IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Murphy v. Morgan,*
2024 BCSC 859

Date: 20240530
Docket: M1810195
Registry: Vancouver

Between:

Daniel Murphy

Plaintiff

And

Jessica Morgan and Erin Audrey Morgan

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiff:	T.L. Spraggs D.A. O'Neill
Counsel for the Defendants:	P.K. Hamilton H.K. Hundal
Place and Dates of Trial:	Vancouver, B.C. January 22-26, 29-31, February 1-2, 2024
Place and Date of Judgment:	Vancouver, B.C. May 30, 2024

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Overview

[1] On October 31, 2016, the plaintiff, Daniel Murphy, was driving westbound on Highway 1 in Chilliwack, British Columbia when he was involved in a motor vehicle accident. Traffic came to a stop on the highway, as did the plaintiff. However, his vehicle was rear-ended by a vehicle driven by the defendant Jessica Morgan, and owned by the defendant Erin Morgan. Liability is admitted.

Background Facts

[2] At the time of the accident, the plaintiff was 55 years old and lived in Port Coquitlam, British Columbia. The plaintiff is now 62 years old and has relocated to Powell River. He has two adult children, Cameron and Megan Murphy, both of whom testified at trial, as did his ex-wife Tania Murphy.

[3] After working in the trades as a gasfitter, pipefitter and welder, the plaintiff retrained as a psychiatric nurse. In January 2005, he began working as a Registered Psychiatric Nurse at the Forensic Psychiatric Hospital ("FPH") in Coquitlam, British Columbia. In this role, the plaintiff provided care to patients with mental health problems who were involved with the criminal justice system.

[4] Mr. Murphy worked as a front-line nurse at FPH until 2012, when he left to take on various roles within the Union of Psychiatric Nurses. From 2012 through 2016, the plaintiff held executive roles in the union, including as president of the Union of Psychiatric Nurses, then as executive director of mental health with the B.C. Nurses Union ("BCNU").

[5] In May 2016, the plaintiff left his role with the BCNU and returned to front-line psychiatric nursing, resuming full-time employment as a Direct Care Nurse, Maximum and Multi-Level Security at FPH. This was a unionized position, governed by the terms and conditions of a provincial collective agreement between the Health Employers Association of B.C. and Nurses' Bargaining Association.

[6] The plaintiff provided patient-centered care to his patients and enjoyed engaging with them in their daily activities. He was an active participant and leader within the FPH nursing team.

[7] The plaintiff worked on the A1 ward at the FPH, where he cared for, among others, patients being assessed to determine if they were fit to stand trial. The A1 ward at FPH was the admitting ward and generally housed the most violent patients who typically suffered from untreated psychosis.

[8] Mr. Murphy testified that that the A1 ward was often dangerous and unpredictable, given that some patients had violent tendencies and there was a high frequency of new admissions in that ward.

[9] Prior to the accident, Mr. Murphy enjoyed spending time with family and friends, working on renovation projects around home, and engaging in sports and other outdoor activities with his family. Megan Murphy described her father as a “fun guy” who people wanted to hang out with.

[10] Mr. Murphy was generally healthy prior to the accident, though he did suffer from some pre-existing conditions including Type II diabetes and sleep apnea. The plaintiff’s diabetes was managed through diet and medication, though his sleep apnea continued to cause him difficulty sleeping at the time of the accident. The plaintiff also experienced episodes of low back and sciatic pain from time to time, and had to take time off work due to back pain in the weeks prior to the accident.

The Accident

[11] The accident occurred when the plaintiff was driving on Highway 1 in his Ford F-150 truck. Tania Murphy in the passenger seat. Traffic came to a stop ahead of them. The plaintiff also stopped, but saw a steady flow of traffic behind him. One car swerved to avoid hitting the plaintiff’s truck, but the car behind it rear-ended them. On impact, the plaintiff was turned sideways to the right and bracing Tania Murphy with his right arm. He recalled his body being thrown back and forth.

[12] The plaintiff testified that his recollection of driving home after the accident was "foggy". Tania Murphy testified that he drove the wrong way up an off-ramp, but the plaintiff has no recollection of that. He recalled feeling tired and nauseous, and that he vomited at home later that evening. The plaintiff thought he had suffered a concussion and asked Tania Murphy to wake him at intervals that evening.

Plaintiff's Post-Accident Circumstances: November 2016 to December 2017

Plaintiff's Condition and Treatment

[13] The plaintiff saw his family physician, Dr. Amin Hasham, the day after the accident. The plaintiff testified that he felt "horrible": his neck was getting stiff, his back was sore, he had a tingly feeling in his fingers and toes, and he experienced ringing in his ears. Dr. Hasham recommended that he take two weeks off work and use anti-inflammatory medications to manage his pain.

[14] In the weeks following the accident, the plaintiff commenced physiotherapy and massage therapy in the weeks following the accident. He continued to have headaches, neck and shoulder pain, and had difficulty lying flat to sleep. He eventually stopped sleeping in his bed in favour of sleeping upright in a chair in the living room.

[15] A December 2016 X-Ray showed moderate degenerative changes in his cervical spine, but no evidence of a fracture or bony lesions. That same month, the plaintiff was diagnosed with chronic lymphocytic leukemia ("CLL"). He understood CLL to be a very treatable type of cancer that did not change his life expectancy. The plaintiff's CLL was asymptomatic at the time of diagnosis and did not initially require treatment.

[16] In January 2017, the plaintiff reported a 60-70% improvement in his pain to Dr. Hasham. He told Dr. Hasham that he was feeling "much better", but was still experiencing persistent headaches along with neck and back pain. Dr. Hasham recommended physical therapy and rehabilitation.

[17] The plaintiff was off work due to his accident-related injuries from November 1, 2016 to February 5, 2017. For the period of October 31, 2016 to February 23, 2017, the

plaintiff received $32,339.98 in paid sick hours from his employer, the Public Health Services Authority (“PHSA”).

Return to Work

[18] As of February 2017, the numbness in Mr. Murphy’s left arm and leg had resolved, but he continued to experience neck and shoulder pain, headaches and ringing in his ears. He also continued to have difficulty sleeping.

[19] In early February 2017, the plaintiff returned to his position on the A1 ward at FPH. He participated in a graduated return to work program from February 6 to March 1, 2017. By the end of February 2017, the plaintiff had increased his workday to six hours per day, and over the following month, returned to full-time hours with modified duties.

[20] Prior to the accident, the plaintiff enjoyed working out with his patients in the gym and playing outdoor sports with them, but found he was unable to engage in such activities at the same level post-accident. He also found he could not get comfortable at work and had trouble concentrating. Mr. Murphy testified that while he was happy to be back at work, he did not feel like he was in any condition to be there and consequently he took a lot of time off work. He would work a shift and then not be able to return the next day. He testified that he was still feeling “terrible”, but the FPH was short-staffed and he felt pressure to return. During this period, Mr. Murphy worked seven to twelve-hour shifts, sometimes longer if overtime was required.

[21] As of March 1, 2017, the plaintiff reduced his hours from a full-time 1.0 line (37.5 hours per week) to a part-time 0.72 line (27 hours per week). The plaintiff testified that he did this because he continued to suffer symptoms from his accident-related injuries and was using up his sick time. He hoped that reducing his hours would give him the ability to recover. Nonetheless, the plaintiff continued to take sick time and received $21,354.98 in paid sick hours and general leave for the period of February 23 to August 11, 2017.

[22] In April 2017, Dr. Hasham prescribed a muscle relaxant, cyclobenzaprine, for the plaintiff's persistent complaints of neck and upper back pain and sleep issues. Dr. Hasham prescribed a variety of medications over the ensuing months to treat the plaintiff's muscle spasms and ongoing sleep issues. Dr. Hasham confirmed that all of these medications were prescribed to address muscle spasms and sleep issues, not because the plaintiff reported symptoms of depression or anxiety.

[23] The plaintiff continued to have neck pain and numbness in his fingers. He had a CT scan in August 2017, which showed severe osteoarthritis at the cervical spine. Dr. Hasham testified that this was not unusual for a patient of the plaintiff's age. The plaintiff also had an MRI in August 2017, which showed multi-level moderate degenerative changes in his cervical spine.

[24] In September 2017, the plaintiff was referred to a pain clinic on account of his ongoing upper back and neck pain, where he received saline injections in his trapezius and neck muscles. Mr. Murphy found these injections very painful and testified that they made his pain worse.

[25] As of the fall of 2017, Mr. Murphy reported to Dr. Hasham that he was able to function at work, but found pain management challenging. He was able to perform some of his job duties, but was not as active with patients as he had been prior to the accident. He also continued to experience difficulty sitting and charting. In early December 2017, the plaintiff reported to Dr. Hasham that he continued to have a moderate amount of neck pain that was affecting his sleep. He continued to take a variety of pain and muscle relaxant medications.

[26] Also, in December 2017, the plaintiff was involved in another motor vehicle accident. He testified that he could not remember anything about the circumstances of that accident, but denied feeling any worse afterwards.

The December 2017 Workplace Incident

[27] It is clear on the evidence that Mr. Murphy was a caring and compassionate nurse who cared about his patients, especially the younger adults. In the months

leading up to December 2017, one of Mr. Murphy's former patients committed suicide, and another young inmate attempted suicide in circumstances where Mr. Murphy felt other nurses did not intervene as they should have. These incidents had a significant effect on him.

[28] On December 22, 2017, Mr. Murphy was involved in a further traumatic event at the FPH, involving a code white "takedown" of a young male psychiatric patient (the "WCB Incident"). The WCB Incident occurred when the plaintiff was walking an agitated patient to a secluded area to help him calm down. Another nurse approached the patient from behind and touched him, which triggered the patient to become violent and aggressive.

[29] An altercation ensued in which Mr. Murphy and the patient fell to the floor. The plaintiff landed on top of the patient, but his arm was pinned underneath. Another nurse fell on top of them. The patient was spitting, hitting, yelling, and threatening to kill people. The patient managed to get Mr. Murphy's finger in his mouth and attempted to bite it off. Mr. Murphy was able to extricate himself, at which point the patient started crying and calling for his mother. This had a significant impact on Mr. Murphy as the patient reminded him of his own son.

[30] The plaintiff suffered an injury to his finger, along with pain in and bruising to his arm. His physical injuries resolved. However, he experienced psychiatric issues following the WCB Incident, which resulted in him making a mental health claim through WorkSafeBC.

[31] In January 2018, Dr. Hasham completed a WorkSafeBC physician's report for the WCB Incident in which he noted that there were no prior or other problems affecting the plaintiff's injury, recovery or disability. Dr. Hasham indicated that the plaintiff was medically capable of returning to full duties, full-time, but indicated that he was suffering from "anxiety, dysphoria and difficulty with concentration". He also described the plaintiff as: "[f]eeling somewhat better physically but is having difficulty with coping mentally. Difficulty with focus and concentration. He did attempt to return to work however had severe anxiety symptoms and was unable to go back to the work site".

[32] In January 2018, WorkSafeBC referred the plaintiff for a psychological assessment with Dr. Alena Kuca. Dr. Kuca noted the following history of emotional issues arising from work-related incidents reported by the plaintiff, the accuracy of which the plaintiff confirmed at trial:

> Mr. Murphy reports that he himself had been dealing with emotional problems for about a year prior to this incident, starting with a young inmate's suicide attempt in which other nurses did not intervene as they should have. About two months prior to [the WCB Incident], he was very upset by the suicide of a young inmate who was recently released to the community. Mr. Murphy had had a good relationship with the inmate who used to call him for support.
>
> There were a number of other upsetting incidents throughout the last year which reportedly affected him more than similar incidents before. On a few occasions he had to leave his workplace and sit in his truck, trying to clam down and control his emotions after certain work incidents.
>
> He stated "Everything is hitting me harder now". However, until the [WCB Incident], he was able to work through his emotions and control his reactions. His functioning was not significantly affected. He admits that he has grown increasingly frustrated with the lack of resources that would help inmates to resolve their issues and to get integrated into normal society. After the closure of the Riverview Hospital, many mentally ill patients were left with inadequate support and resorting to criminal activities which bring them to FPH again and again. Some helpful programs at the FPH have been closed. He says that he care about the inmates and feels particularly sorry for the young ones who have low prospects for a normal life. It always makes him think about his own children and even worrying about their lives.
>
> [Emphasis added.]

[33] Mr. Murphy also reported to Dr. Kuca that when he went back to the FPH after the WCB Incident to talk to his manager about returning to work with alternative duties, he felt very anxious when approaching the building and "could not even get through the door". He also reported feeling tense, being startled by loud sounds, and that this tension and jumpiness were new for him.

[34] As to his emotional state following the WCB Incident, the plaintiff acknowledged that the following excerpt from Dr. Kuca's assessment accurately reflected his experience at the time:

> His mood is low and he doubts himself as he had never done before. He used to pride himself for being good at de-escalating situations. [The WCB Incident] has shown him how vulnerable and how out of control he is. He says that it affected his pride and his confidence; he feels 'guilty and stupid because he cannot fix

> himself'. He denies feeling 'depressed', but he is irritated by minor issues, unmotivated for activities, and he particularly does not want to deal with any challenges or stress.

[35] Dr. Kuca diagnosed the plaintiff with adjustment disorder with mixed anxiety and depressed mood. Dr. Kuca was aware of the accident and that as of January 2018, Mr. Murphy continued to suffer from neck pain. Dr. Kuca's assessment does not indicate that Mr. Murphy reported suffering from any psychological issues arising from the accident.

[36] In June 2018, a registered psychologist assessed the plaintiff to determine his suitability for participation in WorkSafeBC's Resilience over Psychological Trauma (RoPT) Program. The plaintiff again identified the suicide incidents at FPH as impacting his emotional and psychological state. He also reported that the WCB Incident was the "straw that broke the camel's back".

[37] In the context of completing the RoPT assessment, the plaintiff reported having been in the accident, that he continued to have significant neck, shoulder and back pain, and that he was unable to chart incidents at work in a manner that he felt was necessary for appropriate accountability. He also reported that his quality of life was affected by his inability to do the recreational activities that he used to do. The RoPT assessment does not reflect the plaintiff having reported experiencing any anxiety or depressive symptoms arising from the accident.

