IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maher v. Tsegaye,*
2024 BCSC 822

Date: 20240513
Docket: M162837
Registry: Vancouver

Between:

Tyler Joseph Maher

Plaintiff

And

Senayt Tsegaye and Aynalem Abraha

Defendants

- and -

Docket: M169793
Registry: Vancouver

Between:

Tyler Joseph Maher

Plaintiff

And

Jacqueline Blaschuk

Defendant

Before: The Honourable Mr. Justice G.R.J. Gaul

Reasons for Judgment

Counsel for the Plaintiff:	P. Lightbody J. Bednard
Counsel for the Defendants:	M. Monroy C. Smith S. An, (articled student)
Place and Date of Trial:	Vancouver, B.C. December 5 – 8, 2022 December 12 – 15, 2022 January 18, 2023 January 19, 2023
Written Submissions:	February 3, 2023
Place and Date of Judgment:	Vancouver. B.C. May 13, 2024

[1] In 2014, the plaintiff, Tyler Maher, was involved in two motor vehicle collisions. The first involved a motor vehicle owned by the defendants Senayt Tsegaye and Aynalem Abraha, and operated by Ms. Tsegaye ("MVA #1"). The second collision involved a motor vehicle owned and operated by the defendant Jacqueline Blaschuk ("MVA #2").

[2] In the present action, Mr. Maher sues for damages under the following headings:

a) non-pecuniary damages;

b) past loss of earning capacity;

c) loss of future earning capacity;

d) loss of housekeeping ability;

e) cost of future care; and

f) special damages.

Issues

[3] Based upon the pleadings filed and the submissions of counsel, the following issues need to be determined:

a) Liability

b) Causation

c) Quantum of Damages

Liability

MVA #1

[4] On the morning of 24 April 2014, Mr. Maher, 22-years old at the time, was driving a 1999 Toyota Corolla westbound on Grandview Highway in Vancouver. He

was *en route* to the Real Canadian Superstore near the corner of Grandview Highway and Rupert Street (the "RCS") for a work-related first aid training course.

[5] Around the same time, Ms. Tsegaye was driving a 2013 Nissan Rogue eastbound on Grandview Highway, with the intention of turning left at Rupert Street.

[6] Mr. Maher's vehicle and Ms. Tsegaye's vehicle collided in the intersection of Grandview Highway and Rupert Street (the "Intersection"). Both drivers maintain that the other was wholly responsible for the collision.

[7] The evidence at trial relating to the collision came from Mr. Maher, Ms. Tsegaye, and third witness Karen Tejay.

[8] Mr. Maher explained that his intention that morning was to proceed through the Intersection and then turn right into the Superstore's parking lot.

[9] Approaching the Intersection, Mr. Maher noticed a dark-coloured Nissan Rogue in the opposite eastbound left turn lane. He presumed this vehicle intended to turn left onto Rupert Street; however, it was facing forward and had not started its turn. As Mr. Maher proceeded through the Intersection on a solid green light, the Nissan suddenly and unexpectedly began its turn. Mr. Maher immediately applied his vehicle's brakes but he was not able to prevent his vehicle from colliding with the Nissan.

[10] According to Mr. Maher, Ms. Tsegaye's vehicle was practically directly in front of his vehicle, with its tires just in front of the Rupert Street pedestrian crosswalk when the collision occurred. Moreover, the force of the collision pushed his vehicle partially onto Rupert Street and Ms. Tsegaye's vehicle up onto the Rupert Street median.

[11] Mr. Maher testified that he exited his vehicle and after checking to see if Ms. Tsegaye was all right, he called 911 to report the collision. Apparently, the operator told Mr. Maher to move his vehicle, given that it was blocking traffic in the westbound rightmost lane of Grandview Highway. He complied with this direction

and moved the vehicle and parked it in the leftmost lane on Rupert Street, directly in front of Ms. Tsegaye's Nissan.

[12] Ms. Tsegaye's version of events is markedly different from that of Mr. Maher. She alleges that Mr. Maher's vehicle's turn signal was operating as it approached the Intersection, indicating that the vehicle would be turning right onto Rupert Street. Moreover, she claims Mr. Maher stopped at the Intersection for around one minute and then proceeded to make a wide right turn onto Rupert Street. She further testified that she had already passed the pedestrian crosswalk on Rupert Street when Mr. Maher's vehicle collided with hers. She maintains that after the collision, Mr. Maher drove his vehicle in reverse and came to a stop in the Intersection. It was from this position that Ms. Tsegaye claims Mr. Maher made his telephone call to 911. Mr. Maher then drove back along Rupert Street and parked his vehicle in front of hers.

