

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wagner v. Cooper*,
2024 BCSC 986

Date: 20240606
Docket: M1911647
Registry: Vancouver

Between:

Nathan Andrew Wagner

Plaintiff

And

Mark Raymond Cooper

Defendant

- and -

Docket: M1911648
Registry: Vancouver

Between:

Nathan Andrew Wagner

Plaintiff

And

Travis Brandon Large

Defendant

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.
January 15-19, 22-25 and
29-31, 2024

Place and Date of Judgment:

Vancouver, B.C.
June 6, 2024

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I. OVERVIEW

[1] Nathan Wagner was involved in two motor vehicle collisions which occurred one day apart in Kelowna, B.C. On December 12, 2017, Mr. Wagner was driving his Toyota Tundra truck when it was sideswiped by Mark Cooper’s GMC pick-up truck. On December 13, 2017, Mr. Wagner was driving his same vehicle, when it was rear ended by Travis Large who was driving a BMW 525i. The Defendants in both actions have admitted liability.

[2] The claims arising out of both collisions were heard together. The Defendants acknowledge that the Plaintiff sustained injuries from the Collisions. However, they submit that the severity and effects of the Collision-related injuries are not as significant as the Plaintiff portrays.

[3] Mr. Wagner says that the cumulative effect of the two Collisions has caused him significant physical and psychological injuries that have had a profound impact on his function and ability to earn an income. As such he seeks an award exceeding \$1.4 million for his non-pecuniary damages, loss of income earning capacity, loss of housekeeping capacity, future care costs and special damages. The Defendants say that the Plaintiff’s proven damages and losses are less than \$200,000, and resist any award for loss of future earning capacity or housekeeping capacity.

[4] The main point of contention is causation. At the time of the Collisions, Mr. Wagner was suffering from a number of pre-existing physical and psychological conditions. He suffered additional trauma subsequent to the Collisions. The parties disagree on the degree to which these pre-existing conditions and post-Collision events are responsible for Mr. Wagner’s current condition.

[5] Accordingly, the central issue is how much of Mr. Wagner’s ongoing disability is due to the negligence of the Defendants.

II. CREDIBILITY AND RELIABILITY

[6] The credibility of the Plaintiff and the reliability of the evidence of experts (who relied heavily on Mr. Wagner’s self-reports) featured strongly in this trial. I therefore

begin with an overview of the guiding principles in assessing credibility and reliability.

[7] Credibility and reliability are related but distinct concepts. Reliability involves the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity and sincerity, as well as accuracy of the evidence provided: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd [2012] S.C.C.A. No. 392.

[8] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case – a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are recounting, but nevertheless be mistaken in their recollection: *R. v. H.C.*, 2009 ONCA 56 at paras. 41, 53-56.

[9] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at p. 357 and *Bradshaw* at para. 186. I have applied those principles here.

[10] I found Mr. Wagner to be an unreliable witness. There were numerous instances where Mr. Wagner's testimony was contradicted by documentary and other evidence. It also lacked internal and external consistency. Mr. Wagner admitted that some of his recollection of events was negatively impacted by his excessive use of alcohol or drugs during the time of the events. He also had a tendency to exaggerate or catastrophize his symptoms. Drs. Sangha, Okorie, and van den Berg all opined that Mr. Wagner had what are referred to as "cluster B" personality traits, which includes a "dramatic" personality. Dr. van den Berg testified that the Plaintiff tends to be pain and disability focused, and his perception of his functioning is different from the reality. My own observations during the trial support this conclusion.

[11] Though there were times that Mr. Wagner appeared to be making an effort to tell the truth, this was not always the case. Further, the evidence indicates that Mr. Wagner is motivated by financial gain and will act deceitfully in order to obtain money, even if this means making false statements to government agencies.

[12] For example, Mr. Wagner admitted to regularly working “under the table” and not reporting his income to the Canadian Revenue Agency (“CRA”). Mr. Wagner acknowledged that by not reporting his income, there was a risk the government would require him to pay the owed taxes, but stated he was willing to take that risk. Mr. Wagner also tried to justify his behaviour by stating that he did not know that this practice was wrong until he took his business administration diploma. However, even then, he could not admit to the Court that he now knew this practice was illegal, conceding only that:

To some extent, now that I have been through business school, I know that there’s definitely issues with it. Prior to business school, I didn’t think there was any issues.

[13] Another example of Mr. Wagner knowing that something was wrong, but refusing to admit his wrongdoing to the Court, was his testimony about receiving Canada Emergency Response Benefits (“CERB”). Mr. Wagner admitted during his cross-examination that he claimed and received \$10,000 in CERB though it is evident that he was not eligible. He testified that he was aware that CERB was intended to replace income for individuals who could not work due to COVID-19. He admitted that it came to his mind that he may not meet the eligibility criteria but nevertheless applied for and collected CERB anyway as a “matter of survival”. When it was put to him that he knew he was not supposed to get CERB but he claimed it anyway, Mr. Wagner disagreed with the statement, despite being aware of his ineligibility to the point where he expected the CRA to seek his repayment.

[14] Mr. Wagner’s history of untruthfulness in filing tax returns and benefit applications raises substantial questions about his credibility. He has demonstrated a consistent pattern of deliberate misrepresentation for personal gain, indicating a tendency to prioritize financial benefit over truthfulness. The Plaintiff’s behaviour

reveals an awareness of and disregard for legal obligations. Additionally, his attitude of only rectifying these matters if directed by the government reflects a lack of inherent honesty.

[15] Yet perhaps the most egregious example of Mr. Wagner being dishonest for financial gain, is his dealings with the Workers' Compensation Board of Alberta ("WCB"). I pause here to note that there was some disagreement between the parties about how much weight I could place on the WCB records. To clarify, I have placed weight only on those portions of the records that were put to Mr. Wagner and where he: adopted the contents; or agreed that he made the recorded statements; or agreed that he provided the information set out to the WCB; or agreed that certain things that were recorded in the records had occurred or had been brought to his attention at the time.

[16] At trial, Mr. Wagner took the position that his Collision-related injuries were the cause of his relapse into alcohol and his January 2018 suicide attempt. However, he told the WCB that these were related to his throat surgery of December 21, 2017. The following telling exchange occurred when he was asked about what he told the WCB about the cause of his problems:

Q Okay. So you told [WCB] that your relapse in alcohol abuse and your suicide attempt was as a result of I take it what you considered to be unsatisfactory results of your surgery.

A **It wasn't the results of the surgery. It was the experience of the surgery that partially triggered it, yes.**

Q Okay. And you didn't tell them anything about motor vehicle accidents causing relapse or—or suicide attempt; correct?

A **I would have been cut off immediately, so, no.**

Q Sorry?

A **I would have lost any potential for retraining or anything immediately, so that's—I didn't mention it, no.**

Q Sorry, can you explain that.

A **Essentially, if I told them I had another injury, they would have closed my file immediately. There would be—I would be out on the street. I would be—yeah.**

Q Why do you say that?

A **Because I don't have a way to support myself at this time in—well, I guess I was already in the trailer.**

Q Okay. Perhaps I wasn't clear enough with my question. Why do you say they would cut you off?

A **Because that's—I have heard many, many people that I have known—not many people. I have heard many stories from people that I have known that have had other people they have heard of that have been cut off very easily by WCB.**

Q Why would you think you would be cut off if you had a car accident?

A **I'm not sure. That was just—that was my belief at the time.**

Q Well, did—is there any logical reason that you can put to it?

A **Considering how easy WCB has cut me off at other points for other things, just because they decide to, it seemed obvious to me at the time that they would cut me off.**

[17] Later Mr. Wagner was asked about his decision not to disclose to WCB that his Collisions were contributing to his health condition. He replied: “I didn’t disclose it because it wasn’t pertinent, in my mind, and I didn’t want to face being homeless.”

[18] It is clear from this exchange, and other evidence, that Mr. Wagner has presented a different version of events to the WCB than to this Court, for the purposes of maximizing his financial recovery. This leaves me with little confidence that Mr. Wagner is being truthful to the Court when explaining the extent of his injuries, their cause, and impact on his activities.

[19] I have therefore approached the Plaintiff’s evidence with caution, and have looked to other corroborating evidence to assess how much weight to place on Mr. Wagner’s testimony.

[20] As to the other witnesses that testified in this trial, I have addressed any significant concerns regarding their evidence as they arise in these Reasons.

III. EVIDENCE

[21] Mr. Wagner is 31 years old and lives in West Kelowna. He was born and raised in Alberta. His parents home-schooled him until he graduated from high school. Mr. Wagner enjoyed various sports growing up, including mountain biking, volleyball, hiking and climbing.

[22] Mr. Wagner started working part-time as a landscaper when he was 15 years old. He continued this job for another year or so after graduating from high school in 2010.

[23] Around December 2011, Mr. Wagner started working with Black Diamond Industries in Alberta. The job was short lived due to a significant work injury. The work injury occurred on February 28, 2012, when he was 19 years old. Mr. Wagner was injured by a gas explosion at the work site (the “work injury”). Mr. Wagner suffered severe injuries to his neck, throat, and upper chest. He required tracheostomy surgery and trachea reconstructive surgery and was hospitalized for about 2.5 weeks. He then underwent rehabilitation for a further two months.

[24] Mr. Wagner filed a claim with the workers compensation board of Alberta (“WCB”) and received benefits related to his work injury. Mr. Wagner’s WCB claim was ongoing after the Collisions.

[25] When Mr. Wagner returned to work around June 2012, he went back to landscaping. In the fall of 2012, Mr. Wagner enrolled in the environmental horticulture program at Olds College (Alberta), majoring in landscape management. He completed the program in the spring of 2014.

[26] Mr. Wagner moved to Kelowna in May 2014, and continued to work in the landscaping field. From about May 2014 to August 2017, Mr. Wagner worked for Hampton Pools & Landscape in Kelowna. The work was seasonal; Mr. Wagner supplemented his income with various other manual jobs, some of which were paid in cash.

[27] In early September 2017, Mr. Wagner changed careers. He took a job with DirtPro Excavating as a heavy equipment operator on residential excavation sites. To further supplement his income, Mr. Wagner continued to do cash jobs on the side. Around the same time, Mr. Wagner met Sarah King. They started dating about 1-2 months later.

[28] The DirtPro job was physically demanding but Mr. Wagner enjoyed it. He was working full-time and earning \$26 per hour. However, Mr. Wagner's work injury continued to plague him and impact his physical and psychological health.

A. Collisions

[29] When the Collisions occurred, Mr. Wagner was 25 years old, still working at DirtPro, and still dating Ms. King.

[30] On December 12, 2017, Mr. Wagner had finished work and was out shopping for groceries. It was Ms. King's birthday and he had plans to cook her dinner. The first Collision occurred without warning, when Mr. Cooper suddenly changed lanes and hit Mr. Wagner's car. Mr. Wagner testified that he was shaken up and felt tension in his upper body, neck, and shoulder. However, he did not want to cancel his dinner plans. After exchanging information with the other driver, Mr. Wagner completed his errands and went home. He did not seek any medical attention.

[31] The next morning (December 13, 2017), Mr. Wagner was still feeling some discomfort from the first Collision, but not enough to dissuade him from going to work. He decided to go to the body shop after work in order to have the damage to his car assessed. On the way to the body shop, Mr. Wagner was involved in the second Collision.

[32] The second Collision happened when Mr. Wagner was stopped at the intersection. Mr. Wagner stated that he first noticed the BMW driven by Mr. Large in his side view mirror. The car was travelling at a high rate of speed. Mr. Wagner gripped the steering wheel to brace himself. The impact happened very quickly, when his head was turned slightly to the left. Mr. Wagner immediately felt a sharp pain in the left side of his back.

[33] After exchanging information, Mr. Wagner proceeded to the body shop for an assessment of the damage to his vehicle. The total damage to his vehicle from both Collisions was approximately \$5,000.

[34] The records indicate that Mr. Cooper sustained approximately \$8,500 in damage to his truck from the first Collision; Mr. Large's BMW experienced excessive damage in the second Collision, and was a write-off.

[35] As noted earlier, both Defendants have admitted liability. There is no dispute that Mr. Wagner's injuries from the Collisions are indivisible. Consequently, I find both Defendants jointly and severally liable for Mr. Wagner's damages arising from the Collisions.

B. Pre-Collision Condition

[36] The goal of damages is to restore Mr. Wagner as close as possible to the position that he would have been in, had the Collisions not occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (SCC) at para. 32. It is therefore important to determine what the Plaintiff's condition was prior to December 12, 2017.

[37] Mr. Wagner testified that at the time of the Collisions, he was still experiencing the ramifications of his work injury. The pain from the work injury had at times been overwhelming. Over the years, Mr. Wagner had turned to alcohol to cope. By 2013 he had developed an alcohol dependency. In 2016 he also started using cannabis for his physical pain and depression.

[38] By the fall of 2017, Mr. Wagner was still experiencing pain at the site of the incisions from his work injury related surgeries. He stated that he had difficulty breathing, which was exacerbated when he exerted himself, or was exposed to fumes, dust, or dirt. He had chronic pain and "nerve issues" inside his airway. He lacked range of motion in his neck. At times he felt his chest tightening, and a sensation of shards of glass in his throat and neck.

