT to the same age is $858,239. Both figures are net of normal labour market contingencies, such as unemployment and voluntary non-participation in the work force. The difference between those two amounts is a little more than $480,000, and I find that would represent the value of Mr. Cohen's lost future earning capacity if he were never able to return to work as an electrician.

[140] However, there remains a very real possibility that the recommended treatments will be successful enough to allow Mr. Cohen to resume work as an electrician, at least on a part-time basis, or allow him to use his knowledge of the field to take on supervisory positions where the physical demands are less onerous or less frequent.

[141] There is also evidence from Vivian Tran, a BCIT human resources employee, that BCIT instructors like Mr. Cohen have opportunities to obtain more advanced formal teaching qualifications and move to a higher pay scale.

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[142] Therefore, the $480,000 figure I have referred to must be subject to a substantial deduction for contingencies. Doing the best I can with the evidence before me, and recognizing there will almost always be some element of arbitrariness in these assessments, I find that the prospects for substantial improvement justify a 50% deduction. I therefore assess Mr. Cohen's loss of future earning capacity at $240,000.

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VI. COST OF FUTURE CARE

[143] The authorities governing an award for cost of future care are summarized in *Dabu v. Schwab*, 2016 BCSC 613 at para. 89, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at 83-84, 1985 CanLII 179 (S.C.). The award is intended to provide physical arrangements for assistance, equipment and facilities directly related to a plaintiff's injuries. To the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person, it may properly form part of a claim for future care. There must be medical justification, and the claim must be reasonable and fair to both parties.

[144] Because consideration of the future is inherently uncertain, the award is not based on precise mathematical calculation. It requires an assessment based on judgment to arrive at a reasonable amount: *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-33.

[145] Nothing better illustrates the assessment difficulties in this case than counsel's submissions under this head of damages.

[146] The defendants argue that no award should be made for cost of future care. The plaintiff seeks an award of $485,000 for cost of future care, yet major interventions recommended by experts on both sides were either not included in counsel's submissions or included based on only minimal evidence. Plaintiff's counsel seemed to avoid, even as an alternative submission, anything that might reduce a claim based on Mr. Cohen's alleged permanent disability. Meanwhile, defence counsel were so focussed on attacking the plaintiff's credibility and character that they ignored opportunities to put forward the cost of treatments—

some recommended by their own experts—that could reduce a total future care award in the event their primary position was not accepted.

[147] The largest component of the plaintiff's claim is $391,000, which is the stated present value of monthly Botox injections until the Mr. Cohen is 76 years old. The plaintiff testified that he has benefitted from the injections given by Dr. Epstein. But no medical expert, not even Dr. Epstein, suggested monthly Botox injections will be necessary or even appropriate for the rest of Mr. Cohen's life. Some experts think the injections have already gone on for too long.

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[148] The plaintiff seeks $42,000 for the cost of two 42-day attendances at a drug treatment centre. Although both parties led expert evidence about the need for treatment of the plaintiff's opioid use disorder, neither led evidence about the cost of such treatment.

[149] The only evidence elicited was on the cross-examination of Dr. Durnin-Goodman. She said the costs at the treatment centre where she works are roughly $16,000 to $17,000 for 28 day stay and $20,000 to $22,000 for a 42 day stay, with many patients needing to attend more than once. However, she made clear the amounts she referred to were only a "guesstimate."

[150] Experts on both sides referred to the importance of Mr. Cohen being treated at a multi-disciplinary pain clinic, but no cost for that is included in the plaintiff's submissions. Again, the only evidence of the possible cost came in rough estimates elicited on cross-examination.

[151] The witness most familiar with such facilities, Dr. Mahal, was called as a factual witness and did not provide an expert opinion. She said most of the services provided at her clinic are covered by the medical services plan, but there is a long waiting list. When asked about private clinics charging fees for patients wishing to avoid the waiting list, she said she "can see that" but had no knowledge of specific clinics. Asked about a potential cost of $30,000 to $50,000 for treatments that include Botox injections, she said that "seems a bit a high."

[152] The figure of $30,000 to $50,000 was elicited in cross-examination of Dr. Stacey, but he practices in Ontario, and there was no evidence that he is familiar with availability or cost of multi-disciplinary pain clinic treatment in British Columbia. It would have been open to the plaintiff (or, for that matter, the defendants) to obtain a proper expert opinion on that point. Such an opinion might also have included a prognosis about the possible results of treatment.