Ongoing Neck and Shoulder Pain

[38] Around the time of the WCB Incident and for some time thereafter, the plaintiff continued to experience neck and shoulder spasms and pain. He obtained some pain relief from paramedical treatments—including physiotherapy and acupuncture—and exercise. He also continued to experience symptoms of tinnitus and had difficulty sleeping.

[39] In February 2018, the plaintiff attended the Change Pain Clinic for his ongoing neck pain. He reported experiencing pain from both his accident-related injuries and

injuries suffered in the WCB Incident. The clinic recommended physiotherapy and made further referrals for him to see a pain specialist and neurologist.

[40] In September 2018, the plaintiff saw a neurologist, Dr. Cory Toth. In January 2019, Dr. Toth reported to Dr. Hasham that:

> The [plaintiff's] full neurological and cognitive screen today was quite good. I suspect that his pain conditions with headache and spinal pain, along with the effects of depression are most likely the cause for the cognitive issues that he presents with. If a concussion occurred, it would have had to be mild given the absence of any lost consciousness.

[41] Dr. Hasham testified that he understood from Dr. Toth's report that the plaintiff was doing well cognitively and did not have any issues of concern. Dr. Toth did not testify at trial.

Return to Work Post-WCB Incident

[42] The plaintiff was off of work for 10 months following the WCB Incident. He returned to work in November 2018 and participated in a graduated return to work ("GRTW") program from November 19, 2018 to January 18, 2019.

[43] The plaintiff missed multiple shifts throughout his GRTW program as a result of illness. His ongoing neck pain also continued to impact his ability to fully engage in his job tasks, namely, interviewing, charting and attending to aggressive patients. He continued to have moderate neck pain, headaches and ringing in his ears.

[44] The plaintiff completed his GRTW program in January 2019, but did not feel that he could keep up with his responsibilities on the A1 ward. Accordingly, effective February 2019, he bid on and obtained a 0.84 (31.5 hour) line on the A3 brain injury ward at the FPH.

[45] The A3 ward housed brain-injured patients that were high acuity, but more stable than those on the other wards. As such, work on the A3 ward involved a different type of nursing than in the plaintiff's previous position on the A1 ward. The patients were more predictable and "nowhere near as violent", which "made life easier" for Mr. Murphy.

However, the A3 ward required more lab work and charting, which he found challenging because leaning over to write aggravated his neck pain.

[46] After the WCB Incident, Mr. Murphy avoided going into seclusion rooms with patients or taking lead in emergency situations. He also testified that he no longer enjoyed driving as it "got his anxiety going", so he started walking to work or getting rides on occasion due to driving anxiety.

[47] The plaintiff worked in his 0.84 position on the A3 ward from February 2019 to May 2021. Mr. Murphy's hourly wage rates, inclusive of the premium applied to forensic nurses, were as follows: $47.50 from April 1, 2019 to March 31, 2020; $50.95 from April 1, 2020 to March 31, 2021; and $51.90 from April 1, 2021 to March 31, 2022. Mr. Murphy's earnings in this time frame were as follows:

Year	**T4 Slips**	**WCB / EI / Canada Life**	**Source of Funds**
2019	$73,560.46	$3,580.56	Provincial Health Services Authority / Worksafe
2020	$105,943.62	N/A	Provincial Health Services Authority
2021	$55,834.49	$13,109.60	Provincial Health Services Authority / Worksafe

Plaintiff's Circumstances: February 2019 to Trial

[48] As of early 2019, the plaintiff experienced ongoing neck and shoulder pain and headaches, and continued to take a variety of medications to manage these symptoms.

[49] In February 2019, the plaintiff reported to Dr. Hasham that he had good days and bad days, but did not feel he could return to work as a nurse. Nonetheless, he had by this point completed his GRTW and returned to work at the FPH as outlined above. His tinnitus symptoms continued and he was referred to an ear, nose and throat specialist.

[50] In May 2019, the plaintiff reported to Dr. Hasham that his tinnitus "comes and goes", but that he was otherwise doing generally well. As of September 2019, he

reported to Dr. Hasham that he was “feeling ok for the most part”, but had been having more neck pain, mostly when he had to do a lot of charting at work. By this point, the pain was mainly in his neck; his back had improved. He continued to experience moderate tinnitus and difficulty sleeping due to his neck pain.

Other Health Issues

[51] The plaintiff understood that his immune system was compromised because of his CLL. Following the WCB Incident, he told various treatment providers that he hoped to return to a different position, ideally one with less patient contact. His ideal position was a “nurse educator” where he would interact only with other nurses instead of patients. However, Mr. Murphy understood that the nurse educator position was unavailable to him as it had been filled by another person with CLL.

[52] On May 9, 2021, the plaintiff suffered a workplace injury to his groin when he slipped and fell in a patient’s washroom. He went off work due to this injury and has not returned to the workforce in any capacity since.

[53] In early August 2021, the plaintiff contracted COVID-19 and was hospitalized for 10 days. While in hospital, the plaintiff developed pneumonia and spent seven days on supplemental oxygen. Mr. Murphy’s COVID-19 illness was sufficiently dire that Megan Murphy and her partner came home early from a trip to Ontario to be with him.

[54] The plaintiff was eventually discharged from hospital, but required continued oxygen therapy at home and was monitored by a respirologist. He testified that it took him three to four months post-infection to return to even slow walking. Dr. Hasham’s clinical records indicate that the plaintiff reported experiencing post-COVID-19 brain fog.

[55] By mid-August 2022, the plaintiff’s CLL had progressed to the point where he required medication. He has suffered some side-effects from those medications, including headaches, fatigue and weakness. He is currently monitored for oncological purposes by a physician in Powell River, Dr. Lynda Foltz, who in turn provides updates to Dr. Hasham.

[56] Mr. Murphy has a family history of cardiac issues and believes that he may have suffered a mild heart attack in his fifties. In late 2021 or early 2022, he began experiencing shortness of breath, especially when exerting himself. In April 2023, he had a coronary CT angiogram, which resulted in an urgent referral for a further angiogram in June 2023. After assessing the plaintiff in June 2023, the plaintiff's cardiologist (Dr. Heather McPhaden) noted as follows, which the plaintiff agreed was accurate:

> Upon my assessment, Daniel is stable, he has no particular complaints. He continues to experience neck pain which has been an issue for him since a car accident many years ago prior to his diagnosis of CLL. This prevents him from obtaining a good night's sleep. He has no particular complaints. He continues to experience fatigue, but he attributed this to his poor sleep quality as well as cardiac related symptoms of exercise tolerance and shortness of breath. …

[57] As a result of the second angiogram, the plaintiff was referred for urgent cardiac bypass surgery, which occurred in late June 2023. The plaintiff remained in hospital for approximately two weeks post-surgery and testified that his recovery from cardiac surgery lasted until Christmas 2023.

Cessation of Work

[58] In the fall of 2021, while the plaintiff was off work after his groin injury and while recovering from his COVID-19 infection, he decided to apply for long-term disability ("LTD") benefits. Dr. Hasham did not recall discussing this with the plaintiff, and there is no evidence that the decision to apply for LTD was done at Dr. Hasham's, or any of his other treating physicians' recommendation.

[59] Dr. Hasham provided an attending physician's statement of disability dated November 11, 2021, which indicated a primary diagnosis of advanced degenerative disc disease in Mr. Murphy's cervical spine and listed the date of onset of symptoms as the date of the accident. Dr. Hasham provided a secondary diagnosis of depressive disorder, and stated that this contributed equally with his primary diagnosis to Mr. Murphy's condition at the time. Dr. Hasham also listed Mr. Murphy's diabetes and CLL as other complicating factors.

[60] The plaintiff's LTD claim was accepted with a disability date of August 6, 2021. He began receiving LTD payments on December 6, 2021. For the period of December 6, 2021 to November 5, 2023, the plaintiff received $70,079.91 in LTD benefits. As of November 6, 2023, the plaintiff began receiving LTD benefits of $2,970.03 per month.

[61] The plaintiff also applied for CPP disability benefits and was awarded benefits of $1,716.12 per month effective November 1, 2021. As at the time of trial, the plaintiff remained off work and was receiving LTD and CPP disability benefits.

Deterioration of Plaintiff's Psychological State

[62] Tania Murphy and Mr. Murphy were married for approximately 22 years. She testified that prior to the accident, their marriage was a happy one. Tania Murphy was responsible for most of the household work, including cooking, cleaning and grocery shopping, while Mr. Murphy attended to home maintenance and renovations. They enjoyed doing activities as a family, including traveling, camping, biking, hiking and golfing.

[63] Mr. Murphy testified that he experienced symptoms of depression and anxiety after the accident and that this made him irritable and difficult to live with. He characterized his behaviour towards Tania Murphy in particular as "abusive" and testified that it culminated in him "kicking her out" of the family home in October 2018.

[64] Mr. Murphy's immediate family members—Tania, Megan and Cameron Murphy—all testified that Mr. Murphy became progressively unhappier and more irritable after the accident. They testified that he became more withdrawn socially, would leave social functions early, and eventually stopped attending altogether. However, they were largely unable to distinguish between changes in his mood following the accident and following the WCB Incident.

[65] Tania Murphy testified that she noticed a change in the plaintiff soon after the accident and that he gradually became more frustrated and irritable with her over time. Tania Murphy attributed Mr. Murphy's irritability and abusive behaviour, and the resulting impact on their marriage, entirely to the accident. She denied that the WCB

Incident played any part and testified that the accident was the sole reason behind the breakdown of the marriage.

[66] This denial is difficult to accept as it is inconsistent with the preponderance of the contemporaneous medical evidence and events leading up to their ultimate separation. The consistent tenor of the evidence reflected in the clinical records is that the onset of Mr. Murphy's symptoms of low mood, depression and anxiety occurred after the WCB Incident. This timing is also consistent with Megan Murphy's evidence that Mr. Murphy's abusive behaviour towards Tania Murphy escalated and was most noticeable in 2018.

[67] Cameron Murphy testified that he did not observe any additional impacts on the plaintiff after the WCB Incident from what he had already observed following the accident. Again, this evidence is difficult to accept in face of the contemporaneous clinical records documenting the impact that the WCB Incident had on the plaintiff's mental health and corresponding extended medical leave. Cameron Murphy worked out of province in the summer of 2017, and thereafter had only intermittent and limited opportunity to observe and interact with his father. It is unclear whether he returned to the family home following that summer, but he again worked out of province in the summer of 2018. In the circumstances, I find Cameron Murphy's evidence of the plaintiff's post-accident condition to be of limited assistance.

[68] I found Megan Murphy's evidence regarding the plaintiff's condition in the months and years following the accident to be unreliable and, at times, lacking in credibility. The reliability of her evidence is called into question by her admission that her memory of the plaintiff's condition in the months following the accident was "not clear" and "very fuzzy".

[69] As to credibility, two aspects of her evidence give cause for concern. First, Megan Murphy testified that she was not aware of her father having any serious health concerns or problems prior to the accident. This is difficult to reconcile with the plaintiff's evidence that he was experiencing hip and back pain in the summer of 2016 and Megan Murphy offered him marijuana to help with the pain.

[70] Second, she testified that she did not know about the WCB Incident or that the plaintiff was off of work for a year afterwards. Megan Murphy's explanation for her lack of knowledge was that she and the plaintiff did not have a relationship at the time. I find this explanation unpersuasive. Given that Megan Murphy was living in the family home with the plaintiff at the time, it is difficult to accept that she did not notice that her father stopped going to work for almost a full year. In the result, I am unable give much weight to Megan Murphy's evidence as to the plaintiff's physical or psychological condition post-accident.

[71] Considering the evidence as a whole, I find that Tania, Megan and Cameron Murphy's evidence regarding their observations of the plaintiff's psychological condition in the months and years following the accident is unreliable and must be treated cautiously. Each of them downplayed the impact and significance of the WCB Incident on Mr. Murphy in a manner that detracted from their testimony overall. I do not suggest that they were intentionally dishonest or sought to mislead. However, their inability to recall material points and the care they took to avoid giving evidence that may be construed as inconsistent with or unhelpful to Mr. Murphy minimizes the weight that I can give to their evidence.

The Plaintiff's Current Circumstances

[72] The plaintiff relocated to Powell River in 2021, where he now lives in an older property that requires maintenance and upkeep. He testified that he cannot perform the type of home maintenance tasks, such as electrical work, felling trees on the property, and painting that he used to manage before the accident. He testified, for example, that he tries to paint for 30 minutes at a time, but has to rest and take pain medications afterwards. He has been trying to finish painting three rooms, but the project had already taken three months and was ongoing by the time of trial.

[73] The plaintiff testified that he is always sore and that he has some difficulties taking care of his activities of daily living. His usual routine involves a walk in the morning, an afternoon nap, a second nap in the evening and stretching. He prioritizes taking a shower each day and, on a good day, completing one household chore (e.g.

laundry). He said that his house is no longer as clean as he would like it to be and that his neighbours assist him in taking out his garbage.

[74] Mr. Murphy and Tania Murphy have largely lived separate lives since she left the family home in October 2018. Mr. Murphy now has a girlfriend who currently lives in the Philippines, but will be joining him in Canada.

[75] While flying long distances exacerbates his pain, the plaintiff has traveled post-accident, and has also engaged in some limited outdoor activities. In June 2019, he went to Whistler with Megan Murphy where they did a white-water rafting trip one day, and a hike at Joffrey Lakes the following day. In August 2019, the plaintiff took a trip to Alaska with Cameron Murphy. He has also travelled to the Philippines twice and found that this was good for his mental health.

[76] The plaintiff does not currently have close relationships with either of his children. Cameron Murphy has only limited interactions with his father and described him as a "typical grumpy old man" who is short with everyone around him and likes to provoke arguments. Megan Murphy characterized her relationship with her father as "surface level".

[77] The plaintiff rarely attends social gatherings as he does not like crowds and finds it difficult to follow conversation when there are more than two or three people in a group together.