[39] As a result of these and other ongoing symptoms, Mr. Wagner was scheduled for further surgery on his throat on December 21, 2017.

[40] At the time of the Collisions, Mr. Wagner was also dealing with mental health challenges related to his work injury. He was experiencing PTSD, depression, and

episodes of suicidal ideation. In July 2015 he had been admitted to hospital following a suicide attempt. In June 2017 he again attended hospital for suicidal ideation and low mood.

[41] Mr. Wagner testified that in the fall of 2017, he had started feeling more positive about his future. Despite the pending throat surgery, Mr. Wagner felt that his work injury related pain had “plateaued” by the time of the Collisions. He was working at his “dream job”, surrounded by people he considered to be family, and believed he had a future at DirtPro. He was experiencing improvement in his mental health and his psychiatric visits had been reduced. By early December 2017, Dr. Trofimoff (his treating psychiatrist) had moved him to “maintenance” sessions for his mood condition. Mr. Wagner stated that he was looking forward to the future and believed that he was in a committed relationship with Ms. King.

[42] However, Mr. Wagner’s rosy outlook on his life is not supported by the medical or other evidence.

[43] Ms. King testified that while they were romantically involved, she and Mr. Wagner did not put labels on their relationship, such as boyfriend-girlfriend. They also did not discuss marriage or other strong commitments to each other.

[44] Further, while the Plaintiff testified that it was his plan to work at DirtPro permanently, this is undermined by: (a) the fact that his breathing issues were exacerbated by working in a dusty and dirt ridden environment such as his work with DirtPro; and (b) evidence that he was looking to be retrained in a more sedentary and cleaner environment, and actively seeking other career options, due to medical advice. Mr. Wagner’s evidence that he was only undergoing the retraining to please WCB, rather than a decision on his part to change jobs, is not credible. His evidence that he unsuccessfully tried to get in touch with DirtPro once he was able to return to work following the Collisions, is also not credible.

[45] As to the Plaintiff’s physical condition prior to the Collisions, I accept the opinion of Dr. Harpreet Sangha, a physiatrist retained by the Plaintiff, who diagnosed

Mr. Wagner with pre-existing chronic regional myofascial pain and cervicogenic headaches. In addition, the evidence establishes that at the time of the Collisions, Mr. Wagner was also suffering from neck pain and pain at the site of his trachea surgeries; asthma; and environmental allergies.

[46] In terms of Mr. Wagner's pre-existing psychological conditions, I rely in part on the opinions of Dr. Fung and Dr. Okorie, psychiatrists retained by the Plaintiff and Defendants, respectively. I find that Mr. Wagner had pre-existing alcohol use disorder which had gone untreated; cannabis use; adjustment disorder with depressed mood; PTSD; and borderline personality traits.

[47] At the time of the Collisions, Mr. Wagner's employment situation, relationship with Ms. King, and his physical condition were still in flux. While Mr. Wagner had been functioning psychologically better prior to the Collisions than he had for many years, I find that his hold on stability was still tenuous. Mr. Wagner's mental health was tied intimately to other factors in his life, such as relationships, employment, and the physical and psychological sequelae of his work injury.

C. Injuries and Post-Collision Events

[48] Mr. Wagner first sought medical attention for his Collision related injuries the day after the second Collision. He did not return to work again until the spring of 2019.

[49] Mr. Wagner testified that his recollection of the events following the Collisions is sketchy, due to his excessive drinking during that period. He recalled being in severe pain in the first few weeks after the Collisions. The pain was in the left side of his low back to mid-back and across his hips. He found sitting and standing very painful. He also had pain and stiffness in his neck and shoulders; decreased range of motion from the neck; and pounding headaches.

[50] At the same time that he was dealing with the pain from his Collision related injuries, Mr. Wagner was also enduring the aftermath of his work-related surgery. About one week after the Collisions (on December 21, 2017), Mr. Wagner

underwent the pre-planned throat surgery in Kelowna General Hospital. The purpose of the surgery was to improve his breathing and reduce his pain related to the work injury. However, Mr. Wagner testified that the surgery made his condition worse. Although his breathing improved slightly, he was experiencing “more sharper shooting pains in the muscles in the throat”. He testified that while his swallowing improved slightly for the initial few months, it later reverted back to his pre-surgery condition.

[51] Mr. Wagner testified that following the Collisions and his failed throat surgery, he experienced flashbacks, mood swings, excessive dwelling on the work accident, and feelings of anger. He felt he was getting “really dark” and started drinking “more than [he] ever had”. He “vaguely remember[s] trying to drink [his headaches] away a few times”.

[52] According to Mr. Wagner the culmination of his physical pain and psychological distress following the Collisions and his failed throat surgery, “plummeted” him into a “downward spiral of depression and suicidal ideologies”. His drug and alcohol use in the first 5-6 weeks after the Collisions “was raging” and worse than it had ever been. He was using prescription painkillers, marijuana, and hard alcohol to deal with his pain and mood symptoms. This put a greater toll on his relationship with Ms. King, which was already tenuous. Ms. King started drinking heavily with Mr. Wagner.

[53] Eventually Ms. King decided she did not want to continue the relationship with Mr. Wagner. She broke up with him in late January 2018. Not long after, Mr. Wagner attempted suicide. He was admitted into Kelowna General Hospital in late January following his failed suicide attempt. He was discharged after a few days.

[54] Mr. Wagner continued with his excessive alcohol consumption for some time following his discharge from hospital. At some point he finally resolved to make some changes in his life. Mr. Wagner testified that he started exercising and attending physiotherapy. Though he was still in “a lot of pain” he noticed an improvement in his condition.

[55] Mr. Wagner stopped drinking and around June 2018, he entered the Sunshine Coast Health Centre (“SCHC”) to help overcome his addictions. This was a 2.5 month residential treatment program which was based in Powell River. His attendance at the program was funded by WCB. Mr. Wagner completed the SCHC program around August 2018, following which the WCB continued to remain actively involved in his rehabilitation.

[56] Once he completed the SCHC program, Mr. Wagner returned to Kelowna. He testified that he remained sober for about one year following his discharge from SCHC. Sometime in the late summer of 2019, Mr. Wagner began drinking casually. He testified that after about one to two years of casual drinking, he resumed his heavy consumption of alcohol. This would put it around mid 2020 or 2021. However, I find that his heavy consumption of alcohol did not occur until around the fall of 2021. I base this on the fact that Dr. Fung found that his Alcohol Use Disorder was in full sustained remission when he was assessed by her in May 2021. Further, Dr. Okorie assessed him in October 2021, and did not note any concerning behaviours regarding alcohol consumption at that time.

[57] Mr. Wagner testified that around September 2018, he was still experiencing physical pain related to his Collisions. He attended physiotherapy, massage therapy and used a TENS machine to help manage his pain. Although he felt some improvement from his pain, this did not last. He testified that after some time the pain started worsening. Over time his pain began to move lower down his leg and further up his spine, as well as to the right side of his body.

[58] With the assistance of WCB, Mr. Wagner obtained his Class 1 drivers licence in the fall of 2018. Around April 2019, he commenced employment as a truck driver. Mr. Wagner testified that there was an unexpected amount of manual labour involved which was difficult for him to do. He stayed at this job for less than two weeks, before quitting due to increased pain in his neck and back. Mr. Wagner then tried his hand at some construction jobs, but these lasted on average for only a few weeks.

[59] A WCB work assessment conducted in the summer of 2019 determined that Mr. Wagner was not suitable for the role of truck driver. A more administrative type of position such as financial planner was suggested, and in January 2020, Mr. Wagner enrolled in a business diploma program (finance) at Okanagan College. His attendance at the program was part-time and was funded by the WCB. Mr. Wagner completed his studies in January 2023.

[60] Around May 2023 Mr. Wagner commenced working at Rusty's Sports Grill pub in Kelowna. The job started off part-time and then increased to full-time employment. Mr. Wagner quit the job in December 2023, a few weeks before this trial commenced. Mr. Wagner testified that he quit the job at Rusty's because the WCB made a decision to send him to Alberta in the beginning of 2024 for a comprehensive psychological evaluation regarding the work injury. Mr. Wagner believed that he would receive full wage loss benefits from WCB while the assessment was being conducted and quit his job in anticipation of the same.

[61] Mr. Wagner testified that he currently experiences pain in both the left and right side of his back and hips, with accompanied numbness and a stabbing needle like sensation and pain in his arms and fingers. For the past 1.5 to 2 years, he also experiences some paralysis in his left leg. His headaches have increased. He has insomnia related to the pain in his neck and back area.

[62] According to Mr. Wagner, his pain was a lot worse in the last few months prior to the trial. He reported being in bed a lot, and using alcohol "more than [he] should" in order to get his "mind off the pain" and "numb it out". He currently uses alcohol and cannabis to manage his pain. In addition, Mr. Wagner attends massage therapy, and hydrotherapy.

[63] Mr. Wagner testified that his social life suffered after the Collisions. He has lost many of his friends as he is no longer able to engage in activities with them such as hiking or having campfires in the woods. He experiences pain while doing household activities and gets help from family and friends. When his house is really messy, he will spend days cleaning it, but then he will not be able to get up for

several days afterwards. He is no longer able to take his dog for walks because it causes too much pain when he pulls on the leash. He avoids this by having his sister walk the dog for him, or he takes the dog to an off leash park.

[64] Mr. Wagner was not working at the date of trial.

1. Family Witnesses

[65] Mr. Wagner's parents and siblings¹ all testified at the trial. Their evidence corroborated some of his assertions about his physical and psychological condition before and after the Collisions. While I have no concerns about their credibility, the reliability of their evidence is brought into question due to limited opportunities to observe Mr. Wagner.

[66] Mr. Wagner's parents (Judy and Russell), as well as brother Micah, all live in Alberta and have had limited contact with Mr. Wagner since his move to Kelowna. Mr. Wagner's sister Rebecca moved to Kelowna around 2015, and has had more frequent contact with him.

[67] It is evident that Mr. Wagner's entire family care very deeply for Mr. Wagner. However, their relationship with Mr. Wagner became strained around 2015, due to events around his suicide attempt. Mr. Wagner eventually reconciled with his family, though it took time. Even with this normalization of contact, it is clear that Mr. Wagner's parents and brother had limited opportunities to observe Mr. Wagner in the years leading up to the Collisions given that they lived far away. As such, their evidence is only of minimal assistance.

[68] All of Mr. Wagner's family members described the Plaintiff as a healthy, active teenager who enjoyed sports, working out, and staying fit. He was a hard worker. They noted that the work injury had a dramatic effect on Mr. Wagner. He was less social, no longer able to maintain a clean house, and had difficulty doing yard work.

¹ As they all share the same last name, to avoid confusion, I have referred to Mr. Wagner's family members by their first names. No disrespect is intended.

[69] Judy described her son as being on a “continual gradual downhill”, since his 2012 work injury, and explained his circumstances following the work injury as follows:

Q But can you just tell us when you compare who he is now as person emotionally, psychologically, versus who he was as a person, you know, before all this happened to him, so before the first workplace accident -- can you just tell us, like, from what you have observed, who was he then versus who is he now?

A He was a teenager that had big plans, hopes, and dreams. And now he's bitter, angry, and disillusioned.

Q And if you move forward and you think about the time period of the years after the workplace accident and how he was before the car accident, again, can you expand on anything you observed that was a change in him emotionally, psychologically that occurred after the car accidents?

A It's a continual gradual downhill. The causes change, but the downhill has remained. Life has just been a struggle for him. It was a struggle before, and it's just become more of a struggle since. And I think the loss of being able to work and be able to be with people to talk to and interact with on a daily basis has really affected him. He seems more reclusive and angry.

[70] Judy learned about the Collisions from Mr. Wagner over the phone. She was unable to comment on her son’s physical or emotional state immediately following the Collisions. She felt that things were worse after the January 2018 suicide attempt. Under cross-examination, Judy stated that following his discharge from the rehab center “he was moving in a forward direction, and he had a more positive outlook on life. [H]e wasn’t as angry and despondent”.

[71] Russell described Mr. Wagner as an active, ordinary child but noted they were not particularly close. After the Plaintiff moved away to Kelowna, Russell only saw him two or three times per year. After the Collisions, Russell observed that his son had a hard time bending over and seemed to be in pain doing ordinary things around the house. He noted that Mr. Wagner was “never...one to have everything perfectly spotless”, but that things seemed to have gone downhill even more than they were before.

[72] Micah testified that after his brother moved to Kelowna, they saw each other about once per year and kept in touch by phone. Micah did not see Mr. Wagner from

Christmas 2016 to mid/late 2018. Micah described Mr. Wagner as a very caring and considerate person. He stated that he was facing more restrictions after the Collisions including difficulty with lifting or moving things and not being able to work out or walk the dog as much due to leash pulling.