[153] The plaintiff relies on specific care recommendations made by Mr. Rangi, with a total present value of $55,411. The defence expert, Ms. Craig, agrees with some of those recommendations.

[154] Because Mr. Cohen needs a therapeutic exercise program, Mr. Rangi recommends six sessions with a kinesiologist to set up the program, at a total cost of $570, plus a gym membership at an annual cost of $406.98, then $248.98 after Mr. Cohen turns 65. Ms. Craig agrees with that recommendation.

[155] I have not been provided with an economist's calculation of present values for different amounts for different periods or a table that allows precise identification of the present value of each recommendation. However, based on the calculation set out in counsel's submissions, I award $8,500 for the cost of gym memberships and kinesiology consultations.

[156] Mr. Rangi recommends an annual amount of $1,020 for symptom management treatment by physiotherapists, massage therapists and or chiropractors. Ms. Craig generally agrees with that recommendation. The recommendation assumes treatment similar to what has taken place previously, but Dr. Zhang said such treatments are of limited value after the initial stages of injury. However, Dr. Zhang did recommend different physical therapy approaches and occupational therapy. In the absence of better evidence about the specific costs of those treatments, I accept Mr. Rangi's figure for the cost of necessary therapy.

[157] Mr. Rangi's recommendations include the cost of medications at an annual cost of $729, which the plaintiff's counsel submits should continue until Mr. Cohen is

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76 years old. About half of that cost is for Percocet, but the medical evidence is clear that Mr. Cohen needs to be weaned off that drug as soon as possible and that amount must be excluded from a future care award.

[158] Mr. Rangi recommends, and Ms. Craig agrees with, the need for various ergonomic aids, including such items as an ergonomic chair, back support and an angled document holder that would assist Mr. Cohen in his teaching duties. The total cost of these items, including present value of periodic replacement for some of them, is stated at $6,584.

[159] Mr. Rangi's recommendations do not include the cost of attendance at a multidisciplinary pain clinic or a drug treatment program, which the evidence shows to be the things most likely to assist in Mr. Cohen's recovery. I have not been given reliable evidence of their cost, and one approach might be to simply say that the plaintiff has not met the burden of proof. But I cannot ignore the need for that treatment, if Mr. Cohen is going to be put as near as possible in the position he would have been but for the accident.

[160] Doing the best I can with the evidence, adding an admittedly arbitrary amount for drug and chronic pain treatment, and deducting the cost of Percocet from Mr. Rangi's recommendations, I award a global amount of $100,000 for the cost of future care.

VII. LOSS OF HOUSEKEEPING CAPACITY

[161] The plaintiff testified that he cannot do gardening, house cleaning, or yard maintenance, and that he hired house cleaning services while living in Courtenay and after returning to Vancouver. He said he generally needs help "a couple of hours a week." The plaintiff's claim for special damages incurred since the accident includes $5,000 for housekeeping and gardening services. His current housekeeper, Cindy Lanteigne, testified that her work for him includes dusting, vacuuming, mopping, and general kitchen and bathroom cleaning. She currently charges between $50 and $60 an hour.

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[162] The plaintiff seeks an award of $75,000 for loss of housekeeping capacity, based on Mr. Rangi's estimate of costs to hire help with housecleaning, home maintenance and repair, lawn mowing and seasonal yard work. These costs total $3,720 per year, and the plaintiff's claim is based on the present value of that amount to age 76.

[163] The impact of a plaintiff's injury on their ability to perform household tasks may be recognized through a separate pecuniary award or as part of an award of non-pecuniary damages. The proper approach depends on whether the plaintiff is physically unable to perform the relevant tasks and must hire replacement services (sometimes referred to as a "true" loss of capacity), or is able to perform those tasks only with difficulty. In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal summarized the result of its earlier decisions:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[164] I find that Mr. Cohen's situation falls into the latter category. I accept that Mr. Cohen has, since the accident, found many normal household tasks to be difficult or painful and has reasonably sought assistance. But I am not satisfied that he is completely unable to perform those tasks. With proper treatment to address his pain and the confounding conditions medical experts have referred to, I find it likely that many of these difficulties will be lessened, although there may continue to be some discomfort with normal tasks, and there may be occasional heavier tasks where he needs some help. I therefore will include some consideration of loss of housekeeping capacity in the award of non-pecuniary damages.

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VIII. SPECIAL DAMAGES

[165] The plaintiff seeks special damages totalling $94,428.81, for out of pocket expenses made necessary by his injuries since the date of the accident. That is an unusually large special damages claim, but I recognize that it represents an unusually long period between the date of the accident and the date of trial.