Reliability and Credibility

[78] The plaintiff's credibility is a key issue in this trial. This is not unusual in cases involving chronic pain diagnoses as the court must consider the reality of the plaintiff's complaints of ongoing pain in the absence of objective findings to determine the existence and extent of the injuries, and properly assess damages based on such complaints: *Gee v. Bock*, 2019 BCSC 1348 at para. 36; see also *Wells v. Kolbe*, 2020 BCSC 1530 at para. 83.

[79] I am guided in my credibility assessments by the approach set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), and *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). The factors that assess credibility include: the witness's ability and opportunity to observe the events; whether their evidence harmonizes with independent evidence that has been accepted; the firmness of the witness's memory; the ability to resist the influence of interest to modify one's recollection; whether the witness changes their testimony between direct and cross-examination; the witness's general demeanour; whether their testimony seems unreasonable, impossible or unlikely; and whether the witness has a motive to lie. Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense and if a witness is evasive, longwinded, or argumentative in their responses: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at para. 92, leave to appeal to SCC ref'd, 32946 (21 January 2021).

[80] I am mindful that credibility and reliability are separate but related concepts. Credibility pertains to a witness's veracity, while reliability has to do with the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41. Significant frailties in a witness's evidence—such as inconsistencies between their testimony and contemporaneous documentation or inconsistencies and contradictory explanations of key issues—may affect both credibility and reliability: see e.g. *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd*., 2021 BCSC 1445 at paras. 53-55, appeal to CA dismissed as abandoned, 2023 BCCA 39.

[81] That being said, credibility and reliability are not all or nothing propositions. I may believe all, part, or none of a witness' evidence, and can attach different weight to different parts of that evidence: *Radacina v. Acquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44, 2005 CanLII 253 (Ont. C.A.).

[82] The test of the truth of a witness's evidence is its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable within the applicable context: *Buttar v. Brennan*, 2012 BCSC 531 at para. 25, citing *Faryna* at 357. The applicable principles as they apply in the present context were summarized in *Buttar* at para. 24:

- the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 397 (S.C.);
- 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 (*Price* at 399);
- 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 (*Price* at 399);
- the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73;
- in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given *Tai v. De Busscher*, 2007 BCCA 371 at para. 41.

[83] Considering the evidence as a whole, I did not find the plaintiff to be a particularly reliable witness, and I also did not find him credible at times. The plaintiff was not a reliable historian of events and his evidence lacked detail on material points. He also

demonstrated a tendency to downplay or minimize subsequent events and health issues—namely, the impact of the WCB Incident on his psychological state—in favour of attributing all of his physical and psychological issues to the accident. In particular, the magnitude of psychological injury that the plaintiff attributed solely to the accident is inconsistent with his clinical records.

[84] The plaintiff was at times unable to recall information pertinent to his medical history and denied facts that he perceived may be unhelpful to his case. In some instances, he failed to disclose such information to the medical professionals who treated him and provided opinion evidence in this proceeding.

[85] I am mindful that inconsistencies in clinical records are almost inevitable because few people will describe their condition in exactly the same way on numerous occasions: see e.g. *Edmonson v. Payer*, 2011 BCSC 118 at para. 35, aff'd 2012 BCCA 114. However, the issue with Mr. Murphy's evidence is not variability in his description of reported symptoms over time, but rather a failure to report symptoms or a denial of symptoms that were previously reported.

[86] In the circumstances, I find that the best evidence of the plaintiff's medical history and condition at the various material points in time is as reflected in the contemporaneous clinical records of his treating physicians, including those of Dr. Hasham and the medical professionals who assessed and treated him through WorkSafeBC following the WCB Incident. Statements made by Mr. Murphy contained therein are also admissible for their truth as admissions against interest: *Egan v. Andrychuck*, 2022 BCCA 110 at paras. 53, 55; see also *Findlay v. George*, 2021 BCCA 12 at para. 81, citing *Bancroft-Wilson v. Murphy*, 2009 BCCA 195 at para. 9.

[87] Mr. Murphy's evidence also suffered from both internal and external inconsistencies on material points, which casts doubt on his credibility. Three examples are illustrative. First, the plaintiff initially testified that he did not report symptoms of depression or anxiety to Dr. Hasham after the accident (but before the WCB Incident) because his pride prevented him from doing so. However, the plaintiff later changed his evidence to say that he did report depressive symptoms to Dr. Hasham after the

accident and suggested the lack of reference to such symptoms in Dr. Hasham's clinical records was because Dr. Hasham must not have recorded them. This explanation is unpersuasive, and I do not accept it.

[88] Second, the plaintiff denied that that his CLL made him more prone to illness, and that he contracted illnesses from patients at work from time to time. This denial is difficult to accept in face of the plaintiff's testimony that he wanted a role with less patient contact when he returned to work after the WCB Incident and concession on cross-examination that it was fair to say that his immune system was compromised because of his CLL.

[89] It is also contrary to Dr. Hasham's evidence that patients with compromised immune systems due to CLL are more prone to infection and disease. The plaintiff did not object to Dr. Hasham opining on this point and regardless, I find that it falls within Dr. Hasham's expertise as a family physician. Dr. Hasham's contemporaneous clinical records also reflect multiple occasions where the plaintiff stated that he considered himself vulnerable to patient illnesses due to his CLL, and had hoped to obtain a nurse educator position that did not require patient contact.

[90] The record contains multiple additional instances where the plaintiff's evidence was not corroborated in contemporaneous clinical records. The plaintiff claimed he became forgetful immediately after the accident, but there is no mention of this in Dr. Hasham's clinical records. He also testified that he reported driving-related anxiety to Dr. Hasham two weeks after the accident. Dr. Hasham's notes indicate that the plaintiff reported experiencing neck pain when driving, but do not reference any report of driving-related anxiety. The plaintiff denied having had brain fog post-COVID-19 and told Dr. Venugopal Karapareddy (a psychiatrist who prepared a medical expert report for the plaintiff) that he had no ongoing symptoms from his COVID-19 infection, yet he reported experiencing brain fog post-COVID-19 to Dr. Hasham and Dr. Foltz.

[91] The plaintiff also tended to attribute all of his psychological issues to the accident, without regard to the WCB Incident. Given the lack of contemporaneous corroboration establishing the onset of psychological symptoms post-accident but pre-

WCB Incident, I reject the plaintiff's evidence that he was experiencing symptoms of depression or anxiety prior to the WCB Incident.

[92] While I accept that the plaintiff may have suffered periodic instances of low mood in the time frame between the accident and the WCB Incident, I find that they did not rise to the level where he felt it necessary to report them to Dr. Hasham. As such, I treat the plaintiff's evidence regarding the onset, nature, and extent of his psychiatric symptoms with caution. As I discuss further below, this also significantly lessens the weight that can be given to the opinions of the experts who assessed and diagnosed the plaintiff based on his self-reported history of psychological symptoms.

[93] I remain mindful that it does not necessarily follow that because the plaintiff's evidence lacks credibility and reliability, his position is untenable: *Davie v. Hill*, 2022 BCSC 2074 at para. 76, citing *Rab v. Prescott*, 2021 BCCA 345 at para. 51. Nor am I required to reject all of his evidence because I have concerns about his credibility or reliability: *Westergaard v. MacLean*, 2017 BCSC 772 at para. 199.

[94] Accordingly, while I accept that the plaintiff's testimony was, for the most part, well-intentioned, I nonetheless find he was not a reliable or entirely credible witness. Minor inconsistencies in the plaintiff's evidence are to be expected in a case of this nature. However, in my view, the plaintiff's tendency to attribute all of his physical and psychological injuries to the accident while minimizing the impact of the WCB Incident and his myriad of other health issues, went beyond the "natural and excusable tendency" to do so: see e.g. *Sevinski v. Vance*, 2011 BCSC 892 at para. 42. As such, I find that I must treat the plaintiff's evidence cautiously, especially where it lacks corroboration or is inconsistent with his clinical records or other documentary evidence.

Expert Evidence

[95] The plaintiff tendered reports from four medical experts: Dr. Hasham, his general practitioner; Dr. David Flaschner, a physiatrist; Dr. Karapareddy, a psychiatrist; and Dr. Vance Tsai, an otolaryngologist. The plaintiff also tendered two reports from Mr. Timothy Winter, an occupational therapist and expert in functional capacity evaluation. The defendant did not call any expert evidence.

[96] The weight a court will give to an expert opinion depends on the degree to which the underlying assumptions have been proven by other admissible evidence: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40. If the plaintiff's account of their change in physical, mental or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinion rests will be undermined: *Safdari v. Buckland*, 2020 BCSC 769 at para. 86, citing *Samuel v. Chrysler Credit Canada Ltd*., 2007 BCCA 431 at paras. 15, 49-50. Where an expert report does not align with the evidence adduced at trial, this undermines the reliability of the opinion and impacts the weight that can be given to the evidence: *Toora v. Caldwell*, 2023 BCSC 1985 at paras. 45, 150-151.

[97] The importance of a plaintiff's reliability and credibility in reporting their symptoms to the usefulness of an expert's report was described by Chief Justice Wilson in *Leonard v. British Columbia Hydro and Power Authority* (1964), 49 D.L.R. (2d) 422 at 424-425, 1964 CanLII 485 (B.C.S.C.), as cited in *Wettlaufer v. Air Transat A.T. Inc*., 2013 BCSC 1245 at para. 50, as follows:

> … The doctor says he accepted some statements made by his patient as facts and formed an opinion thereon. Such an opinion, I think, is subject to criticism if the patient does not appear as a witness and corroborate the existence at the time of the symptoms alleged to have been described to the doctor. Such an opinion, in so far as it relies on the credibility of the patient, is subject to rejection by a judge or jury who, having heard the patient, do not find him credible. I do not think they are bound by the doctor's opinion as to credibility but they must pay a considerable regard to it, particularly if it is related to associated objective evidence, such, for instance, as evidence of spasm. But I do not see any reason why a judge or jury, having heard the expert and the patient, should not, in a proper case, reject the evidence of the expert on the ground that the patient is not a credible witness and that, therefore, the hypothesis on which the expert gave his opinion is not established having, of course, the fullest regard to the expertise of the doctor and to any objective evidence he has propounded. If this were not so then judges and juries would be completely bound by the opinions of experts as to credibility, and this cannot be.
>
> [Emphasis added.]

[98] The importance of an accurate medical history on the weight that can be given to an expert's opinion was also noted in *Butterfield v. Coufour*, 2005 BCSC 179:

> [18] However, medical history is critical to the formulation of an opinion on causation, aggravation or exacerbation. The absence of an accurate medical

> history renders the opinions of the health care providers and experts of limited assistance. While Dr. Apps gave evidence in a very forthright and objective manner he relied on inaccurate or incorrect information provided by Ms. Butterfield in forming his opinion regarding her injuries and causation of those injuries. As such his opinion with respect causation or the degree of exacerbation or aggravation is of limited assistance. Similarly, Ms. Butterfield's other expert witnesses, their evidence is largely unhelpful in an assessment of causation or the alleged degree of exacerbation or aggravation of Ms. Butterfield's chronic conditions because those experts did not have Ms. Butterfield's full or complete medical history.
>
> [Emphasis added.]

[99] The plaintiffs' experts' lack of awareness, or failure to meaningfully address, the impact of the WCB Incident and his multitude of other injuries and illnesses on his psychological and neurological conditions undermines their opinions as to causation. The opinion evidence proffered by the experts, particularly in relation to the plaintiff's alleged psychological injuries, relies heavily on his description of his symptoms and the timing of their onset. Where—as I have found to be the case here— the plaintiff's description of their symptoms is unreliable, the corresponding expert opinion will be similarly unreliable and, therefore, should be given less weight: *Wettlaufer* at para. 49.

[100] I also note that the plaintiff's failure to provide a complete and accurate history to the physicians who assessed him for the purpose of providing opinion evidence in this litigation lessens the weight that can be given to the expert evidence. In particular, it undermines the experts' attribution of the plaintiff's psychological conditions and ongoing symptoms/disability arising therefrom to the accident.

(a) Dr. Hasham – General Practitioner

[101] Dr. Hasham testified as a fact witness and was also qualified to provide expert opinion evidence in the area of family medicine. Dr. Hasham prepared a report dated February 27, 2023.

[102] Dr. Hasham opined that the accident caused the plaintiff to sustain a grade three whiplash associated disorder injury, a mild traumatic brain injury ("MTBI"), and soft tissue injuries to his neck and back. He further opined that these injuries in turn resulted in neck pain, upper and lower back pain, cervicogenic headaches, progression of the

plaintiff's pre-existing degenerative disc disease, sleep disturbance, and depressive symptoms.

[103] Dr. Hasham opined that the plaintiff's inability to return to work following the May 2021 groin injury and COVID-19 infection was caused by the ongoing symptoms, including depression, from his accident-related injuries. Specifically, Dr. Hasham opined that "[the plaintiff] was unable to return to work on a full-time basis after the motor vehicle accident, due to his ongoing symptoms, and therefore had to work on a part-time basis and on modified duties. However, after a period he was unable to work in any capacity and therefore applied for long-term disability".

[104] As to the plaintiff's future prognosis, Dr. Hasham opined that due to his persistent symptoms, he is presently disabled from being able to return to work as a nurse and has limited capabilities for other type of work. The plaintiff's ongoing symptoms from his accident-related injuries will likely affect his future employment opportunities and non-work areas of his life. Dr. Hasham's long-term prognosis is guarded.

[105] By consequence of his long-standing role as the plaintiff's general practitioner, Dr. Hasham had the most comprehensive picture of the plaintiff's overall health and the myriad of health conditions he experienced after the accident. Despite this, Dr. Hasham's report did not address the impact—if any—of these post-accident injuries and illnesses on the plaintiff's present condition or prognosis in his expert report. For example, he:

a) did not address the impact of the WCB Incident, progression of the plaintiff's CLL, COVID-19 infection and hospitalization on the plaintiff's decision go on LTD instead of returning to work post-November 2021; and

b) did not address the impact of the plaintiff's coronary artery disease and June 2023 cardiac bypass surgery, if any, on his future prognosis or his ability to return to work.

[106] Dr. Hasham attempted to explain the lack of reference to any of the plaintiff's other health issues in his report as arising from his understanding that the report was

supposed to pertain to the accident and accordingly, while the other health issues were "significant', they were not pertinent in terms of his report. This explanation is unpersuasive.