[73] Micah recalled that around Christmas of 2016, Mr. Wagner was able to push out a stuck truck while off-roading, whereas now he cannot move a jack to lift up the truck to work on it. Under cross-examination, Micah conceded that his brother talked to him about suicidal ideation for years prior to the Collisions. He has avoided talking to Mr. Wagner about his suicide attempts, but believes that he is “still kind of a little bit down...[and] has times where he gets a little bit depressed because he can’t physically do what he used to be able to do”. However, Mr. Wagner has continued to host family events at his house when Micah’s family is in Kelowna. This past Christmas, Micah stated that he helped Mr. Wagner around the house and removed some bags of garbage which he had piled up outside. He explained that Mr. Wagner did not have the time to do it when he was working at the bar.

[74] Rebecca moved to Kelowna in 2015 and had frequent contact with Mr. Wagner, until they had a falling out after she called emergency services on his suicide attempt. They resumed regular contact about a year before the Collisions. She described Mr. Wagner’s workplace accident as “pretty severe” and noted that he had ongoing breathing issues up to the time of the Collisions. She believed his neck pain had cleared up. She recalled that he experienced depression after the workplace accident and was “not as enthusiastic about life.”

[75] In terms of activities prior to the Collisions, Rebecca testified that Mr. Wagner was limited by dust but was still active. Though he could not ride a bike prior to the Collisions, they hiked and worked out together. Rebecca testified that she saw Mr. Wagner between the Collisions and his December 2017 surgery, and he appeared to be in pain. Since the Collisions, they see each other frequently. They attempt to go for walks sometimes but it causes him “severe pain”.

[76] Rebecca testified that after the Collisions Mr. Wagner's back pain severely limited him from working due to problems with lifting, bending, housework, sitting or standing for too long. Rebecca admitted that she never saw Mr. Wagner at work and that the information on how his injuries have impacted his work, comes from Mr. Wagner.

[77] Rebecca stated that Mr. Wagner's mental state has improved following attendance at SCHC, though it is "still not great" as he remains socially isolated.

[78] Rebecca described one instance a few years prior where she received a call from her mother to check-in on Mr. Wagner. She found him at his house on the floor and barely communicative. She did not believe he had been drinking and assumed that he was lying on the floor due to pain. It is unclear what occurred on this occasion, as Mr. Wagner did not testify about this incident.

2. Friends

[79] Ms. King is a friend of Mr. Wagner's. They briefly dated for a few months starting in late 2017. She stated that they became estranged for a while after his Collisions, and then reconnected as friends. She considers him a good friend now and sees or talks to him daily.

[80] Ms. King's memory of past events was vague, weak, and inconsistent. For example, she could not recall if Mr. Wagner had one Collision or two, or when they broke up. She claimed that they were not on talking terms before the surgery, and she never saw him afterwards, but then she also stated that she was with him for the surgery and she drove him there and took him home afterwards. Ms. King also had a tendency to minimize things that would put herself or Mr. Wagner in a bad light, such as their level of drinking prior to the Collisions. While I do not find that she was actively trying to mislead the Court, I find much of her evidence unreliable. Though I have not discounted her evidence entirely, I have approached her evidence with caution and considered it in light of the other evidence before the Court.

[81] Ms. King testified that when she met Mr. Wagner (likely in the early fall of 2017) they did outdoor activities together such as kayaking, fishing, hiking, off-roading, and going to the beach. She found him to be kind and easygoing and did not observe any physical limitations at that time. Though she denied that they drank heavily together prior to the Collisions, Ms. King admitted that they drank a bottle of wine together almost every night.

[82] Ms. King testified that when she first heard about the Collisions, the Plaintiff was violent, angry and slamming things. Their relationship went downhill “very quickly” after that. When they saw each other, he would lie down and moan. He started drinking hard liquor including drinking in the morning. Ms. King claimed that she broke up with Mr. Wagner right after the Collisions. He said something to the effect of “don’t worry you will never see me again.” She claims that they were not seeing each other anymore after the Collisions including when he had his throat surgery, at which point they were not even on talking terms. She had trouble recalling the specific timeline of when they stopped seeing each other. However, based on Mr. Wagner’s evidence, and the medical records, I find on the preponderance of probability that Ms. King broke up with Mr. Wagner in late January 2018, just before Mr. Wagner’s suicide attempt.

[83] Ms. King testified that since the Collisions, the Plaintiff is always complaining about pain. He has a hard time carrying things and doing housekeeping activities. She observed that his place is “never clean” and has stacks of dishes. She helps Mr. Wagner with yard work and cleaning his house. For instance, she rakes leaves while he holds the bag. She also gets him out of bed and brings him his coffee. Sometimes he does not get up at all. When he comes to her house, he “stinks” the whole apartment, and she washes his feet for him. She testified that he does not do fun stuff anymore and it has as much to do with his mental state as his physical difficulties. Under cross-examination, Ms. King denied that the Plaintiff spends days cleaning up his home.

[84] Samuel Williams is a friend of Mr. Wagner's. He was not able to provide much useful evidence due to his limited contact with Mr. Wagner in the years immediately surrounding the Collisions.

[85] Mr. Williams testified that they met in Kelowna in the summer of 2015. Their social interaction at the time was limited and mostly through other mutual friends. They lost touch between April 2016 to 2019, as Mr. Williams was busy with family life. Mr. Williams moved to Edmonton in the summer of 2022, and currently has limited contact with Mr. Wagner.

[86] According to Mr. Williams when he reconnected with Mr. Wagner in 2019, it was to help a friend move. He found it odd that Mr. Wagner did not physically help with the move. Once they reconnected, they became good friends and did outdoor activities together, such as fishing trips. Mr. Williams testified that he helped Mr. Wagner with a yard project from 2021-2022, but the Plaintiff was not able to rip up the grass or dig new holes for plants. Instead, he operated a machine to secure things in place. I note that it is unclear from the testimony if Mr. Williams observed these limitations or whether the Plaintiff told him he was unable to do certain types of work.

3. Employer witnesses

[87] Rae Doyle is the general manager at Rusty's Sports Lounge and the Plaintiff's former boss. She explained that Rusty's is a very large neighbourhood pub which seats around 220 people. Everything in the pub is far away from each other, including the kitchen which is some distance away from the bar area. She hired the Plaintiff as a bartender about eight months before trial; he quit his job just a few weeks before trial began.

[88] Ms. Doyle described Mr. Wagner as a reliable employee who got along with his coworkers and was very knowledgeable about mixing drinks. His job included lifting ice, moving beer, stocking shelves, counting money and walking to the kitchen to pick-up food. He struggled to keep up when it was busy and at times he had difficulty getting ice, stocking the beer, and keep up with the "chits". According to

Ms. Doyle, Mr. Wagner had a harder time getting his tasks done on some shifts. He was usually sad but could turn it on for customers. Every time he came in she asked “how are you today?” and his response would be “well, I’m here.”

[89] Ms. Doyle testified that she observed Mr. Wagner doing stretches at the start of his shift and using a cart to move heavier items. However, she noted that they encourage everyone to use the cart and there is at least one other person that did so. Although Ms. Doyle stated that she would hire Mr. Wagner back, she indicated that it would be for a part-time position. She did not explain why she would not hire him back full-time.

[90] Dean Sutherland was the manager at Hampton Pools & Landscape where the Plaintiff worked from 2014 to 2017. He described Mr. Wagner as a skilled, great worker with a natural knack for landscaping, lots of energy, an easy laugh and he took any job with a range of duties. His duties included driving small equipment, digging trenches, and planting trees. He said that he did not observe the Plaintiff having physical issues; rather he was in great shape. However, his opportunities to observe Mr. Wagner were limited by the fact that Mr. Sutherland only spent a third of his day at job sites, and even then he was moving between different sites. In describing some of the equipment that Mr. Wagner operated, Mr. Sutherland noted that driving skid steers requires the use of both hands. Further, some of the equipment operated by Mr. Wagner – like a Bobcat – could run on diesel or gas but would still create a lot of fumes which would be around the machine. Mr. Sutherland stated that he would hire the Plaintiff back.

[91] Lanny Coombs was a former director of DirtPro and a partner from 2016 to 2021, when he sold his interest in the company. He prepared a certificate of earnings on behalf of DirtPro. The company did residential and commercial construction. He briefly met Mr. Wagner a few times and did not observe him working in the field. He testified that there was no role at the company that required a class 1 licence. The Plaintiff quit the company in December 2017. Mr. Coombs

testified that he was not aware that Mr. Wagner had tried to contact DirtPro after his Collisions to try to inquire about employment.

[92] Wilfred Plester manages Black Diamond Industries where Mr. Wagner suffered his work injury in 2012. Mr. Plester provided details about the work injury which occurred due to a gas meter explosion. Mr. Plester recalls Mr. Wagner being an excellent and reliable employee, who he would be willing to hire back.

D. Expert Opinions

[93] A total of six experts testified in the trial: one physiatrist and one psychiatrist each for the Plaintiff and the Defendants; one vocational rehabilitation professional for the Plaintiff; and one occupational therapist for the Plaintiff. As the evidence of the latter two experts relates to Mr. Wagner's loss of earning capacity claim, I will address it later in these Reasons.

[94] As noted elsewhere, the information provided by the Plaintiff to the healthcare providers and experts may be exaggerated or inaccurate. This is owing in part to his Cluster B personality traits as well as my own concerns about his credibility and reliability. I have therefore approached all of the expert opinions with more than the usual degree of caution.

1. Psychiatrists

[95] Dr. Krete is a physiatrist retained by the Defendants. He assessed Mr. Wagner on June 9, 2022, and prepared his report on October 25, 2022. Dr. Harpreet Sangha is a physiatrist retained by the Plaintiff. He assessed the Plaintiff on June 20, 2023, and prepared a report dated June 28, 2023.

[96] The psychiatrists disagree on the extent of Mr. Wagner's injuries which are related to the Collisions, and his prognosis for recovery.

[97] The reliability of Dr. Krete's opinion is diminished by his failure to disclose to the Court some key findings made by him during an earlier outpatient visit with Mr. Wagner. In his medical legal report, Dr. Krete opined that Mr. Wagner

experienced a “back strain or back sprain” due to the Collisions as well as an aggravation of his pre-existing neck pain. However, Dr. Krete did not advise the Court that he had treated Mr. Wagner as an outpatient at Kelowna General Hospital in February 2020. During that visit, Dr. Krete had reported that Mr. Wagner had been struggling with chronic pain following the Collisions, and opined that Mr. Wagner had “a picture of chronic myofascial pain syndrome”.

[98] During his cross-examination Dr. Krete conceded that he was also of the view that Mr. Wagner was suffering from chronic myofascial pain syndrome, a component of which was chronic back pain which was caused by the Collisions. I reject his explanation that he did not provide the chronic pain diagnosis in his medical legal report, as he was only asked about what injuries were “directly” caused by the Collision. Given Dr. Krete’s duty of candour to the Court, he should have understood his obligation to provide a complete diagnosis, regardless of how the question from defence counsel was framed.

[99] I do not have the same concerns about Dr. Sangha’s report, and largely found his opinion to be reliable and well balanced. Dr. Sangha opined that Mr. Wagner suffered a cervical strain as a result of the Collisions, which aggravated his pre-existing chronic regional myofascial pain and cervicogenic headaches. In addition, he suffered a lumbosacral strain resulting in chronic regional myofascial pain, disordered sleep, psycho-emotional distress, and chronic pain syndrome with features of central sensitization. Mr. Wagner was expected to have flare-ups of pain and dysfunction which would require a combination of therapies. The recommended therapies should be active rather than passive in nature. At trial, Dr. Sangha also opined that Mr. Wagner’s physical symptoms were intertwined with his psychological state.

[100] Under cross-examination, Dr. Sangha stated that while Mr. Wagner had “histrionic traits” and cluster B traits, he found Mr. Wagner to be a “reasonable historian”. It is unclear what Dr. Sangha based this opinion on, given that the reliability of the medical records which Dr. Sangha referred to, was itself brought into

question due to Mr. Wagner's cluster B traits. Dr. Sangha was also asked about Mr. Wagner's ability to do squats during his assessment. He stated that the Plaintiff was able to do so but reported back pain.

[101] The Defendants take issue with Dr. Sangha's opinion that the Collisions caused more than a temporary aggravation of Mr. Wagner's neck injury. I do not share their concerns. While there are other contributing factors to Mr. Wagner's ongoing pain in his neck region (for example, his failed surgery in that region), I accept that the Collisions also played a role in causing a permanent aggravation to Mr. Wagner's neck condition. Consequently, while the ramification of the Collisions on Mr. Wagner's pre-existing neck pain and headaches has diminished significantly over time, I am satisfied that some of his current pain experienced in those regions is still related to the injuries sustained in the Collisions.

[102] Dr. Sangha and Dr. Krete also disagree on whether Mr. Wagner could see further medical improvement of his low back. Dr. Krete opined that Mr. Wagner could experience significant improvement. He based this opinion on the fact that Mr. Wagner's lumbar spine imaging "has proven essentially normal". Dr. Sangha noted that the imaging is expected to be normal in myofascial pain states. He opined that Mr. Wagner had largely reached maximum medical recovery with respect to his myofascial impairment, and "if anything he has deteriorated in that he now has features of central sensitization". Dr. Sangha noted the extensive nature of Mr. Wagner's difficulties, and the longstanding nature of his problems.