[13] Ms. Tsegaye also testified that there were no witnesses to the collision and that Mr. Maher had in essence convinced someone to come forward to say they had witnessed the collision. Although Ms. Tsegaye could not identify who this witness was, she maintained that the person arrived at the scene 30 minutes after the collision had occurred.

[14] The only independent witness who testified at trial about MVA#1 was Karen Tejay. Ms. Tejay was clearly uncomfortable in her role, yet she testified in what I considered to be an earnest and credible manner. She most certainly was not someone whose testimony and evidence had been prefabricated by Mr. Maher.

[15] Ms. Tejay's recollection of the events of 24 April 2014 was not particularly strong. However, she was able to confirm that she was driving eastbound on Grandview Highway and intended to turn left onto Rupert Street. Her vehicle was positioned behind Ms. Tsegaye's as they waited for the opportunity to turn. Ms. Tejay testified that she saw Mr. Maher's vehicle proceeding eastbound on Grandview Highway approaching the Intersection. It appeared to her that Mr. Maher's vehicle was going to proceed directly through the Intersection. Although

she could not be specific, she testified that she thought the collision occurred in the intersection, just short of the Rupert Street pedestrian crosswalk. She testified that she was on the scene of the collision very shortly after it had occurred.

[16] I find Ms. Tejay's evidence is more supportive of Mr. Maher's version of events than Ms. Tsegaye's. According to Ms. Tejay, Mr. Maher's vehicle appeared to be proceeding through the Intersection and not turning right onto Rupert Street, as Ms. Tsegaye claims. Ms. Tejay's evidence, in conjunction with Mr. Maher's, satisfied me that the collision occurred in the general location where Mr. Maher says it did, and not on Rupert Street, as asserted by Ms. Tsegaye.

[17] On the issue of liability for MVA#1, I accept the evidence of Mr. Maher and find it is, to a certain degree, corroborated by Mr. Tejay's evidence.

[18] Ms. Tsegaye's evidence, on the other hand, was less than compelling. I found her testimony to be troublesome in a number of respects. She was a challenging witness who clearly had difficulty answering reasonably simple questions with what should have been reasonably simple answers. Instead, she was argumentative and appeared on a number of occasions to be wanting to answer questions that had not been asked of her. Additionally, she asserted that Mr. Maher had been dishonest in that he had moved his vehicle back into the Intersection after the collision to make it look like the collision had happened there and not on Rupert Street. This is something that I find Ms. Tejay would likely have seen if it had actually occurred. Given that Ms. Tejay had no recollection of seeing this, I am satisfied that this portion of Ms. Tsegaye's evidence is lacking in credibility.

[19] Section 174 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 (the "*Act*") provides the statutory framework in which to assess liability for MVA #1. This section reads:

> 174. When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the

> intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[20] In *Nerval v. Khehra*, 2012 BCCA 436, Mr. Justice Harris, explained the statutory obligations created by s. 174 of the *Act* as follows:

> [33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn must not be commenced unless it is clearly safe to do so. If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way. In other words, if a left turning driver complies with his or her obligation only to start the left turn when no other vehicles are in the intersection or constitute an immediate hazard, then the left turning driver assumes the relationship of being the dominant vehicle and approaching vehicles become servient and must yield the right of way.
>
> [34] As observed in *Salaam v. Abramovic,* 2010 BCCA 212 at para. 33, the words "immediate hazard" are "used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, by themselves, define the standard of care in a negligence action."
>
> [35] The effect of s. 174 is to cast the burden of proving the absence of an immediate hazard at the moment the left turn begins onto the left turning driver. This result flows inevitably from the wording of the section itself, given the nature of the absolute obligation the section creates. If a left turning driver, in the face of this statutory obligation, asserts that he or she started to turn left when it was safe to do so, then the burden of proving that fact rests with them.

[21] I accept the plaintiff's submission that Mr. Maher's vehicle would have constituted an obvious immediate hazard for Ms. Tsegaye and that she was at fault when she turned left into the Intersection.

[22] I find Ms. Tsegaye 100% liable for MVA#1.

MVA #2

[23] On 16 December 2014, a collision occurred between Mr. Maher's vehicle and a vehicle being driven by the defendant Ms. Blaschuk. The accident took place at

around 9:00 a.m. as both vehicles were travelling northbound on the Ironworkers' Memorial Bridge (the "Bridge").