[107] Dr. Hasham was specifically instructed to address whether there were "any other accidents, illnesses, or medical conditions that pre- or post-date the motor vehicle accident that are relevant to the injuries". His failure to do so in favour of adopting a narrow focus on the accident as the sole cause of the plaintiff's ongoing disability and inability to return to work in any capacity demonstrates a lack of appreciation for the proper role of an expert and strays into advocacy.

[108] This is particularly the case considering that the plaintiff did in fact return to work after the accident and again after the WCB Incident, and worked for over two years until the May 2021 groin injury. The plaintiff did not decide to apply for LTD until November 2021, five years after the accident, and at a time when he had recently been off work due to the groin injury and was recovering from a serious COVID-19 infection. In these circumstances, I find Dr. Hasham's highly generalized opinion that "after a period [the plaintiff] was unable to work in any capacity and therefore applied for long-term disability" (emphasis added) ambiguous to the point of being misleading to the extent it suggests that the accident caused the plaintiff's inability to return to work after his groin injury and COVID-19 infection. This is particularly the case in light of his admission noted above, that the plaintiff's other health issues were "significant" and "played a role" in his inability to return to work and decision to go on LTD.

[109] Dr. Hasham's report also at times downplayed improvement in the plaintiff's symptoms and attributed complaints to the accident in the absence of contemporaneous clinical notes and contrary to reports made in other contexts. For example, he:

a) opined that the plaintiff continued to struggle with tingling in the right arm and memory problems (among other issues) throughout the summer of 2017, yet conceded that there are no contemporaneous notations to that effect in his clinical records;

b) diagnosed the plaintiff as having depressive symptoms in the summer of 2017 despite having no record of such symptoms being reported by the plaintiff at that time; and

c) opined that the plaintiff suffered memory issues as a result of the accident but was unable to point to any supporting reference in his clinical records. Dr. Hasham conceded in cross-examination that the plaintiff's reports of memory issues were in his clinical notes "at a later date" and that he must have made this diagnosis "in retrospect".

[110] Dr. Hasham's evidence that the plaintiff was experiencing depressive symptoms arising from the accident in the period following the accident but prior to the WCB Incident is particularly problematic. As noted above, his report states that the plaintiff was having "depressive symptoms" in the summer of 2017, and "had a bout of depression due to chronic pain and disturbed sleep". His opinion in this respect is unsupported by his clinical records and inconsistent with the various reports and forms he completed from time to time which, in my view, establishes that the plaintiff's psychological issues manifested in material part after the WCB Incident. By way of example, Dr. Hasham conceded in cross-examination that:

a) his chart notes do not record any complaints of depressive symptoms in the November 2016 to December 2017 period;

b) the medications he prescribed in that time frame were for pain and to assist with sleep, not for depression;

c) the only reference to depressive symptoms in the relevant time frame was in response to the combination of medications the plaintiff was taking for a period of time, not the accident; and

d) the Insurance Corporation of British Columbia CL19 form he completed for the plaintiff in January 2017 did not note any complaints of psychological issues or driving-related anxiety, and he admitted that he would have included those issues in the CL19 form had they been reported by the plaintiff.

[111] For his part, the plaintiff initially testified that he did not tell Dr. Hasham about his psychological symptoms because of his pride, but he later changed his evidence to say that he did report depressive symptoms in the period after the accident but before the WCB Incident, but Dr. Hasham must have failed to note them in his clinical records. I do not accept the plaintiff's evidence on this point and find that he did not report any symptoms of depression or anxiety to Dr. Hasham in the period between the accident and the WCB Incident. I accept Dr. Hasham's evidence that in his role as family physician: he is required to and does record pertinent facts reported by his patients; he knows to look for symptoms of depression in patients that have been involved in motor vehicle accidents; he considers those symptoms to be pertinent and would have recorded them if reported; and if he believes a patient may be suffering from mood-related symptoms, he will make a referral to the appropriate specialist.

[112] I also reject Dr. Hasham's opinion both that the plaintiff's whiplash associated disorder ("WAD") injury caused more rapid progression of the plaintiff's pre-existing degenerative disc disease and that WAD injuries may result in more rapid progression of the disease generally. His opinion in this respect was limited in that all he could say was that there is "some evidence in the literature" that progression of degenerative disc disease is a "potential" sequelae of WAD injuries. Dr. Hasham was unable to provide any further elaboration on the literature referred to, other than to say he recalled reading something to that effect in a continuing medical education publication for family physicians. It is also questionable whether this aspect of Dr. Hasham's opinion falls within the scope of his expertise in family medicine.

[113] Considering all of the above, I accept Dr. Hasham's opinion that the plaintiff suffered a MTBI, grade three WAD injury, and soft tissue injuries to his neck and upper back as a result of the accident, and that these injuries caused chronic neck and upper back pain, cervicogenic headaches, and exacerbated his pre-existing sleep issues. His opinions in this respect are consistent with the clinical records and objective findings on assessment.

[114] I reject Dr. Hasham's opinion that the plaintiff suffered depressive symptoms arising from the accident. I also give no weight to his opinion that the accident caused an exacerbation of the plaintiff's pre-existing degenerative disc disorder.

(b) Dr. Karapareddy – Psychiatrist

[115] Dr. Karapareddy is a psychiatrist who was qualified to provide expert opinion evidence in the area of general psychiatry with expertise in addictions psychiatry. Dr. Karapareddy assessed Mr. Murphy on September 20, 2023, and provided a report dated October 20, 2023.

[116] Dr. Karapareddy diagnosed the plaintiff with the following conditions arising from the injuries he sustained in the accident: moderate major depressive disorder; specified anxiety disorder with traffic-related anxiety; somatic symptom disorder, predominantly related to residual pain; and mild neurocognitive disorder due to multiple etiologies, opining as follows:

> Major depressive disorder: The cumulative, stress, chronic pain and cognitive and functional impairment appears to have contributed to his depressive disorder. If not for the index motor vehicle accident, Mr. Murphy would not have experienced these symptoms at this time in his life. Therefore, the motor vehicle accident is likely a causative factor for his major depressive disorder. There is a mention of Major Depressive disorder diagnosis was [sic] noted in the assessments of work-related injuries. However, his worksafe claim as [sic] more around adjustment disorder, rather than depression. It may well be that work relate [sic] injuries may have maintained his depressive symptoms.
>
> Other specified anxiety disorder, with traffic-related anxiety: Given the temporal relationship between the accident and the onset of his symptoms, it is more likely than not that the motor vehicle accident is a causative factor.
>
> Somatic symptom disorder, predominantly pain, residual: Due to chronic pain, Depression, anxiety, and functional losses may well have contributed to his condition. If not for the motor vehicle accident injuries, Mr. Murphy would have not experienced these symptoms at this time in his life.
>
> Mild neurocognitive disorder due to multiple etiologies: At the time of the motor vehicle accident, Mr. Murphy was working in a highly demanding role as a senior nurse for a number of years. Although there was no loss of consciousness in the motor vehicle accident, it appears that he presented with post-concussive symptomatology, chronic pain, mood and anxiety in the aftermath of the accident, which likely caused cognitive impairment. If it were not for the motor vehicle accident, he would not have experienced these symptoms at this time in his life.

[117] Dr. Karapareddy's opinion that the accident caused the plaintiff's major depressive disorder and anxiety disorder is premised on the plaintiff having reported symptoms of depression and anxiety to Dr. Hasham in the period after the accident but before the WCB Incident. No such symptoms are reflected in the Dr. Hasham's clinical records, and I rejected the plaintiff's evidence on this point. Accordingly, the key factual assumption underpinning Dr. Karapareddy's opinion that the plaintiff's depression and anxiety were caused by the accident is not borne out in the evidence.

[118] When confronted with this in cross-examination, Dr. Karapareddy became evasive, defensive and argumentative. He initially refused to concede that the plaintiff's clinical records showed no reports of psychological issues until after the WCB Incident and made generalized assertions that people who suffer from chronic pain are also at high risk of psychological issues. He also attempted to speculate about why Dr. Hasham's clinical notes did not indicate that Mr. Murphy had reported depression-related symptoms, including suggesting that this was because general practitioners are focused on a patient's physical rather than mental health.

[119] Dr. Karapareddy eventually conceded that Dr. Hasham's first reference to the plaintiff reporting symptoms of anxiety or depression was not until after the WCB Incident and in the course of the plaintiff being assessed through WorkSafeBC. However, he maintained that the plaintiff must have been having symptoms of depression or anxiety prior to the WCB Incident because Dr. Hasham prescribed Ativan, gabapentin and Cymbalta at various points in time post-accident but pre-WCB Incident.

[120] Dr. Karapareddy's explanation is belied by Dr. Hasham's evidence, which I accept, that the various medications he prescribed to the plaintiff from November 2016 through December 2017 were for pain management and sleep, not depression or anxiety. In particular, he prescribed amitriptyline in September 2017 not as an anti-depressant, but rather to manage the plaintiff's nerve pain and assist with sleep. Dr. Hasham's evidence in this respect is consistent with the plaintiff's contemporaneous reported complaints of continuing neck pain and difficulty sleeping.

[121] Dr. Karapareddy also relied heavily on the temporal relationship between the accident and the onset of the plaintiff's symptoms—that the plaintiff developed depressive symptoms within six months of the accident—in opining that "it is more likely than not that the motor vehicle accident is the causative factor". Yet the contemporaneous clinical records establish no such temporal connection between the accident and the onset of the plaintiff's psychological symptoms. The plaintiff did not report depressive symptoms or feeling anxious until after the WCB Incident. Moreover, the anxiety he reported after the WCB Incident was not when driving, but rather when he first attempted to return to the FPH after the WCB Incident.

[122] In this respect, while I accept Dr. Karapareddy's diagnosis of major depressive disorder, I do not accept his opinion that this was caused by the accident. The key factual assumptions underpinning Dr. Karapareddy's opinion as to causation have not been established on the evidence.

[123] Dr. Karapareddy's diagnosis of specified anxiety disorder with traffic-related anxiety suffers from the same problem. The facts and assumptions upon which Dr. Karapareddy relied in making that diagnosis were similarly not established on the evidence. There is no mention of the plaintiff experiencing driving related anxiety in the contemporaneous clinical records. Rather, the plaintiff reported that driving exacerbated his neck and shoulder pain. Further, Dr. Hasham did not mention anxiety in the January 2017 CL19 form, and he testified that had the plaintiff reported such symptoms, he would have included them in that document.

[124] I do not accept Dr. Karapareddy's suggestion that this is because the plaintiff was suffering from "undiagnosed traffic related anxiety" (emphasis added). The only evidence supporting this diagnosis is the plaintiff's self-reported history, and I have found him to be a poor historian who was unable to provide an accurate or reliable timeline of his medical history and symptomatology.

[125] Another issue of significant concern with Dr. Karapareddy's opinion is his treatment of the WCB Incident and its potential effect on the plaintiff's psychological condition. Rather than addressing the WCB Incident directly, Dr. Karapareddy

questioned the criteria used by WorkSafe BC physicians in diagnosing him with depression and attempted to characterizing that diagnosis as “more around adjustment disorder, rather than depression”. He thus concluded that “[i]t is not totally clear if the accident related injuries had impact on his work related injuries to worsen his Depression from the accident related injuries”.

[126] This creates particular cause for concern given Dr. Karapareddy’s concession in cross-examination that the WCB Incident was “definitely very traumatic”, “definitely caused stress and trauma”, and “significant in this context”. In the circumstances, I find Dr. Karapareddy’s attempt to minimize and recharacterize the WCB Incident undermines his opinion that the plaintiff’s major depressive disorder was caused by the accident to the point where I cannot give it any weight.

[127] Finally, I do not accept Dr. Karapareddy’s opinion that the plaintiff is suffering from mild neurocognitive disorder due to depressive disorder and chronic pain, nor do I accept his opinion that ongoing post-concussion symptoms are contributing to the plaintiff’s neurocognitive defects. This aspect of Dr. Karapareddy’s opinion is predicated on the plaintiff having “presented with post-concussive symptomatology, chronic pain, mood and anxiety in the aftermath of the accident” which he opined “likely caused cognitive impairment”.

[128] Dr. Karapareddy was not qualified to opine in the area of neurology, and his diagnosis of mild neurocognitive disorder appears to be predicated on his review of opinions provided by neurologists (Dr. Toth and Dr. Donald Cameron), which were not before the Court. Additionally, his opinion that ongoing post-concussion symptoms are contributing to the plaintiff’s neurocognitive defects is unsupported in the evidence and difficult to reconcile with his conclusion that the plaintiff’s MTBI had resolved.

[129] To summarize, I accept Dr. Karapareddy’s opinion that that plaintiff suffers from residual somatic symptom disorder related to his chronic neck and back pain caused by the accident, I also accept his diagnosis of major depressive disorder. However, I give no weight to Dr. Karapareddy’s opinion that the plaintiff suffers from mild neurocognitive disorder or specified anxiety disorder with traffic-related anxiety as a result of the

accident, or that the accident caused the plaintiff's depression. The facts and assumptions upon which these opinions were based were not proven.

[130] Dr. Karapareddy's prognosis for the plaintiff is guarded given that the plaintiff continues to have symptoms six years post-accident:

> Concurrent mental health and chronic pain issues are likely to continue his long-term disability. In my clinical opinion, he is permanently disabled from returning to his previous role as a psychiatric nurse or engaging in related employment in the next 12 months or longer. Beyond this, it is difficult to predict how his symptoms will change. His vocational disability is most likely due to a combination of neurocognitive disorder, major depressive disorder, chronic pain, as well as anxiety.

[131] I give no weight to Dr. Karapareddy's opinion that the plaintiff "separated from his wife due to the neurocognitive disorder, depression, as well as chronic pain". The factual basis upon which this opinion is predicated is unclear, and to the extent that it relies on the plaintiff's self-reported reasons for separation, I have found him not to be a reliable historian of events. Finally, having rejected Dr. Karapareddy's diagnosis of traffic-relaxed anxiety, I give no weight to his opinion that the plaintiff is partially permanently disabled with respect to driving.

