

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ishii v. Thompson*,
2024 BCSC 1095

Date: 20240624
Docket: M194519
Registry: Vancouver

Between:

Brandon Kiyoshi Ishii

Plaintiff

And:

Derrick Andrew Thompson and The Corporation of the City of Port Coquitlam

Defendants

Before: The Honourable Justice Jones

Reasons for Judgment

Counsel for the Plaintiff:

C.R. Bacon
P.J. De Bruyn

Counsel for the Defendants:

N. Wignall
J.S. Lemoine

Place and Date of Trial:

Vancouver, B.C.
September 5-8 and 11-14, 2023

Place and Date of Judgment:

Vancouver, B.C.
June 24, 2024

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I. INTRODUCTION

[1] The plaintiff, Brandon Ishii, was injured in a motor vehicle accident on July 25, 2017 (“2017 Accident”).

[2] The defendants admit liability for the 2017 Accident.

[3] The issues for determination are the damages claimed by Mr. Ishii for his injuries from the 2017 Accident, including claims for non-pecuniary damages, past and future loss of earning capacity, loss of housekeeping capacity, future care costs and special damages.

[4] Mr. Ishii was also injured in an earlier motor vehicle accident on August 24, 2010 (“2010 Accident”).

[5] The parties agree that in the 2010 Accident Mr. Ishii sustained injuries, including fractures to his right leg and right wrist resulting in permanent partial disabilities. The ongoing impact of these pre-existing injuries affects the assessment of damages for the 2017 Accident.

[6] Mr. Ishii was awarded damages in 2015 for injuries from the 2010 Accident. The reasons for judgment and the awards are irrelevant for the purposes of my decision in this matter, and are not before me: *Bracey v. Jahnke*, 147 D.L.R. (4th) 632, 1997 CanLII 2988 (B.C.C.A.) at para. 17.

II. AGREED STATEMENT OF FACTS

[7] An agreed statement of facts was entered into evidence at the commencement of the trial, as follows:

1. The plaintiff, Brandon Ishii, was born on May 22, 1992.
2. The plaintiff was involved in a previous motor vehicle accident on August 24, 2010 and sustained serious injuries, including fractures to his right leg and right wrist resulting in permanent partial disabilities.
3. The plaintiff was able to work as a pizza delivery driver and pizza kitchen helper after his 2010 injuries.

4. The plaintiff was able to return to videogames, working on cars and amateur racing after his 2010 injuries.

The Accident

5. The Accident occurred on July 25, 2017.
6. The plaintiff was operating a 2010 Honda Ridgeline with BC plate number JX 4491.
7. The defendant, Derrick Thompson, was the driver of a 2006 Ford F250 bearing BC plate number 4771 HP which was owned by the Corporation of the City of Port Coquitlam.
8. The defendant was travelling northbound on Shaughnessy Street, at or near the intersection of Eastern Drive, in Port Coquitlam, B.C. when he attempted to make two consecutive lane changes. Upon making the lane change, the defendant collided with the front of the plaintiff's vehicle which was also travelling on Shaughnessy Street.
9. The plaintiff's vehicle was a total loss.
10. The defendants' vehicle sustained \$6,906.92 in damage.
11. The defendants have admitted liability for the Accident.

Damages

12. At the scene of the Accident, the plaintiff complained of lower back pain.
13. The plaintiff was taken by ambulance to Eagle Ridge Hospital where x-rays were taken of his back which showed slight curvature of the spine at L3 to L4.
14. The plaintiff attended at his family doctor, Dr. Reynolds, on August 17, 2017 who prescribed him medication and referred him for physiotherapy and chiropractic and treatments.
15. A CL-19 report from Dr. Reynolds was prepared on December 4, 2017 which documented the plaintiff's initial subjective complaints as lower back pain right side radiating to the right buttock. Her initial impression was that he had localised sprain right L4-5.
16. The plaintiff was provided with occupational therapy support with Neha Bhardwaj at Karp Rehabilitation.
17. The plaintiff attended for active rehabilitation, physiotherapy and chiropractic treatments.

18. On July 25, 2017, imaging was conducted and identified intact vertebral and intervertebral disc height with altered mild and low back scoliotic curvature alignment, moreso in the lower spine and bending to the left.
19. On October 31, 2019, a CT scan was conducted and revealed: “transitional anatomy with 6 lumbar type vertebral segments; levoconvex curvature; intervertebral disc height at L6-S1 is not as great as it is at the other levels, probably a developmental finding. Minimal disc bulge at L5-6. There may be marginal contact of the traversing left-sided root here but severe compression is not suspected.”
20. On August 5, 2020, a MRI imaging was conducted and identified tiny L2-3 and small L4-5 circumferential disc bulges with L4-5 facet joint osteoarthritic changes with mild narrowing of the left subarticular recess and traversing nerve root contact and no identified mass affect or compression of the nerve.
21. The plaintiff saw his family doctor, Dr. Reynolds, for his motor vehicle related injuries on: August 17, 2017, December 4, 2017, January 15, 2018, September 13, 2018, February 6, 2019, March 6, 2019, May 6, 2019, July 17, 2019, August 21, 2019, December 9, 2019, January 20, 2020, March 2, 2020, April 6, 2020, June 1, 2020, October 30, 2020, April 30, 2021, August 19, 2021, September 10, 2021, October 1, 2021, November 26, 2021, December 16, 2021, January 12, 2021.
22. The plaintiff attended for five (5) counselling sessions with Metro Counselling.
23. The plaintiff attended treatment at the following places:
 - a. Coast Therapy (39 visits)
 - b. Karp Rehabilitation (21 visits)
 - c. Nova Active Rehab (29 visits)

Income Loss

24. The plaintiff worked for Dominos Pizza as a delivery driver from approximately 2014 until 2015.
25. The plaintiff started occasional part time casual work as a locksmith assistant June 30, 2018 with Tidey Lock and Key earning \$15 per hour.
26. The plaintiff obtained a Security Worker Licence October 25, 2019.
27. The plaintiff began a locksmith apprenticeship and part time employment with Tidey Lock and Key on October 25, 2019 at \$15 per hour.

- 28. The plaintiff received wage increases to \$16 per hour in March 2020 and \$17 per hour in November 2021.
- 29. The plaintiff currently works part time at Tidey Lock and Key and earns \$18 per hour.

Special Damages

- 30. The plaintiff has incurred special damages to date in the total amount of \$2,625.80.

Future Care

- 31. The plaintiff requires future care comprising of a personal trainer, psychotherapy and medication.

[8] The parties agree on special damages to the date of trial in the amount of \$4,026.05. I award that amount for special damages.

III. BACKGROUND

[9] For context, I will provide the following brief summary of Mr. Ishii’s evidence of his circumstances before and after the 2017 Accident. In my analysis of the issues I will provide more details of the evidence relevant to the issues.

A. The Plaintiff’s Circumstances Prior to the 2017 Accident

[10] Mr. Ishii graduated from high school in 2010. His studies included automotive courses in grades 10, 11 and 12.

[11] He aspired to attend BCIT to become a pilot, or alternatively take the automotive apprenticeship program.

[12] His extracurricular interests included camping, hiking, dirt biking, paintball, and working on cars.

[13] The 2010 Accident occurred within a couple of months of Mr. Ishii’s graduation from high school. Mr. Ishii was riding a motorcycle through an intersection when an oncoming vehicle turned left into his path and his motorcycle collided with the side of the vehicle. He was thrown off the motorcycle, struck the

vehicle and landed on his knees on the pavement. He fractured his right femur and both wrists, requiring surgery.

[14] At that time of the 2010 Accident he was working at a Canadian Tire store at the automotive parts desk.

[15] In 2012 Mr. Ishii was involved in another accident. A truck merged into Mr. Ishii's lane and struck the right front of his vehicle. The other vehicle left the scene. Mr. Ishii followed the truck. The other driver stopped the truck, approached Mr. Ishii's vehicle and threw an axe at the vehicle. Mr. Ishii sustained no physical injuries, but suffered post-traumatic stress disorder and anxiety as a vehicle passenger ("2012 Accident").

[16] From 2010 to 2015, Mr. Ishii worked at a number of jobs including at a retail clothing store, an automotive parts store delivering parts, a McDonalds restaurant, a Budget Brake & Muffler shop, and Domino's Pizza in the store and as a delivery driver.

[17] Between 2014 and 2016, Mr. Ishii drove lengthy road trips to Terrace, California, and twice to Toronto.

[18] From 2010 to 2017, Mr. Ishii enjoyed working on vehicles as a hobby. He purchased run-down vehicles, fixed them up, then sold them to fund his next vehicle. His physical limitations from the 2010 Accident made work at lower heights awkward when squatting to work. He used a knee brace to hold and stabilize his knee, which helped to increase his endurance for walking and manoeuvring.

[19] Mr. Ishii developed an interest in auto racing. In 2016 he worked on a 1987 Chevy Caprice for the "24 Hours of Lemons" (a play on words relating to the 24 Hours of Le Mans race in France). Contestants are limited to spending \$500 to prepare their vehicles for racing, other than for safety improvements.

[20] He drove in the 2016 Lemons race in Shelton, Washington.

[21] In October 2016, Mr. Ishii and his father invested in a residential property in Oliver near his father's home, with thoughts of expanding the real estate holdings, but nothing further came of it and the property was sold in 2020.

[22] Mr. Ishii also purchased a membership in Area 27, a motorsports facility near Oliver. If the real estate venture expanded, Mr. Ishii thought he might pursue work with an automotive shop doing maintenance work on exotic cars used at Area 27.

[23] In March 2017, Mr. Ishii moved out of his mother's residence into an apartment with Sean McKenna and Shannon Drake.

[24] For a few months before the 2017 Accident, Mr. Ishii worked some shifts doing bread sorting work associated with Weston Bakeries, for which he was paid approximately \$50 per shift, or \$100 per week.

[25] In early 2017, Mr. Ishii was preparing to participate in the 2017 Lemons race.

[26] The 2017 Accident occurred approximately four weeks before the race.

B. Issues From Prior Accidents

[27] At the time of the trial in 2015 relating to the 2010 Accident, Mr. Ishii's evidence is that he continued to have limited motion in his right wrist, with limited strength and general soreness. His right knee was still bothering him. Tasks requiring squatting or loaded flexion of his knee were difficult and painful.

[28] The squatting limitations associated with his right leg injury, making it difficult for him to lift truck tires, was the cause of him not continuing as a mechanic following his apprenticeship at Budget Brake & Muffler.

[29] When working at Domino's Pizza in or about 2014 to 2015, the injuries from the 2010 Accident caused him some difficulty in handling larger take-out orders.

[30] Before the 2017 Accident his right knee injury prevented him from running. Hiking was fine if the terrain was fairly decent, but there was crunching and grinding in the right knee joint. He had some difficulty with daily activities involving medium to

low level tasks, particularly anything requiring squatting. He could do most things from the waist up, but as an example it was awkward for him to kneel down to get a pot from the back of a cupboard. He could mop and sweep and do general cleaning, but lifting was limited to no more than 30 pounds. He had no low back pain.

[31] He still had limited range of motion in his right wrist. His wrist strength had improved somewhat. Tasks requiring wrist twisting were still difficult. When using hand tools he would adapt by opting for more leverage, or using power tools to assist.

[32] From the 2012 Accident he still had some anxiety as a passenger, but a lot of the issues had resolved and he suffered no depression.

C. The 2017 Accident

[33] In the 2017 Accident, the right front side of Mr. Ishii's Honda Ridgeline truck struck the left rear fender of the defendants' vehicle. The right front wheel of Mr. Ishii's truck rode up the area of the left rear fender of the defendants' vehicle, then dropped to the ground, collapsing the right front suspension of the truck.

[34] Mr. Ishii recalls that he was pushed down and to the right over the centre console of the truck. He opened the door and stood on the running board to yell at the other driver. He felt a sharp stab of pain right across his lower back and sat back down.

[35] He was assisted from his vehicle to the ambulance. He was taken to Eagle Ridge Hospital, where x-rays were done of his back, and he was discharged later that day.

D. The Plaintiff's Injuries and Treatment

[36] Mr. Ishii's injuries from the 2017 Accident are recorded in the ambulance report and emergency room records as lumbar back pain, both sides.

[37] He described the back pain as feeling like he had worked out way too hard at a muscle workout, an aching feeling that develops progressively into a sharper pain throughout the day.

[38] As a result of the continuing back pain, over time he felt that he developed depression.

[39] The treatment of Mr. Ishii's injuries from the 2017 Accident are stated in the agreed facts, above, relating to active rehabilitation, physiotherapy and chiropractic treatments.

E. The Plaintiff's Circumstances After the 2017 Accident

[40] After the 2017 Accident, Mr. Ishii continued to work on the Chevy Caprice with his friend, Connor Williams, for the 2017 Lemons race about four weeks later.

[41] Mr. Williams gave evidence that the work Mr. Ishii was able to do was restricted. He was not as mobile, he could not lean into the engine bay, and he had trouble working for long periods of time. Mr. Williams took on the majority of the physical work, with Mr. Ishii guiding him. Mr. Ishii stopped the heavy torquing of bolts, and worked less hours.

[42] At the 2017 Lemons race, Mr. Ishii drove for 30-40 minutes. He complained about his injuries and could not go out again.