[24] Mr. Maher says he was driving in the righthand lane. As he approached the crest of the Bridge, he decided to change lanes and move into the middle lane. He claims he engaged his left turn indicator, checked his mirrors and then proceeded to make his lane change. He maintains that as his vehicle was moving into the middle lane it was suddenly struck on the driver's side by Ms. Blaschuk's vehicle.

[25] Mr. Maher asserts that Ms. Blaschuk was entirely responsible for MVA#2.

[26] For her part, Ms. Blaschuk maintains that she had practically completed her lane change and that most of her vehicle was in the middle lane when Mr. Maher's vehicle suddenly collided with the passenger side of her vehicle.

[27] Determining liability for MVA#2 has proved to be somewhat of a challenge because I cannot say that the evidence of one party was more persuasive than the other. Moreover, I cannot say that on a balance of probabilities, Mr. Maher has convinced me that Ms. Blaschuk is 100% responsible for MVA#2.

[28] In my opinion, both Mr. Maher and Ms. Blaschuk began their respective lane changes without noticing each other. This means, they are equally at fault for having not taken the appropriate measures to ensure that they could make their lane changes in a safe manner.

[29] With respect to MVA#2, I find liability should be apportioned equally between Mr. Maher and Ms. Blaschuk.

Causation

[30] Mr. Maher alleges that as a result of MVA#1 he suffers from chronic back pain and persistent psychological issues, including Major Depressive Disorder. Furthermore, he contends that these injuries were aggravated by MVA#2.

[31] Dr. William Craig, a medical doctor with an expertise in physical medicine and rehabilitation provide opinion evidence on behalf of Mr. Maher relating to the injuries Mr. Maher suffered in the two motor vehicle accidents. In his first expert medical-legal report dated 26 January 2017, Dr. Craig observed:

> It is my opinion that Mr. Maher likely had a moderate soft tissue injury to his neck and back as a result of the April 24, 2014 accident. It is more difficult to comment on the December 16, 2014, accident as I saw no specific references to it in the provided records.
>
> Mr. Maher had some issues with his back in 2013 and 2011. This would have made him more susceptible to a poorer outcome from injuries from the April 24, 2014, and December 16, 2014, accidents. I suspect that his current symptoms are also being complicated by concurrent mood issues.
>
> …
>
> He is likely a year away from his point of maximum medical improvement. Prognosis will depend on how he responds to further treatment and whether he has a concurrent mood disorder. If he has a concurrent mood disorder and fails to respond to further treatment, then prognosis is worse for resolution of his symptoms. At present though, he should be able to continue working at his present job up to full-time hours. Whether he could work as a tire technician will depend on how he responds to further treatment.
>
> I see no contraindications to him participating in regular recreation, and I would encourage this.
>
> He should be capable of doing all of his routine household tasks without significant symptoms.

[32] In his second medical-legal report, dated 2 July 2021, Dr. Craig concluded:

> It sounds as if he had made some adaptions as to how he did his work and was generally tolerating it, with the exception of periodic flares. Given the ongoing symptoms, less physically demanding work would be most appropriate for Mr. Mayer(sic). I would defer comments to a psychologist or psychiatrist as to how his current mood symptoms would affect his employability. Function tends to be works in the setting of concurrent mood and pain issues.
>
> He is likely nearing his point of maximal medical improvement with regards to his physical symptoms unless he has significant improvement in his mood. Long-term, I think his ability to do more physically demanding employment would have been decreased due to injuries from the April 24, 1214(sic) accident…
>
> I would encourage him to participate in regular recreation and I would see no contraindications. This could help with both pain and mood issues.

> He should be capable of his routine household tasks but would likely have difficulty with heavier yard work or household maintenance and repairs.

[33] In his final report, dated 27 October 2022, Dr. Craig opined:

> …His symptoms and function have improved since the time of my last assessment.
>
> He has managed to return to work part-time. He would likely have difficulty with work that involves prolonged work in a flexed or awkward posture or repetitive medium and heavier lifting and carrying. From a physical perspective, he would be capable of full-time sedentary to light physical demand employment with some medium physical demand tasks.
>
> …Long-term, he will likely continue to have issues with low back pain with more physically demanding tasks or maintaining static postures for longer periods of time. I would encourage him to participate in regular recreation and I would see no contraindications. This would help with both pain and mood issues.
>
> He is doing all of his household tasks. If he lived in a house, he would likely have difficulty with household maintenance and repairs and medium and heavy yard work.