(c) Dr. Tsai – Otolaryngologist

[132] Dr. Tsai is an otolaryngologist who was qualified to provide expert evidence in otolaryngology, including opinions on tinnitus, inner ear, and hearing conditions. Dr. Tsai assessed Mr. Murphy on May 25, 2023, and provided a report dated July 6, 2023.

[133] Dr. Tsai opined that Mr. Murphy's tinnitus and hearing loss were more likely than not caused by the accident. Dr. Tsai would not have projected Mr. Murphy's current tinnitus complaints in the absence thereof. I accept Dr. Tsai's opinion in both respects.

[134] With respect to hearing loss, I reject the defendants' contention that the plaintiff's complaints of hearing loss are attributable to an ear infection. In this respect, I prefer Dr. Tsai's evidence, which was based on diagnostic testing consistent with the plaintiff's self-reported symptoms as reflected in Dr. Hasham's clinical records, specifically left-side asymmetric sensorineural and high-frequency hearing loss.

[135] Dr. Tsai testified that tinnitus is difficult to successfully treat and opined that he does not anticipate substantive improvement to occur in Mr. Murphy's case. He recommends tinnitus retraining (counselling) therapy, use of white noise machines and custom hearing aids to assist in managing Mr. Murphy's condition.

(d) Dr. Flaschner – Physiatrist

[136] Dr. Flaschner is a physiatrist who was qualified to provide expert opinion evidence in the area of physical medicine and rehabilitation, including musculoskeletal injuries and chronic pain. He was qualified to provide a diagnosis of the plaintiff's condition in these areas, along with an opinion on the causes, prognosis, treatment, and impact on the plaintiff's functioning. Dr. Flaschner assessed the plaintiff on September 21, 2023, and provided a report dated October 6, 2023.

[137] Dr. Flaschner diagnosed the plaintiff with the following injuries arising from the accident: MTBI, chronic cervicothoracic musculoligamentous sprain/strain, bilateral shoulder sprain/strain, lumbar sprain/strain (resolved), and post-traumatic headache. Dr. Flaschner opined that given the onset of injuries contemporaneous with the accident and persistence of symptoms, the plaintiff's current musculoskeletal chronic presentation more likely than not were caused by the injuries he sustained in the accident.

[138] Dr. Flaschner also opined that the plaintiff's cognitive issues are a consequence of disturbed sleep, chronic pain and mood issues. However, Dr. Flashner's qualifications did not extend to neurology or neurological function, and I find that his evidence regarding neurocognitive issues falls outside the scope of his expertise.

[139] As to prognosis, Dr. Flaschner testified that the plaintiff has reached maximal medical improvement, and that his ongoing injuries are expected to require long-term management. Dr. Flaschner opined that the plaintiff is expected to tolerate sedentary to light level employment that allows for frequent changes in position and posture throughout the day, but should avoid work that places him at risk of physical altercations or safety-critical decision making in the absence of supervision. Dr. Flaschner found the plaintiff's reports of worsening symptoms with prolonged static postures and physical

exertion consistent with his ongoing pain presentation. Given the plaintiff's chronic musculoskeletal injuries, Dr. Flaschner opined that heavier lifting, carrying, repetitive bending, reaching and prolonged static postures may exacerbate the plaintiff's pain.

[140] Dr. Flaschner recommended that ongoing treatment be directed at an active rehabilitation program to be learned over the course of six to eight weeks, together with manual therapies for temporary symptomatic relief. Dr. Flaschner also recommended medial branch blocks and continuation of the plaintiff's current combination of medications, potentially coupled with a topical analgesic.

(e) Mr. Winter – Occupational Therapy and Functional Capacity

[141] Mr. Winter is a certified work/functional capacity evaluator. He was qualified as an occupational therapist with expertise in the area of work and functional capacity assessment, cost of future care evaluations and in providing cost of care recommendations.

[142] Mr. Winter completed two functional capacity evaluations of Mr. Murphy. The first assessment was conducted January 16-17, 2019 and resulted in an initial report dated February 28, 2019 ("2019 FCE"). Mr. Winter conducted a second assessment on March 1, 2023, and provided follow-up report dated April 11, 2023 ("2023 FCE").

[143] When Mr. Winter conducted the 2019 FCE, the plaintiff was experiencing an episode of sciatica pain in his lower back and right leg that limited his performance on the assessment. This pain also affected Mr. Murphy's walking tolerance and, together with unsafe blood pressure readings, prevented Mr. Winter from conducting a full assessment of Mr. Murphy's functional capacity.

[144] Nonetheless, Mr. Winter concluded that Mr. Murphy would likely be well-suited to the physical demands of psychiatric nursing "if not for his recent back injury". He noted that "[w]hile [the plaintiff's] neck, upper shoulder and upper back symptoms continue to be reactive with static upper body alignment, cervical flexion, and reaching for example, the inherent flexibility to oscillate work postures and demands within the day will likely support his sustained work tolerances".

[145] Mr. Winter understood that Mr. Murphy was not currently working when the 2019 FCE was conducted, but did not know that he had been off work for a year prior and indicated that having this knowledge may have affected his testing. He also noted the potentially serious health consequences of remaining entirely out of the workforce or severely curtailing his participation therein. Among other things, Mr. Winter recommended that Mr. Murphy engage in appropriate therapy and pursue a suitable return to work target.

[146] In the 2023 FCE, Mr. Murphy reported that he was able to lift and carry 20-30 lbs, and was able to manage his current driving needs, though it made him anxious and uncomfortable. Mr. Murphy denied having limitations related to pushing and pulling, walking, stair climbing, grip strength or fine dexterity, which represented an improvement over the 2019 FCE. Mr. Winter similarly noted improvement on the multidimensional task ability profile, where Mr. Murphy's perceived ability to typically perform both work tasks and activities of daily living improved from the 44th to 55th percentile. Mr. Murphy demonstrated weaker results in some areas, including on his perception of his disability resulting from headaches.

[147] In the 2023 FCE, Mr. Murphy reported to Mr. Winter that he was able to manage cooking and meal preparation and that he was able to perform all necessary house and yard work, though he contends with motivation issues and fatigue. This was a further improvement from the 2019 FCE, where Mr. Murphy reported that all home maintenance and repair had been put on hold due to pain, and Mr. Winter observed that a number of projects were left incomplete at the plaintiff's former residence.

[148] There are some discrepancies in Mr. Winter's opinion between the 2019 FCE and the 2023 FCE. For one, in the 2019 FCE, Mr. Winter opined that Mr. Murphy's functional limitations resulted from his lower back and leg pain. In the 2023 FCE, he attributed such limitations to the plaintiff's upper back and neck pain. Mr. Winter became defensive when questioned about this under cross-examination. Moreover, despite the various improvements in Mr. Murphy's functional capacity documented between the

2019 and 2023 FCEs, Mr. Winter's conclusion regarding Mr. Murphy's ability to tolerate the demands of psychiatric nursing in the 2023 FCE was less optimistic.

[149] In the 2023 FCE, Mr. Winter concluded that Mr. Murphy's current functional tolerances did not meet the demands of a psychiatric nurse as he is unlikely to durably tolerate the functional stress on his neck and upper back/shoulder regions that are routinely encountered in his pre-accident work setting. Mr. Winter also opined that Mr. Murphy would not be effective in a physical altercation given his current pain levels and mobility limitations. Nonetheless, Mr. Winter agreed that other types of psychiatric nursing roles are available in various settings that are less physically demanding and dangerous than the roles Mr. Murphy occupied at the FPH.

[150] Importantly, Mr. Winter was unaware that Mr. Murphy returned to work in February 2019, shortly after the first FCE, and worked a 0.84 position on the A3 ward for over two years until his groin injury in May 2021. Mr. Winter testified that this information would have been valuable to him, and he would have considered it in forming his opinion.

[151] Mr. Winter's lack of awareness of the plaintiff's ability to return to work for over two years after the WCB Incident materially impacts the weight that can be given to his opinion that the plaintiff's ongoing neck and back pain render him unable to tolerate the job demands of a psychiatric nurse, particularly in a setting other than on the A1 ward at the FPH. I must consider this omission alongside my findings regarding the reliability and credibly of Mr. Murphy's evidence and the extent to which Mr. Winter's opinion relies on Mr. Murphy having provided an accurate report of his medical history and symptomology. Accordingly, I find that Mr. Winter's 2023 FCE opinion likely understates Mr. Murphy's current capacity for employment as a psychiatric nurse, particularly in a less demanding role than his prior positions at the FPH.

[152] Mr. Winter understood that Mr. Murphy resigned from the FPH and moved to Powell River. He noted that despite the plaintiff having a number of connections within mental health services in Powell River and employment offers, he remained reluctant to re-engage in psychiatric nursing due to his ongoing symptoms. Mr. Winter again noted

the potentially serious health consequences of remaining out of, or severely curtailed from, participation in the workforce. He recommended that a reasonable next step for Mr. Murphy may include pursuing volunteer opportunities with a longer-term goal of returning to psychiatric nursing on a part-time basis.

Causation

[153] Mr. Murphy alleges that his physical and psychological injuries were all caused by the accident. The defendants concede that the plaintiff suffered physical injuries in the accident, but deny that the accident caused depression, anxiety or neurocognitive defects. They say that the plaintiff's psychological issues were caused by the WCB Incident, not the accident.

Legal Principles

[154] The plaintiff bears the onus of proving on a balance of probabilities that the defendants caused or contributed to the injuries for which he seeks compensation. The general test for causation is the "but for" test, which requires a plaintiff to show that the injury for which they seek compensation would not have occurred but for the defendant's tortious act: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13–14, 1996 CanLII 183, as cited in *Rattan v. Li*, 2022 BCSC 648 at para. 105.

[155] The evidence must establish causation in both fact and law. The principles are summarized in *Nelson (City) v. Marchi*, 2021 SCC 41:

> [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.
>
> [97] Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote (*Mustapha*, at para. 11; *Saadati*, at para. 20; *Livent*, at para. 77). The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79). Remoteness is distinct from the

> reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury (*Livent*, at para. 78; Klar and Jefferies, at p. 565).

[156] To establish causation in fact, there must be a "substantial connection between the injury and the defendant's conduct": *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 23, citing *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 327; see also *Farrant v. Laktin*, 2011 BCCA 336 at para. 11. The substantial connection requirement recognizes that every injury has multiple necessary factual causes and that not every cause necessary for the harm to occur is sufficient to trigger liability: *Locke v. Rowantree*, 2024 BCSC 852 at para. 14.

[157] The question of whether causation-in-fact has been established is approached in a "robust common sense fashion" and may be established by inference: *Clements v. Clements,* 2012 SCC 32, at paras. 9-11. Scientific evidence of causation can he helpful, but it is not required. As Griffin J.A. observed in *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 120, "it will be a rare case where determining causation does not require some inference-drawing". However, any such inferences must be based on proven facts and cannot be simply guesswork or conjecture: *Engman v. Canfield*, 2023 BCCA 56 at para. 94.

[158] Proof of a "substantial connection" between the injury and the defendant's conduct is also relevant to the causation in law analysis. However, the question of legal causation requires discrete analysis: it is a remoteness inquiry which asks whether the harm suffered is sufficiently related to the wrongful conduct to hold the defendant fairly liable: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 12; see also *Locke* at para. 15.

[159] Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

Findings on Causation

[160] The defendants accept that the accident caused the plaintiff to suffer soft tissue injuries to his neck, upper back and shoulders, tinnitus, headaches, and a MTBI. That concession is well founded on the expert evidence I accept. I therefore find that the plaintiff suffered the following injuries as a result of the accident:

a) a MTBI that has resolved;

b) soft tissue injuries to his neck, upper back and shoulders with resulting chronic pain;

c) tinnitus with associated hearing loss;

d) exacerbation of pre-existing sleep issues;

e) cervicogenic headaches; and

f) residual somatic symptom disorder.

[161] The contentious issue is whether the expert opinion evidence supports the plaintiff's theory that he developed major depressive disorder, specified anxiety disorder with traffic-related anxiety, and neurocognitive defects as a result of the accident. The plaintiff relies on Dr. Karapareddy's opinion in support of his position that the accident caused these injuries. As set out above, while I accept Dr. Karapareddy's diagnosis of major depressive disorder, I reject his opinion that it was caused by the accident, or that the accident caused the plaintiff anxiety disorder or neurocognitive defects. These aspects of Dr. Karapareddy's opinion rested on facts and assumptions that were not proven on the evidence.

[162] While inferences are permissible in determining causation, *Engman* instructs that they must be based on proven facts, not derived from guesswork on conjecture. The proven facts necessary to permit the drawing of inferences required for a finding of causation are absent. Dr. Karapareddy's opinion on causation thus amounts to little more than conjecture.

[163] Dr. Karapareddy's conclusion that the accident caused the plaintiff's depression lacks cogent analysis. He does not adequately consider the impact of the WCB Incident or the plaintiff's other subsequent health issues on his psychological condition in favour of providing what is essentially a bare conclusion, unsupported in the evidence, that all of the plaintiff's current psychological conditions were caused by the accident.

[164] The plaintiff has thus failed to establish the required substantial connection between his psychological conditions and the accident to establish causation in fact. My conclusion in this respect renders the issue of causation in law moot. The plaintiff has not proven on a balance of probabilities that his depression, which did not on the evidence materialize until after the WCB Incident, was caused by the accident, or that the he suffers anxiety disorder or neurocognitive defects as a result of the accident.

[165] The absence of a substantial connection between the accident and the plaintiff's psychological injuries flowing from the WCB Incident, results in the WCB Incident being treated as an independent intervening non-tortious event.

Non-Pecuniary Damages

[166] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, disability, and loss of enjoyment of life. Common factors that influence an award of non-pecuniary damages include: the plaintiff's age; the nature of the injury; the severity and duration of pain; level of disability; emotional suffering; loss or impairment of life; impairment of family, marital, and social relationships; impairment of physical and mental abilities; and loss of lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (19 October 2006).

[167] It is also recognized that "as a matter of ordinary experience and common sense, a person's ability to tolerate chronic pain diminishes with age": *Davidge v. Fairholm*, 2014 BCSC 1948 at para. 166(e); *Morlan v. Barrett*, 2012 BCCA 66 at para. 41.