[166] More than half of that amount consists of the cost of Dr. Epstein's treatments. Other portions of the claim include other therapies, including physiotherapy and massage therapy, travel costs and mileage associated with attending all these appointments, and the cost of prescription medication. Although it is possible, based on expert evidence at trial, to retrospectively question the necessity of some of these things, I find Mr. Cohen did in fact incur these expenses and, in doing so, was entitled to rely on the professional advice he was receiving at the time.

[167] In the absence of any submissions from the defendants about which expenses are or are not properly recoverable as special damages, I award the claimed special damages of $94,428.81.

IX. NON-PECUNIARY DAMAGES

[168] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. They are assessed on the basis of some common factors applied to a plaintiff's individual circumstances. Those factors include, but are not limited to: the nature of the injury; severity and duration of pain and disability; emotional suffering; loss or impairment of life; impairment of physical and mental abilities; loss of or interference with pre-accident lifestyle; impairment of family, marital, and social relationships; stoicism; and age: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[169] As usual in cases of this kind, I have been provided with a number of cases as possible guides to the appropriate range of non-pecuniary damages. While previous decisions involving similar injuries provide helpful guidance, no two cases are identical and each must be decided on its own facts: *Trites v. Penner*, 2010

BCSC 882 at paras. 188-189. The award should be fair and reasonable to both parties.

[170] Mr. Cohen was injured when he was in the early stages of a new career. For the last 10 years, he has had pain in his jaw, neck back and shoulder. Although some individuals would have recovered more quickly from similar injuries, Mr. Cohen has developed somatic symptom disorder and myofascial pain syndrome, complicated by depression and an opioid use disorder that was at least contributed to by his injuries. His life has involved regular and frequent medical treatments, which have so far provided only temporary relief. However, expert witnesses have recommended different treatment approaches that offer a real and substantial possibility of long-term relief.

[171] Mr. Cohen attempted to pursue his new career as an electrician, but his condition ultimately led him to abandon those efforts. He has, however, established himself in a related teaching position. His lifestyle outside work was previously centred on often intense and demanding outdoor activities. He has had to give up many of those activities and continue others only in more limited, less challenging ways. At the time of the accident, Mr. Cohen was engaged to be married, and I accept his evidence that his post-accident condition contributed to the break-up of that relationship.

[172] The plaintiff seeks $300,000 in non-pecuniary damages and relies on cases where non-pecuniary damages were assessed in the $200,000 to $250,000 range. Those cases include *St. Jules v. Cawley*, 2021 BCSC 1775, *Felix v. Hearne*, 2011 BCSC 1236, *Donaldson v. Grayson,* 2023 BCSC 1675, *Adamson v. Charity*, 2007 BCSC 671, *Mickelson v. Sodomsky*, 2019 BCSC 806, and *Young v. Anderson*, 2008 BCSC 1306.

[173] The defendants point to cases involving non-pecuniary damages of $50,000 to $85,000 for primarily soft tissue injuries. Those are *Zamora v. Lapointe*, 2019 BCSC 1053, *Burnett v. Granneman,* 2023 BCSC 1425, *Chalmers v. Morris,* 2021 BCSC 2004, *Ehirchiou v. Esguerra,* 2021 BCSC 39 and *Daitol v. Chan,* 2012 BCSC

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209. The defendants say an award between $50,000 and $85,000 would be fair and reasonable.

[174] Of all those cases, I find *St. Jules* and *Donaldson* to be the most nearly comparable. Both are relatively recent cases dealing with a similar combination of physical upper body injuries and psychological factors including somatic symptom disorder and depression. In *St. Jules*, the Court awarded $200,000 under this head of damages. In *Donaldson*, the Court awarded $250,000. In both cases, the loss of housekeeping capacity was included in the award for non-pecuniary damages. However, I find there is more evidence in the present case of potential for significant relief of symptoms in the future.

[175] I therefore find that an appropriate and fair award of non-pecuniary damages, taking into account the loss of housekeeping ability, to be $175,000.

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X. SUMMARY

[176] I award Mr. Cohen the following damages:

Past Income Loss	$72,000
Future Loss of Earning Capacity	$240,000
Cost of Future Care	$100,000
Special Damages	$94,428.81
Non-Pecuniary Damages	$175,000
Total	$681,428.81

[177] Mr. Cohen is entitled to costs, unless counsel need to address matters I am not aware of.

"N. Smith J."