[34] The defendants presented the expert opinion evidence of Dr. Bassam Masri, a medical doctor with a specialty in orthopaedic surgery and Dr. David Lipson, a medical doctor with a specialty in physiatry. Based upon this evidence as well as the opinions of Mr. Maher's medical experts, the defendants accept that Mr. Maher suffered soft tissue injuries to his neck and back as a result of MVA#1, and that these injuries were aggravated by MVA#2. The defendants also acknowledge that Mr. Maher continues to suffer from chronic back pain that is attributable to both accidents.

Psychological Injury

[35] Mr. Maher claims that he now suffers from psychological injuries as a result of MVA#1 and MVA#2 is challenged by the defendants.

[36] In *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318, Mr. Justice Lambert summarized the principles to be applied in assessing claims of psychological injury at paras. 12-13:

12 It is important to understand what is established and what is not established by the decision in *Maslen v. Rubenstein*. I propose to set out a number of principles extracted from the reasons of Mr. Justice Taylor, for the Court, in the *Maslen* case. The first point is a preliminary point and appears in *Maslen* at p. 133 under the heading "(a) The Background":

1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.

The remaining ten points are drawn from the part of the reasons headed "(b) The Basic Principles" at pp. 134 to 137:

2. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.

3. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.

4. The plaintiff's psychological problems do not have their cause in the defendant's unlawful wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".

5. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind, otherwise it seems to me to beg the question; see my first observation, later in this Part of these reasons.)

6. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.

7. Any question of mitigation, or failure to mitigate, arises only after causation has been established.

8. It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the

> questions of legal liability or the question of assessment of damages.
>
> 9. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
>
> 10. Mr. Justice Spencer, at trial in the Maslen case, put the overall test quite correctly in these words:
>
> [C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.
>
> 11. There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.
>
> 13 I am sure Mr. Justice Taylor did not consider that the "basic" principles which he set out exhausted all the possibilities for the application of principle to the difficult problems in these cases. The general principles which apply in relation to causation in law will apply to psychological injury as they apply to physical injury.

[37] The principal evidence relating to Mr. Maher's psychological issues came from the plaintiff's expert, Dr. Kathryn Fung and the defendants' expert, Dr. Johann Brink.

[38] Dr. Fung is a medical physician with a specialty in psychiatry. She assessed Mr. Maher on 24 August 2021, which resulted in her expert medical-legal report dated 30 August 2021 and then again on 31 October 2022 from which Dr. Fung prepared a follow-up medical-legal report dated 7 November 2022.

[39] Dr. Fung diagnosed Mr. Maher with Major Depressive Disorder ("MDD") as a result of MVA#1 and MVA#2. In her opinion the chronicity of his physical injuries from MVA#1 were aggravated in MVA#2 and these accidents caused the MDD. In her opinion, Mr. Maher had not been adequately treated. Moreover, Dr. Fung was of the view that Mr. Maher would probably improve with optimized treatment: adhering

to medications prescribed, optimizing dose of antidepressants, behavioural activation, sleep hygiene and a progressive exercise program.

[40] In her expert medical-legal report dated 30 August 2021 Dr. Fung diagnosed Mr. Maher with a major depressive disorder that she concluded was more likely than not attributable to both motor vehicle accidents. She also observed:

> It is my opinion that Mr. Maher should be able to resume his usual job as a personal shopper at Superstore with a diagnosis of major depressive disorder. His capacity has been decreased, particularly in combination with chronic back pain, but he is unlikely to be totally disabled from working long term. At times, when his MDD is more symptomatic, he may experience period fo decreased productivity (partial disability) or total disability. With optimized treatment of his mental health, he is expected to be able to continue working at his current job.
>
> …
>
> It is unlikely that he will be totally disabled from working due to major depressive disorder in the future.

[41] Dr. Fung also opined that Mr. Maher could possibly suffer from an avoidant personality disorder or avoidant traits, but that this would pre-date the accidents in question.