[168] An award of non-pecuniary damages must be fair and reasonable to each party, with fairness measured in part against awards made in comparable cases: *Rattan* at para. 124. The amount of the award depends on the seriousness of the injury

considered in the context of the specific plaintiff's circumstances: *Tisalona* at para. 39; *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, 1981 CanLII 35.

[169] The plaintiff seeks an award of non-pecuniary damages in the range of $190,000 to $220,000 in 2024 dollars. Consistent with the plaintiff's theory that all of his injuries and resulting symptoms were caused by the accident, the cases he relies on do not generally involve subsequent injuries or illness. The plaintiff relies on the following cases in support of his position, among others:

a) *Ranahan v. Oceguera,* 2019 BCSC 228, where a 51-year-old plaintiff who suffered a mild traumatic brain injury and soft tissue injuries, chronic pain and several psychological and cognitive disorders, was awarded $160,000;

b) *Niessen v. Emcon Services Inc.,* 2018 BCSC 1410, where a 52-year-old plaintiff who suffered neck and back pain, headaches, tinnitus, depression, social withdrawal, sleep disruption, cognitive problems, anxiety, and PTSD, was awarded $170,000; and

c) *Sharp v. Song,* 2021 BCSC 1422, where a 47-year-old plaintiff experienced "catastrophic consequences" resulting from two accidents which caused a mild traumatic brain injury, soft tissue injuries, tinnitus, and severe psychological disorders, was awarded $200,000.

[170] The defendants say that an appropriate award of non-pecuniary damages in this case is in the range of approximately $85,000 to $101,000 in 2024 dollars, relying primarily on:

a) *Abraha v. Suri,* 2019 BCSC 1855, where a 51-year-old plaintiff who sustained soft tissue injuries to her neck and back, and who's psychological condition changed significantly following the accident, was awarded $70,000; and

b) *Peter v. Beveridge,* 2020 BCSC 750, where a 33-year-old plaintiff who sustained soft tissue injuries, chronic back pain, intermittent headaches, and

> sporadic neck pain, was awarded $85,000, inclusive of loss of housekeeping capacity.

[171] I remain cognizant that each case must be decided on its own facts, and prior cases provide a useful guide—but only a guide—in the assessment of non-pecuniary damages: *Westergaard* at para. 213; *Trites v. Penner*, 2010 BCSC 882 at para. 189.

[172] In my view, the range of damages suggested by the defendant does not reflect the findings I have made regarding the plaintiff's injuries and how they have impacted his life. However, the plaintiff's proposed award is too high and fails to sufficiently account for the impact of the multitude of other unrelated health issues that the plaintiff experienced, namely the WCB Incident, the groin injury, and his myriad of other health issues.

[173] That being said, I accept that the injuries the plaintiff suffered as a result of the accident—including, in particular, tinnitus, headaches, chronic pain and residual somatic symptom disorder—caused the plaintiff significant pain, disability, and loss of enjoyment of life. They impacted on his ability to engage in activities he formerly enjoyed, including outdoor pursuits, home improvement projects, and working on his vehicles and boats.

[174] At the same time, the plaintiff remains able to travel, and has done so post-accident, travelling to Texas, Arizona, Hawaii, Whistler, Alaska, and to the Philippines. His accident-related injuries also do not appear to have impeded his ability to forge a new romantic partnership. He met a woman in the Philippines who is now his girlfriend and who will be coming to join him in Canada. Regardless, I am satisfied that the quality of his life has been diminished as he continues to feel the effects of the chronic pain that developed as a result of his accident-related injuries.

[175] Considering my findings regarding the plaintiff's circumstances, the nature and extent of the injuries caused by the accident, the *Stapley* factors, and the cases cited by the parties, I am satisfied that $175,000 will properly compensate the plaintiff for his pain and suffering and loss of past and future enjoyment of life. However, I find a 30% negative contingency is necessary to account for the impact of the plaintiff's multitude of

subsequent injuries and health issues on his current condition: *Khudabux v. McClary*, 2018 BCCA 234 at paras. 26, 37. I thus award $122,500 in non-pecuniary damages.

Loss of Earning Capacity

[176] The plaintiff is currently on LTD and CPP disability. He expects to remain on LTD until age 65. His position is that his accident-related injuries are the sole cause of his inability to return to work following the May 2021 groin injury and COVID-19 infection.

The Plaintiff's "Original Position"

[177] The plaintiff's position is that but for the accident, he would have continued working full time until age 67, after which he would have worked part time into his 70s. With respect to loss of earning capacity, the plaintiff asserts that his recovery from the WCB Incident was prolonged because of his accident-related injuries. He submits that his other medical conditions (diabetes, CLL, COVID-19 infection, and cardiac issues) are neutral factors that did not materially or detrimentally contribute to his inability to return to work such that no negative contingencies ought to be applied.

[178] More specifically, the plaintiff asserts that absent the accident and his resulting injuries, he would not have taken the initial four months off work following the accident and drained his sick bank. Rather, the plaintiff says that he would have:

a) remained in a full time 1.0 position at FPH rather than taking a part-time 0.72 position and further depleting his sick leave bank;

b) returned to work following the WCB Incident three months earlier in a full-time position instead of a part-time 0.84 position, and would have used less sick time during this period;

c) resumed a full-time position after recovering from the May 2021 groin injury and August 2021 COVID-19 infection rather than going on LTD;

d) again returned to work in his full-time position after recovering from his June 2023 cardiac bypass surgery; and

e) continued working full time until age 67, then part-time one to two shifts per week until age 73.

[179] The defendants accept that the plaintiff is disabled from returning to his pre-accident full-time position as a psychiatric nurse at the FPH. However, the plaintiff successfully returned to work following the accident and the WCB Incident, and in the defendants' submission, ultimately went on LTD in November 2021 due to intervening events unrelated to the accident, including the WCB Incident.

[180] The question of whether the plaintiff's original position would have been adversely affected by a pre-existing condition or an unrelated intervening event turns on a consideration of hypothetical events. A future or hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

[181] Hypothetical events are given weight according to their relatively likelihood; they need not be proven on a balance of probabilities: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 35, citing *Athey* at para. 27; *Rattan* at para. 108. Where the evidence establishes a real and substantial possibility of the occurrence of a future or hypothetical event, the event becomes a contingency that must be accounted for into the assessment of damages: *T.W.N.A.* at paras. 35 and 48.

[182] Unrelated intervening events are considered in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the defendant's wrongful conduct is not as great, and damages are reduced proportionately: *Rattan* at para 107, citing *T.W.N.A.* at para. 36. In this way, where an intervening event has in fact occurred, then it is considered in same manner as a contingency that affects the plaintiff's original position.

[183] The defendant does not need to prove that the independent intervening event would have inevitably led to the plaintiff's current condition. Rather, like a contingency, the intervening event should be given weight according to its relevant likelihood: *T.W.N.A.* at para. 36; *Barnes v. Richardson et al.,* 2008 BCSC 1349 at para. 96, aff'd 2010 BCCA 116.

[184] Considering the evidence as a whole, I accept the plaintiff has established a real and substantial possibility that absent the accident, he would have continued to work as a psychiatric nurse in his full-time (1.0) position until the WCB Incident occurred in December 2017. However, given the circumstances of the WCB Incident, I find there is a real and substantial possibility that the plaintiff would not have returned to full-time work thereafter, irrespective of the accident.

[185] There is also a real and substantial possibility that, irrespective of the accident, the plaintiff would have not have returned to his 1.0 position in November 2021. By this point in time, he had suffered a further workplace injury and was still recovering from a serious COVID-19 infection. As of October 2021, he continued to require respiratory therapy, and he testified that it took him three to four months "between oxygen and just doing slow exercise and slow walking" to get back to the point where he could function again, such that his recovery from COVID-19 ran into December 2021.

[186] I thus conclude that the evidence establishes a real and substantial possibility that, given his other intervening health issues, Mr. Murphy would not have returned to a 1.0 position in November 2021. It follows that I also reject the proposition that Mr. Murphy would have returned to a 1.0 position after recovering from his June 2023 cardiac bypass surgery. To the contrary, I am satisfied on the evidence that given his multitude of other health issues, there is a real and substantial possibility that irrespective of his accident-related injuries, the plaintiff may not have returned to work in any capacity after June 2023.

[187] Finally, I find the proposition that the plaintiff would have continued to work one to two shifts per week on an "on call" basis after age 67 is speculative, at best. The plaintiff's own evidence on this point was inconsistent. When asked about his future plans, the plaintiff testified that "guys in their 70s" would work on call at the FPH and were seen as great mentors that coworkers loved having around. However, he also testified that 90% of his coworkers in their late 60s or early 70s "struggled to do the job".

[188] In the result, I find that there is a real and substantial possibility that the subsequent injuries and health issues experienced by the plaintiff after the accident (the

WCB Incident, the May 2021 groin injury, the August 2021 COVID-19 infection, the progression of the plaintiff's CLL, and the cardiac issues resulting in the June 2023 cardiac bypass surgery) would have rendered him incapable of continuing to work a 1.0 position at the FPH irrespective of his accident-related injuries. These events have the effect of reducing the net loss attributable to the defendants' conduct and will be accounted for in my assessment of damages.

Past Loss of Earning Capacity

[189] An award of damages for past or future loss of earning capacity compensates for a plaintiff's pecuniary loss. Compensation for past loss of earning capacity is based on what a plaintiff would have—not could have—earned but for the accident-related injuries: *Sekhon v. Cruz*, 2023 BCSC 319 at para. 78, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[190] The plaintiff must prove actual past events on a balance of probabilities. However, an assessment of both past and future earning capacity involves consideration of hypothetical events. An award for past loss of earning capacity requires the court to assess how a plaintiff's life would have unfolded in the pre-trial period absent the injury. Such hypothetical events need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, and will be taken into consideration as long as the hypothetical event is a real and substantial possibility and not mere speculation: *Dornan v. Silva*, 2021 BCCA 228 at paras. 63-64, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 and *Athey* at para. 27.

[191] As a result of the accident, Mr. Murphy suffers from chronic pain in his neck and upper back, tinnitus, headaches, exacerbation of his sleep issues, and residual somatic symptom disorder. I am satisfied that he has established that these injuries limit his ability to work in physically demanding roles, including as a psychiatric nurse at the FPH. These injuries have, in my view, rendered Mr. Murphy less competitively employable overall, thereby creating a lack of capacity that resulted in his inability to work at full time as a psychiatric nurse at the FPH following the accident.

October 31, 2016 to March 1, 2017

[192] The plaintiff claims $32,339.98 on account of past loss of earning capacity for the period from the date of the accident to March 1, 2017. The defendants accept that the plaintiff received $32,339.98 in sick leave benefits for the period of October 31, 2016 to February 5, 2017 when he was off work immediately following the accident.

[193] I thus award $32,340, without deduction for income tax in accordance with *Bjarnson v. Parks*, 2009 BCSC 48 at para. 56 and *Curpen v. Burns*, 2021 BCSC 685 at paras. 177-179.

March 1, 2017 to December 22, 2017

[194] Unhelpfully, the defendants' closing argument does not address the balance of the plaintiff's claim for past loss of earning capacity. In oral submissions, the defendants submitted that the lack of evidence as to when the plaintiff applied for the part-time 0.72 position leads to an inference that he sought to reduce his hours prior to, and irrespective of, the accident. I find no basis in the evidence to draw such an inference and decline to do so. I am satisfied that the plaintiff's reduction in hours from the date of the accident to the WCB Incident were on account of his accident-related injuries.

[195] As of March 1, 2017, the plaintiff returned to work at the FPH, but in a part-time 0.72 position and worked in that capacity until December 22, 2017 when the WCB Incident occurred. The plaintiff says that absent the accident, he would have remained at a 1.0 (37.5 hours) position throughout this period and would not have had to utilize his sick bank.

[196] I accept Mr. Murphy's evidence that he wanted to get back to work after that accident and find that there is a real and substantial possibility that but for his accident-related injuries, he would have returned to his full-time 1.0 position. I also accept that he decreased his hours of work because he was struggling to perform his job duties following the accident, which exacerbated his accident-related injuries. Mr. Murphy's evidence in this respect is consistent with Dr. Hasham's clinical records, which show

ongoing prescriptions of various medications to address Mr. Murphy's pain and sleep issues.

[197] James White is a former nursing school colleague and co-worker of the plaintiff who worked as an access and discharge coordinator at the FPH. Mr. White would see Mr. Murphy once every week or two when he attended the A1 ward for morning meetings and to arrange transfers. Mr. White testified that prior to the accident, Mr. Murphy had all of the skills and abilities required of a psychiatric nurse at the FPH, but following the accident, the plaintiff seemed to be in pain, appeared disengaged, and was not as active a participant in team discussions. Mr. White recalled the plaintiff being off work following the WCB Incident, but testified that he did not know why.

[198] The difference between Mr. Murphy's pre- and post-accident positions is 10.5 hours per week. I find that Mr. Murphy is entitled to compensation for this past loss of earning capacity. The period in issue represents approximately 42 weeks and the applicable wage rate at the time was $44.90 per hour. This would amount to an award of $19,800 (42 weeks x 10.5 hours x $44.90 per hour).

[199] However, while he had a full-time (1.0) position, Mr. Murphy did not work full-time hours (75 hours per pay period) in the months leading up to the accident. Rather, from May 6 to October 20, 2016, his hours ranged from 15.33 to 61.33 hours per pay period. A 10% reduction is thus appropriate to account for what I find is a real and substantial possibility that the plaintiff would not have consistently worked full-time hours during this timeframe irrespective of the accident. I thus award $17,820 ($19,800 x 90%), subject to appropriate deductions for income tax pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, to be determined by agreement of the parties.

[200] The plaintiff also continued to take sick leave during this time frame and received $20,956.18 as paid sick benefits. The plaintiff concedes that some of this sick leave pay was attributable to time off work due to a gastrointestinal issue, but says the balance relates to time he took off work due to his ongoing injuries from the accident.