[103] However, Dr. Sangha did agree that Mr. Wagner could benefit from the kinesiology and physiotherapy recommended by Dr. Krete, except that these would be supportive for flare-ups rather than curative. I find Dr. Sangha's opinion on this issue well considered and have placed weight on it.

2. Psychiatrists

[104] Dr. Kathryn Fung assessed Mr. Wagner on May 28, 2021, and prepared a report dated July 28, 2021. Dr. Okorie's report is dated November 9, 2021, and is based on an assessment done on October 18, 2021.

[105] The psychiatrists agree that the Collisions exacerbated some of Mr. Wagner's pre-existing psychological conditions, though they differ on whether the exacerbation was temporary or permanent.

[106] Dr. Fung diagnosed Mr. Wagner with the following at p. 16:

DSM-5 DIAGNOSES

- Alcohol use disorder, in full sustained remission – pre-existing
- Adjustment disorder with depressed mood – pre-existing
- Posttraumatic stress disorder – pre-existing (no aggravation or exacerbation after the subject MVAs)
- Borderline personality traits, rule out borderline personality disorder – pre-existing
- Cannabis use

Medical diagnoses:

- Pre-MVA: elevated liver enzymes, asthma, environmental allergies, gastritis, tracheotomy, tracheal reconstruction (2012), and chronic front neck pain
- Post-MVA: myofascial back pain (Dr. Simonett)

[107] With respect to the alcohol use disorder, while Dr. Fung found that it was in full sustained remission at the time of her assessment in May 2021, this does not mean that it was in remission at the time of the Collisions. Based on the evidence before me, I find that Mr. Wagner's alcohol use disorder was still active at the time of the Collisions, and worsened after the throat surgery, until Mr. Wagner quit drinking just prior to starting his treatment at SCHC. The evidence also leads me to conclude that the alcohol use disorder went into remission following his treatment at the SCHC and continued to be in remission until after Mr. Wagner was assessed by Dr. Okorie in the fall of 2021, at which point Mr. Wagner resumed his heavy consumption of alcohol, which continued to the date of trial.

[108] According to Dr. Fung, the PTSD, alcohol use disorder and borderline personality traits increased the Plaintiff's vulnerability to poor coping or poorer outcomes after trauma or stressful events, compared to the average person.

[109] Dr. Fung opined that Mr. Wagner did not develop any new psychiatric diagnoses or significant vehicle-related trauma symptoms after the Collisions. However, she considered the Collisions to be “a factor in the exacerbation of his alcohol use disorder and adjustment disorder with depressed mood”, noting that both these diagnoses “are vulnerable to stress and pain”. Nevertheless, she found it unlikely that the Collisions have aggravated his PTSD or his borderline personality traits. The latter primarily affects his coping and resiliency.

[110] Dr. Fung also opined that there were factors post-Collision which probably contributed to the exacerbation of Mr. Wagner’s alcohol use disorder and/or adjustment disorder, i.e. “the December 2017 tracheal stoma revision, the breakup with his girlfriend in January 2018, multiple break ins after his 2019 move, the change from in-person to virtual classes during the COVID-19 pandemic, and his kitchen catching fire in September 2020”.

[111] Although the alcohol use disorder did impact Mr. Wagner’s ability to work while it was active or he was in treatment, Dr. Fung did not consider Mr. Wagner’s psychiatric conditions to prevent him from working or attending school, though she allowed for the fact that he may have decreased productivity at work or school in the future, which may not necessarily be due to the Collisions “given his pre-existing history of psychiatric symptom fluctuations due to stress”.

[112] Nevertheless, Dr. Fung considered Mr. Wagner to have some impairment in his home and recreational activities which was partially due to psychiatric symptoms. Though she does not expect Mr. Wagner to fully recover from the mental conditions, he can expect to see improvement if he reduces his use of cannabis and continues treatment to promote abstinence from alcohol.

[113] Dr. Okorie summarized his opinion of Mr. Wagner’s pre-existing and post-Collision psychological condition as follows at pp. 7 and 8:

Self-reported history and available medical records show that Mr. Wagner’s mental health was in a destabilized state arising from his excessive alcohol/marijuana use, and romantic relationship stress and that he was receiving antidepressant therapy and psychological care for pre-existent

cluster B personality traits, posttraumatic stress disorder, and alcohol use disorder at the time of the subject MVA.

In my opinion, these pre-MVA disorders were caused by his early life experiences, 2012 work accident and lifestyle choices that had nothing to do with the subject MVAs. Also, I did not find any reason to believe that these disorders caused the subject MVAs.

Shortly after the accidents and associated back pain, his situation was further exacerbated by his throat surgery triggering flashbacks to the 2012 work accident and the breakup in his relationship with his girlfriend resulting in a dysregulated, suicidal behaviour and a brief psychiatric admission.

[114] With respect to causation, Dr. Okorie's opinion is similar to that of Dr. Fung's, though he finds the Collisions may have exacerbated his PTSD, alcohol use disorder and personality traits. Dr. Okorie opined as follows at p. 8:

In my opinion, Mr. Wagner did not incur any mental disorder as a direct result of the subject MVAs. I believe that MVA-related acute lower pain and associated functional limitations may have contributed to the exacerbation of his personality traits, posttraumatic stress disorder and alcohol use disorder that culminated in his hospital admission in January 2018.

[115] Dr. Okorie went on to say the following:

As pain is a risk factor for mental disorders, I should point out that his reported MVA-related low back pain, unless treated to resolution, would increase his vulnerability for future episodes of mental disorders.

[116] However, Dr. Okorie opined that any contribution from the Collisions to the exacerbation of Mr. Wagner's pre-Collision mental disorders resolved before his discharge from the SCHC in September 2018. I find this opinion is supported by the evidence as a whole. For example, it is consistent with the Plaintiff's evidence about the benefits received from the rehabilitation program and his period of stabilized alcohol consumption after rehabilitation.

[117] Importantly, Dr. Okorie did not find Mr. Wagner "to have any active mental disorders or any psychologically mediated disabilities at the time of [his] assessment".

[118] Dr. Okorie made the following recommendations for Mr. Wagner's future care:

5 Even though Mr. Wagner's pre-MVA cluster B personality traits, posttraumatic stress disorder, and alcohol use disorder are currently not active, these are chronic disorders which fluctuate in severity depending on the patient's circumstances, treatments, and coping capacity. Consequently, I would recommend long-term treatment with Pristiq 100mgs daily and ongoing employment of coping strategies learned in therapy as well as abstinence or reduction in his marijuana use to maintain his current improved mental state.

[119] Both psychiatrists were knowledgeable, unshaken in cross-examination, and provided fair and objective assessments. I find no fault in either of their approaches. Insofar as there is a difference in their opinions, I have considered the evidence as a whole in arriving at my conclusions regarding Mr. Wagner's injuries and their resolution. To the extent that it is necessary to resolve a conflict between their opinions, I find that Dr. Okorie's opinion more closely accords to the evidence at trial.

IV. NON-PECUNIARY DAMAGES

[120] A damage award for non-pecuniary losses is intended to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Though restitution is never possible for these types of losses, the monetary award is intended to provide a substitute for pleasures and amenities to make the life of the plaintiff "more bearable": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 274, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.); and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 105.

[121] The goal of damages is to put the plaintiff in the same position, but not better than, they would have been in, had the collision not occurred. Where there are several tortious and non-tortious causes of injury, the defendant is fully liable "so long as the defendant's act is a cause of the plaintiff's damage": *Blackwater v. Plint*, 2005 SCC 58 at para. 78 [emphasis added].

[122] The "thin skull rule" mandates that the tortfeasor must take the plaintiff as they are, even if the injuries are more severe than they would otherwise have been because of a pre-existing condition. In contrast, the tortfeasors are not responsible for the debilitating effects of a pre-existing condition that the plaintiff would have experienced in any event (the "crumbling skull rule"): *Athey* at paras. 34-35.

[123] In *Dornan v. Silva*, 2021 BCCA 228 at para. 62, Justice Grauer explained the analytical approach to assessing pre-existing conditions. This is summarized as follows:

- a) Did the plaintiff suffer from a pre-existing condition?
- b) If so, is there a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence?
- c) If so, what is the relative likelihood of this hypothetical event occurring?

[124] Similar to pre-existing injuries, in cases where there are intervening events, the court can do a global assessment of general damages for the plaintiff's injuries, and then reduce that amount to account for the intervening events: *Khudabux v. McClary*, 2018 BCCA 234 at para. 46.

[125] A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not "mere speculation": *Dornan* at para. 63.

[126] In *Athey*, the court explained the process of assessing the relative likelihood of an event, as follows:

27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146.

For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).

[Emphasis added.]

[127] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to S.C.C. ref'd [2006] SCCA No. 100, the Court set out a non-exhaustive list of factors to be considered in assessing non-pecuniary damages. These include: the plaintiff's age; nature of the injury; severity and duration of pain; 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. The plaintiff's stoicism is a factor that should not, generally speaking, penalize the plaintiff: *Stapley*, at para. 46 citing *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at para. 55.

[128] The award is to be fair to both parties and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156.

[129] The Plaintiff submits that prior to the Collisions, he was a highly functional and physically capable person. While he was still experiencing the sequelae of his 2012 work accident injuries, the pain in his neck was minor and his mental state was stable. He was in a committed relationship, doing a job that he loved, and feeling positive and optimistic about his future. The Collisions exacerbated his previous injuries and conditions, and also caused him new injuries. It is submitted that these have had a devastating impact on his life, and have caused him significant pain and suffering, such that an award of \$150,000 for his non-pecuniary damages is warranted. In support, the Plaintiff relies on the following cases: *Deol v. Sheikh*, 2016 BCSC 2404; *Campbell v. Van Den Broek*, 2013 BCSC 1754; *Perry v. Perry*, 2011 BCSC 432; and *Morgan v. Scott*, 2012 BCSC 1237.

[130] The Defendants submit that the Plaintiff's circumstances are a classic example of a crumbling-skull plaintiff. In addition to cluster B personality traits, PTSD, and alcohol abuse, the plaintiff was also suffering from physical limitations such as neck pain and breathing issues preventing physical assertion. The Defendants acknowledge that the Plaintiff sustained injuries from the Collisions, specifically a temporary exacerbation of his pre-existing psychological symptoms and an injury to his mid and lower back which has resulted in chronic myofascial

pain syndrome. However, the Defendants submit that the severity and effects of the Collision-related injuries are not as significant as the Plaintiff portrays. Rather, they say that Mr. Wagner recovered from most of his Collision related injuries by the time he was discharged from the rehabilitation centre. While the chronic pain remains ongoing, they say that it is not disabling. Consequently, they say that the Plaintiff should be awarded general damages in the range of \$100,000. In support, they rely on the following decisions: *Callow v. Van Hoek-Patterson*, 2023 BCCA 92; *Hoffman v. Luan*, 2021 BCSC 811; *Karpenko v. King*, 2023 BCSC 345; *Halvorson v. West*, 2021 BCSC 1322; and *Warren v. Biswal*, 2023 BCSC 1318.

[131] I agree with the Plaintiff that “injury to an already disabled person can be devastating”: *Morgan v Scott*, 2012 BCSC 1237 at para. 40 quoting *Agar v. Morgan*, 2003 BCSC 630 at para. 229, rev’d in part on other grounds 2005 BCCA 579. However, I do not agree that the injuries in this case should result in a non-pecuniary award such as the one sought by the Plaintiff. The Plaintiff’s position fails to adequately account for the real and substantial risk that his pre-existing conditions would have detrimentally impacted his future, regardless of the Defendants’ negligence.

[132] Consequently, while I agree that the Collisions were of causative significance in Mr. Wagner’s pain profile and physical restrictions, as well as his psychological condition, so too were Mr. Wagner’s pre-existing conditions and the numerous intervening events that followed the Collisions. As such, these pre-existing conditions and post Collision events must also be taken into account in determining his non-pecuniary damages award.

[133] At the time of the Collisions, Mr. Wagner had the following pre-existing physical conditions: (1) neck pain and pain at the site of his trachea surgeries; (2) chronic regional myofascial pain; (3) cervicogenic headaches; (4) asthma; and (5) environmental allergies. The impact of these conditions on Mr. Wagner’s health and employment included limited range of motion in his neck, difficulty going up stairs, pain sensation in his throat and neck, and difficulty breathing which was exacerbated

with exposure to fumes, dust and dirt. In my view, there was a measurable risk that these pre-existing physical conditions would have further detrimentally affected Mr. Wagner in the future, regardless of the defendant's negligence. I put that risk at 30%.

[134] The Collisions caused Mr. Wagner to suffer a cervical strain which aggravated his pre-existing chronic regional myofascial pain and cervicogenic headaches. In addition, Mr. Wagner suffered new injuries, including: (1) lumbosacral strain resulting in chronic regional myofascial pain; (2) disordered sleep; (3) psycho-emotional distress; (4) and chronic pain syndrome with features of central sensitization. These have had a profound impact on Mr. Wagner's ability to cope.