[42] In her expert medical-legal report dated 7 November 2022, Dr. Fung concludes:

> Mr. Maher's prognosis for major depressive disorder is fair. At the time of my August 30, 2021 medical legal report, he had not reached maximal medical improvement. Since my last report, Mr. Maher has been switched to a first-line antidepressant for major depressive disorder, started counseling, started active rehab again, and worked with an occupational therapist for behavioural activation. He was able to return to part time work in February 2022 and increased his hours in August 2022. Although his physical and psychiatric symptoms have persisted, his function and endurance have improved since August 2021 with treatment optimization.
>
> …
>
> My opinion is unchanged from my August 30, 2021 medical legal report. This was question 8 in the original report. His total disability from working at Superstore occurred from April or May 2021 to February 2022 when his major depressive disorder was poorly controlled, in combination with chronic pain. Since his depression treatment was optimized, he has been gradually able to return to work. Since August 2022, he has been working 18 hours per week. This is less than his pre-MVA hours. He has informal accommodations at work.

[43] In their written final submissions, counsel for Mr. Maher observed:

> 263. [Of note, Dr. Fung states "accidents", plural. The experts and Mr. Maher have all taken steps to put [MVA#2] into proper context, and it is clear it was a significantly lesser event, causing approximately one month of aggravation on a physical level. It is submitted that it is safest to conclude that, based on the totality of the evidence in particular from Mr. Maher, that Dr. Fung's opinion on causation for mental health issues should be narrowed to [MVA#1]].

[44] Like Dr. Fung, Dr. Brink is a medical physician with a specialty in psychiatry. Dr. Brink conducted an independent medical exam of Mr. Maher on 19 July 2021 which resulted in an expert medical-legal report dated 6 October 2021.

[45] Dr. Fung diagnosed Mr. Maher with:

a) Major Depressive Disorder with anxious distress – moderate severity; and

b) Somatic Symptom Disorder – predominantly pain.

[46] Dr. Brink also opined that Mr. Maher may also suffer from a Social Anxiety Disorder.

[47] Having considered all of the evidence, I am satisfied that Mr. Maher suffers from a major depressive disorder as a result of MVA#1. In this regard, I agree with counsel for the plaintiff that MVA#2 likely had little to no impact Mr. Maher's psychological or mental health status.

Quantum of Damages

Duty to Mitigate

[48] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. However, once the plaintiff has proved the defendant's liability for their injuries, the defendant must prove that the plaintiff acted unreasonably in declining to pursue a recommended program or treatment and that the plaintiff's damages would have been reduced if the plaintiff had acted reasonably. Whether the plaintiff acted reasonably is a factual

question and it involves a consideration of all of the circumstances, including the degree of risk posed by the treatment, the gravity of the consequences for refusing the treatment and the extent by which the plaintiff's damages would have been reduced if the plaintiff had acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618; *Harle v. Williams*, 2020 BCSC 1684.

[49] Mr. Maher confirmed in his testimony that he did not follow all of the recommendations of his health care professionals. The defendants argue that this proves he failed to mitigate his damages and consequently the court should reduce by 25% any awards for non-pecuniary damages and future loss of opportunity to earn income. I am not persuaded by the defendants' argument. In Mr. Maher's case, I accept that his failure or inability to follow all of the treatments and programs recommended by his doctors and other health care professional was, to a noticeable degree, because of the psychological issues he has been dealing with since MVA#1. In this regard, I find the following remarks of Mr. Justice Blok in *Wagner v. Newbery*, 2015 BCSC 894 apposite to Mr. Maher's case:

> [232] There is, however, another problem with the defendants' mitigation argument because the circumstances suggest Ms. Wagner's lack of diligence may well be part of her depressive symptoms. Certainly, the defendants have not shown that it is not a consequence of depression, and they have the burden of proof on this issue. A plaintiff cannot be found to have failed to mitigate damages where that failure stems from a condition that the defendants themselves have caused, at least in part.

[50] On the question of mitigation, I accept the position advanced by counsel for Mr. Maher. I am satisfied that Mr. Maher has made genuine efforts to obtain treatment for the injuries he has suffered in the motor vehicle accidents. He has continued to have appointments with his family physician; he has attended courses to address his mental health issues; he has commenced an active rehabilitation program, which has included support from an occupational therapist; and he had continued to try various anti-depressant medications, as recommended by his physician.

[51] Overall, I see no basis to conclude that Mr. Maher has failed to mitigate his losses.

Non-Pecuniary Damages

[52] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[53] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

> [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[54] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[55] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J. In referring to an earlier decision, he said:

> In Butler v. Blaylock, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[56] With respect to Mr. Maher's personal history, I heard evidence from Mr. Maher himself as well as from his father Dwight Maher and his mother Ann Maher.

[57] Mr. Maher was 22 years old at the time of MVA#1. He was 23 when MVA#2 occurred. At the time of trial, he was 31 years of age.

[58] Mr. Maher lives with his wife and his mother-in-law in an apartment in Burnaby, British Columbia.