[43] Mr. Ishii also participated in the 2018 and 2019 Lemons races. He did one stint of driving in 2018, but not for very long because his tolerance did not improve. In 2019 he did not drive at all. At a second Lemons race in October that year he wanted to be involved as he enjoyed it, so he went as a spectator, not as a driver.

[44] Since the 2017 Accident, Mr. Ishii has been to Area 27 in Oliver three times. Before the 2017 Accident he was able to drive to Oliver in one shot, but now needs to stop a number of times along the way. He took his car out on the track the first time, but found it hard to drive. The second time he took his car out once around the track, but then had to come in because he was in a lot of pain.

[45] After the 2017 Accident, Mr. Ishii did shorter road trips including to Oliver, and also to St. Albert outside Edmonton, with pre-planning for stops along the way. He arrived in St. Albert a day early to recover from the trip, and stayed later to rest before driving back home.

[46] Mr. Ishii has continued to buy and sell vehicles since the 2017 Accident, but is more restricted in what he is able to do since that accident.

[47] After the 2017 Lemons race, Mr. Ishii purchased a 1989 Nissan S-Cargo vehicle.

[48] He hoped he could use the Nissan S-Cargo as a delivery vehicle, possibly with advertisements on the side. He had signed up for Uber Eats to do light delivery work. The S-Cargo bench seat proved to be too uncomfortable to do any long periods of driving in it. He tried driving a shift with his Honda Accord, but could not make it through four hours.

[49] In June 2018, Mr. Ishii decided to sell the Nissan S-Cargo vehicle.

[50] He advertised the vehicle on Facebook, where it was seen by Thomas Wales, the owner of Tidey Lock & Key (“Tidey”), a locksmith company in North Vancouver.

[51] Mr. Wales met with Mr. Ishii to view the vehicle. He came away from that meeting impressed with both the vehicle and Mr. Ishii. Mr. Wales thought that Mr. Ishii could be a fantastic fit as a locksmith with Tidey because he appeared to have the right attitude and the right technical knowledge. About a week later, Mr. Wales purchased the vehicle and asked Mr. Ishii if he would consider becoming a locksmith.

[52] Mr. Wales offered Mr. Ishii a tryout at Tidey’s store. Mr. Wales described it working out remarkably well. Mr. Ishii started to work on a part time casual basis as a locksmith assistant at Tidey on June 30, 2018. Over the course of the next year he obtained the necessary security licence. He began more formally working at Tidey in

early September 2019, and commenced his apprenticeship when he obtained his security licence on October 25, 2019.

[53] Mr. Ishii's work at Tidey was interrupted for a period of time during the COVID-19 pandemic starting in March 2020. He returned to work at Tidey in May 2021.

[54] At the time of trial, Mr. Ishii had accumulated approximately half the 3,600 hours needed for completion of his apprenticeship leading to certification as a locksmith.

IV. WITNESSES

A. Introduction

[55] For contextual purposes, I will list the witnesses called by the parties at trial, with a brief summary of their evidence, discussed in more detail in relation to the issues.

B. Non-Expert Witnesses

[56] Mr. Ishii called the following non-expert witnesses:

1. Connor Williams, a friend of Mr. Ishii since 2011, gave evidence about their shared hobby of working on cars, their road trips, camping trips, and playing paintball.
2. Ali Mubarek gave evidence about working with Mr. Ishii at Domino's Pizza starting in 2014 when Mr. Ishii worked as a delivery driver.
3. William Primeau, a bookkeeper and locksmith at Tidey in North Vancouver, gave evidence about working with Mr. Ishii at Tidey.
4. Thomas Wales, the owner of Tidey, gave evidence about Mr. Ishii's work at Tidey.
5. Steven Dick, Mr. Ishii's father, gave evidence about Mr. Ishii's involvement in motorsports, and their real estate investment in Oliver.
6. Jason Skellenger, a locksmith at Tidey, gave evidence about his work as a locksmith and his observations of Mr. Ishii at Tidey.

7. Shannon Drake and Sean McKenna, gave evidence as Mr. Ishii’s friends and roommates.
8. Neha Bhardwaj, an occupational therapist, gave factual evidence at trial about her work with Mr. Ishii from January 2018 to May 2020.

C. Plaintiff’s Expert Witnesses

[57] Mr. Ishii called four expert witnesses, with their evidence broadly summarized as follows:

Dr. H.A. Anton - physical medicine and rehabilitation

[58] Dr. H.A. Anton was qualified as an expert in physical medicine and rehabilitation. He evaluated Mr. Ishii on October 3, 2011 in relation to injuries Mr. Ishii sustained in the 2010 Accident.

[59] Dr. Anton conducted a second evaluation on December 20, 2018 after the 2017 Accident. As a result, Dr. Anton had the benefit of evaluating Mr. Ishii before and after the 2017 Accident.

[60] Dr. Anton’s first report after the 2017 Accident is dated January 13, 2019 (“First Report”). A second report is dated April 17, 2023, which is based on a video assessment of Mr. Ishii that day (“Second Report”).

[61] Dr. Anton’s First Report includes a summary of Mr. Ishii’s injuries from his 2010 Accident as follows:

1. Mr. Ishii’s documented injuries in that accident included an open fracture of the right femur; fracture to the right wrist including a comminuted distal ulnar fracture and distal radial fracture with volar displacement; and fracture of the left wrist involving the scaphoid bone and distal ulnar styloid.
2. He was left with decreased range of motion in the right wrist and forearm and continuing symptoms and decreased mobility in the right leg.
3. Mr. Ishii reported when I reassessed him that his right leg had improved “a little” after my prior assessment. He still had difficulty kneeling and bending to get things off the floor, and some pain in the right knee.

[62] Dr. Anton’s opinion in his First Report regarding the injuries from the 2017 Accident, and the pre-existing injuries from the 2010 Accident is that:

1. He probably sustained injuries to soft tissue structures in the right lumbar area of the back in the accident on July 25, 2017.
2. It appears that psychological factors have also complicated Mr. Ishii's situation since the accident.
3. It is probable that deconditioning is contribution to Mr. Ishii's current back pain.
4. Mr. Ishii was left with residual right knee pain and left [*sic*] wrist stiffness after the prior motor vehicle accident in 2010. Those do not appear to have grown significantly worse as a result of the most recent accident. However, his residual right leg symptoms have probably made it more difficult for him to participate in exercise.

[63] Dr. Anton's diagnosis is that Mr. Ishii "probably sustained injuries to soft-tissue structures in the right lumbar area of the back" in the 2017 Accident. His current pain is myofascial, arising from the muscles.

[64] Dr. Anton's opinion appears from his reports to be based primarily on Mr. Ishii's subjective reporting to him of the pain he was experiencing.

[65] Dr. Anton stated his prognosis for Mr. Ishii in his First Report as follows:

The duration of Mr. Ishii's pain and the complicating role of psychological factors in his case are negative prognostic factors. However, he still has the potential to improve with further treatment. In the best case, his back pain will resolve. In the worst case, there will be no improvement. The most probable scenario is somewhere in between, which is improvement but not resolution of his pain and improved activity tolerance.

[66] Dr. Anton recommended integrated treatment of physical rehabilitation with psychological intervention, an initial 12 sessions, but probably more after that.

[67] Dr. Anton also recommended a gradually progressed exercise program with direction from a kinesiologist, at least 24 sessions before continuing independently.

[68] Dr. Anton's Second Report dated April 17, 2023, four years after his First Report, and five months before trial, is based on his earlier in-person assessment of Mr. Ishii on December 20, 2018, and a video assessment on April 17, 2023.

[69] The Second Report repeats Dr. Anton's opinions that:

1. Mr. Ishii's situation is complicated by deconditioning, which may predispose him to musculoskeletal pain including back pain.

2. His current back pain is probably mainly non-specific activity related mechanical low back pain, exacerbated by postures and activities that mechanically load his back.
3. It is still probable that some of Mr. Ishii's back pain is myofascial, meaning a chronic soft tissue pain syndrome involving muscle.
4. Chronic pain causes secondary physiological and psychological changes, including depression, which play a greater role in perpetuating the pain.

[70] Dr. Anton's opinion is that Mr. Ishii has also developed kinesiophobia, which likely predates the 2017 Accident. Kinesiophobia is a fear of movement due to fear of pain and/or reinjury, which may be a barrier to participation in normal physical activity and active rehabilitation.

[71] Dr. Anton describes Mr. Ishii continuing to experience symptoms and associated impairment from problems in the right knee and leg arising from the 2010 Accident. He continues to experience lumbar back pain and associated impairment arising from the 2017 Accident. He also continues to experience fluctuating symptoms of depressed mood and anxiety.

[72] Dr. Anton's opinion is that, given the duration of the pain, more than five years post-accident, he is very unlikely to have significant improvement in future. Counselling and exercise may improve his activity tolerance. Considering the chronicity of the pain, he is unlikely to be able to do more work as a locksmith in future.

[73] I note that Dr. Anton's opinion regarding Mr. Ishii's work capabilities appears to be based on Mr. Ishii's report to Dr. Anton, on December 20, 2018, that he had only been able to work 20 hours per week in his new job as an apprentice locksmith, and Mr. Ishii's report to him in the video assessment, on April 17, 2023, that he is scheduled to work 14 hours per week, he tries to work 18-19 hours, never managing more than 20.

[74] I do not refer to these hearsay statements noted in Dr. Anton's report about the number of hours of work as admissible to the truth of their contents of the statement because Mr. Ishii was not cross-examined on the statements in Dr.

Anton's records about the number of hours he was working. The non-hearsay purpose of my reference to these statements is only for the relevant and necessary purpose of demonstrating the basis upon which Dr. Anton formed his opinion: *R. v. Mehl*, 2021 BCCA 264 at para. 233; and *Ford v. Lin*, 2022 BCCA 179 at paras. 87-89.

[75] Dr. Anton again recommended psychologically based treatment.

[76] Dr. Anton concludes his Second Report by responding to a report of defence expert, Dr. Helper, noting that their findings were quite similar; agreeing with Dr. Helper's statement that Mr. Ishii has difficulty bending, lifting, twisting and squatting; his condition is unlikely to resolve; but disagreeing with Dr. Helper's opinion that with psychological support and hands-on kinesiology training, Mr. Ishii should achieve a greater than 50% improvement in his low back pain mobility and subjective pain.

[77] In cross-examination at trial, Dr. Anton reiterated his view that his opinion did not differ a great deal from Dr. Helper, it being a matter of degree, with both the 2010 Accident and the 2017 Accident part of Mr. Ishii's chronic pain, with disability in the right leg, right wrist, and back, and repeating the need for active rehabilitation and counselling.

Dr. Leslie Kiraly - psychiatrist

[78] Dr. Leslie Kiraly was qualified as an expert in psychiatry. He conducted a virtual assessment of Mr. Ishii on August 12, 2020 and authored an expert report dated September 8, 2020.

[79] Dr. Kiraly's assessment was that Mr. Ishii presented with:

1. major depression, starting after the 2010 Accident with an aggravation or second episode after the 2017 Accident;
2. moderate symptoms of trauma, with some improvement over the years;

3. somatic symptom disorder predominantly pain, with the pain impacting his sleep, anxiety and depression symptoms.

[80] Dr. Kiraly's recommendations are exercise and cognitive behavioural psychotherapy, and consideration of psychotropic medications.

Bruce Hunt – physical capacity and work evaluation

[81] Bruce Hunt was qualified as an expert in physical capacity and work tolerance. He evaluated Mr. Ishii on February 10, 2022, including an evaluation of his competitive employability and tolerance for work, activities of daily living, socio-recreation and sport. His expert report is dated March 1, 2022.

[82] An important issue with Mr. Hunt's evidence is that he appears to have exaggerated Mr. Ishii's recovery time after Mr. Hunt's work capacity testing which was intended to simulate the occupational demands of a locksmith for a six hour work day. That assessment and Mr. Ishii's recovery from that assessment forms the basis of Mr. Hunt's opinion that Mr. Ishii is not capable of increasing his work hours and days. For the following reasons, I give limited weight to that opinion.

[83] In Mr. Hunt's report, and at trial, he referred to having conducted the work capacity testing with Mr. Ishii on February 10, 2022. He then followed up to Mr. Ishii with two emails, a telephone message and a text message to find out the cumulative effect of Mr. Ishii having engaged in the activities that simulated the work for a day.

[84] At trial, Mr. Hunt stated the following regarding Mr. Ishii's delayed response to Mr. Hunt's messages:

I think what happened with, well I know actually what happened with Mr. Ishii is that the testing actually exceeded his capacity and durability, and it actually caused him to miss several days of work, and I think it also put into a depressed mental state, so he didn't want to interact or communicate.

[85] The first underlined portion of this testimony appears to be an exaggeration of the length of time for Mr. Ishii's recovery from the work capacity testing. Mr. Ishii's email to Mr. Hunt quoted below, two weeks after the assessment, states he missed one day of work, not several days of work, as follows:

Hello Bruce,
Apologies for the delayed response.
I had to take the 11th off of work due to overall soreness. My right knee, and right hip were stiff and painful, and my back pain prevented me from even leaving the house on the 11th. Soreness remained until around the 13th, though I was able to return to work on the 12th.
My right wrist actually still hurts from the grip testing. I have recently been attempting to relieve my wrist pain with a wrist brace and arthritis medication. It appears to be working somewhat, but time will tell.
Please let me know if you need any further information.
Thanks

[86] In that email, Mr. Ishii states he did not go to work the next day after the assessment – February 11; he then returned to work the second day – February 12; and the overall soreness persisted for three days, with the right wrist pain continuing to persist from the grip testing.