[135] While Mr. Wagner was already experiencing physical restrictions due to his pre-existing conditions and injuries, his Collision related injuries worsened his pain experience and caused new injuries and limitations. These restricted him further from physical activities and household duties. He also had to curtail even those sports and other recreational activities (such as fishing and hiking), which he was previously able to do prior to the Collisions. This has been very distressing to him as he had enjoyed being active.

[136] Although Mr. Wagner has largely recovered from the ramifications of his physical injuries noted above, he continues to experience some pain and restriction which is attributable to the Collisions, such as difficulty with lifting, bending, heavy housework, and extensive sitting or standing. It is also likely that he will have flare-ups of pain and dysfunction due to the injuries sustained in the Collisions.

[137] I also find that Mr. Wagner's lower back pain and associated functional limitations partially contributed to the temporary exacerbation of his personality traits and PTSD which were pre-existing.

[138] At the time of the Collisions, Mr. Wagner suffered from the following pre-existing psychological conditions: (1) alcohol use disorder; (2) adjustment disorder with depressed mood; (3) PTSD; (4) borderline personality traits; and (5) cannabis

use. The evidence leads me to conclude that there was a measurable risk that Mr. Wagner's pre-existing psychological conditions would have detrimentally affected Mr. Wagner in the future, regardless of the Defendants' negligence. I put this risk at 50%.

[139] I find that the Collisions were a factor in the temporary exacerbation of Mr. Wagner's alcohol use disorder and adjustment disorder with depressed mood. However, Mr. Wagner also suffered numerous post-Collision events which I find contributed to his worsened mental health condition and the exacerbation of his pre-existing conditions. These post-Collision events include his December 2017 work related surgery; the breakup with Ms. King in January 2018; multiple break-ins into his residence after his 2019 move; the change from in-person to virtual classes during the COVID-19 pandemic; his kitchen catching fire in September 2020; and an incident in September 2021 during which Mr. Wagner says he was assaulted by the police. With the exception of his break up with Ms. King, there is no evidence that any of these other events were related to the Collisions.

[140] I do not agree that the Plaintiff's suicide attempt of January 2018 was attributable to the Collisions. Rather I find it would have occurred regardless of the Collisions. The evidence indicates that Mr. Wagner's suicide attempts prior to and including the January 2018 attempt, were intimately connected to failed relationships. In this case, the suicide attempt followed the breakup of his relationship with Ms. King. I take from Ms. King's evidence that the breakup of the relationship was only partially related to Mr. Wagner's behaviours, such as his increased consumption of alcohol. While the Collisions played a part in Mr. Wagner's worsening mental state and increased drinking, in the words of Dr. Okorie, they pushed Mr. Wagner "closer" to the proverbial cliff, but did not push him over it. Consistent with this finding, I note Mr. Wagner's mother's evidence that the Collisions were part of a "continual gradual downhill" for Mr. Wagner.

[141] Further, I find that any contribution from the Collisions to the exacerbation of Mr. Wagner's pre-Collision mental disorders likely resolved by September 2018, by

which point Mr. Wagner had successfully completed his treatment at the SCHC. He had ceased consuming alcohol and by all accounts was in stable mental health for several years following. Indeed, Mr. Wagner maintained sobriety for over one year before commencing drinking on a casual basis. Mr. Wagner's decline into excessive drinking appears to have been gradual and occurred over the next two years.

[142] There is insufficient evidence for me to correlate Mr. Wagner's post SCHC increased drinking and decline in his mental health, with the Collisions. Rather, I find that Mr. Wagner's underlying psychological disorders and personality traits, as well as the numerous post-Collision events, are the predominant cause of Mr. Wagner's subsequent psychological problems. Despite Mr. Wagner's assertion about his current psychological condition, there is strong evidence that he continues to maintain a considerable degree of functionality, and that his current mental condition is not as severe as he portrays.

[143] Before I assess Mr. Wagner's loss, I will address the various hypothetical events. I have already found that there is a 30% likelihood of Mr. Wagner's pre-existing physical conditions detrimentally affecting him in the future; and a 50% likelihood regarding the detrimental impact of the pre-existing psychological conditions. These figures also take into account a reduction to the global award for the aforementioned intervening events (such as the throat surgery) that would have caused the Plaintiff injuries regardless of the Collisions. In addition, there is reliable medical evidence that Mr. Wagner's mental health condition should improve if he follows recommendations to decrease his use of cannabis and alcohol. I put the chances of this occurring at 10%. The prospect of Mr. Wagner's condition improving is countered by the prospect that it will worsen over time. There is reliable medical evidence that Mr. Wagner has been left vulnerable for future episodes of mental disorders. I put the risk of Mr. Wagner's condition worsening at 15%.

[144] It is trite law to say that determining damages is an assessment, and not a precise mathematical calculation. This is particularly important in a case such as this, where it is the combined effect of the physical and psychological injuries on

Mr. Wagner's life as a whole that must ultimately be compensated. Thus, while I have expressed the relative likelihood of the impact of the various events occurring in terms of percentages, arriving at the ultimate award is not a linear mathematical exercise. Rather, I must consider the impact of the various injuries and hypothetical events on Mr. Wagner's life as a whole.

[145] Thus, while I find that \$150,000 is an appropriate measurement of Mr. Wagner's non-pecuniary damages following the Collisions, after accounting for the above hypothetical events, I arrive at \$115,000. This figure includes an award for deficits related to housekeeping capacity (which is explained further elsewhere).

[146] In my view, \$115,000 represents a fair and reasonable sum to compensate Mr. Wagner for the pain and suffering he has experienced due to the negligence of the Defendants.

V. LOSS OF EARNING CAPACITY

[147] Damages for impairment of earning capacity are awarded to provide a plaintiff with full compensation for all their pecuniary losses: *Thomson v. Thiessen*, 2018 BCSC 1353 at para. 55, citing *Grewal v. Naumann*, 2017 BCCA 158 at para. 42. The purpose of the award is to restore the plaintiff to the position he would have been in but for the accidents.

[148] The value of the plaintiff's earning capacity loss may be measured in different ways. For example, it could be assessed on the basis of actual earnings the plaintiff would have received; the replacement costs of the tasks the plaintiff is no longer able to do; an assessment of reduced company profits; or the amount of secondary income that has been lost: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 31, citing Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06.

[149] Claims for past and future loss of earning capacity are subject to the same legal test, i.e. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss: *Grewal*, at para. 48.

Assessing the likelihood of hypothetical and future events is more appropriate than applying the balance of probabilities test, because what would have happened in the past, absent injury, is no more 'knowable' than what will happen in the future: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

[150] Hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; and *Dornan* at paras. 93–94.

[151] The onus is on the plaintiff to demonstrate that the injuries suffered in the accident have impaired the plaintiff's income earning ability, such that there is a real and substantial possibility that the diminished earning capacity has resulted in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140 at paras. 21, 32-33. The court must then award compensation on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17.

[152] In general, the value of the plaintiff's capacity to earn is equivalent to the value of the earnings he would have received in the past or the future, had the tort not been committed: *Crimeni v. Chandra*, 2015 BCCA 131 at para. 15. The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

A. Past Loss of Earning Capacity

[153] There is no dispute that the Plaintiff was working full time at DirtPro when the first Collision occurred; that he never returned to this job after the second Collision; and that he earned very little income during the approximate five-year period leading up to the trial. The parties differ however on how much the Plaintiff would have earned but for the Collisions, and how much of this "lost income" is attributable to the negligence of the Defendants.

[154] To understand the differing positions, it is helpful to look at Mr. Wagner's pre-Collision earnings history, as follows:

Table 1: Pre-Collision Earnings

Income Source	2014	2015	2016	2017
T4 Gross Earnings	\$33,155	\$42,925	\$8,314	415,635 ²
Unreported Cash	Nil	unknown	\$13,500	unknown
WCB	\$1,775	\$2,018	\$2,113	\$26,504
EI	Nil	Nil	\$7,336	Nil
Business	\$1,370	\$Nil	\$Nil	Nil
TOTAL	\$36,300	\$44,943	\$31,263	\$442,139

[155] For the tax years 2014 to 2017, the evidence reveals a fluctuating earnings history which was marked by frequent job changes, unreported cash income, and income supplemented through the receipt of WCB and EI benefits. The only year for which it is possible to estimate the amount of cash earnings is 2016 when Mr. Wagner testified he worked for several months with Aqua Gardens and was paid \$25 per hour. The Defendants submit that by his evidence Mr. Wagner would have earned approximately \$12,000 to \$15,000 at this job. I have used \$13,500 in Table 1 as the middle of the range proposed by the Defendants for the Aqua Gardens job.

[156] The Plaintiff submits that if the Collisions had not occurred, he would have continued working full-time at DirtPro, with the exception of a 2 to 4 week period

² The actual T4 earnings are \$14,595. They have been increased by \$1,040 to account for the additional week that the Plaintiff would have worked but for the Collisions, leading up to his December 21, 2017, surgery.

following his pre-scheduled December 21, 2017, throat surgery. The Plaintiff concedes that this period should be deducted from any past wage loss claim.

[157] The Plaintiff estimates that his gross past income loss is \$195,691. This is based on gross estimated earnings of \$260,000 calculated as follows:

$$\$26/\text{hour} \times 8 \text{ hours}/\text{day} \times 5 \text{ days}/\text{week} \times 50 \text{ weeks}/\text{year} = \$52,000$$

$$\$52,000/\text{ year} \times 5 \text{ years} = \$260,000$$

[158] I pause here to note that the actual period from the date of loss to the date of trial is 5.1 years. However, the Plaintiff has reduced it to 5 years to account for the one month estimated recovery time from the throat surgery. The Plaintiff has also proposed earnings based on 50 weeks per year rather than 52 weeks, presumably to account for unpaid vacation or other leaves of absence.

[159] The Plaintiff asserts that he had the following employment earnings to the date of trial:³

Table 2: Post Collision Earnings to Trial

2018	2019	2020	2021	2022	2023	TOTAL
Nil	\$10,263	\$4,000	\$1,800	\$8,940	\$17,563	\$42,564

[160] The income information for most of the years in Table 2 is not obtained through T4 slips. Rather it is based on pay stubs, bank statements, and in the case of cash jobs, estimates made by Mr. Wagner. As the Defendants did not dispute the accuracy of these numbers, I have relied on them for the purposes of determining Mr. Wagner’s pre-Collision Earnings to the date of trial.

³ All figures are rounded off to the nearest dollar.

[161] The \$42,564 total found at Table 2 does not include \$10,000 in CERB payments received by the Plaintiff in 2021. This is because I agree with the Plaintiff (for reasons which I will explain later) that the CERB payments are not deductible.

[162] After deducting \$42,564 from \$260,000, the resulting figure is \$217,436. From this, the Plaintiff applies a 10% negative contingency for his pre-existing mental health condition, to arrive at \$195,691 representing the gross past wage loss.

[163] The Defendants' approach to the past income loss issue is radically different.

[164] First, the Defendants argue that the Plaintiff's past income loss claim should be assessed based on either a four year average of \$28,774, or his highest level of income achieved prior to the Collisions which was about \$43,000 in 2015.

[165] Second, the Defendants submit that the Plaintiff's past wage loss arising from the Collisions should only cover the one week period between the second Collision and his throat surgery, because: the Plaintiff would have taken time off work for his recovery after the throat surgery, regardless of the Collisions; after the surgery he attempted suicide, which was unrelated to the Collisions; the Plaintiff did not incur any wage loss between his suicide attempt and his enrollment in the Sunshine Coast program, which was funded by the WCB; upon completing the WCB program, the Plaintiff continued to receive wage loss benefits from WCB during retraining; and the Plaintiff's overall income exceeded \$43,000 annually post-Collisions, due to a combination of employment income, unreported income, WCB benefits, and CERB payments.

[166] Consequently, the Defendants say that Mr. Wagner's past loss of earning capacity should be assessed as follows:

$$\text{\$26/hour} \times 8 \text{ hours} \times 5 \text{ days} = \text{\$1,040}$$

[167] As the Defendants' position is partially contingent on the deductibility of CERB and WCB benefits, I will address these issues first.

1. Deductibility of CERB

[168] The defendants argue that “the CERB should be deducted from past wage loss because the Plaintiff was not entitled to receive these benefits in any event.” They further assert that if CERB is not deducted “not only the Plaintiff would be overcompensated, but he will also be rewarded for misleading the Government”.

[169] In support, the Defendants rely on *Bennett v. Lopez*, 2023 BCSC 1812, where Justice Taylor made deduction of the CERB contingent on the plaintiff being obliged to repay that amount to the government, as follows:

[177] The defence argues that Ms. Bennett received \$147,118 in benefits between 2017 and 2023 which should be deducted, resulting in a loss of \$21,348.24. However, this includes a \$20,000 CERB benefit which I understand Ms. Bennett is obliged to return to the government. To the extent that Ms. Bennett has already repaid this amount to the government prior to this decision or has an imminent legal obligation to repay (which I assume here), this award should be adjusted upward accordingly to \$41,348.24.