[59] During his time in high school, Mr. Maher was reasonably active, playing a number of sports including soccer and badminton.

[60] Mr. Maher has suffered from environmental allergies since he was a child. At times they can result in severe reactions and cause him to suffer respiratory distress. When these allergies flare up, Mr. Maher often finds himself getting sick which in turn causes him to take time off from work.

[61] In his teens, Mr. Maher developed cholinergic urticaria, which is a skin condition that causes him to break out in hives.

[62] Mr. Maher acknowledged that in high school he experienced bouts of anxiety especially in his final year. He has also occasionally had to deal with insomnia and sleep apnea.

[63] Having considered all of the evidence, I am satisfied that as a result of MVA#1, Mr. Maher suffers from chronic back pain and ongoing psychological issues, including a major depressive disorder. MVA#2 aggravated his physical injuries but had no material influence on his psychological condition.

[64] I am also satisfied, based upon the expert medical evidence, that Mr. Maher may have some improvement of his symptoms with further regular treatment, but that he will likely continue to experience chronic back pain and variations in his mood for the foreseeable future.

[65] I accept that on account of his back pain, he is not as physically active as he was prior to MVA#1. Moreover, factoring in the psychological issues resulting from MVA#1, I find his ability to socialize with friends has been restricted and his overall his enjoyment of life has been diminished.

[66] Relying upon the following case authorities, Mr. Maher submits that the appropriate award for non-pecuniary damages in his case is between $150,000 and $175,000:

a) *Pearson v. Savage*, 2017 BCSC 1435: $175,000 for a 21-year old plaintiff who suffered from chronic pain in their neck and back, headaches, and depression.

b) *Bolognese v. Phan*, 2022 BCSC 1734: $150,000 for a 27-year old plaintiff who suffered injuries to their neck, back, ribs, and coccyx, in addition to anxiety and depression.

c) *Lal v. Singh*, 2021 BCSC 2378: $165,000 for a 33-year old plaintiff who suffered from chronic pain in their neck and back. They also suffered from headaches and depression.

d) *Culver v. Skrypnyk*, 2019 BCSC 807: $175,000 for a 32-year old plaintiff who sustained injuries to their back and legs. They also developed anxiety and depression.

[67] In submitting that the appropriate range for an award for non-pecuniary damages in this case is between $60,000 and $80,000, the defendants rely upon the following cause authorities:

a) *Bearpark v. Lakhanpal*, 2013 BCSC 2082: $70,000 for a 25-year old plaintiff who suffered from significant ongoing chronic lower back pain, difficulty sleeping, depression, and anxiety.

b) *Dhadda v. Bradley*, 2019 BCSC 1840: $110,000 for a 23-year old plaintiff who suffered chronic neck and upper back pain and an anxiety disorder brought on by the pain. The award was reduced to $82,500 for failure to mitigate.

c) *Le v. Point*, 2015 BCCA 134: $60,000 for a 28-year old plaintiff who suffered pain in their neck, shoulder, and back. Symptoms of anxiety and depression eventually developed.

d) *Livsey v. Rukavina*, 2009 BCSC 1960: $40,000 for a 22-year old plaintiff who suffered soft tissue injuries to their neck and lower back.

e) *Safdari v. Buckland*, 2020 BCSC 769: $67,500 for a 36-year old plaintiff who suffered soft tissue injuries to their neck and upper back area, and cervicogenic headaches. Additionally, the plaintiff suffered an aggravation of their pre-existing lower back pain, anxiety and depression.

[68] Considering the factors articulated in *Stapley*, I am satisfied that the injuries Mr. Maher suffered in MVA#1 and MVA#2 have left him with mild to medium chronic pain in his back and a depressive disorder that can be managed with appropriate treatment.

[69] In my view, the appropriate award for non-pecuniary damages in this case is $100,000.

Past Loss of Earning Capacity

[70] In 2009 Mr. Maher began working at the RCS in North Vancouver, B.C. At the outset, he worked in the bulk foods section of the store but eventually he transferred to the Natural Value section. Mr. Maher chose to make the switch because if offered him more hours of work.

[71] In the Natural Value section, Mr. Maher's work consisted of stocking dairy products, canned foods, and various other snack items on shelves. There was some minor record keeping as well as cleaning as required.

[72] During his tenure with RCS, Mr. Maher has twice been offered supervisory positions. He has declined the offers because he believed supervisors worked longer hours without any overtime pay.