[87] The second underlined portion of Mr. Hunt’s testimony, above, regarding a depressed mental state, goes beyond Mr. Hunt’s expertise. The difficulty with that testimony is that there is nothing in Mr. Ishii’s email to Mr. Hunt that makes any reference to any depression or to his mental state, and gives no reason for why Mr. Ishii did not respond for two weeks after Mr. Hunt’s inquiry. It is speculative to suggest that he did not respond because he was depressed, just as it would be speculative, without anything more than Mr. Ishii’s email, to suggest that Mr. Ishii did not respond for two weeks because he was busy with work or other activities, or because he was taking the time to consider his recovery from the testing before responding to Mr. Hunt.

[88] Mr. Hunt’s apparent exaggeration of the time for Mr. Ishii to recover from the work capacity testing is significant for Mr. Hunt’s opinion on the issue of whether Mr. Ishii could increase his hours of work, and also a second issue regarding Mr. Hunt’s recommendation for housekeeping assistance.

[89] Regarding the increase in hours of work, Mr. Hunt’s response to a question in direct examination on that issue referred to the work capacity testing and he again stated that “he subsequently missed several days of work”, concluding that “at the moment he doesn’t meet the ability to increase his hours to full time.” Mr. Hunt’s

written report is less specific on the amount of work missed, stating that “he required several days to recover and missed scheduled work from pain exacerbation and sleep deprivation.”

[90] Regarding housecleaning, in response to a later question to Mr. Hunt in direct examination about how the pain that Mr. Ishii was experiencing was impacting his domestic responsibilities, Mr. Hunt’s answer again referred to Mr. Ishii’s inability to work “for several days”, and his mental state, as follows:

Well, we talked about this earlier with him being with me for six hours, and he was unable to work for several days after that, and so when you’re unable to actually work and you’re fairly compromised and, you know, cleaning your house involves all the things that he has difficulty with, bending, low level positioning, you’re cleaning the bathroom fixtures you have to reach deeply and low in order to get there; pushing and pulling the vacuum cleaner; but I think, and I can’t really comment much on his mental state, but obviously the pain impacted him to the point that it took him a significant amount of time to respond back to me because he didn’t have I guess have the desire to do it, because he was in a depressed state. So the pain is affecting him mentally as well, which is impacting his ability to engage in normal activities like all of us come home and have to clean the kitchen or whatever, and he’s not doing that, so that’s the recommendation I made for him to actually have home support to do some cleaning because it is actually not really fair for his roommates to have to clean up after him, and it becomes quite contentious when you’re living with other people and you’re not pulling your weight.

[91] Again, the reference to Mr. Ishii being unable to work for several days after the work capacity testing is an apparent exaggeration of what Mr. Ishii reported in his email to Mr. Hunt.

[92] Also of note in this quote is that although Mr. Hunt recognizes that he “can’t really comment much on his mental state”, he then goes on to “guess” that Mr. Ishii took some time to respond to Mr. Hunt because he was in a depressed state. On that basis he recommends home cleaning support, adding that he considers it unfair to Mr. Ishii’s roommates and he states speculatively that it can become contentious with them if Mr. Ishii is not pulling his weight with the cleaning.

[93] Mr. Hunt’s report is useful for the documenting of Mr. Hunt’s testing of Mr. Ishii’s physical abilities and recommendations for treatment, for example, Mr. Ishii’s tolerance for sitting with an overall duration of close to 4 hours, and

standing and walking up to 90 minutes; however, I can place little weight on Mr. Hunt's opinions on work capacity and home care support because Mr. Hunt exaggerated Mr. Ishii's length of recovery from the effects of the work capacity testing, and, Mr. Hunt grounds his opinions on work capacity and home care support on that exaggerated length of recovery, and on Mr. Hunt's view that Mr. Ishii took time to respond to Mr. Hunt's follow up inquiries because of Mr. Hunt's belief that Mr. Ishii was in a depressed state.

Kevin Turnbull – economist

[94] Kevin Turnbull is an economist who prepared a loss of earnings report and a cost of future care report, both dated September 6, 2023, reviewed below in the analysis on past and future loss of earning capacity, and future cost of care.

D. Defendants' Expert Witnesses

[95] The defendants called two experts, and tendered an additional two expert reports without the experts attending at trial, as follows:

Dr. Steven Helper - physiatry

[96] Dr. Steven Helper was qualified as an expert in physiatry. He gave evidence about his examination of Mr. Ishii on July 28, 2022. His physiatry assessment report is dated July 31, 2022. He prepared a second report dated October 10, 2022 following his review of further documents.

[97] Dr. Helper's report notes that the plaintiff's expert, Dr. Anton, had the advantage of having assessed Mr. Ishii's injuries following the 2010 Accident, and then again following the 2017 Accident, while Dr. Helper did not see Mr. Ishii before the 2017 Accident.

[98] Dr. Helper also states in his first report that he was left with the impression that Dr. Anton's report was, for the most part, accurate, with a few clarifications.

[99] Dr. Helper was generally in agreement with Dr. Anton that:

1. Psychological factors are contributing to Mr. Ishii's chronic pain. There is a complicated relationship between chronic pain and depression and anxiety.
2. Kinesiophobia (fear of pain with movement) is also common in patients with chronic pain and in Mr. Ishii's case may have contributed to reduced effectiveness of active rehabilitation.
3. Residual right knee pain and left [*sic*] wrist stiffness after the prior motor vehicle accident in 2010 do not appear to have grown significantly worse as a result of the most recent accident.

[100] Dr. Helper describes the prognosis for further moderate improvement as controversial. Dr. Helper's opinion is that it is unlikely Mr. Ishii will resolve his condition, and a full recovery is unlikely.

[101] Where Dr. Helper's opinion diverges to some extent from Dr. Anton is in relation to Dr. Helper's more optimistic prognosis for improvement (50% or greater), and Mr. Ishii's ability to increase his hours of work, compared to Dr. Anton's more guarded view of unlikely significant improvement in the future.

[102] At trial, in cross-examination, Dr. Helper equated 50% with the term "moderate", that term expressing for the purposes of his opinion on the prognosis for improvement, if Mr. Ishii works with a psychologist and exercises, a range of 40-60%, but here capping it at 50%, as follows:

1. With psychological support and hands-on kinesiology training, he should achieve a greater than 50% improvement in his low back mobility and subjective pain relative to his current state.
2. Currently, 14 hours of work per week seems appropriate; however, this is not expected to represent his maximum capability; following a further course of fully supported, compliant psychological counselling and kinesiology training, I expect he will achieve a 50% or greater improvement in his subjective pain complaints and his objective movement quality; I would expect that he would be able to achieve a 30-hour work week, with modification to partially protect against aggravation of his low back pain.
3. The most useful support would be psychological support and additional kinesiology training, and a gym membership.

[103] Regarding Mr. Ishii's ability to work, Dr. Helper's opinion was unchanged on cross-examination. He expected Mr. Ishii could achieve a 30 hour work week, something less than full time, based on his training and experience with thousands

of patients with soft tissue injuries, given the injuries, partial disability, the imaging, and an accommodating work environment.

***Dr. Randall Loch* – orthopedic surgery**

[104] Dr. Randall Loch was qualified as an expert in orthopedic surgery. He authored a report dated December 12, 2022.

[105] Dr. Loch did not meet with Mr. Ishii for a personal assessment, his report is based on documents provided to him by defence counsel.

[106] Plaintiff's counsel is critical of the defendants' use of Dr. Loch's report, referring to *Wong v. Campbell*, 2020 BCSC 243 at paras. 51–56, in which the opinions of a defence physiatrist were given little weight in part because the opinions were premised solely on a records review.

[107] In *Wong*, the Court referred to a number of other cases in which comments have been made about the weight to be accorded to expert reports premised solely on a records view. The cases include *Preston v. Kontzamanis*, 2015 BCSC 2219 at paras. 125–132 where Justice Parrett expressed concerns about a document review report, commenting that such a process is unlikely to assist the court in any material way.

[108] Other cases referred to by Parrett, J. as drawing adverse comment on the practice include *Dhaliwal v. Bassi*, 2007 BCSC 549 at paras. 2–3; *Ruscheinski v. Biln*, 2011 BCSC 1263 at paras. 85–87; and *Rizzotti v. Doe*, 2012 BCSC 1330 at para. 35.

[109] Here, based on Dr. Loch's review of the documents, his opinion of a reasonable expected functional recovery time for Mr. Ishii to return to the vast majority of all activities he was engaged in prior to the 2017 Accident, would be no longer than 6-9 months, explaining that the course of Mr. Ishii's functional recovery is not within the bounds of what he would expect.

[110] Given the limitations of Dr. Locht having never seen Mr. Ishii and having only reviewed records, I have given the report little weight in my review and assessment of the evidence; however, given my analysis relating to Mr. Ishii's credibility, below, Dr. Locht's report is useful in that context for his comment that the CT scan and MRI report do not describe any post-traumatic findings, and his opinion of the reasonable expected functional recovery time of 6-9 months.

John Timbol - accountant

[111] John Timbol, accountant, authored a report dated September 12, 2023, which was tendered in evidence by the defendants without Mr. Timbol appearing at trial.

[112] Mr. Timbol's report comments on the reports authored by the plaintiff's expert economist, Kevin Turnbull, regarding calculations on the issues of past and future loss of earning capacity, and future cost of care. Mr. Timbol's report is considered under the analysis of these categories of damages below.

Dr. Mitchell Spivak - psychiatrist

[113] Dr. Mitchell Spivak's psychiatric report dated November 16, 2022 was tendered by the defendants without Dr. Spivak's attendance at trial. Dr. Spivak assessed Mr. Ishii by video.

[114] Dr. Spivak's diagnosis is that Mr. Ishii has developed symptoms of depression in the context of living with chronic pain and its limitations, and he has alternated between periods of having a major depressive disorder in partial remission to other periods of where he has had symptoms of a major depressive disorder.

[115] Dr. Spivak disagrees with Dr. Kiraly's diagnosis of post-traumatic stress disorder based on Mr. Ishii not describing flashbacks, nightmares, or any patterns of avoidance regarding the accident, and it did not appear as though Mr. Ishii viewed the 2017 Accident as a life-threatening event.

[116] Dr. Spivak also disagrees with Dr. Kiraly's diagnosis of a somatic symptom disorder with predominant pain. Dr. Spivak appreciates that Mr. Ishii has been

preoccupied by his pain and how it affects his life; however, he did not see any disproportionate attention to his pain issues that would necessitate the diagnosis. Nonetheless, Dr. Spivak's opinion is that Mr. Ishii's motional distress likely arises from his pain and how it limits him.

[117] Dr. Spivak's assessment of Mr. Ishii's level of impairment from his psychiatric/psychological injuries is in the realm of mild to moderate, ebbing and flowing where his motivation is impacted; he does not believe that the amotivation has impacted his ability to work as much as his ability to produce good work has been limited by his physical issues. Mr. Ishii's depressive symptoms moreso appear to be a measure of the degree to which his quality of life has been impacted and by the experience of living with a constant pain burden.

[118] Dr. Spivak's recommendations include continuing to attempt to find an antidepressant medication that is comfortable for him and to provide the greatest level of efficacy; and, seeing a cognitive behavioral therapist, which could be beneficial for providing Mr. Ishii with better skills in coping with his depressive symptoms as well as with his pain.

V. CREDIBILITY

A. Legal principles

[119] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (BCCA) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128

(S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[120] Generally, it was my impression that Mr. Ishii and the other witnesses gave evidence for the most part in a straightforward, honest and reliable manner; however, on some points there appeared to be some inconsistencies and exaggeration, as discussed in more detail below, specifically regarding the evidence of Mr. Ishii, Bruce Hunt, and Shannon Drake.

B. Plaintiff – Brandon Ishii

[121] For Mr. Ishii, there are a number of inconsistencies in the evidence regarding his hours of work.

[122] First, Mr. Ishii’s evidence of having worked “full time” at Domino’s Pizza for part of the year 2015 is difficult to reconcile with his income tax return for that year where his earned income is reported as only \$410. Earned income of \$410 from Domino’s Pizza in 2015, at \$7.50 per hour, would equate to approximately 55 hours of work, significantly less than full time if the months of January and February 2015 before the previous trial in March 2015 are considered, after which he left that employment. Mr. Ishii explained he was not good at recording his tip income, but that does not explain the low earnings on his employment income based on the hourly rate of \$7.50 per hour.

[123] Second, Mr. Ishii’s evidence at trial was that he is presently scheduled for 14 hours per week and his claim for future loss of earning capacity is based on that many hours of work; however, he also stated that he believes he is capable of working inside at Tidey in a range of 20 to 24 hours per week; 2-3 days in a row depending on the workload; and daily hours about 5 hours, or if required a bit more, but performance drops off after 5 hours from the pain in his back.