[201] The wage loss calculations adduced into evidence for this period end as of August 11, 2017. The plaintiff suggests that a conservative estimate of the amount of sick time he used for four remaining months until December 2017 is $1,000 per month, which translates into 22 hours or three missed shifts per month. In the five and a half months from March 1 to August 11, 2017, the plaintiff utilized 339 paid sick hours which is approximately 61.5 hours per month or eight missed shifts.

[202] I find the plaintiff's estimate reflects a realistic estimate of the plaintiff's ongoing need for sick leave, in particular bearing in mind the indications in Dr. Hasham's clinical records that while his pain and sleep issues continued, the plaintiff did report improvement in his back and neck pain during this time frame. I thus find that an award of $24,000 on account of sick leave utilized is appropriate, without deduction for income tax.

[203] The plaintiff is thus entitled to an award for loss of earning capacity for March 1, 2017 to December 22, 2017 of $41,820 ($17,820 + $24,000), subject to appropriate statutory deductions.

December 22, 2017 to February 1, 2019

[204] The period between December 22, 2017 and February 1, 2019 is when the plaintiff was off work and completing his GRTW program following the WCB Incident. The plaintiff's position is that he sought psychological treatment following the WCB Incident and fully recovered from it.

[205] The plaintiff does not claim "strict wage loss" during this time period. I interpret this to mean that he is not seeking repayment of any sick bank time used or benefits paid while he was on leave following the WCB Incident. I thus make no award in that respect.

[206] The plaintiff asserts that he would have returned to work sooner after the WCB Incident absent the accident, and seeks an award of past loss of earning capacity of three months wages. In support of this submission, the plaintiff says that the accident

made him increasingly sensitive to stimuli around his work and, because of this, the WCB Incident affected him emotionally more than it otherwise would have.

[207] Mr. Murphy relies on Mr. White's observations of him as being more irritable, less social, and withdrawn from the nursing team following the accident as corroborative of his assertion that the accident caused him to react more significantly to workplace stressors. As noted above, Mr. White had limited opportunity to observe the plaintiff and did so only in respect of portions of his duties. His evidence is thus of limited assistance. Further, given my concerns regarding the credibility and reliability of Mr. Murphy's self-reporting, I cannot rely on his evidence to find that WCB Incident had a greater effect on him because of the accident.

[208] Nor does the medical evidence properly before the Court in this proceeding establish a real and substantial possibility that Mr. Murphy's accident-related injuries impacted his reaction to the WCB Incident. Contrary to the plaintiff's submission, Dr. Karapareddy's evidence does not establish this to be the case. Rather, he opined that it was "not totally clear" if his accident-related injuries impacted his work-related injuries, and then opined that "It may well be that work relate [sic] injuries may have maintained his depressive symptoms".

[209] Such a finding also ignores the plaintiff's reported impact of the workplace suicide events in the months leading up to the WCB Incident, and the uncontested evidence that the plaintiff's GRTW program was extended on account of him missing multiple shifts as a result of illness unrelated to the accident or the WCB Incident.

[210] Finally, the plaintiff relies on an August 2019 WorkSafeBC determination having relieved his employer of 50% of the cost of his claim arising out of the WCB Incident as indicative that he would have returned to work earlier than he otherwise did following the WCB Incident absent his accident-related injuries. I do not find this submission compelling. First, WorkSafeBC findings are made pursuant to a distinct statutory scheme on a different evidentiary record and thus do not bind this Court: *Safdari* at para. 118.

[211] Second, the WorkSafe BC case manager was considering whether to relieve PHSA of a portion of the costs of the plaintiff's WCB Incident claim pursuant to s. 39(1)(e) of the *Workers Compensation Act,* R.S.B.C. 2019, c. 1. In that context, the case manager determined that there was evidence of "a pre-existing disease, condition, or disability which is mood alteration in the year prior to [the WCB Incident] related to other workplace incidents, as well as chronic neck pain", but did not identify the "other workplace incidents" related to the plaintiff's mood alteration. The timing and statements reportedly made by the plaintiff in the course of his WCB claim suggest they were likely the two suicide incidents that preceded the WCB Incident, but this is unclear.

[212] Third, the WorkSafeBC medical advisor who reviewed the claim was unable to accurately assess the relative contribution of compensable versus non-compensable factors. The advisor did not allocate 50% responsibility to non-compensable causes based on the medical evidence, but rather in accordance with WorkSafeBC policy, using a standardized grid to apportion costs, concluding as follows:

> A WorkSafeBC Medical Advisor reviewed the claim and provided an opinion that the moderate pre-existing conditions have likely impacted the worker's disability, however, he was unable to accurately assess the relative contribution of compensable versus non-compensable factors in regard to the worker's disability and time loss under the claim. As such, I have relied on the Relief of Costs grid found in policy.
>
> [Emphasis added.]

[213] In the result, I find that the plaintiff has not established a real and substantial possibility that absent the accident, he would have returned to work sooner following the WCB Incident. Accordingly, I decline to make an award for past loss of earning capacity for the December 22, 2017 to February 1, 2019 period.

February 1, 2019 to May 2021

[214] Mr. Murphy returned to work in February 2019, in a 31.5 hour per week position on the A3 ward. The A3 ward housed long-term brain injury patients and was less violent than the A1, though physical altercations with patients remained possible.

[215] Mr. Murphy testified that the charting requirements on the A3 ward were more intensive than the A1 ward, and that he continued to struggle with that aspect of his job because of his neck pain, tinnitus, headaches and ongoing memory difficulties. He testified that he continued to miss work from time to time during this period on account of his accident-related injuries and sleep difficulties.

[216] The difference between Mr. Murphy's pre-accident and post-WCB Incident positions is six hours per week. The period in issue represents approximately 48 weeks in 2019, 52 weeks in 2020 and 17 weeks in 2021. His wage rate from April 1, 2019 to March 31, 2020 was $47.50 resulting in wage loss of approximately $15,960 (14 months x 4 weeks x 6 hours per week x $47.50 per hour).

[217] While Mr. Murphy earned $105,943 in 2020, I am satisfied that there is a real and substantial possibility that but for his accident-related injuries, he could have earned additional income and that the difference of six hours per week provides a realistic approximation of this loss. Mr. Murphy's wage increased to $48.45 as of April 1, 2020, which results in wage loss of approximately $14,244 ([12 months x 4 weeks + 1 week] x 6 hours per week x $48.45 per hour) for the balance of this time frame (March 2020 to April 2021). This results in a total award of $30,204.

[218] I do not accept that the plaintiff "fully recovered" from the WCB Incident as of February 2019, or by consequence, that his inability to work full-time from February 2019 to May 2021 was solely on account on the ongoing sequelae of his accident-related injuries. I find that there is a real and substantial possibility that the psychological issues that arose after the WCB Incident would have prevented him from working full time irrespective of his accident-related injuries.

[219] Accordingly, I find that a negative contingency of 30% is appropriate to account for the real and substantial possibility that the plaintiff would not have consistently worked full-time hours after returning to work following the WCB Incident irrespective of the accident. This yields an award of $21,143, subject to appropriate deductions for income tax pursuant to s. 98 of the *Insurance (Vehicle) Act*, to be agreed to by the parties.

May 2021 to Trial

[220] As discussed above, on May 9, 2021, Mr. Murphy suffered a workplace groin injury and went off work. There is a paucity of evidence regarding the nature of this injury, its impact on the plaintiff, and how long he was off of work as a result. Similarly, it is unclear on the evidence when the plaintiff returned to work, if at all, before he went on vacation and contracted COVID-19.

[221] The plaintiff concedes that the defendants are not liable for any loss of earning capacity suffered from August through November 3, 2021 when he was convalescing from his COVID-19 infection.

[222] Dr. Hasham completed a LTD claim form for the plaintiff that indicated a return to work date of November 4, 2021. The plaintiff relies on this to assert that he would have returned to work full-time as of that date absent his accident-related injuries. He thus seeks $16,061 in loss of earning capacity for November and December 2021.

[223] The defendants do not contest the wage rate calculations underlying the plaintiff's submission in this respect. However, the evidence establishes a high probability that the plaintiff was not sufficiently recovered from his COVID-19 infection to return to full-time work until January 2022, as he continued to require supplemental oxygen and was being monitored by a respirologist through the fall of 2021. I am not satisfied that the plaintiff has established a real and substantial possibility that he would have returned to work in 2021 but for his accident-related injuries. I thus decline to make any award for loss of earning capacity for November and December 2021.

[224] For 2022, the plaintiff submits that he would have worked full-time and earned $24,091 for January through April, then $75,005 for the balance of the year, resulting in total earnings of $99,096. The plaintiff also says he would have earned shift premiums on top of his base wage rage, increasing his potential earnings during this period to approximately $110,000. I accept that $110,000 represents a reasonable approximation of the plaintiff's earning capacity.

[225] However, by August 2022, in addition to his accident-related injuries, the plaintiff had suffered a further workplace injury, continued to deal with psychological issues, and his CLL had progressed to the point of requiring treatment. In my view, a negative contingency of 50% is appropriate to account for what I find is a real and substantial possibility that the multitude of significant health issues the plaintiff was experiencing in this timeframe would have limited his ability to return to full-time work. I thus find $55,000 is a fair and appropriate award for loss of earning capacity for 2022.

[226] The plaintiff had cardiac bypass surgery in June 2023. Again, there is a paucity of evidence as to how long his recovery from this surgery was or, more importantly, its impact on his ability to return to work. The only evidence in this respect is the plaintiff's testimony that it took him until Christmas 2023 to be fully recovered from his cardiac bypass surgery. In the circumstances, the plaintiff's submission that a deduction of "three to four months salary" is sufficient to account for the time he would have taken off work for his cardiac surgery and recovery is speculative and inconsistent with the evidence. Rather, I find there is a real and substantial possibility that the plaintiff would not have returned to work full time, or potentially at all, following his June 2023 cardiac bypass surgery.

[227] The plaintiff's submission as to his potential income in 2023 is the same as 2022, namely he would have earned an approximate annual salary of $110,000 inclusive of shift premiums. Accepting that he was unable to work for the latter six months of 2023 (June to December) due to his cardiac surgery, this leaves six months of potential earnings. Applying a negative contingency of 60% to account for the plaintiffs' cardiac condition in addition to the multitude of other conditions he continued to deal with, I find that $22,000 is a fair and appropriate award for loss of learning capacity for 2023.

Conclusion on Past Loss of Earning Capacity

[228] In light of the above, considering the evidence as a whole, and bearing in mind that a loss of earning capacity is an assessment, not a mathematical calculation, I find that $172,000 ($32,340 + $41,820 + $21,143 + $55,000 + $22,000, rounded to nearest $1,000) is a fair and reasonable award for past loss of earning capacity.

Loss of Future Earning Capacity

[229] Assessing loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings after the accident. Accordingly, the central task for the court is to compare the plaintiff's likely future working life with and without the accident: *Rattan* at para. 145, citing *Dornan* at paras. 156–157; *Bains v. Cheema*, 2022 BCCA 430 at para. 21. Justice Horsman (as she then was) aptly summarized the proper approach to this assessment post-trilogy in *Rattan* as follows:

> [146] The assessment of a claim for loss of future earning capacity involves consideration of hypothetical events. Hypothetical events need not be proved on balance of probabilities. A hypothetical possibility will be accounted for as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event. Allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Rab v. Prescott*, 2021 BCCA 345 at para. 28 [*Rab*], citing Goepel J.A., in dissent, in *Grewal* at para. 48. The assumptions may prove too conservative or too generous; that is, the contingencies may be positive or negative.
>
> [147] Contingencies may be general or specific. A general contingency is an event, such as a promotion or illness, that, as a matter of human experience, is likely to be a common future for everyone. A specific contingency is something peculiar to the plaintiff. If a plaintiff or defendant relies on a specific contingency, positive or negative, they must be able to point to evidence that supports an allowance for that contingency. General contingencies are less susceptible to proof. The court may adjust an award to give effect to general contingencies, even in the absence of evidence specific to the plaintiff, but such an adjustment should be modest: *Steinlauf v. Deol*, 2022 BCCA 96 at para. 91, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[230] The three-step process for considering claims for loss of future earning capacity is as follows:

a) Does the evidence disclose a potential future event that could give rise to a loss of capacity?

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff?

c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

See *Rattan* at para. 148, citing *Rab* at para. 47.

[231] When an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future, the first and second steps of the analysis may well be foregone conclusions since the plaintiff clearly lost capacity and income: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 11. The assessment is then not simply whether there was a loss of capacity, but whether that loss gave rise to a real and substantial possibility of a future loss and the value of that loss: *Ploskon-Ciesla* at para. 11; *Rab* at para. 33; *Ker v. Sidhu*, 2023 BCCA 158 at para. 44.

[232] At the third step of the analysis, the court may assess damages assessed using the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial, and typically involves a determination of the plaintiff's without-accident future earning capacity, using expert actuarial and economic evidence as well as the plaintiff's past earnings history: *Kim v. Baldonero*, 2022 BCSC 167 at para. 91, citing *Lo v. Vos*, 2021 BCCA 421 at para. 109; *Dornan* at paras. 155–156. In my view, this approach is appropriate here.

[233] At the final stage of the damage assessment process, the court must determine whether the damage award is fair and reasonable: *Lo* at para. 117.

Rab Step One: Loss of Capacity

[234] I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity. As a result of the accident, Mr. Murphy suffers from chronic pain in his neck, upper back and shoulders, tinnitus, headaches and sleep issues and residual somatic symptom disorder which have limited his ability to work in the physically demanding roles, including as a psychiatric nurse at the FPH. These injuries have, in my view, rendered Mr. Murphy less competitively employable overall, thereby creating a lack of capacity that satisfies the first step of the *Rab* analysis.

Rab Step Two: Pecuniary Loss

[235] I am also satisfied that there is a real and substantial possibility that his injuries from the accident will impair his earning capacity in the future, as it has done in the pre-trial period. While Mr. Murphy was able to return to work after the accident, it was not without exacerbation of his injuries and he was unable to do so in his pre-accident capacity.