[178] To the extent that Ms. Bennett does not repay the \$20,000 CERB amount to the government, the defendants shall have leave to apply to adjust the award downward accordingly.

[170] However, it does not appear that Justice Taylor undertook an analysis of the issues that arise with respect to deductibility, nor does it appear that he was apprised of this Court’s decision in *McLean v. Redenbach*, 2023 BCSC 8, or the Court of Appeal’s decision in *Yates v. Langley Motor Sport Center Ltd.*, 2022 BCCA 398.

[171] In *McLean*, Chief Justice Hinkson refused to deduct CERB benefits from the plaintiff’s past lost income award, despite the plaintiff’s decision not to claim wage loss for those years. He explained as follows at para. 144:

[144] The plaintiff’s income increased in 2019 and 2020 as a result of her obtaining alternative employment and the Canada Emergency Response Benefit (“CERB”), so she made no claim for wage loss for those years. Her concession, however, is inconsistent with the treatment of CERB payments directed by the Court of Appeal in *Yates v. Langley Motor Sport Center Ltd.*, 2022 BCCA 398 [Yates]. The Court in *Yates* found that CERB payments should not be deducted from a wrongful dismissal damages award. The Court was not convinced that if CERB was not deducted, the victim would be

overcompensated. In the result, I will not deduct CERB payments received by the plaintiff from her lost income award.

[172] In *Yates* a key issue before the Court of Appeal was whether the trial judge had erred in deducting CERB payments from the plaintiff's damages award for wrongful dismissal. In holding that these payments should not be deducted from a damages award, the Court of Appeal rejected many of the same arguments advanced by the Defendants in this case.

[173] The Court of Appeal noted the broader policy considerations and the purpose of the CERB program, which supported its conclusion that the CERB should not be deducted. The Court of Appeal also disagreed that there would be overcompensation to the plaintiff.

[174] Of particular significance is that while *Bennett* was decided after *Yates*, *Yates* rejects the reasoning upon which *Bennett* seemed to rely, as follows:

[64] I note that in the cases in the British Columbia Supreme Court favouring deductibility and indeed in this case below, much turned on the judge's conclusion, or more accurately their prediction, as to whether the CERB payments might in the end be repayable by the wrongfully dismissed employee.

[65] I consider this a bit of a fruitless exercise. To the extent that there is no certainty on this issue, I think the view of the courts in *Jack Cewe Ltd.* and other cases is the correct reaction. Whether the payments are in the end repayable by the plaintiff is of no concern to the defendant employer. It is a matter between the plaintiff and the authorities administering the scheme.

[175] Having regard to the *Yates* and *McLean* decisions, I find that the CERB payments are not deductible from any past income loss award.

2. Deductibility of WCB Benefits

[176] I turn now to whether the WCB benefits received by Mr. Wagner following his Collisions are deductible.

[177] Mr. Wagner's WCB claim was re-opened at some point following the Collisions. Subsequently, Mr. Wagner continued to receive some form of wage indemnity until at least January 2023. According to the WCB records, he was paid

total temporary disability benefits until he completed the treatment program at Sunshine Coast. He was then placed on vocational wage loss benefits. The Defendants ask that these WCB benefits be deducted from any past income loss that may be awarded to Mr. Wagner.

[178] The Plaintiff argues that the WCB benefits are not deductible under the private insurance exception as outlined in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 1994 CanLII 120 (SCC). The Defendants disagree. They further rely on *IBM Canada Limited v. Waterman*, 2013 SCC 70 [*Waterman*] for the proposition that the Plaintiff received a “compensating advantage” from another source that lessened their actual loss, such that the WCB benefits should be deducted to avoid “double recovery”.

[179] In *Cunningham*, the SCC found that long term disability benefits obtained by the plaintiff pursuant to a collective agreement fell within the private insurance exception and were not deductible, even though the plaintiff did not pay for them privately. The Court noted considerations of fairness and social policy which underlie the exception:

Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

[180] The SCC disagreed with the Court of Appeal’s approach which required proof of direct deduction from the plaintiff’s pay, which it characterized as “too narrow an exception”. The SCC noted that the benefits were bargained for and obtained as a result of a reduction in the hourly rate of pay, and thus were “obtained and paid for by the plaintiff just as much as if he had bought and privately paid for a policy of disability insurance”.

[181] Concerns of double recovery and over-compensation were re-visited in *Waterman*, within the context of pension benefits paid to the plaintiff during the

notice period following termination of his employment. The SCC dismissed the appeal and upheld the trial judge's decision to not deduct the pension benefits, on the grounds that the employee contributed to the pension benefits and they are not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach: para. 16. Rather, they are a form of "deferred compensation" for an employee's service, and akin to a type of retirement savings: para. 4.

[182] The SCC explained that the issue of a "compensating advantage" arises when a connection can be made between the benefit and the breach. In other words, there may be a compensating advantage "when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of legal duty": para. 20. The SCC summarized the applicable test as follows:

[32] To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and either (a) the plaintiff would not have received the benefit but for the defendant's breach, or (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.

[emphasis added]

[183] If neither of these conditions is present, there is no issue about deduction. If either of these conditions is present, there is: *Waterman* at para. 28.

[184] The SCC summarized the applicable legal principles relating to the private insurance exception as follows at para. 76:

(a) There is no single marker to sort which benefits fall within the private insurance exception.

(b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.

(c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.

(d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.

(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

[185] For the following reasons, I find that the WCB benefits paid to Mr. Wagner fall within the private insurance exception and are not deductible. This finding is unique to Mr. Wagner's circumstances and should not be considered a statement on the deductibility of WCB benefits in general.

[186] The fact that the Plaintiff received compensation from the WCB for the same period for which he is claiming past lost of earnings from this Court, does not mean that the WCB benefit is intended to be an indemnity for the sort of loss resulting from the Defendants' breach. Nor does it support that he would not have received the WCB benefit but for the defendant's breach. At best, this evidence establishes that the Plaintiff could receive compensation beyond his actual loss if he is successful in obtaining a past loss of earning capacity award from the Court for the same period. However, as held in *Waterman*, this is not enough. The Court must also find that one of the other two conditions of the *Waterman* test are met. The evidence falls short in both those respects.

[187] First, it is evident from the various WCB records and documents submitted into evidence, that the benefits that were paid to the Plaintiff by the WCB during the period following his Collisions were for his work injury and not his Collisions.

[188] Second, there is no evidence that the benefits were intended to indemnify the Plaintiff for the sort of losses arising from the Defendants' breaches. The Defendants' breaches related to the two motor vehicle Collisions. The WCB benefits are intended to provide coverage for workers that experience work related injuries. There is no evidence that the Collisions were work related, or that a workers compensation claim was opened for the Collisions. Further, Mr. Wagner's WCB

benefits following the Collisions were paid under the claim number associated with the work injury.

[189] To establish intention, the Defendants would have to provide some evidence that the WCB was aware of, and intended to compensate the Plaintiff for, the injuries sustained in the Collisions. The evidence establishes the contrary. Indeed, a key part of the Defendants' argument is that the WCB was not aware of the Collisions until much later, and when it did become aware, the Plaintiff was not upfront with the WCB about the impact that the Collisions were having on his condition.

[190] I conclude that a compensating advantage does not arise in this case. Consequently, no issue of deduction arises.

[191] I note also that there is evidence that the Plaintiff has contributed to the WCB benefits even if he did not pay for them directly. Mr. Wilfred Plester was the Plaintiff's employer at Black Diamond when the Plaintiff was involved in the work injury. Mr. Plester testified that as an employer, he has the option of getting his own WCB coverage; however, purchasing coverage for his salaried employees is mandatory. He explained that the WCB benefits scheme is funded based on a percentage calculated on the total employee payroll and claims history.

[192] Mr. Plester provided the following evidence about how the mandatory WCB premium impacts what he can pay his workers:

Q Now, do the WCB payments that you are required to make—do those payments factor into what you are able to pay your workers?

A Well, certainly, it would be—it's the same thing as Canada Pension or EI payments. The fact that I have to pay that additional payroll burden certainly impacts what I can pay to people who work for me. And, for example, I pay a little higher hourly rate for a contractor than I would for a regular employee, because they don't cost me as much money for CPP or—yeah, CPP and EI and things like that. Every—every expense that is associated with payroll certainly impacts what I can pay them.

[193] Although the WCB benefits were not paid for directly by Mr. Wagner, there is sufficient evidence that he made financial sacrifices in exchange for WCB coverage. By working as a salaried employee Mr. Wagner was paid less by his employer, and

in exchange he received coverage for CPP, EI, and WCB. As in *Cunningham*, I can see no reason why the Defendants should be entitled to benefit from these sacrifices made by the Plaintiff.

[194] I also find the Defendants' position objectionable on grounds of inconsistency. For the purposes of reducing the quantum of damages payable to the Plaintiff, they argue that the Plaintiff's losses following the Collisions are primarily related to the work injury. On the other hand, they seek to benefit from the WCB payments received by the Plaintiff, by arguing that the Plaintiff would not have received the benefits but for their breach. The Defendants cannot have it both ways. While this also holds true for Mr. Wagner, any deception by Mr. Wagner to the WCB which resulted in him getting WCB benefits, is a matter between Mr. Wagner and the WCB. It does not change my analysis about the deductibility of the WCB benefits.

[195] In *Yates*, after considering *Waterman*, the Court noted that there were broader public policy reasons to not allow the deduction to be made:

[55] In the end, what tips the balance against deductibility in my view are the policy considerations of the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct and the need for clear rules that are easy to apply (*Waterman* at para. 76).

[196] I find that these policy considerations are equally applicable in this case, with the exception that the unique circumstances of Mr. Wagner's case should not be interpreted to mean that WCB benefits are never deductible. It is possible that on a different set of facts deductibility could be established.

[197] I conclude that the WCB benefits paid to Mr. Wagner following his Collisions, are not deductible in this case.

3. Assessment of Past Loss

[198] Assessment of Mr. Wagner's loss of earning capacity which is attributable solely to the Collisions is complicated by the nature and extent of his pre-existing injuries and conditions, and the numerous intervening events which occurred post

Collision (including complications from his December 2017 neck surgery). Consequently, I have approached the assessment of Mr. Wagner's past loss of earning capacity by first considering what Mr. Wagner's earnings would have looked like absent Collisions.

[199] I do not agree with the Plaintiff that but for the Collisions, he would have earned at least \$52,000 per year. The evidence simply does not support such a finding. This figure is based on an assumption that Mr. Wagner would have continued to work at DirtPro, but for the Collisions. However, while the Plaintiff testified that it was his plan to work at DirtPro permanently, this evidence is significantly undermined by the evidence that prior to the Collisions he was looking to be retrained in a more sedentary and cleaner environment, and actively seeking other career options, due to medical advice.

[200] On the other hand, I am also not swayed by the Defendants that Mr. Wagner's maximum earning potential was \$43,000. While this figure is closer to what Mr. Wagner's likely earnings would have been had he not been in the Collisions, it fails to account for the fact that Mr. Wagner was older, more focussed on finding a career path, and actively engaged with the vocational rehabilitation process. As such his past earnings history is not an accurate reflection of his earning capacity at the time of the Collisions.

[201] After having regard to all of the evidence, I find that \$48,000 is a fair and reasonable figure upon which to base Mr. Wagner's pre-Collision past loss of earning capacity. This figure includes additional cash earnings or wage increases that might have occurred over the years. To extrapolate this figure to the date of trial, I have multiplied it by 5 years (rather than 5.1 years) to account for the one month estimated recovery time from the throat surgery.

[202] The resulting absent Collision past earnings figure to the date of trial, is \$240,000. From this I have deducted Mr. Wagner's actual earnings of \$42,564, to arrive at his maximum gross loss of \$197,436, which I have rounded off to \$200,000.

[203] I now turn to considering the various hypothetical events. Given the seriousness of Mr. Wagner's pre-existing physical conditions (such as sensitivity to dust and shortness of breath which was exacerbated while climbing stairs), combined with his psychological conditions (such as alcohol use disorder, cannabis use, adjustment disorder with depressed mood, PTSD, and borderline personality traits), and the impact of the various post Collision events on his mental and physical health (detailed at para. 138), I find that there is a 60% possibility that Mr. Wagner would have experienced the above loss of earning capacity, regardless of the Collisions.

[204] I conclude that \$80,000 of the gross past loss of earnings are attributable to the Defendants' negligence.

[205] Section 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, stipulates that a plaintiff is entitled to recover damages for only their past net income loss. The parties did not provide the court with any submissions on what the appropriate tax deduction should be. Instead, the Plaintiff asked that this issue be left to the parties to agree on, failing which he be given leave to have the issue determined by the Court. In my view it is a waste of valuable judicial resources to have the parties return to court to determine an issue that ought to have been addressed at trial. Given the requirement in s. 98, the parties should be prepared to make submissions at trial as to the appropriate income tax that should be deducted, rather than leaving the matter to further court applications.

[206] I find that it is appropriate to make a deduction of 20% for income tax. This is the figure used by the Court in *Sharma v. Sagoo*, 2023 BCSC 1136 at para. 115, and in my view, it is appropriate to apply it here having regard to the available evidence in this case, including income tax returns.