[124] This inconsistency between the scheduled 14 weekly hours, and the higher 20-24 weekly hours, is highlighted by evidence of Mr. Ishii’s hours which are recorded in Tidey employment records for specific periods of time – late 2019 and

late 2021 – before and after the COVID interruption of Mr. Ishii’s employment, when Mr. Ishii consistently worked more than 14 hours a week.

[125] A Tidey calendar record of employees’ hours from September 2019 to August 2023 was in evidence at trial (“Tidey Calendar”).

[126] Mr. Ishii confirmed at trial that the entries in the Tidey Calendar for his hours of work are accurate.

[127] The Tidey Calendar includes, for Mr. Ishii, in the period September to December 2019, 11 weeks worked in excess of 14 hours, with a majority of the weeks in these months in a range of 17-21 hours.

[128] Plaintiff’s counsel’s written submissions appear to minimize the significance of this 2019 evidence in stating that: “his hours in 2023 are about the same as they were in the fall of 2019, 50-70 hours a month, rarely more” (*emphasis added*); however, the Tidey Calendar for the Fall of 2019 records 73 hours for each of the months September to November 2019, greater than 50-70 hours per month.

[129] These submissions also ignore the even higher average hours per month worked by Mr. Ishii in late 2021. For the period from August to December 2021, Mr. Ishii’s monthly hours are within a range of 84-96 hours, with the weekly hours including numerous weeks in the 18-33 hour range, the average weekly hours in a range of approximately 20-24 hours.

[130] That late 2021 period followed Mr. Ishii’s return to work in May 2021 after the COVID-19 shutdown, during which time he was continuing to collect CERB benefits. He was working hours which counted towards his apprenticeship hours, but he was not back on the Tidey payroll until November 2021. Although the hours worked by Mr. Ishii from May through October 2021 were not paid by Tidey, they were recorded as hours worked in the Tidey Calendar.

[131] The significance of the hours recorded in the Tidey Calendar is that they provide some objective evidence of Mr. Ishii’s capacity to work following the 2017

Accident. There was no explanation from Mr. Ishii about how he was able to work the higher number of hours per week in late 2019 and 2021, as compared to the more consistent 14 hours per week in 2022 and 2023.

[132] Mr. Ishii gave evidence that Tidey was not doing well coming out of the COVID-19 shutdown, and he eventually proposed to work for free to continue to work, and to also apply for income assistance, which he received from April to August 2023; however, that does not explain the reduction in Mr. Ishii's working hours from the higher number of hours in late 2019 and late 2021, to the lower number of hours in 2022 and 2023.

[133] Further, in an email to plaintiff's counsel on November 2, 2022, Mr. Wales stated that 40 hours per week was available to Mr. Ishii. At trial, Mr. Wales also stated there was full time work available for Mr. Ishii.

[134] Ultimately, whether Tidey was doing well or not, an important issue for the assessment of awards for past and future loss of capacity is what capacity Mr. Ishii had for work before trial, and what capacity he has to work after trial. The plaintiff's final written submissions at trial submit that Mr. Ishii should be entitled to an award for future loss of capacity based on his residual ability to work based on Mr. Ishii "currently working about 30% of full time". 30% of full time is approximately 12 hours per week. 14 hours is 35% of full time. Unmentioned and explained by those submissions, and Mr. Ishii's evidence, is the objective evidence of his work history which includes the period of August to December 2021 when his weekly hours of work include numerous weeks of him working in the 18-33 hour range, with the average weekly hours in a range of approximately 21-24 hours.

[135] A third inconsistency about Mr. Ishii's hours of work relates to his work at Tidey in the period from June 30, 2018 to October 25, 2019.

[136] According to the agreed facts, Mr. Ishii started occasional part time casual work at Tidey as a locksmith assistant on June 30, 2018, earning \$15 per hour. On

September 1, 2019 he began more “formal” work until October 25, 2019 when he received his security licence and began a locksmith apprenticeship.

[137] A challenge for assessing the claim for past loss of earning capacity for the majority of this early period of Tidey work – from June 30, 2018 to August 31, 2019 – is that there is no record of what hours Mr. Ishii worked, and no record of the income he earned in that period.

[138] The Tidey Calendar records Mr. Ishii having worked 73 hours in both September and October 2019. For the 13 months preceding September, from June 30, 2018 to August 31, 2019, there is no Tidey evidence of what hours Mr. Ishii worked, and what income he earned.

[139] Mr. Ishii’s 2018 income tax return records no employment income for 2018.

[140] Mr. Ishii’s 2019 tax return records \$4,263 of employment income, which is exactly consistent with the 284.25 hours recorded on the Tidey Calendar at \$15 per hour from September through December 2019, leaving no record of any employment earnings for January to August 2019, despite Mr. Ishii having started occasional part time casual work as a locksmith assistant on June 30, 2018 with Tidey.

[141] There is also no evidence that Mr. Ishii made any other efforts to seek work or to earn income during that period from June 30, 2018 to August 31, 2019, and also earlier in late 2017 or early 2018, other than the two driving shifts following the 2017 Accident, despite his mechanical and computer skills, and his previous experience in automotive parts sales.

[142] The lack of recorded income on Mr. Ishii’s tax returns is not compelling evidence of limited income earned because Mr. Ishii admitted in other circumstances he did not report income, two examples being his Domino’s Pizza tip income, his explanation being that he was “not the best at record-keeping”, and the income he received for the bread sorting work associated with Weston Bakeries.

[143] In addition to the lack of evidence of how much Mr. Ishii worked at Tidey from June 30, 2018 to August 31, 2019, the hours he worked immediately after that period in the Fall of 2019, as summarized above, indicate he was working up to 20 hours per week. There was no evidence to explain why he could not have worked some hours, or something more than whatever unrecorded part-time casual hours he worked in the preceding months during the period June 30, 2018 to August 31, 2019.

[144] As a result of all of the above, I have considered Mr. Ishii's evidence about his hours of work with caution. The references to the period of time from June 30, 2018 to August 31, 2019 is relevant to the assessment of past loss of earning capacity below, and Mr. Ishii's capacity to work in the future.

[145] Another issue regarding the credibility of Mr. Ishii's evidence relates to his answers to the questions in direct examination about his expected hourly rate of pay when he completes his apprenticeship and achieves his locksmith certification.

[146] Mr. Ishii answered those questions by referring to his understanding of Mr. Skellenger's hourly rate, \$21.25, and the unspecified value of the non-wage benefit of Mr. Skellenger's use of a Kia Soul vehicle, and payment of fuel, insurance and tools.

[147] Overall, Mr. Ishii then "estimated" Mr. Skellenger's total earnings at \$35-\$39 per hour.

[148] A first concern is that Mr. Ishii provided evidence of Mr. Skellenger's pay, which is hearsay. There were other witnesses called at trial by the plaintiff, described below, who could have given more direct evidence of Mr. Skellenger's pay.

[149] I specifically question the evidence of Mr. Ishii's "estimate" of Mr. Skellenger's hourly rate at \$35-\$39 per hour, for the following reasons:

1. The plaintiff called Mr. Skellenger, who gave evidence that his hourly wage is \$22 per hour, and he stated he has the benefit of the use of a Kia

Soul vehicle, without any further explanation of the value of that benefit. Obviously, Mr. Skellenger was in a better position to provide evidence of his hourly rate and non-wage benefits. He was also not asked to elaborate, for example, how that vehicle benefit relates to his primary role doing mobile service calls outside the Tidey shop, compared to Mr. Ishii's work inside the shop.

2. The plaintiff also called the owner of Tidey, Mr. Wales, and the Tidey bookkeeper, Mr. Primeau, both of whom would be expected to be in a better position than Mr. Ishii to provide evidence of issues such as Mr. Skellenger's hourly rate; the value of any non-wage benefits available to Mr. Ishii; whether or not Mr. Ishii would be entitled to the use of a vehicle given his work is mostly inside the shop and not requiring travel; and generally about the earnings of a certified locksmith. Neither Mr. Wales nor Mr. Primeau were asked to give evidence about these issues.
3. There was no explanation from Mr. Ishii how he estimated a range of \$35-\$39 for Mr. Skellenger's total hourly compensation, other than Mr. Ishii's reference to his understanding of Mr. Skellenger's hourly rate, and a general reference to a car and tool allowance, fuel and insurance.
4. Taking \$37 as the average hourly wage of Mr. Ishii's estimated range of \$35-\$39, one explanation for that figure is an assessment of the value of Mr. Skellenger's non-wage benefits, but there was no explanation of that value. \$37 per hour would equate to approximately 75% of Mr. Ishii's understanding of Mr. Skellenger's \$21.25 hourly wage. This suggests a significant exaggeration of the non-monetary benefits; and, it is also inconsistent with the report of the plaintiff's own expert economist, Mr. Turnbull, where he states that a relatively small company, in reference to Tidey, tends to have limited benefit packages, but he considered it

might be appropriate to increase earning estimates by 8-12% for non-wage benefits, or an average of 10%.

5. A second possible explanation for \$37 as the average of Mr. Ishii's estimated range of \$35-\$39, and the one I consider more likely, is that:
 - a. When \$37 is multiplied by full time annual hours ($40 \times 52 = 2,080$), the result is an annual salary of \$76,960, which is within \$79 of Mr. Turnbull's figure of \$76,881 as the current dollar figure of Mr. Turnbull's first year estimated average without accident annual earnings of a full time locksmith, which Mr. Turnbull uses for the purpose of his future loss of earnings report. However, this figure is an unexplained leap in relation to Mr. Ishii having started with his understanding of Mr. Skellenger's hourly rate and his unvalued non-wage benefits. Mr. Skellenger's earnings, if he were to work full time hours, would be approximately \$50,000 based on \$22 per hour, including an additional 10% for non-wage benefit benefits, significantly less than \$76,881.
 - b. When Mr. Turnbull's \$76,881 is divided by full time hours, the result is \$39.96, almost exactly \$37 per hour.
 - c. I will refer to the \$76,881 figure in more detail below in the section on future loss of earning capacity.

[150] The inconsistencies in Mr. Ishii's evidence noted above, negatively impact my view of Mr. Ishii's credibility relating to his hours of work, and his expected hourly rate of pay.

[151] I refer to Mr. Ishii's evidence in relation to some of the factors in the *Bradshaw* case on this point, specifically:

1. Mr. Ishii's evidence changed between direct and cross-examination about reporting all of his income to Revenue Canada. He stated in direct

examination that he reported all his income to Revenue Canada, but admitted in cross-examination that he did not declare all his income earned from Domino's Pizza and Weston Bakeries.

2. An agreed fact is that Mr. Ishii was working part-time casual hours between June 30, 2018 and August 31, 2019 at Tidey, but there was no admissible evidence of the hours worked, and there were no earnings reported to Revenue Canada on Mr. Ishii's tax return for 2018, and for January to August 2019;
3. Mr. Ishii's evidence about Mr. Skellenger's hourly compensation appears unreasonable for the reasons stated above, and the reasoning suggests exaggeration of Mr. Skellenger's hourly rate and income to attempt to inflate Mr. Ishii's estimate of his anticipated hourly rate as a locksmith. The issue of the amount of a certified locksmith's earnings is significant for the assessment of Mr. Ishii's claim for future loss of earning capacity.
4. Mr. Ishii's evidence of being scheduled 14 hours a week, and submissions that 14 hours is his present capacity, is inconsistent with the documented evidence in the Tidey Calendar of Mr. Ishii having worked longer hours per week in late 2019 and 2021.

[152] As a result of the inconsistencies in Mr. Ishii's evidence, I place no weight on his estimate of a locksmith's hourly rate, and I treat his evidence on his hours of work, and the submissions on his capacity to work, with caution.

[153] Given my concern about Mr. Ishii's credibility relating to his evidence on the issues of his hours of work and a locksmith's hourly rate, his evidence relating to his injuries also requires some careful consideration.

[154] I am mindful of the Court of Appeal's recent decision in *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47–50, citing *Mariano v. Campbell*, 2010 BCCA 410, referring to the need to take care in cases where there is limited objective evidence of continuing injury, the correct approach being that “there must be evidence of a

‘convincing’ nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff’s own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.”

[155] Dr. Anton and Dr. Helper’s opinions are consistent in diagnosing a soft-tissue back injury with chronic pain, based primarily on Mr. Ishii’s subjective reports to them about his back injury and pain.

[156] The agreed facts include references to a CT scan and MRI imaging with observations of spine curvature and disc bulging. Dr. Anton and Dr. Helper do not relate those imaging results with Mr. Ishii’s reports of pain.

[157] Dr. Locht states that the CT scan and MRI report do not describe any post-traumatic findings. I have already referred to Dr. Locht’s opinion regarding his expected normal recovery period in Mr. Ishii’s circumstances of 6-9 months in the case of soft-tissue injuries.

[158] Dr. Anton’s Second Report states that he observed no unusual pain behaviour or overreaction.

[159] None of the experts, other than Dr. Locht, express concern that Mr. Ishii is malingering or the symptoms he reports are the result of anything other than the injuries he suffered in the 2017 Accident and the 2010 Accident.

[160] Dr. Anton’s two reports express consistency over time about Mr. Ishii’s reporting of his injury and pain issues to him.

[161] The non-expert witnesses’ evidence also supports the finding that Mr. Ishii is suffering from a back injury causing him ongoing pain. Mr. Ishii’s father, his friends and work colleagues, all of whom had opportunities to see Mr. Ishii and interact with him in different settings over time, and some of whom interacted with him before and after the 2017 Accident, were relatively consistent in their descriptions of Mr. Ishii and the apparent impact of his back injury from the 2017 Accident.