[73] According to Mr. Maher's evidence, in or around 2013, he and his parents started very preliminary discussions about him taking over his father's Big O Tire franchise in West Vancouver, BC (the "Tire Store"). Having considered the evidence of Mr. Maher as well as his parents' evidence, I find that nothing came from those discussions and that there was no material plan or decision made with respect to Mr. Maher working at and becoming responsible for the Tire Store.

[74] In this action against the defendants, Mr. Maher seeks an award for past loss of earning capacity of between $129,935.25 and $428,544. The former figure is derived from income Mr. Maher would likely have earned from his employment with RCS. The latter is based on the premise that starting in 2014 Mr. Maher would have been working at his father's tire store and transitioning into a more responsible and remunerative position of general manager.

[75] The defendants maintain that the evidence is insufficient to conclude that there was any reasonable possibility that Mr. Maher would have taken over from his father at the Tire Store. Instead, the defendants maintain that a modest amount ought to be awarded under this head of damages based upon the difference

between Mr. Maher's 2013 employment income from RCS and the income he earned in from RCS in 2014.

[76] In *Quigley v. Jonsen*, 2019 BCSC 1812, Mr. Justice Thompson observed with respect to a claim for past loss of earning capacity:

> [42] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as "past loss of income" is actually a claim for past loss of earning capacity — i.e., "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury". The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, by a replacement-cost evaluation of tasks that the plaintiff is now unable to do, or by an assessment of reduced business profits. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would occur: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Grewal v. Naumann*, 2017 BCCA 158 at paras. 43-46; *Rousta v.* MacKay, 2018 BCCA 29 at para. 14.

[77] A past loss of capacity is also an assessment of hypothetical events. That is, what is the value of the hypothetical loss?

[78] In my opinion, the defendants are correct when they submit that Mr. Maher's claim for an award for past loss of earning capacity based upon the premise that he was going to work at and eventually become responsible for the Tire Store is speculative at best. I am not persuaded that there was any real plan or intention on the part of Mr. Maher to follow through with anything relating to the Tire Store. The evidence points to the fact that he was not interested in working at his father's store and that the type of work involved did not suit or interest him. All of this leads me to conclude that there was no reasonable likelihood of Mr. Maher taking over his father's business and earning his principal income from that employment.

[79] In my view, Mr. Maher's claim under this head of damages is better and more appropriately calculated using his employment at RCS.

[80] Based upon Mr. Maher's evidence, as well as that of Susan Espin, a co-worker of Mr. Maher's at RCS, I accept that there was a good likelihood that Mr. Maher could have and would have worked more hours than he did at RCS in the

years following the motor vehicle accidents had the accidents not occurred. Relying upon the documentary evidence relating to the number of hours Mr. Maher worked in the years following the accidents as compared to the number of hours that would have been available to him, I accept that his loss of past earning capacity can be reasonably compensated by an award of $85,000.

Loss of Future Earning Capacity

[81] As counsel for the plaintiff correctly points out in their written submissions, when addressing whether there is a possibility that a future event will lead to a loss of income, the standard of proof to be applied is “simple probability” and not a “balance of probabilities”. In other words, Mr. Maher need not show that it is more likely than not that we will suffer future income loss; instead all he need show is that there is a “real possibility” that such a loss will occur.

[82] The Court of Appeal in *Rab* v. *Prescott*, 2021 BCCA 345 set out the three-step process a Court in determining whether a claim for Loss of Future Earning Capacity has been made out:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.

[83] As I noted in my remarks addressing Mr. Maher’s claim for loss of past earning capacity, I am not convinced that the evidence supports the proposition that Mr. Maher had any realistic intention or design to take over the Tire Shop and use it as his principal source of income.

[84] With regards to this head of damages, I am satisfied that Mr. Maher’s back pain may occasionally flare up to the point where he is temporarily unable to work.

The same can be said about the psychological issues he has been managing since MVA#1. In my opinion, the assessment of Mr. Maher's loss of future earning capacity is better addressed using the "capital asset" approach, articulated in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) and *Perren v. Lalari*, 2010 BCCA 140.

[85] Based on the evidence presented at trial, Mr. Maher will likely be actively employed for another 30 years or so. I also accept that given the chronic nature of his accident related injuries, he will likely be occasionally absent from his work at RCS on account of those injuries.

[86] The expert medical evidence is guarded when it comes to Mr. Maher's prognosis; however, based on that evidence, as well as Mr. Maher's own evidence, I am satisfied that full-time employment involving his current or similar duties with RCS or another employer is in his long-term future.