[207] After application of 20% for income tax, I arrive at \$64,000, which I find is a fair and reasonable sum to compensate the Plaintiff for his past loss of earning capacity.

B. Future Loss of Earning Capacity

[208] The Court in *Rab v. Prescott*, 2021 BCCA 345, restated the proper approach for assessing loss of future earning capacity. At para. 47, the Court set out a three-step analysis to guide an assessment of future earning capacity. This analysis is particularly relevant where the evidence indicates no loss of income at the time of trial. The first two steps are relevant to entitlement; the third step relates to the assessment of the loss. I have framed these steps as questions, and summarized them as follows:

- a) Does the evidence disclose a *potential* future event that could lead to a loss of capacity (i.e., chronic injury, future surgery or risk of arthritis)?
- b) Is there a real and substantial possibility on the evidence that the future event in question will cause a pecuniary loss?
- c) If such a real and substantial possibility exists, what is the value of that possible future loss, taking into consideration the relative likelihood of the possibility occurring?

[209] As a final step, the overall fairness and reasonableness of the award must be considered, taking into account all the evidence: *Lo v. Vos*, 2021 BCCA 421 at para. 117.

[210] The jurisprudence identifies two approaches to the assessment of damages for loss of earning capacity: an earnings approach and a capital asset approach. A capital asset approach is generally preferred for younger plaintiffs as their future trajectory is more difficult to predict.

[211] Where the earnings approach is used, valuation of the future loss 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: *Lo* at para. 109.

[212] Where the capital asset approach is preferred, such as when the plaintiff continues to earn income at or near pre-collision levels, the loss of capacity in the

future may be valued through various methods, including using the plaintiff's pre-collision income as a tool: *Rab* at para. 78; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.), 1995 CanLII 2871 (BCCA) at para. 42; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 18–20.

1. Positions of the Parties

[213] The Plaintiff submits that a fair and just amount for future loss of earning capacity is \$887,650. This amount is arrived at after subtracting \$271,729 (his residual earning capacity) from \$1,159,379 (his maximum absent Collision earnings). These figures are based on the following assumptions relied on by the Plaintiff:

1. But-for the collisions Mr. Wagner would have continued working in heavy equipment operation or some similar form of medium-strength position.
2. He would have worked full-time at \$31 per hour, which translates to \$64,000 per year.
3. He has 33.5 years of residual employment, based on the fact that he is currently 31 years old and the assumption that he would have worked until age 65.
4. A discount rate of 1.5% applies, yielding a multiplier of 25.8790⁴ for a period of 33 years.
5. A 20% negative general contingency is appropriate based on *Hann v. Lun*, 2022 BCSC 1839, aff'd 2023 BCCA 288.
6. A further 10% case specific negative contingency is appropriate to account for his pre-existing throat and neck pain and mental health issues.

⁴ This is taken from Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update)).

7. The Plaintiff's residual earning capacity is \$15,000 per year based on part-time employment.
8. It is appropriate to apply a 30% negative contingency to the residual earning capacity.

[214] Based on the above, the Plaintiff argues that the present value of Mr. Wagner's without-accident earning stream is \$1,656,256. Mr. Wagner's future absent Collision earning potential is \$1,159,379, which is arrived at after applying 30% for the various contingencies.

[215] The Plaintiff argues that his residual earning capacity is \$388,185 to age 65. After applying a 30% negative contingency to the residual earning capacity figure, the Plaintiff arrives at \$271,729.

[216] The Defendants argue that this approach is not a fair representation of the Plaintiff's future loss of earning capacity. The Defendants submit that if the Court finds the Plaintiff suffers a loss of future capacity (which they say is not supported on the evidence), it is more appropriate to use a capital asset approach to assess the Plaintiff's future loss of earning capacity, given the paucity of evidence regarding his past earnings. They also take issue with the Plaintiff's residual capacity being part-time employment, and rely on Dr. van den Berg's opinion that there are numerous sedentary jobs available to him. According to the Defendants, if a loss of earning capacity award is warranted, a fair and reasonable amount would be to assess it as 1 to 2 years future capacity using the baseline income of \$43,000, to which should be applied a present value discount of 1.5%.

2. Expert Evidence

[217] Dr. van den Berg, a Vocational Rehabilitation Professional, prepared an expert opinion report for the Plaintiff dated September 16, 2023, based on a June 19, 2023 assessment of Mr. Wagner.

[218] Without commenting on causation, his opinion indicates that Mr. Wagner is precluded from doing physically demanding work, by virtue of his current health conditions. In it he opined as follows:

78. Mr. Wagner is precluded from physically demanding work. Considering that his vocational history consists exclusively of labour intensive work, he is no longer able to perform any of his past occupations. Considering his functional abilities and limitations and his medical prognosis, he would require a career change to less physically demanding work. I am guarded that he would be able to sustain his current bartending work considering the job requirements and his impairments for carrying in excess of light strength, frequent standing, and bending at the waist. Overall, he has sustained a permanent partial disability as a result of his injuries and functional limitations from the MVAs.

[219] Dr. van den Berg goes on to say that he does not meet the physical requirements for his pre-Collision occupation, but is suited for other full-time work:

80. Mr. Wagner does not meet the physical requirements for his pre-MVA occupation as a heavy equipment operator and considering his medical prognosis he is not able to return to this occupation. He has the capacity for full-time work in a select range of occupations. He would have to be more selective with his job choices and he is at an elevated risk for repeated and prolonged periods of unemployment in the future.

[220] At paras. 83, 84 and 86 of his report, Dr. van den Berg sets out Mr. Wagner's vocational strengths as well as negative prognostic factors:

83. Mr. Wagner presents with several vocational strengths. This includes his young age, strong intellectual and learning ability, which would allow him to access a much wider range of jobs than otherwise would be the case, a wide range of vocational interests, and strong motivation to work evidenced in his ongoing vocational attachment post-MVA.

84. He also presents with a number of negative prognostic factors. These include pre-existing psychological and physical issues that limit his range of occupational options and were significantly aggravated by the subject MVAs. Further, he has no history of working in traditional "white collar" jobs, including office or clerical jobs. His customer service and sales experience is limited to the part-time bartending job he is currently doing. In addition, he presents with Cluster B personality traits of borderline personality disorder, which I expect would make him susceptible to issues with emotional regulation and interpersonal relationships on the job. His difficulty securing administrative and clerical work despite having completed a Diploma in Business Administration is evidence of the fact that he will likely have some difficulty convincing employers of his ability to succeed in a non-labour intensive occupation. Consequently, while he has the cognitive capacity for the occupations listed above, it remains unclear whether he would succeed in

a full-time administrative, customer service, or sales job. Further, I expect that he would be at an elevated risk for repeated and prolonged periods of unemployment in the future.

...

86. Mr. Wagner would be precluded from physically demanding work outside his functional range. Considering his poor performance on my Cognitive Processing Speed testing he is precluded from work that requires fast information processing and frequent deadlines. Also considering his psychological and pain symptoms and fatigue, he is precluded from working long hours, frequent overtime work, or shift work especially night shifts. Further, considering his psychological and pain symptoms, he is precluded from work that requires a high degree of emotional resilience including stress and conflict management. In addition to the reduced range of job options available to him, these limitations would significantly reduce his earnings potential and limit him to income at the lower end of the wage scale. I also expect that his ability to advance into higher responsibility and higher paying work, and to qualify for financial incentives and rewards such as performance bonuses has been reduced.

[221] According to Dr. van den Berg, Mr. Wagner has the capacity for full-time employment in the following occupations which meet his physical, cognitive, psychological, and vocational profile:

82. Mr. Wagner has the capacity for full-time employment in a select range of occupations within his physical, cognitive, and psychological abilities and vocational profile. Based on the results from my vocational assessment and the medical reports, he would qualify for the following occupations:

- Associate financial planner (\$37.02/hour with a range of \$22.15 to \$62.50¹¹. This requires completion of additional coursework, which would be funded by WCB).
- Automotive service advisor (\$18.00/hour with a range of \$16.75 to \$28.17. Automotive Training Centre offers a 13-week Service Advisor program at a cost of \$8,033).
- Automotive collision estimator (\$30.00/hour with a range of \$18.00 to \$37.50. Automotive Training Centre offers a 13-week Automotive Collision Estimator program at a cost of \$8,033).
- Technical wholesale person (\$29.33/hour with a range of \$18.00 to \$41.03. Income tends to be heavily commission-based).
- Occupational safety advisor (\$38.82/hour with a range of \$17.50 to \$52.31. Okanagan College offers a part-time 272-hour Occupational Health and Safety Certificate at a cost of \$6,752.48).

[222] I note however that with the exception of the technical wholesale person job (which is heavily commission based) all of the other identified occupations require Mr. Wagner to complete additional coursework or training at an added cost. While there is ample evidence that Mr. Wagner has the intellectual capacity to complete these programs, it is unclear how he would fund them. In my view, any options which are predicated on Mr. Wagner coming up with the funds to access these programs, are not viable. There is little evidence that he currently has the financial means or access to resources that would enable him to participate in such programs.

[223] Nevertheless, Mr. Wagner's situation is ameliorated by the fact that his cognitive tests reveal advanced intellectual ability as noted by Dr. van den Berg at para. 69:

69. ... Considering his low processing speed and the timed nature of the aptitude test, his results are likely somewhat depressed. Mr. Wagner has the intellectual capacity for occupations that require a high level of analysis, reasoning, problem-solving, and decision-making. He has the educational capacity for a two-year college diploma or four-year bachelor's degree. He is likely more of an applied/hands-on learner than academic/theory-based.

[224] I now turn to assessing the Plaintiff's future loss of earnings.

3. Analysis

[225] Considering the first part of the *Rab* analysis, I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity. In this case, the potential future event is the impact of Mr. Wagner's Collision related physical and psychological injuries on Mr. Wagner's ability to work. It has now been 5 years since the Collisions, and while some of the injuries have abated over time, Mr. Wagner continues to experience pain and restriction that are at least partially attributable to the Collisions. Given the longstanding nature of these injuries, and the poor prognosis for full recovery, I find that there is a real and substantial possibility that these Collision related injuries will impact Mr. Wagner into the future and will cause a pecuniary loss.

[226] In assessing the value of the possible future loss, I will first address the assumptions on which the Plaintiff's position is based.

[227] In relation to the Plaintiff's first and second assumptions, the evidence does not support a finding that the Plaintiff would have been able to earn \$64,000 per year if the Collisions had not occurred. Insofar as the Plaintiff grounds this figure in work as a heavy machine operator or a Class 1 truck driver, I reject that assumption. Neither of these were viable career options for him given his pre-existing health conditions. Indeed, Mr. Wagner testified that he had accepted the medical advice given to him prior to the Collisions to change jobs to a sedentary and clean environment which was more in keeping with his physical limitations.

[228] Thus, the suggestion that Mr. Wagner's Collision related injuries are the reason he is restricted to sedentary employment, is contradicted by the evidence. Despite the fact that Mr. Wagner was operating heavy equipment prior to the Collision, he was already transitioning to more sedentary employment, and there is no basis to believe that this sedentary employment would have earned him \$31 per hour. That hourly rate is based on Mr. Wagner temporarily working at a non-sedentary job for Emil Anderson Construction in 2019. This job lasted for only three weeks. In my view, regardless of the Collision related injuries, this job did not present a long term viable option for Mr. Wagner, given the working conditions and Mr. Wagner's breathing difficulties and other pre-existing conditions.

[229] I find that but for the Collisions, Mr. Wagner would have retrained and found work in a sedentary office type of position to accommodate his numerous health concerns and restrictions. While Mr. Wagner may not have worked at the exact administrative positions identified by Dr. van den Berg, these jobs still provide some evidence of the ranges of hourly rates that Mr. Wagner could have achieved depending on his skill set.

[230] After considering all the evidence before me, I find that absent Collision, Mr. Wagner would have earned \$55,000 per year.

[231] I find the third and fourth assumptions advanced by the Plaintiff to be reasonable and supported by the evidence. Consequently, it is appropriate to use a multiplier of 25.8790 (which applies to a period of 33 years) to age 65. Applying this to \$55,000 per year, yields a figure of \$1.423 million.

[232] While I accept the fifth assumption (that a 20% general negative contingency is appropriate), I disagree with the Plaintiff that only a 10% case specific negative contingency should be applied. In my view, this figure does not adequately account for Mr. Wagner's significant pre-existing conditions and injuries from intervening events. After factoring in case specific positive contingencies (such as Mr. Wagner's condition improving over time), I arrive at a total case specific negative contingency of 30%. When added to the 20% general negative contingency, the cumulative 50% negative contingency reduces Mr. Wagner's absent Collision future earning capacity to \$711,500.