[236] The chronology of Mr. Murphy's attempts at returning to work have been detailed at length elsewhere in these reasons. Drs. Hasham, Tsai and Karapareddy, and Mr. Winter, all provided opinion evidence about the plaintiff's prognosis for returning to work. Their evidence is consistent to the effect that the plaintiff is not competitively employable or able to durably tolerate the demands of his pre-accident 1.0 position on the A1 ward at the FPH., but retains some capacity for part-time light or sedentary work, potentially as a psychiatric nurse in a community setting.

[237] In particular, Mr. Winter opined in the 2023 FCE that Mr. Murphy had improved in some areas and that functional testing determined that he is capable of working in some capacity with multiple compensatory considerations to support his functions. Mr. Winter also testified that Mr. Murphy may be capable of working part-time on non-consecutive days.

[238] Dr. Tsai noted that the plaintiff's ongoing tinnitus symptoms will more likely than not have a significant impact on the trajectory of his long-term employment. Finally, Dr. Karapareddy opined that the plaintiff's concurrent mental health and chronic pain issues are likely to continue his long-term disability, and that his vocational disability is most likely due to the combination of neurocognitive disorder, major depressive disorder, chronic pain, as well as anxiety. However, I afford lesser weight to Dr. Karapareddy's opinion given my rejection of his opinions as to causation of the plaintiff's psychological issues.

[239] In the circumstances, I am satisfied that there is a real and substantial possibility that Mr. Murphy's accident-related injuries—particularly his chronic pain and tinnitus—will impair his earning capacity in the future, as it has done in the pre-trial period, though

not to the extent of a complete inability to work in any capacity. It is material in this respect that Mr. Murphy returned to work after both the accident and the WCB Incident, increased his position from 0.72 to 0.84 after the WCB Incident, then worked in that capacity for over two years until the May 2021 groin injury caused him to go off work again.

[240] I thus find that Mr. Murphy has suffered a future loss of earning capacity as due to his accident-related injuries, and he is unlikely to be able to sustain full-time employment in physically demanding psychiatric nursing roles. I am satisfied that there is a real and substantial possibility that this future limitation will lead to a pecuniary loss because he is no longer able to work at the same capacity as he was prior to the accident. The second step of the *Rab* analysis is thus met.

Rab Step Three: Valuation

[241] The plaintiff was 62 years old at trial and testified that he intended to work full time to age 67. I accept the plaintiff's evidence in this respect and find that his post-trial without accident earnings for the five years from ages 62 to 67 would have been approximately $550,000 (approximately $110,000 annually for period of five years). Using the multiplier of 4.7826 from Appendix E of the *CIVJI: Civil Jury Instructions,* 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf updated 2024) ("*CIVJI*") (*MacGregor v. Bergen*, 2019 BCSC 315 at para. 116), this results in a present value of $526,086.

[242] The plaintiff says that the Court should decline to apply any negative contingencies to account for his unrelated medical conditions. I disagree and conclude that a significant negative contingency must be applied to account for the real and substantial possibility that irrespective of his accident-related injuries, the plaintiff's multitude of other unrelated health issues would have resulted in him working only part-time, or retiring completely, prior to age 67.

[243] For the reasons set out above, I am not satisfied that the plaintiff's accident-related injuries alone have rendered him unable to work in any capacity in the future. Rather, there remains a real and substantial possibility that the plaintiff may return to

part-time work. The evidence establishes that the plaintiff may be capable of returning to part-time work, whether in the nursing community in Powell River, or in another capacity. Bearing in mind that the plaintiff was able to work a 0.84 position from February 2019 to May 2021 (though not without some aggravation of his pain), I find a negative contingency of 70% appropriately accounts for the plaintiff's unrelated medical conditions on the possibility that he may one day return to work. This would result in an award of loss of future earning capacity to age 67 of $157,826.

[244] I make no award for loss of future earning capacity for on-call work from age 67 to 73. The plaintiff did not tender evidence establishing the availability or nature of such work in Powell River, the likelihood of it being offered to him, the volume of work available, or the applicable wage rates. I find the potential availability of such work speculative, and it becomes all the more so when one considers the impact of plaintiff's additional non-accident related health conditions.

[245] As the final step of the quantification process, I conclude that an award of $160,000 is fair and reasonable, and reflects the type and severity of the plaintiff's injuries that I have found were caused by the accident, the impact of his subsequent workplace injuries and health issues, and the nature of his anticipated capacity for future employment: *Ploskon-Ciesla* at para. 7. In making the award for loss of future earning capacity, I have tethered my conclusions to the available economic evidence, but remain aware that valuation is not a mathematical exercise.

Cost of Future Care

[246] The principles that govern the assessment of cost of future care were aptly summarized in *Wishart v. Mirhadi*, 2023 BCSC 627 at para. 117:

> [117] An award for cost of future care is intended to provide a plaintiff with physical care or assistance in order to maintain or promote the plaintiff's health as a result of injuries. There must be medical justification for the items claimed, and the items claimed must be reasonable: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68–70. The medical necessity may be established by health care professionals other than a physician but there must be a link between the physician assessment and the other health care professional's recommendation: *Gao* at para. 70. The Court must consider positive and negative contingencies: *Morlan v. Barrett*, 2012 BCCA 66 at para. 76; *Tsalamandris v. McLeod*, 2012

> BCCA 239 at paras. 64–72. The standard of proof for assessing cost of future care is real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209. If it is shown by the evidence that a plaintiff is unlikely to participate in a program, it cannot be said that an award for such a program is reasonably necessary: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 28.

[247] The plaintiff has engaged in various treatment modalities to address his ongoing injuries resulting from the accident and testified that he would continue to attempt any treatment recommendation made. Accordingly, he seeks an award covering annual expenses for a wide variety of treatments as recommended by Drs. Karapareddy, Tsai, Hasham and Mr. Winter, to the age of 85.

[248] The defendants did not engage in any meaningful way with the plaintiff's cost of future care claim. They took the position that since the plaintiff historically reported to Dr. Hasham that he did not obtain much benefit from various forms of treatment attempted to date, it is unlikely he will undertake future treatment. Accordingly, they say that no award under this head of damages is warranted. This approach is not only unhelpful, but also inconsistent with the evidence. The plaintiff testified that some treatments did assist in alleviating his pain, even if only temporarily, and he expressed a willingness to attempt or revisit any form of medically recommended treatment.

[249] The plaintiff concedes that the recommendations made by the physicians and Mr. Winter overlap in many respects, and that duplication in the award made ought to be avoided. Many of the plaintiff's cost of future care recommendations were also predicated on all of the plaintiff's ongoing health issues being caused by the accident. I determined that not all of the plaintiff's conditions were caused by the accident, and I am mindful that my findings factor into the cost of future care analysis where some treatments may pertain primarily to the plaintiff's non-accident related injuries.

[250] Considering the evidence as a whole, I find that the following care items are necessary to maintain and promote the plaintiff's health as a result of the injuries I found were caused by the accident to the age of 85, and are medically justified and reasonable in the circumstances:

a) active rehabilitation with a kinesiologist over the course of six to eight weeks as recommended by Dr. Flaschner, which represents a one-time cost of $2,295;

b) attendance at an integrated program for treatment of chronic pain, mental health and cognitive issues as recommended by Dr. Karapareddy and Mr. Winter, at a one-time cost of $18,500;

c) occupational therapy as recommended by Mr. Winter in the one-time amount of $2,704;

d) tinnitus retraining therapy and custom tinnitus hearing aid as recommended by Dr. Tsai, together with ongoing audiologic follow-up and testing in the amount of $6,000 for the hearing aid, replacement every 5 years and annual maintenance in the amount of approximately $28,000; and

e) ongoing pain treatments including massage therapy, intra-muscular stimulation, acupuncture, trigger point injections, as recommended by Dr. Hasham and Mr. Winter with a one-time cost of $2,889 and annual cost of $1,440 for a total present value amount of $29,950.

[251] Where appropriate, the monetary values set out above are expressed in present value using the 2% discount rate prescribed by s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 and s. 1(b) of the *Law and Equity Regulation,* B.C. Reg. 352/81, and the present value table set out in the *CIVJI*.

[252] I reject the balance of expenses the plaintiff sought under this head of damages. In my view, they are not medically necessary or reasonable in the circumstances, and the plaintiff failed to establish the appropriate quantum for the award sought. For example, Mr. Winter was unable to provide recommendations or costing for in-home supplies or equipment, and there was insufficient evidence to quantify an appropriate award for the cost of continued use of prescription and over the counter medications. In the result, I award $81,449 for cost of future care.

Loss of Domestic Capacity

[253] Mr. Murphy seeks an award for loss of housekeeping capacity in the range of $35,000 to $50,000 in addition to an award for non-pecuniary damages.

[254] The issue of whether to address a claim for loss of housekeeping capacity as part of a plaintiff's non-pecuniary loss or as a segregated head of damages is a matter of discretion: *Kim v. Lin*, 2018 BCCA 77 at para. 33, citing *Liu v. Bains*, 2016 BCCA 374 at para. 26. Loss of capacity to undertake home maintenance and renovation may be compensated under this head of damages: *Hastings v. Matthew*, 2020 BCSC 1418 at paras. 52–54.

[255] Some decisions have referred to this head of damages as impairment or loss of domestic capacity: see e.g. *Hastings*. Regardless of the terminology used, the animating principles underpinning the award remain the same. The analytical approach that applies when considering a claim for loss of housekeeping capacity was aptly summarized in *Ali v. Stacey*, 2020 BCSC 465:

> [67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:
>
> > a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
> >
> > b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; [*Riley v. Ritsco*, 2018 BCCA 366] at para. 101.
> >
> > c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
> >
> > d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[256] Prior to the accident, Mr. Murphy was skilled and adept at a variety of home renovation and maintenance tasks. He was able to undertake labour-intensive tasks

commonly performed by tradespeople, including plumbing, electrical work, carpentry and painting. He put these skills to use in maintaining and renovating the family home.

[257] There is some dissonance in the evidence as to the plaintiff's ability to undertake home maintenance tasks. However, as of 2023, the plaintiff was able to do chores around the house by pacing himself and able to undertake some home renovation tasks (e.g. painting), though not without aggravation of his pain or at the pace he was able to work prior to the accident.

[258] Considering the evidence as a whole, I find that while Mr. Murphy retains some capacity for domestic maintenance, his capacity has been impaired by the injuries he sustained in the accident, especially his capacity to undertake the type of more extensive home renovation projects he was previously able to complete. This give rise to a compensable loss separate from my award of non-pecuniary damages: see e.g. *Hastings* and *Reeve v. Brown*, 2024 BCSC 596 at paras. 263-265.

[259] To the extent that the plaintiff claims his injuries have impaired his capacity to restore or maintain his vehicles, boats, or other "big boy toys" (as the plaintiff and Megan Murphy described them), I am of the view this reflects a loss of enjoyment in engaging in his hobbies, not loss of domestic capacity. As the plaintiff testified, boating, fishing and fixing up old vehicles were leisure activities that he enjoyed doing with his friends and family prior to the accident. Accordingly, I find that the plaintiff's loss in that respect is appropriately compensated, so far as money permits, by the award of non-pecuniary damages.

[260] In the result, I consider $20,000 to be a fair and reasonable award for the plaintiff's loss of capacity to undertake significant home maintenance tasks and renovations.

Special Damages

[261] Out-of-pocket expenses are compensable as special damages when they are reasonable and incurred as a result of the accident: *X. v. Y.*, 2011 BCSC 944 at para. 281, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79, 1985 CanLII 179 (S.C.),

aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.), [1987] B.C.J. No. 1833. Reasonableness is assessed with reference to the context of the injuries, including medical justification for the expenses and the plaintiff's subjective belief that the expenses were reasonably necessary: *Fryer v. Nakusp (Village)*, 2022 BCSC 497 at para. 248, citing *Redl v. Sellin*, 2013 BCSC 581 at para. 55 and *MacIntosh v. Davidson*, 2013 BCSC 2264 at para. 128.

[262] The parties agree that the plaintiff undertook the following treatment modalities as a result of the accident: physiotherapy; massage therapy; active rehabilitation; clinical counselling; occupational therapy; prescription medication; over the counter medication; trigger point injections; and bilateral facet joint block injections.

[263] The plaintiff seeks $780 in respect of physiotherapy, kinesiology and active rehab treatments at Port Coquitlam Physiotherapy. The defendants do not dispute this amount and I award it.

[264] In August 2017, the plaintiff obtained a MRI of his cervical spine from MedRay Imaging at a cost of $700. The plaintiff could not recall if he discussed obtaining an MRI with Dr. Hasham. However, Dr. Hasham's expert report notes, and his clinical records confirm, that a CT scan of the plaintiff's cervical spine suggested the possibility of a central disc protrusion, and the radiologist thus recommended a MRI. In the circumstances, I find the cost of a private MRI was reasonable and necessary.

[265] The plaintiff testified that the occupational therapy he received through CBI Health Centre in November and December 2018 pertained to the WCB Incident. It is unclear whether the occupational therapy treatment from JR Rehab Services in January 2019 pertained to the plaintiff's injuries from the accident, the WCB Incident or another issue. I thus make no award in either respect.

[266] Finally, the plaintiff claims special damages of $380 in respect of three counselling sessions he attended with Sheran Selluski Counselling in November and December 2018. An additional $95 is claimed in respect of a cancellation fee. The parties' agreed statement of facts provides that the plaintiff received counselling services from Sheran Selluski Counselling "as a result of" the accident. Accordingly, the

plaintiff is awarded $285 for the three appointments he attended; I make no award in respect of the cancellation fee.

[267] Special damages are awarded in the amount of $1,765.

Conclusion

[268] In the result, I find that Mr. Murphy is entitled to the following:

a) Non-pecuniary damages	$122,500
b) Past loss of earning capacity	$172,000
c) Loss of future earning capacity	$160,000
d) Cost of future care	$81,449
e) Loss of domestic capacity	$20,000
f) Special damages	$1,765

[269] Mr. Murphy is awarded damages in the amount of $557,714, subject to applicable statutory deductions where noted above, to be agreed to by the parties.

[270] As the successful party, Mr. Murphy is presumptively entitled to his costs at Scale B. If either party seeks an alternative costs order, they have leave to request a further hearing before me on the issue of costs within 30 days of the date of this judgment.

"Hughes J."