[87] In my opinion, $6,500 per year will reasonably compensate Mr. Maher for the number of hours or the amount of work that he will lose on account of his accident-related injuries. Given that I accept that he will likely work for the next 30 years, an award of $195,000 is, in my view, a reasonable and appropriate amount to compensate him for his future loss of earning capacity.

Loss of Housekeeping Capacity

[88] In their final submissions, counsel for Mr. Maher argued that it would be appropriate in this case to increase the award of non-pecuniary damages to reflect Mr. Maher's inability to perform the same household tasks that he did prior to MVA#1.

[89] I am not convinced that the evidence presented supports Mr. Maher's position. The medical evidence indicates that Mr. Maher should be able to perform the general household tasks the he had been doing prior to MVA#1. I accept that some of them may be a little more challenging given his back pain; however, I am not satisfied that Mr. Maher's circumstances warrants an additional award under this heading of damages or an increase in the amount of non-pecuniary damages.

Costs of Future Care

[90] Mr. Maher seeks an award in the range of $75,000 to compensate him for the anticipated costs associated with managing his accident-related injuries.

[91] In *Lowney v. Yung*, 2022 BCSC 1918, Madam Justice Francis explained the principles relating to this head of damages as follows:

> [124] The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.
>
> [125] The test for assessing future care costs is well-settled and asks (i) whether the costs are reasonable and (ii) whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.
>
> [126] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* (*Guardian ad litem of*) *v*. *Brisco*, 2002 SCC 9 at para. 21.

[92] Mr. Maher has medical health benefits with his current employer that pays for 100% of the cost of his prescription medications. In light of that fact, it would not be appropriate to factor that amount into the calculation of Mr. Maher's future care costs. However, in addition to prescription medications, Mr. Maher will also have a need for non-prescription medications to address his chronic pain. With respect to those medications, it is fair and reasonable that he be compensated for those modest future costs and I would set it at $500.00.

[93] I do however accept that Mr. Maher has an identifiable need for ongoing physiotherapy and cognitive behavioural therapy. I accept that $13,000 is a reasonable amount to compensate Mr. Maher for these foreseeable future costs. An additional $500 is awarded for the costs associated with Mr. Maher undergoing intra-muscular stimulation and another $2,500 for the kinesiology services that he will need in the future.

[94] The expert medical evidence also endorses Mr. Maher's need for the services of an occupational therapist and consequently I will grant Mr. Maher $2,500 for associated costs.

[95] Mr. Maher claims that his use of cannabis products assists him in managing his chronic pain. I am not convinced that there is an evidentiary basis to make an award covering the costs associated with these products.

[96] Although some of the medical experts recommended or endorsed Mr. Maher other treatments or items to assist Mr. Maher in managing the consequences of his injuries, the evidence relating to the costs was either non-existent or vague to the point where it cannot be determined.

[97] In summary, I will award Mr. Maher $19,000 for his costs of future care.

Special Damages

[98] Mr. Maher claims approximately $4,500 in special damages. This relates to the out of pocket expenses he says he has already paid for services and items directly related to the management and treatment of his accident-related injuries.

[99] The defendants accept that Mr. Maher's claim of $560 for mileage and $855 for physiotherapy are reasonable and justified. They also accept the $55 claimed for the non-prescription medications that Mr. Maher has purchased.

[100] The defendants argue that the remainder of the claimed expenses are either not related to the accident-related injuries, were not recommended by any identifiable health care professional or are unaccompanied by any proof of purchase. I agree with the defendants' position and will award Mr. Maher $1,500 in special damages.

Conclusion

[101] In summary, I find that the defendant Ms. Tsegaye 100% responsible for MVA#1. With respect to MVA#2, I find Mr. Maher and Ms. Blaschuk equally liable.

[102] In the result, I make the following awards:

a) Non-pecuniary damages:	$100,000
b) Past Loss of Earning Capacity:	$ 85,000
c) Loss of Future Earning Capacity:	$195,000
d) Cost of Future Care:	$ 19,000
e) Special Damages:	$ 1,500
f) Total:	$414,000

[103] If there is a need to make submissions relating to costs, then counsel are to advise me in writing within 30 days of the date of this judgment. Otherwise, the plaintiff is entitled to his costs.

[104] Additionally, either party has liberty to apply for directions in respect of any other matter within the scope of the pleadings that has not been addressed in these reasons.

"G. R. J. Gaul, J"