[233] I also reject the sixth assumption that the Plaintiff only has a residual earning capacity of \$15,000 per year. The Plaintiff argues that any future loss should not be predicated on him working full time at an administrative or clerical job, as he has not shown any ability to secure or hold this type of employment. I disagree. First, while it is always possible that Mr. Wagner would not succeed in this type of employment for a whole host of reasons, his previous lack of experience in administrative work does not mean that he will not succeed in it. Second, there are many occupations (such as the ones identified by Dr. van den Berg) that involve clerical types duties, but are located in labour type settings with which Mr. Wagner has familiarity. Third, Mr. Wagner successfully undertook the business administration program that was geared towards securing him office jobs. This suggests that Mr. Wagner understood that office jobs presented a viable option for him and was motivated to pursue it. Fourth, Mr. Wagner has high intellectual abilities and a high degree of motivation which is reflected in his active efforts to be gainfully employed. These indicate that he could succeed in this type of work. Finally, I note that if Mr. Wagner only earned minimum wage, his full-time earnings would be around \$36,000 per year, and part-time earnings would be \$18,000.

[234] Having regard to all of the evidence in this case, I find that Mr. Wagner's with Collision earning capacity is \$30,000 per year. This figure is based on him working less than full-time hours at a rate of \$18-20 per hour. This yields a figure of \$776,370 to age 65.

[235] As to the final assumption advanced by the Plaintiff, I agree that a 30% negative contingency should be applied to Mr. Wagner's with Collision earnings. I accept that Mr. Wagner will experience general labour market contingencies of 20%. Even though the case specific negative contingencies are high (such as worsening of his condition due to his Collision related injuries), they are partially off set by positive contingencies (such as improvement of his condition). Consequently, a 10% case specific future contingency is warranted.

[236] After applying the 30% contingency, I anticipate Mr. Wagner's with Collision future earnings to be in the range of \$543,000. After factoring in the absent Collision earnings of \$711,500, this methodology results in \$168,000 representing Mr. Wagner's future loss of earning capacity.

[237] The reasonableness of this figure is supported by the fact that it aligns very closely with a capital asset approach that focusses solely on annual without Collision earnings as a baseline to assess the future loss. Using this approach, I find that the evidence establishes that Mr. Wagner's capital asset has been impaired in part due to the Collisions, such that he:

- a) Is less capable overall from earning income from all types of employment;
- b) Is less marketable or attractive as an employee to potential employers;
- c) Has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- d) Is less valuable to himself as a person capable of earning income in a competitive labour market.

[238] To compensate Mr. Wagner for his loss, bearing in mind his age and the nature of his injuries and pre-Collision condition, an appropriate method would be to

use three years of earnings at \$55,000. That would result in a figure of \$165,000, which is virtually identical to the earlier methodology.

[239] After having regard to all of the evidence in this case, I find that a fair and reasonable assessment of Mr. Wagner's loss of future earning capacity is \$165,000.

VI. LOSS OF HOUSEKEEPING CAPACITY

[240] The Plaintiff argues that he should be compensated separately for a loss of housekeeping capacity. He seeks \$6,000 in past loss of housekeeping capacity; and seeks \$116,432 for future loss of housekeeping capacity.

[241] The Defendants submit that the Plaintiff should not receive an award under this head of damage and should instead be compensated for any loss of housekeeping capacity under the head of non-pecuniary damages.

[242] The relevant legal principles were recently summarized by our Court of Appeal in *McKee v. Hicks*, 2023 BCCA 109, as follows:

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

[243] The Plaintiff conceded that he had some limitations prior to the Collisions with respect to the performance of household duties, as follows:

It was definitely some limitations with what I could lift, what I could do. I would basically have to make it in increments. It was manageable. I would try and avoid letting dust and dirt build up so that it wouldn't affect my respiratory issues from the workplace accident. Yeah, it was -- there were small limitations, but, yeah.

[244] However, following the Collisions, he explained that his ability to perform his household chores was “extremely limited”. He provided the following example:

Extremely limited. For example, I had dishes that I didn't clean for almost two months over this past summer. Very difficult. Sweeping, vacuuming, things like that pretty much put me on my back for a day. When I'm working, it's almost impossible to do any form of chores. So I went, like, months without cleaning. Just, yeah, things get really filthy, and then I will essentially get to a point where I just -- I have to clean it. I have to get things done. So I will power through it for a couple of days and get as much as I can possibly get done done, and then I'm usually in so much pain and it's so agonizing, that I have to take two, three days just laying in bed doing nothing, trying to recover. Yeah.

[245] According to Mr. Wagner, he has difficulty with all household tasks, such as washing the dishes, sweeping floors, dusting, laundry, making beds, and washing walls. He has a dog and a parrot which also creates a mess that he has to clean up.

[246] Mr. Wagner testified that he gets help cleaning his home from his sister and Ms. King. They, along with his friend Brent Edgar, also help him with yard work. He noted that he found the yard work “pretty much impossible”.

[247] The Plaintiff relies on the expert opinion of Ashea Neil, consultant occupational therapist, dated November 14, 2022, based on an assessment of October 26, 2022. Ms. Neil observed Mr. Wagner having difficulties with tasks including bending, lifting, and reaching overhead. Upon reviewing his home, it was littered with trash, clothes and dust laying various surfaces.

[248] Ms. Neil recommended a full cleaning professional for five hours monthly plus six hours for a one-time clean for tasks such as washing the bathroom and completing yard work, based on an average rate of \$37.67 per hour. She expected Mr. Wagner to complete “lighter daily household chores” such as dishes, laundry and tidying. She also recommended moving support at 16 hours every five to 15

years and, on an ongoing basis, yard work for 10 to 15 hours for seasonal yard clean-up and 12 weeks of weekly snow removal.

[249] The evidence supporting the loss of housekeeping claim is inconsistent and unreliable. According to Ms. Neil, Mr. Wagner “can complete lighter daily household chores such as doing the dishes, wiping counters, laundry, and general tidying”. She also noted that he told her that he found it difficult to keep up with his housekeeping duties due to school, and that he was also using pacing strategies to complete yard work and snow removal. Mr. Wagner also advised her that his landlord is responsible for the bigger maintenance tasks whereas “the smaller stuff he can manage”.

[250] This is in direct contrast to what Mr. Wagner told this Court and indeed, to Ms. King, who has occasionally been assisting him with his housekeeping chores. According to Ms. King, Mr. Wagner tells her he can’t do anything.

[251] I note also that while Mr. Wagner is seeking compensation for loss of housekeeping capacity, there is evidence that he has been working for cash doing heavy tasks that he is seemingly capable of doing. For example, in 2021 he was working on a rock wall and drainage system.

[252] I also note that the little evidence there is about the state of Mr. Wagner’s home before the Collisions, indicates that he has had a longstanding issue with maintaining a neat and tidy home. Ms. Neil’s description of cans and bottles littering his countertops, which do not require significant physical strength to place in the bin, suggest a general laziness and lack of care rather than inability.

[253] I accept that Mr. Wagner’s Collision related injuries had some impact on his ability to maintain his home for some periods of time following the Collision. I find that it is appropriate to award Mr. Wagner a separate sum of \$3,000 for past loss of housekeeping capacity to compensate him for his Collision-related loss.

[254] However, a separate future housekeeping capacity pecuniary award is not warranted. There is insufficient evidence to support that Mr. Wagner has or is likely

to have, a pecuniary loss associated with his injuries. Based on the above evidence, coupled with my concerns with the Plaintiff's reliability, credibility and self-reports which seriously undermine his claim, this is a case where a separate award for future loss is not warranted. I find that the Plaintiff can "perform usual and necessary household work, but with some difficulty or frustration in doing so": *McKee* at para. 112.

[255] It is more appropriate to subsume this aspect of the loss of housekeeping capacity award into the non-pecuniary damages, which I have done.

VII. FUTURE CARE COSTS

[256] When determining a cost of future care award, the court should try to restore the plaintiff, as best as possible with a monetary award, to the position he would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 274, 1985 CanLII 179 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.) at para. 184.

[257] A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113-115, citing *Milina* at para. 211; *Hardyчук v. Johnstone*, 2012 BCSC 1359 at paras. 210-212.

[258] Once a claim is established, to assess costs of future care the court requires evidence of the amounts claimed: *Patterson v. Gauthier*, 2019 BCSC 633 at para. 98, citing *Manky v. Scheepers*, 2017 BCSC 1870 at para. 154. A cost of future care award assessment is subject to a discount rate of 2%: *Pearson v. Savage*, 2020 BCCA 133 at para. 104; *Law and Equity Act*, at s. 56; and the *Law and Equity Regulation*.

[259] A future cost of care award can be justified without the need for expert reports: *Moges v. Sanderson*, 2020 BCSC 1511 at para. 168.

[260] It is appropriate to apply a discount to a future care costs award to take into consideration the plaintiff's pre-existing condition and intervening events. The amount applied may be different than what is used to discount other awards such as loss of earning capacity: *L.A.F. v. G.M.F.C. Ltd.*, 2019 BCSC 2252 at para. 210; *Athey* at para. 35.

[261] The plaintiff claims \$44,443 in cost of future care, and is comprised of the following:

- a) Psychologist – 20 visits at \$225/session (\$4500)
- b) Occupational therapist – 6 visits at 144.67/session (\$868)
- c) Massage therapist – 45 visits per year for 5 years at \$108/session (net present value \$22,907)
- d) Cannabis – \$150/month for 10 years (net present value \$16,168)

[262] This position is largely based on Ms. Neil's report, with the exception that Ms. Neil recommends 24 visits of massage therapy in the first year at \$108/session (\$2,592) plus 15 visits per year for every year thereafter, at \$75/session (\$1,125 annually).

[263] The Defendants say that only \$5,000 for future cost for massage therapy is warranted.

[264] I will first address the psychological treatments. The psychological treatment that is sought is in relation to management of chronic pain and stress. Dr. Fung recommends psychological counseling of up to 20 sessions for one year to help Mr. Wagner develop strategies to cope with chronic pain and improve stress management. In my view, such treatment is medically warranted, reasonable, and likely to be incurred. I am satisfied that the same factors which warrant a reduction in Mr. Wagner's loss of future earning capacity should result in some reduction in his future care costs claim. However, I do not think the evidence supports applying the same discount rate as for the earning capacity award given the nature of the

Plaintiff's Collision related psychological injuries, pre-existing condition and post Collision events, and my view of the real and substantial likelihood that psychological treatment would have been required regardless of the Collision. After considering the likelihood of the various hypothetical events, including positive and negative contingencies, I find that the overall award for psychological services should be discounted by 40%. Consequently, I find that a lump sum award of \$2,700 is appropriate for future psychological services. This award represents 12 visits at \$225/session.

[265] I turn next to the occupational therapist sessions. This recommendation comes from Ms. Neil herself, and according to her report, is intended to provide Mr. Wagner with support for employment stability. However, in my view, this expenditure is not justified. For many years prior to and following his Collisions, Mr. Wagner has received vocational support from the WCB. I am unable to conclude that further support from an OT is justified or reasonable.

[266] I will now address the massage therapy. The request is based on Mr. Wagner attending 46 sessions for massage therapy in 2023. However, the medical advice does not support such excessive use. Dr. Sangha testified that the Plaintiff needs to stay active rather than receiving passive treatments, and specifically stated that being active is the "lion's share" of the treatments. Mr. Wagner was recommended to only use massage when he experiences intense flare ups. Accordingly, I find that an award of 12 sessions per year, for 10 years at \$108/session (totalling \$12,960), is medically justified and reasonable. This amounts to \$1,296 per year. The multiplier for a discount rate of 2% over 10 years, is 8.9826. The net present value of this figure is \$11,641. In my view, a 30% reduction from this award is warranted, to account for the likelihood that Mr. Wagner would have required this treatment regardless of the Collisions. This figure is lower than the discount for the psychological services due to the nature of the pre-existing conditions and post Collision events, and their respective impact on Mr. Wagner's physical and mental health. Consequently, I find that an award of \$8,150 is appropriate to compensate Mr. Wagner for this loss.

[267] I turn finally to the claim for cannabis. None of the medical experts recommended use of cannabis as part of the Plaintiff's treatment. Indeed, it is contra-indicated – both Dr. Okorie and Dr. Fung recommended that the Plaintiff abstain from cannabis, due to the negative consequences on his mental health. Regardless of whether the Plaintiff experiences short term pain relief, I find that it is unreasonable for the Plaintiff to continue using cannabis against medical advice. Consequently, no award is allowed under this head of damages.

[268] In summary, I find that future care cost expenses in the amount of \$10,850 are medically justified, reasonable, and likely to be incurred. This figure is comprised of \$2,700 for a psychologist, and \$8,150 for a massage therapist.

VIII. SPECIALS

[269] The parties have agreed to specials expenses of \$10,006.81.

IX. SUMMARY OF DAMAGES

[270] Mr. Wagner is entitled the following damages:

Non-pecuniary Damages	\$115,000.00
Past Loss of Earning Capacity	\$ 64,000.00
Future Loss of Earning Capacity	\$165,000.00
Past Loss of Housekeeping Capacity	\$ 3,000.00
Costs of Future Care	\$ 10,850.00
Specials	\$ 10,006.81
Total	\$367,856.81

[271] The plaintiff is also entitled to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

X. COSTS

[272] The Plaintiff is entitled to his costs at Scale B, subject to any offers or other matters that I have not been made aware of.

“Shergill J.”