[162] As a result, I consider Mr. Ishii’s evidence of his back injury and ongoing pain, with the other witnesses’ evidence, to be convincing of continuing back pain. From my earlier discussion of his evidence on work hours; however, there is a question about the extent to which his injuries impact his ability to work. That issue will be considered below in the analysis of the heads of damages.

C. Bruce Hunt

[163] I have already reviewed Bruce Hunt’s evidence above where Mr. Hunt exaggerated the length of Mr. Ishii’s recovery from the work capacity testing, which impacts the weight of his opinion on Mr. Ishii’s work capacity and his recommendation for home support.

D. Shannon Drake

[164] For Shannon Drake, one of Mr. Ishii’s two roommates, my impression was that Ms. Drake was motivated to assist Mr. Ishii with her evidence. For example, when speaking of Mr. Ishii gaining independence, her emphasis was on her belief that Mr. Ishii would require “a lot of monetary assistance”. Regarding her view of Mr. Ishii’s injuries, specifically his knee pain, she stated that Mr. Ishii’s knee pain and hip pain were related to his back pain, without any explanation how she was able to make that determination.

[165] As a result, I have given little weight to Ms. Drake’s evidence, specifically regarding the issue of housekeeping capacity.

VI. ANALYSIS

A. Overview

[166] The defendants admit liability for the 2017 Accident, but disagree on damages.

[167] The damages claimed by Mr. Ishii are non-pecuniary damages, past and future loss of earning capacity, future cost of care including housekeeping capacity, and special damages.

[168] An issue in the assessment of damages arising from the 2017 Accident is the impact, if any, of the pre-existing injuries from the 2010 Accident, discussed below.

[169] Before I analyze each head of damages, the following is a review of Mr. Ishii's employment at Tidey because of its importance in the assessment of damages, expanding from the summary above about how Mr. Ishii came to meet the owner of Tidey, Thomas Wales, through his purchase of the Nissan S-Cargo vehicle from Mr. Ishii in June 2018.

B. Employment - Tidey Lock & Key

[170] After Mr. Wales purchased the Nissan S-Cargo from Mr. Ishii in June 2018, Mr. Ishii began a tryout at the Tidey store commencing June 30, 2018. Mr. Wales described that tryout as having worked out remarkably well. Mr. Wales had Mr. Ishii doing fine motor skill work, and rebuilding locks using tiny components and tiny springs. Mr. Wales described Mr. Ishii as having "in spades" the necessary locksmith attributes of technical skills, technical knowledge, and fine motor skills.

[171] According to Mr. Wales, Mr. Ishii made very good progress learning the locksmith trade. Mr. Wales described Mr. Ishii as having a very high mechanical aptitude and he believed that Mr. Ishii would make a very good locksmith. Mr. Ishii learned to operate the various machines in the shop, including a highly specialized machine for high security locks, and a computer controlled machine that up until then only Mr. Wales could work. Within a month of Mr. Ishii running that machine he was giving Mr. Wales instructions because Mr. Ishii was so good at it.

[172] Mr. Wales believes Mr. Ishii has the potential to advance to management of the shop with some help with management and sales skills, potentially taking over the company from Mr. Wales.

[173] The Tidey work includes work in the shop, and outside calls including residential and commercial work. The commercial work includes, for example, replacing or re-keying all locks in multi-unit buildings.

[174] For the outside calls the work can be heavier, for example there is a lot of heavy work installing door closers on doors, or electronic controls for doors. Physical postures including kneeling on the floor for working on handles, or crouching on the floor for an extended time to open a jammed lock.

[175] Mr. Wales described having Mr. Ishii do work on the road with another worker who does much of the outside work. Mr. Ishii was able to do everything that they needed him to do, he was very competent at the work and his customer skills were described as phenomenal, putting the customers at ease. For big jobs with a lot of work required, or involving heavier and higher work, he would send Mr. Ishii with a second worker to work with him.

[176] Mr. Ishii's injuries from the 2010 Accident are limiting for the outside work because stairs are an issue for him, or standing for long periods of time, or squatting to pick up heavy objects such as a box of door closers. Mr. Ishii's evidence is that he does a limited amount of outside work, the majority of his work is in the shop.

[177] Mr. Wales has made accommodations for Mr. Ishii, for example, he provided Mr. Ishii with an electric screwdriver to make it easier for his wrist, he gave him a cart to hold tools and equipment, and he provided him with a rolling stool for sitting.

C. Findings of Fact

[178] In addition to the agreed statement of facts above, I summarize the findings of fact for the analysis of damages, with further findings noted in the analysis of the individual heads of damages.

[179] Mr. Ishii sustained serious injuries in the 2010 Accident, including fractures to his right leg and right wrist, resulting in permanent partial disabilities.

[180] From the 2010 Accident he was left with decreased range of motion and strength in the right wrist and forearm.

[181] Mr. Ishii continues to experience symptoms and associated impairment from problems in the right knee, right leg and right wrist arising from the 2010 Accident.

[182] At the time of the 2017 Accident, Mr. Ishii continued to be affected by the injuries from the 2010 Accident, specifically his right leg and right wrist. He continued to experience pain in his right leg, particularly his knee, and his leg and knee injury made it difficult for him to squat, kneel and bend to do work below his waist.

[183] The expert medical evidence and the evidence of Mr. Ishii establishes on a balance of probabilities that the defendants' negligence in the 2017 Accident caused the following injuries:

1. Injury to soft tissue structures in the right lumbar area of the back, resulting in lower back pain which has become chronic.
2. Depression and anxiety.

[184] The injuries from the 2010 Accident and the 2017 Accident are divisible in that Mr. Ishii's right leg and right wrist injuries from the 2010 Accident were not caused by the 2017 Accident and are divisible injuries from the back injury: See *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 24; and *Estable v. New*, 2011 BCSC 1556 at paras. 53–56.

[185] Mr. Ishii continues to experience lumbar back pain and associated impairment arising from the 2017 Accident.

[186] Deconditioning is contributing to Mr. Ishii's current back pain. Mr. Ishii has gained weight since the 2017 Accident.

[187] Mr. Ishii continues to experience fluctuating symptoms of depressed mood and anxiety.

[188] I accept Dr. Anton and Dr. Helper's opinions that psychological treatment and an active rehabilitation program could benefit Mr. Ishii in terms of management and possible improvement of his pain, but full recovery is unlikely.

[189] From 2010 to 2015, Mr. Ishii worked at a number of jobs.

[190] At the time of the 2010 Accident, Mr. Ishii was working in the automotive parts department at a Canadian Tire store.

[191] After his recovery from the 2010 Accident he worked at the Armani Exchange retail store stocking shelves and preparing clothes for retail sale.

[192] In 2012 he worked full time at Lordco Auto Parts delivering parts. He had some physical difficulty with particularly heavy parts.

[193] He also worked in 2012 at a McDonalds restaurant, but he was restricted by his knee injury and stated he could not keep up with the high-paced environment.

[194] In 2013 he started an automotive apprenticeship at Budget Brake & Muffler doing general vehicle maintenance. He was hired after completing the apprenticeship, but was unable to continue the job because his leg injuries from the 2010 Accident made it difficult to squat and lift heavy pickup tires off the ground, a common task for that job.

[195] In or about 2014 to 2015, Mr. Ishii worked at Domino's Pizza delivering pizzas and working in the store making pizzas. He made \$7.50 per hour, averaging \$100 per day including tips. The only problem he experienced was for big orders with a lot of drinks. He would have some difficulty carrying them and had to make more trips.

[196] Mr. Ishii left the Domino's job after the trial in March 2015 relating to the 2010 Accident, for reasons unrelated to the judgment, in part because he decided to step back from work to some extent after an illness around Christmas 2014.

[197] Mr. Ishii did some bread sorting work associated with Weston Bakeries a few months before the 2017 Accident, but it was not full time and there is no documentation of the income he earned from that work. His evidence is that he would earn \$50 for a four to five hour shift, or \$100 per week.

[198] Mr. Ishii's hobbies from 2010 to 2017 included buying used vehicles, doing mechanical work on them, and reselling them. This activity was not profitable, the proceeds from one vehicle's sale funded the purchase of the next vehicle. He also

worked on a vehicle to prepare it for auto racing, and participated in auto racing in the Lemons races, and driving at the motor sports facility Area 27 near Oliver.

[199] From 2015 to the date of the 2017 Accident he focussed on preparing for the 2017 Lemons race.

[200] Before 2017, Mr. Ishii, his father, and a third partner had invested in a residential property in Oliver. Mr. Ishii also purchased a membership at the new motor sports facility Area 27, which opened in 2016 in the Oliver area. If the real estate venture had expanded, one option was for Mr. Ishii to move to Oliver and possibly work in an automotive shop maintaining high-end vehicles used at Area 27. Mr. Ishii had discussed with owner of one shop, “JF”, the possibility of working at the shop. The option was conditional on the real estate venture expanding, but the one property was sold in 2020, and nothing further came of the venture.

[201] Since 2017, Mr. Ishii’s ability to work on vehicles has been more limited to lighter work, and his ability to actively engage in auto racing and motor sports is limited for the most part to more passive spectator or managerial roles.

[202] After the 2017 Accident, Mr. Ishii drove at least one shift with Uber Eats as a delivery driver, and tried a second shift, but was unable to continue because of his back pain. He was also interested in potentially pursuing employment as a pilot car driver, but did not pursue training for that role.

[203] In June 2018, Mr. Ishii met Mr. Wales. On June 30, 2018, Mr. Ishii started working on a part time casual basis as a locksmith assistant at Tidey until October 25, 2019 when he had obtained his security licence and could start working as an apprentice locksmith.

[204] His wage as an apprentice locksmith started at \$15 per hour, increasing yearly in one dollar increments to \$19 per hour at the date of the trial. He has completed approximately half of the 3,600 hours required to qualify as a licenced locksmith.

[205] Jason Skellenger is a licenced locksmith at Tidey, with approximately ten year's experience as a locksmith there. Mr. Skellenger earns \$22 per hour, plus non-wage benefits of the use of a vehicle for work outside the shop, and he uses the vehicle for personal use.

[206] From September 2019 to February 2020, before COVID-19 interrupted Mr. Ishii's employment at Tidey, the Tidey Calendar records Mr. Ishii working an average of approximately 70 hours per month (up to 73 hours), and an average of approximately 17 hours per week (up to 21 hours).

[207] From August to December 2021, the Tidey Calendar records Mr. Ishii working an average of approximately 90 hours per month (up to 96 hours), and an average of 19 hours per week (up to approximately 24 hours).

[208] Mr. Ishii's weekly frequency of shifts for September through December 2021 is higher compared to his earlier work in late 2019, and higher than his later work in 2022 and 2003. In this September to December 2021 period he worked a higher number of days, up to 5 or 6 shifts a week, with the number of hours per shift varying between 3 hours and 8 hours.

D. Issues

1. Causation

[209] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[210] Here, based on my review of the expert opinion evidence and the other witnesses' evidence above, I find that Mr. Ishii has established, on a balance or probabilities that he suffered an injury to soft tissue structures in the right lumber area of his back, resulting in lower back pain which has become chronic, and he continues to experience fluctuating symptoms of depressed mood and anxiety.

[211] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32–35.

[212] The principles relating to the plaintiff's pre-existing injuries are issues relating to compensation, not causation, see *Lo v. Vos*, 2021 BCCA 421 at paras. 36–37; and *Dornan v. Silva*, 2021 BCCA 228 at para. 48.

[213] The impact of Mr. Ishii's pre-existing leg and wrist injuries on compensation are considered in the following sections on damages.

2. General (Non-Pecuniary) Damages

a) Legal Principles

[214] A non-exhaustive list of common factors to be considered in assessing non-pecuniary damages was set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, which include: the age of the plaintiff; the nature of the injury; the severity and duration of the pain; the degree of disability; emotional suffering; any loss or impairment to life, family, marital or social relationships or physical and mental abilities; and loss of lifestyle. In addition, a plaintiff's stoicism should not generally be used against them.

[215] The purpose of non-pecuniary damages is to put a plaintiff in the same position they would have been had it not been for the defendant's negligence. Awards will have to vary in each case to meet the specific needs and circumstances of each individual. As stated in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 1981 CanLII 35 at 637, the amount of an award for non-pecuniary damages is not dependent solely on the seriousness of the injury, but must take into account its ability to ameliorate the condition of the victim given their particular circumstances.

[216] Courts also have a duty to approach the issue in a reasonable manner, remembering that one cannot provide a complete or perfect compensation but make sure that the award is moderate and fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 at 242.

[217] Non-pecuniary damages are meant to compensate the plaintiff for pain and suffering, loss of enjoyment of life, or loss of amenities. The issue is what, based on the evidence, is needed to put the plaintiff in the position they would have been but for the defendants' negligence: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22. While similar cases can be helpful, they only can serve as a rough guide as each case depends on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189; and *Boal v. Parilla*, 2022 BCSC 2075 at para. 131.

b) Plaintiff's Position on Non-Pecuniary Damages

[218] Plaintiff's counsel submits that an appropriate award for non-pecuniary damages is \$200,000.

[219] The plaintiff relies on the following cases:

- *Lo v. Vos*, 2021 BCCA 421: \$175,000 award;
- *Fletcher v. Biu*, 2020 BCSC 1304: \$200,000 award;
- *Boal v. Parilla*, 2022 BCSC 2075: \$220,000 award; and
- *Moges v. Sanderson*, 2020 BCSC 1511: \$200,000 award.

[220] Plaintiff's counsel submits that the facts in these cases are comparable to the facts in Mr. Ishii's case.

c) Defendants' Position on Non-Pecuniary Damages

[221] The defendants submit that an appropriate range of an award for non-pecuniary damages is \$75,000 to approximately \$145,000.

[222] The defendants rely on the following cases:

- *Skibeness v. Northway*, 2020 BCSC 1825: \$75,000 award;
- *Haynes v. Haynes*, 2022 BCSC 1273: \$210,000 award, reduced by 20% to \$165,000 for the measurable risk that the plaintiff's pre-existing health conditions would have caused difficulties akin to the plaintiff's present injuries; and
- *Johnstone v. HMTQ*, 2006 BCSC 1867: \$100,000 award (\$144,252 in 2023).

d) Analysis of Non-Pecuniary Damages

[223] Here, considering the non-exhaustive factors in *Stapley*, Mr. Ishii was 25 years old at the time of the 2017 Accident, and age 31 at trial. Mr. Ishii's age is of some significance because he is relatively young and, although his physical and psychological symptoms may improve, full recovery is unlikely.

[224] The nature of the injury is a lower back soft tissue injury which has persisted.

[225] Mr. Ishii gave evidence that after the 2017 Accident he attempted to continue to prepare for the 2017 Lemons race, but was not able to do very much. He was limited by pain when he moved his trunk with side to side movements, rotation, and leaning forward. He did limited work on the car, and took more of an advisory role. In the four weeks following the 2017 Accident he felt back pain all the time, an aching tiredness, with a sharper pain developing as it progressed through the day.

[226] Before the 2017 Accident, Mr. Ishii had used a knee brace to stabilize his knee to increase his endurance for walking. He also had a cane. Mr. McKenna recalled seeing Mr. Ishii use the cane if Mr. Ishii was walking or standing for an extended period of time, such as when they attended a motorcycle show for several hours. Mr. McKenna described seeing Mr. Ishii using the cane more often after the 2017 Accident. Mr. Ishii's evidence was that at the time of the 2017 Accident he was not using the cane, and following the 2017 Accident he has used the cane outside the house when walking about 90% of the time.

[227] At the time of the 2017 Accident, Mr. Ishii was permanently partially disabled from the effects of the right leg fracture, more focussed on the knee, and the right

wrist fracture he suffered in the 2010 Accident. The 2017 Accident has caused an additional degree of disability in that his back injury has resulted in greater difficulty in performing lower level tasks because of the pain he experiences daily, and particularly when a task may involve bending at the waist.

[228] Mr. Ishii has suffered emotionally as a result of the 2017 Accident. Dr. Kiraly diagnosed major depression with anxiety, moderate symptoms of trauma, the pain impacting on Mr. Ishii's sleep, anxiety and depressions symptoms.

[229] Mr. Ishii, Dr. Kiraly and Mr. Ishii's roommates gave evidence that his work at Tidey appears to have been good for his mental health in reducing his depression and noticeably improving his mood.

[230] Mr. Ishii gave evidence that he is not as social as a result of the pain. He does less of the recreational activities he did before the 2017 Accident, including paintball, camping, hiking and road trips.

[231] There was no evidence about an impact of his injuries on his relationship with his parents. Mr. Ishii's father, Steven Dick, gave evidence at trial that he sees Mr. Ishii every month or two for dinner in Vancouver. He and Mr. Ishii share an interest in motorcycles and car racing. The two of them invested in the Oliver house together, they have both been involved in Area 27 through Mr. Ishii's membership, and Mr. Dick gave evidence it was nice that he was able to help his son with the 2017 Lemons race, given Mr. Ishii's keen interest in that activity.

[232] Mr. Ishii continues to maintain an interest in working on cars, but his ability to do mechanical work on the cars is more limited than before the 2017 Accident. He continued to attend the Lemons races after the accident, but because of his injuries he is less directly involved in the racing, enjoying it in a different capacity as a manager, not as a driver.

[233] Here, in the four cases cited by the plaintiff, I consider the impact of the injuries on the plaintiffs in those cases to be more significant than Mr. Ishii in the severity, extent and prognosis of the physical injuries suffered from the accident, and

in the impact on their lives, specifically the greater negative impact on employment in all four cases. As a result, I consider an award lower than \$200,000 to be appropriate.

[234] No two cases are identical and each case must be decided on its own merits. Although *Johnstone* is an older case, of all the cases cited by the parties I find it to be the most similar to Mr. Ishii's circumstances. In *Johnstone* the plaintiff was awarded \$100,000 in 2006, which is, when adjusted for inflation to the date of trial, approximately \$145,000.

[235] In *Johnstone*, the plaintiff was 32 years old. He was cycling when a vehicle turned into his path. He was thrown over the hood of the vehicle. Some similarities with Mr. Ishii's case are that following the accident, the plaintiff, Mr. Johnstone, claimed he suffered from anxiety and sleep disturbances, and physically he suffered from disabling low back pain. His active recreational lifestyle was significantly curtailed, and his employment prospects were limited by his injuries. The Court found that he continued to suffer from depression, and pain limited his physical capacity to lift and carry; to do repetitive bending and twisting; to remain standing, stooping, sitting or constrained for a prolonged time; and these limitations would continue for the indefinite future.

[236] I also take into account the impact of the 2017 Accident injuries on Mr. Ishii's housekeeping capacity, which as discussed in more detail below, under the separate housekeeping section, has been negatively impacted, but not to the degree that I make a separate award for loss of housekeeping capacity. I have considered the loss of housekeeping capacity in the assessment of the award for non-pecuniary damages.

[237] Considering the *Stapley* factors, the evidence and the case law to which I have been referred, I assess \$155,000 as an appropriate award for non-pecuniary damages.

e) Pre-existing Injuries

[238] At the time of the 2017 Accident, Mr. Ishii continued to be affected by the pre-existing permanent partial disability to his right leg, principally his knee, and his right wrist from the 2010 Accident. As a result of the leg injury, Mr. Ishii continued to experience pain and issues with squatting and working at lower levels.

[239] The assessment of damages can include a deduction in the overall award if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, as explained in *Athey* at para. 35, as follows:

The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[240] The question, as a matter of compensation, is whether a deduction should be made from any or all of the awards for non-pecuniary damages, past and future loss of capacity to earn income, and future cost of care.

[241] Mr. Ishii’s pre-existing right leg and wrist injuries are a permanent disability that will continue to affect him in the future. This pre-existing condition was manifest at the time of the 2017 Accident and it continues to affect him through pain and physical limitations. There is no evidence this pre-existing condition will get progressively worse, or improve.

[242] There is a measurable risk the pre-existing leg and wrist injuries will detrimentally affect Mr. Ishii in the future, regardless of the defendants’ negligence

relating to the 2017 Accident. As a result, an assessment is required to determine the amount of a reduction of damages assessed in relation to the 2017 Accident, and whether a reduction should be applied to some or all of the awards for non-pecuniary damages, past and future loss of capacity to earn income, and future care costs.

[243] Based on the evidence of the impact of the 2010 Accident on Mr. Ishii's abilities before the 2017 Accident, and after the 2017 Accident, on a percentage basis I consider that impact to be more than minimal or nominal (which for this purpose I refer to minimal or nominal as less than approximately 20%).

[244] The 2010 Accident injuries – right wrist stiffness and right leg pain – continue to impact Mr. Ishii's life and activities. He has decreased mobility, including difficulty in kneeling, bending and squatting.

[245] I consider the degree of the impact of the partial disabilities associated with these injuries on Mr. Ishii, both in relation to his work and other aspects of his life, to be more than the 20% minimum, but less than 50% when considered in relation to the impact of the back injury from the 2017 Accident.

[246] Narrowing that range of 20-50% to 30-40%, the average of that range is 35%, which I consider to be a fair and reasonable assessment of the impact of the permanent partial disability of the 2010 Accident injuries on Mr. Ishii's life.

[247] I consider it appropriate to reduce the award for non-pecuniary damages by 35% on account of the pre-existing injuries for the 2010 Accident. Reducing the \$155,000 award by 35% equals \$100,750, which I consider to be a fair and reasonable assessment of the impact of the injuries from the 2017 Accident on Mr. Ishii's life.

3. Past Loss of Capacity to Earn Income

a) Legal Principles

[248] In *Brill v. Forsyth*, 2024 BCSC 124, Justice Warren summarized the principles regarding an assessment of a claim for past loss of capacity to earn income as follows:

[136] A claim for past loss of income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[137] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period, while taking into account all realistic contingencies.

[249] The test to be applied was discussed in *Rousta v. MacKay*, 2018 BCCA 29 as follows:

[14] The test to be applied to *hypothetical events*, past and future, is whether there is a real and substantial possibility that the events in question would occur.

[15] In *Grewal v. Naumann*, 2017 BCCA 158, the Court described the principles underlying this approach as follows:

[42] The trial judge commenced his analysis by setting out the principles that govern awards concerning past loss of opportunity and diminished earning capacity:

[134] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, (1978), 1978 CanLII 1 (SCC), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 34-35.

[135] As an initial threshold issue, the plaintiff must demonstrate both impairment to his or her earning capacity and that, in this case, there is a real and substantial possibility that the diminishment in earning capacity will result in a

pecuniary loss. It is not to be an exercise in the abstract though at the same time is described in *Andrews v. Grand & Toy Alberta Ltd.*, as “gazing deeply into the crystal ball”. If established, quantification of the loss can be by either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[136] In *Brown v. Golaiy*, (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), Finch J. as he then was stated:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff 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
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[137] Under any approach to assessing damages, the court is to make an assessment as opposed to applying a mechanical mathematical or statistical exercise.

[138] Ultimately, the court must base its decision on what is fair and reasonable in all the circumstances: *Parypa v. Wickware*, 1999 BCCA 88.

[Emphasis added.]

[250] With these principles in mind, the plaintiff’s and defendants’ positions on past loss of capacity to earn income are as follows.

b) Plaintiff’s Position on Past Loss of Capacity to Earn Income

[251] Mr. Ishii submits that an assessment of his past loss of capacity to earn income should be based on two time periods, the first being from the Fall of 2017 following the 2017 Accident when his evidence is that he had plans to start working following the 2017 Lemons race, and the second period commencing from the Fall of 2019 when he started as a locksmith apprentice at Tidey, to the date of trial.

[252] The plaintiff’s approach is the “capital asset approach”, informed by a mathematical calculation, or “anchor” to found the assessment, the first period based on his evidence of the income he earned while working as a Domino’s Pizza delivery driver from in or about 2014 to 2015, and for the second period based on his rate of pay while working at Tidey.

[253] Mr. Ishii’s position appears to be based on him being unable to work for the first period, followed by the second period of a reduced capacity to work when he started working at Tidey.

i. Post 2017 Accident: Fall of 2017 to Fall of 2019

[254] For the first two year period from the Fall of 2017, Mr. Ishii’s evidence is that his plan was to try a kind of delivery driving job like Uber Eats or SkipTheDishes, while investigating possible training as a pilot car driver.

[255] When Mr. Ishii had worked as a Domino’s Pizza delivery driver, Mr. Ishii’s evidence was that he earned \$100 per shift, including tips.

[256] Mr. Ishii submits that his purchase of the Nissan S-Cargo vehicle in October 2017, and his attempt to drive an Uber Eats shift, provides evidence that he was serious about starting to work as a delivery driver starting in the Fall of 2017.

[257] Mr. Ishii’s submissions on past loss of opportunity to earn income for this two year post-accident period are that a best estimate, based on his income earned earlier as a pizza delivery driver, is approximately \$25,000 per year, which is the approximate result of a calculation of \$100 per shift for 5 shifts per week for 52 weeks, or \$20,000 net per year, for a two year claim of \$40,000.

[258] I note that this first period includes the time of Mr. Ishii’s part-time casual employment with Tidey from June 30, 2018 to August 31, 2019, before what he describes as his more “formal” employment starting with Tidey as of September 1, 2019.

[259] As noted above in the credibility section, there is no admissible evidence of Mr. Ishii's hours of work or income during the June 30, 2018 to August 31, 2019 period, and Mr. Ishii's submissions make no deduction for Mr. Ishii's capacity to work, or any income he earned during this period. I will refer to this point in more detail in my analysis below.

ii. Post 2017 Accident: Fall 2019 to date of trial

[260] For the second post-accident period from the Fall of 2019 to the date of trial on September 5, 2023, the plaintiff's assessment is based on his employment with Tidey from September 1, 2019 at \$15 per hour, increasing at a rate of \$1 per hour each year, reaching \$19 per hour in 2023.

[261] Mr. Ishii's evidence is that he worked less than full time on account of his injuries from the 2017 Accident.

[262] For the period from September 1, 2019 to the date of trial, Mr. Ishii's claim is based on the expert report prepared by Kevin Turnbull, amended at trial to account for deductions explained below.

[263] For this period, Mr. Turnbull's report estimates past loss of earnings in the net amount of \$90,579, based on a projection of gross earnings assuming Mr. Ishii would have worked at Tidey 40 hours per week, less his actual earnings, less payroll deductions.

[264] At trial, Mr. Turnbull amended his calculations to reduce the estimated past loss of earnings on account of two issues:

1. Mr. Ishii was not on the Tidey payroll from March 2020 to October 2021, unrelated to the 2017 Accident, because the COVID-19 pandemic shutdown interrupted his employment at Tidey. During this time he received Canada Emergency Relief Benefits ("CERB") as income loss relief.

2. From April 1, 2023 to the date of trial, Tidey could not afford to pay Mr. Ishii because of a slow recovery from the COVID-19 shutdown. Mr. Ishii continued to work to accumulate unpaid hours towards completion of his apprenticeship hours. He received welfare benefits from April 1, 2023 to approximately August 2023, in the amount of approximately \$5,200.

[265] The result of these reductions is that Mr. Turnbull's calculation of the total net past earnings loss for the second period of the Fall 2019 to date of trial is reduced to \$46,600 (from \$90,579).

[266] Taking into account the above calculations, Mr. Ishii's claim for past loss of capacity to earn income is based on the estimate of \$40,000 for the first period of two years from September 2017 to August 31, 2019, and \$46,600 for the second period of four years from September 1, 2019 to the date of trial, for a total claim of \$86,600 for past loss of capacity to earn income.

c) Defendants' Position on Past Loss of capacity to Earn Income

i. Generally

[267] The defendants' position on past loss of capacity to earn income also refers to the first period from the date of the 2017 Accident to the end of August 2019, roughly equivalent to the plaintiff's reference to Fall of 2017 to Fall of 2019, above, and the second period from September 1, 2019 (Fall 2019) to the date of trial.

[268] The defendants submit that Mr. Ishii's past wage loss is \$17,274 based on the expert report of John Timbol for the second period from September 2019 to the date of trial, but no award for past wage loss for the first period from the date of the 2017 Accident to August 2019, for the following reasons.

ii. Post 2017 Accident: Fall of 2017 to Fall of 2019

[269] For the earlier period from the date of the 2017 Accident to September 2019, the defendants rely on the following evidence in support of their submission that

there was no wage loss in the period, and no past lost opportunity for this earlier period:

1. Dr. Spivak's report recounts that Mr. Ishii described himself as "... wilfully unemployed at the time of the indexed accident as he was contemplating what his next step would be from a vocational perspective".
2. Mr. Ishii had considered work as a pilot car driver prior to the 2017 Accident, but he had not applied for such work, and he had not applied for such training.
3. Mr. Ishii testified he worked at Domino's Pizza from in or about 2014 to 2015 in a full time or close to full time capacity; his T4 earnings of \$410 on his 2015 income tax return were from Domino's; he quit in 2015 soon after the 2015 trial for the 2010 Accident; and he never returned. These 2015 T4 earnings do not reflect full time earnings. Mr. Ishii explained that he was inexperienced in keeping track of tips in such a job.
4. Mr. Ishii's bread sorting work associated with Weston Bakeries started a few months before the 2017 Accident, and would pay \$50 for a four to five hour shift, or \$100 per week, but is not recorded on his 2017 income tax return.

iii. Post 2017 Accident: Fall 2019 to date of trial

[270] For the post-accident period from the Fall of 2019 when Mr. Ishii began the locksmith apprenticeship with Tidey, the defendants rely on the expert report of John Timbol for their submissions that Mr. Ishii's past wage loss is \$17,274.

[271] Regarding the assumption that Mr. Ishii would have worked 40 hours per week absent the 2017 Accident, Mr. Timbol's opinion is that the 40 hours is unsupported based on his review of the Tidey Calendar of the hours recorded for the four workers at Tidey, noting that there were a total of four employees throughout September 2019 to October 2022 with the hours ranging from a low of 17.33 hours

per week to a high of 77.17 hours per week for all employees, and the highest hours ever worked by an employee in one week was 35.35 hours.

[272] Mr. Timbol's report also notes that Mr. Turnbull's reports do not consider the potential lingering impact of the 2010 Accident on Mr. Ishii's work capacity.

[273] Mr. Timbol provides his calculations for past income loss from September 2019 to the date of trial based on three scenarios of Mr. Ishii working 25, 30 and 35 hours per week, for corresponding past net income loss of \$23,514, \$33,732 and \$43,949, respectively, taking into account time off work (unrelated to the 2017 Accident) as recorded in the Tidey Calendar. Defence counsel then reduces those figures by \$6,240 for Mr. Ishii's receipt of welfare benefits for approximately six months from April 2023 to the date of trial, for a total of \$17,274 for the 25 hour per week scenario.

d) Analysis of Past Loss of Capacity to Earn Income

[274] Here, I find that Mr. Ishii has demonstrated that as a result of the 2017 Accident he suffered a back injury that impacted his ability to work at his pre-accident level. The expert evidence is that Mr. Ishii suffers chronic lower back pain from the 2017 Accident which impacts his ability to work, complicated by psychological factors of depression.

[275] Applying the factors from *Brown* as referenced in *Grewal* above, from Mr. Ishii's evidence and the evidence of the experts, I find that as a result of the injuries Mr. Ishii suffered in the 2017 Accident, Mr. Ishii has been rendered less capable overall of earning income from all types of employment. For example, he is less capable of earning income from some driving jobs, for which he was capable before the 2017 Accident.

[276] Mr. Ishii is less marketable or attractive as a potential employee, given some limitation on his physical abilities as a result of the back injury.

[277] As a result of the back injury, he has also lost the ability to take advantage of all job opportunities that might otherwise have been open to him, and he is less valuable to himself as a person capable of earning income in a competitive labour market. This is evidenced primarily by Mr. Ishii's reduced ability to take advantage of driving opportunities.

[278] Consequently, as a result of the 2017 Accident, there has been an impairment of Mr. Ishii's earning capacity, and there is a real and substantial possibility that the diminishment in earning capacity resulted in a pecuniary loss from the date of the 2017 Accident to the date of trial, and there is a real and substantial possibility that the impairment to his earning capacity will continue in the future.

[279] The question is what income Mr. Ishii would have earned had the 2017 Accident not occurred, and how those earnings relate to the income Mr. Ishii earned, or had the capacity to earn during that period, while taking into account all realistic contingencies, with one factor being the pre-existing disability of his leg and wrist injuries from the 2010 Accident.

[280] Mr. Ishii had not established a work history and a clear career trajectory at the time of the 2017 Accident. For this reason his own assessment for the first period of the Fall of 2017 to the Fall of 2019 is based on the "capital asset approach" rather than the "earnings approach", but informed to a great extent by his evidence of his most recent employment as a Domino's Pizza delivery driver from in or about 2014 to early 2015.

[281] For the second period from the Fall of 2019 to the date of trial, Mr. Ishii's assessment of his past loss of capacity is informed by his employment with Tidey.

[282] I agree that it is appropriate to assess past loss of income in two periods as taken by both parties in two separate periods: the first period from the date of the 2017 Accident to the Fall of 2019, and the second period from the time he started working consistently at Tidey in the Fall of 2019.

[283] For the first period, I further distinguish between the first and second years, (1) Fall 2017 to Fall 2018, and (2) Fall 2018 to Fall 2019, because of Mr. Ishii's work at Tidey from June 30, 2018 to August 31, 2019.

[284] Mr. Ishii's most recent paid employment before the 2017 Accident was his brief bread sorting work associated with Weston Bakeries, and earlier, from in or about 2014 to 2015 at Domino's Pizza delivering pizzas and working in the store making pizzas. He made \$7.50 per hour, averaging \$100 per day including tips.

i. Post 2017 Accident: Fall 2017 to Fall 2019

[285] Following the 2017 Accident, Mr. Ishii did not pursue pilot car driver training. He tried driving two shifts for Uber Eats, but found it difficult because of his back injury from the 2017 Accident, he could not complete a four hour shift.

[286] Regarding the pilot car driver scenario, some difficulties with that scenario are that there was no evidence at trial about what a pilot car driver might be expected to earn, and what training is required before one can become a pilot car driver, and whether or not there are any pilot car driver duties other than driving that might limit Mr. Ishii as a result of his injuries from the 2010 Accident.

[287] The evidence at trial was that Mr. Ishii had taken no steps to train to be a pilot car driver before or after the 2017 Accident, other than looking into the possibility of training.

[288] As a result, while it may have been a real and substantial possibility that Mr. Ishii would have been employed as a pilot car driver following the 2017 Accident, there is no evidence of the earnings of a pilot car driver in order to value such a loss. The best that could be done would be to value that driving career in relation to the Domino's Pizza driving income, which would be speculative. Also, without any evidence of working conditions and hours of a pilot car driver, an assessment can only mimic the analysis of the Domino's Pizza driver scenario.

[289] Regarding working on high-end vehicles in the Oliver area, in his cross-examination Mr. Ishii explained that his thought process was that any such opportunity would depend on the real estate venture with his father expanding with income to support a move to Oliver, and he would figure it out from there. His evidence was that he had spoken with JF, the owner of an automotive shop near Area 27. There was some evidence from Mr. Ishii's father about what such an opportunity might have paid, \$5,000 - \$8,000 from April to October, with some race cars requiring potentially major maintenance.

[290] However, that scenario was dependent on the real estate venture; Mr. Ishii had taken no further steps towards that opportunity; and the real estate venture ended with the sale of the property in 2020.

[291] Also, given that this work was vehicle maintenance, there was no evidence about how that work would be any different from Mr. Ishii's previous vehicle maintenance work at Budget Brake and Muffler, which Mr. Ishii was unable to continue because of his 2010 Accident injuries.

[292] As a result, I consider the vehicle maintenance work scenario associated with Area 27 to be speculative, and I do not consider it to be a real and substantial possibility.

[293] Regarding an assessment of past income loss as a driver, particularly doing delivery driving for Uber Eats, I consider that employment as a real and substantial possibility because of Mr. Ishii's previous work as a Domino's Pizza delivery driver, his purchase of the Nissan S-Cargo vehicle as a possible delivery vehicle after the 2017 Accident, and his attempt at working as an Uber Eats driver in the Fall of 2017.

[294] Mr. Ishii's evidence was that it was his intention to work after the 2017 Accident, and he attempted to drive for Uber Eats, despite the injuries from the 2017 Accident. As a result, I consider that but for the 2017 Accident he would have worked, and would have earned some income as a driver between the Fall of 2017

and the Fall of 2019. As a result of the 2017 Accident, there was a loss of his capacity to earn income that led to a pecuniary loss.

[295] The value of that loss is to be assessed, not calculated: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[296] Assessment of the value of Mr. Ishii's past loss of income based on Mr. Ishii's income as a delivery driver for Domino's Pizza at \$100 per shift, including tips, is the most likely scenario, since but for the 2017 Accident it appears most likely that Mr. Ishii would have worked as a delivery driver starting in the Fall of 2017 following the Lemons race that year.

[297] The relative likelihood of Mr. Ishii working and earning income in this period is high, and the relative likelihood of Mr. Ishii working something less than full time is also high.

[298] In the years before the 2017 Accident there is limited evidence that Mr. Ishii was consistently working full time. In 2017 before the 2017 Accident he worked some shifts with bread sorting work associated with Weston Bakeries, but it was not full time work. Mr. Ishii was spending some time at his hobby fixing up cars and preparing his Chevy Caprice for the 2017 Lemons race.

[299] Mr. Ishii's work at Domino's Pizza work in 2015 was not full time.

[300] After the 2017 Accident, other than his two-shift attempts as an Uber Eats driver, a few bread sorting shifts, and his looking into the possibility of training to become a pilot car driver, there was no evidence of any other efforts by Mr. Ishii to look for employment, despite his mechanical skills, his aptitude with computers, his knowledge of vehicles, and his previous work at Canadian Tire in the automotive parts department, and at Lordco Auto Parts.

[301] Mr. Ishii began part-time casual employment at Tidey on June 30, 2018. Mr. Wales described Mr. Ishii being able to work 2-3 hours at first, increasing to 5 hours over time. Based on this evidence, for July and August 2018, it appears that

Mr. Ishii's work at Tidey, if any, was limited. For that reason, for the purpose of an assessment of past loss of capacity to earn income for the first full year following the 2017 Accident, from September 2017 to the end of August 2018, I assess the loss based on the Domino's Pizza income.

[302] Given Mr. Ishii's work history in at least the two years before the 2017 Accident, which was less than full time, I consider the relative likelihood that Mr. Ishii would have been working consistently full time, or the equivalent of 5 Domino's Pizza shifts, in the first year following the 2017 Accident to be less likely, expressed as a percentage at 50%, with the relative likelihood of something less than full time likely, at an equal 50% percentage, averaging the equivalent of 3-5 Domino's Pizza shifts, at 4 shifts, and assess the valuation of the loss on that basis.

[303] As a result, for the first year following the 2017 Accident, full time without accident past loss earnings are assessed at 50% of full time employment at Dominon's Pizza based on five shifts at week at \$100 per shift (\$13,000 gross), plus 50% based on four shifts a week at \$100 per week (approximately \$10,500), for a total of \$23,500 gross, approximately \$19,500 net (all net figures are based on rough estimates of deductions for income tax and employment insurance in Mr. Turnbull's report at Table 2).

[304] For the second year after the 2017 Accident, Fall 2018 to Fall 2019, full time at the Tidey hourly rate of \$15 equals approximately \$31,000 gross for that year as an estimate of a loss of capacity to earn income but for the 2017 Accident, assuming Mr. Ishii could not work.

[305] For that second year following the 2017 Accident, Fall 2018 to Fall 2019, Mr. Ishii's residual capacity to work must be considered, but there is no admissible evidence of Mr. Ishii's hours of work that year.

[306] September 2018 is chosen as the rough starting point of this second year after the 2017 Accident, because the assessment of the past loss of capacity for the

first year following the 2017 Accident, above, is based on a driver's income ending in the Fall of 2018 when Mr. Tidey was working at Tidey.

[307] In the credibility section above I referred to the Tidey Calendar from September 2019 to December 2019 in which the majority of weeks for Mr. Ishii's hours were in the range of 17-21 hours per week. As a result, for the 12 months preceding September 2019, I infer that Mr. Ishii's potential to work from September 2018 to August 2019 was up to 20 hours per week, which results in a contingency deduction of 50% from the \$31,000 gross full time wage, for a past loss of capacity to earn income of \$15,500 gross, or approximately \$13,000 net for the second year following the 2017 Accident, from September 2018 to August 2019.

[308] Adding the two figures, \$19,500 net for the first year following the 2017 Accident, and \$13,000 net for the second year, equals a total of \$32,500 net, as an assessment of Mr. Ishii's past lost of capacity to earn income in the two years following the 2017 Accident.

[309] Considering all of the evidence regarding Mr. Ishii's injuries, and his ability to work, and the amount of the assessed award, I consider \$32,500 to be a fair and reasonable award for Mr. Ishii's past loss of capacity to earn income for the two years following the 2017 Accident, until August 31, 2019.

ii. Post 2017 Accident: Fall 2019 to date of trial

[310] I consider that there was a real and substantial possibility that Mr. Ishii's earning capacity was diminished by the impact of the 2017 Accident during the four year period working at Tidey from September 1, 2019, continuing as an apprentice from October 25, 2019 to the date of trial on September 5, 2023.

[311] For this four year period of past loss of capacity to earn income, the capital asset approach is appropriate where the loss is not easily measurable; however, the start of this period coincides with Mr. Ishii's hours being recorded on the Tidey Calendar starting in early September 2019, and starting his apprenticeship at Tidey on October 25, 2019, earning \$15 per hour, that rate increasing annually in one

dollar increments to \$19 per hour in 2023. As a result, Mr. Ishii's income at Tidey provides, as plaintiff's counsel submits, a useful "anchor" for assessing the loss of capacity.

[312] For this period, the plaintiff refers to Mr. Turnbull's detailed calculations to assess Mr. Ishii's past loss of capacity to earn income.

[313] By the date of trial, Mr. Ishii had accumulated approximately half of the 3,600 hours required for him to become certified as a licenced locksmith.

[314] As noted above, for this second period of past loss of earning capacity, Mr. Turnbull at trial conceded that deductions from his calculation of \$90,579 were warranted in response to the two factors of COVID-19 and Mr. Ishii's receipt of CERB benefits, and Mr. Ishii's receipt of income assistance, resulting in a net past loss of earnings claim of \$90,579 to a claim of \$46,600 for the time period from September 1, 2019 to the date of trial.

[315] An issue raised by defence expert, Mr. Timbol, is the assumption there was 40 hours per week available for Mr. Ishii to work throughout his employment at Tidey. He points to Tidey's employment records showing that none of the four employees with recorded hours has worked 40 hours a week from September 2019 to February 2023, the highest weekly total hours being 35 hours.

[316] Mr. Wales gave evidence that when Mr. Ishii was hired there was full time work available for Mr. Ishii. More recently, Tidey has had some difficulty recovering its business from the COVID-19 shutdown, and was unable to pay Mr. Ishii for the six months before trial when Mr. Ishii received income assistance, but he worked unpaid hours which continued to count toward his apprenticeship hours.

[317] Regarding the recorded hours for the other employees being less than 40, Mr. Wales stated that one of the employees, Jason Skellenger, works less than full time by his choice because of his family commitments; a second employee, Bill Primeau, is the bookkeeper for Tidey, he works three days a week, 10:00 – 3:00, and does not do the work that Mr. Ishii does; and a third employee, Roy Palmer,

retired at the time of the COVID-19 shutdown. He was approximately 92 years old at that time, and not working full time.

[318] In the section on credibility above, I referred to Mr. Ishii's inconsistent evidence regarding his hours of work, or capacity to work, specifically relating to Mr. Ishii's evidence he has been scheduled to work for 14 hours per week, his counsel's submission that he is limited to 14 hours per week, as compared to Mr. Ishii's own evidence he presently believes he can work 20-24 hours per week inside.

[319] As also detailed in the credibility section above, the Tidey Calendar in the period September to December 2019 records 11 weeks worked in excess of 14 hours, with the majority of the weeks in these months in a range of 17-21 hours.

[320] For the more recent period, August to December 2021, Mr. Ishii averaged approximately 90 hours per month over that time period, averaging approximately 22 hours per week, followed by 2022 and 2023 when Mr. Ishii was scheduled for 14 hours a week.

[321] For these reasons, specifically the evidence about the hours Mr. Ishii was working in late 2019 and late 2021, in excess of 14 hours, I consider it a real and substantial possibility that Mr. Ishii could have been working for the period from September 1, 2019 to the date of trial in the 17-24 hour per week range, an average being approximately 20 hours per week, or 50% of full time hours, with subtractions for COVID-19 unemployment time (March 2020 to May 2021); and for time receiving CERB benefits before he returned to the Tidey payroll in November 2021; and for receipt of income assistance of \$1,040 per month from April to August 2023, approximately \$5,200.

[322] The assessment of Mr. Ishii's past loss of capacity to earn income is based on full time pay at 40 hours per week, discounted by Mr. Ishii's capacity to work at 20 hours per week (50% of full time), the loss being 50% of the full time pay, as follows:

- 2019: 17.3 weeks (Sep. 1 – Dec. 31) x 40 hrs. x \$15/hr. x .5 = \$5,200;

- 2020: 13 weeks (Jan. 1 – Mar. 31) x 40 hrs. x \$15/hr. x .5 = \$3,900;
- 2021: 8.5 weeks (Nov. 1 – Dec. 31) x 40 hrs. x \$17/hr. x .5 = \$2,900;
- 2022: 52 weeks x 40 hrs. x \$18/hr. x .5 = \$18,700;
- 2023: 35 weeks (Jan.1 – trial) x 40 hrs. x \$19/hr. x .5 = \$13,300.
- Total: \$44,000.

[323] The total loss for these five years from September 1, 2019 to the date of trial is \$44,000 gross.

[324] Mr. Ishii's actual gross annual employment earnings from September 1, 2019 to the date of trial are \$4,263 (2019); \$2,805 (2020); \$3,315 (2021); \$10,201 (2022) and \$9,410 (2023), the total being approximately \$30,000.

[325] Subtracting Mr. Ishii's total actual earnings from the total loss of capacity (\$44,000 minus \$30,000) equals \$14,000, minus the income assistance received in the amount of approximately \$5,200, results in a loss of a capacity of \$8,800 gross, or approximately \$8,000 net, for the period from the Fall of 2019 to the date of trial.

e) Conclusion – Past Loss of Capacity to Earn Income

[326] Summarizing the above analysis for an award for past loss of capacity to earn income, the award for the period from the date of the 2017 Accident to the Fall of 2019 is assessed at \$32,500, and for the second period from the Fall of 2019 to the date of trial is assessed at \$8,000, for an award for past loss of income earning capacity of \$40,500.

[327] Similar to the discussion in the non-pecuniary damages section above regarding a reduction for pre-existing injuries, as Mr. Ishii's capacity to earn income is negatively impacted by his injuries from the 2010 Accident, I consider it appropriate to reduce this award for past loss of income earning capacity by 35%, for a final award of \$26,300.

[328] Considering all of the evidence of the circumstances following the 2017 Accident to the date of trial, and the impact of the 2010 Accident injuries, I consider

\$26,300 to be a fair and reasonable assessment of the award for past loss of income earning capacity.

4. Future Loss of Earning Capacity

a) Legal Principles

[329] In *August-Mansfield v. Yun*, 2023 BCSC 1633, Justice Brongers summarized the assessment of a claim for future loss of earning capacity, as follows:

[68] Assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32:

... An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. ...

[69] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

- 1) Is there a potential future event that could lead to a loss of earning capacity?
- 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If there is a such a possibility, what is its value? Included in this step is what is the relative likelihood of the possible future loss occurring? (*Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 33 and 47-48.

[70] Valuation of the loss can be done using either the "earnings approach" or the "capital asset approach": *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*] at para. 7; *Perren v. Lalari*, 2010 BCCA 140 at paras. 11–12. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48. The capital asset approach involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123. Under either approach, the plaintiff

must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren* at para. 33), and damages are assessed, not calculated (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18).

[330] The third step of the assessment of the loss includes a determination of the relative likelihood of the future loss occurring and whether any contingencies apply, and whether the award should be reduced to account for the relative likelihood that the future event will not occur: see *Haynes* at para. 136.

[331] To receive compensation for loss of future earning capacity, a plaintiff must demonstrate impairment to their earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss in the future. The capital asset approach involves considering the *Brown* factors such as (a) whether the plaintiff has been rendered less capable overall of earning income from all types of employment, (b) whether the plaintiff is less marketable or attractive as a potential employee, (c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open, and (d) whether the plaintiff is less valuable to themselves as a person capable of earning income in a competitive labour market: *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.

b) Plaintiff's Position on Future Loss of Earning Capacity

[332] Mr. Ishii submits that before the 2017 Accident his driving skill and mechanical skills made for promising and good paying jobs, but these prospects were almost wholly destroyed by his back injuries from the 2017 Accident.

[333] Mr. Ishii submits that but for the 2017 Accident he would have started a driving job in the Fall of 2017, either as a pilot car diver or a delivery driver, referring to his earlier work as a pizza delivery driver at Domino's Pizza.

[334] Mr. Ishii also points to the possibility of working in the Oliver area maintaining exotic cars for their owners' use at Area 27.

[335] Mr. Ishii submits that as a result of meeting the owner of Tidey and working as an apprentice locksmith, he salvaged a potential future part time career option as a

locksmith, work that he enjoys and is good for his mental health as it has reduced his depression.

[336] Mr. Ishii's submissions state that the case law does not encourage an arithmetic approach to valuation of Mr. Ishii's loss of capital asset of his earning capacity, but states it is helpful to have an anchor to found the assessment.

[337] I note that the plaintiff's assessment, as summarized in the following paragraphs, uses a detailed arithmetic approach with reference to the report of the plaintiff's expert accountant, Mr. Turnbull.

[338] Mr. Turnbull's report calculates Mr. Ishii's career earning as a licensed locksmith from the date of trial to age 70 at \$1,809,000, plus 10% for non-wage benefits, referring to Tidey providing Mr. Skellenger with a vehicle, for plaintiff's calculation of the total without accident career compensation at \$1,989,000.

[339] Mr. Ishii submits that if the court finds that the 2010 Accident affected his ability to earn 100% of his potential without accident locksmith career income, for example if he had 70 to 80% of full locksmithing capacity given his residual 2010 Accident symptoms, then 70% of career earnings is \$1,266,000, and 80% is \$1,447,000, plus 10% for non-wage benefits results in a range of \$1,392,000 to \$1,591,700.

[340] The plaintiff's submissions then refer to Mr. Ishii currently working about 30% of full time. 30% of future earnings totaling \$543,000 plus 10% for non wage benefits, for a total with accident future earnings amounting to \$597,300 to age 70.

[341] Deducting Mr. Ishii's with accident 30% earning capacity, or \$597,000, reaches a net loss in the range of \$795,300 (70%) to \$994,400 (80%).

[342] I note that the summary of the plaintiff's submission in the preceding three paragraphs uses 30% of full time as the figure for Mr. Ishii's "with accident" full time earning capacity. Mr. Turnbull's report also refers to Mr. Ishii's hours to be just under 30% of full time hours; however, the plaintiff's evidence and final submissions

consistently refer to his capacity as working 14 hours per week, which is 35% of full time at 40 hours per week.

[343] As a result, the plaintiff's use of 30% of full time earning capacity for the total with accident future earnings, underestimates the total with accident future earnings. The plaintiff's calculation of his with accident earnings is \$597,000 to age 70, above. When that \$597,000 is deducted from the plaintiff's figures for a range of full time without accident earnings (\$1,266,000 to \$1,447,000), the result in the plaintiff's calculation of a range of net loss figures (\$795,300 to \$994,400), is exaggerated by approximately \$100,000, when compared to figures using 35% as the with accident earning capacity.

[344] Finally, Mr. Ishii submits that the mathematical anchor suggested by the case law of the assessment of Mr. Ishii's lost capital asset does not capture the whole asset because of Mr. Ishii's lost capacity to work at driving jobs such as a delivery driver for Uber Eats or as a pilot car driver; and, he has lost his ability to compete for light auto mechanical work, notably on race cars associated with Area 27, in addition to or instead of locksmithing.

[345] As a result, Mr. Ishii submits that Mr. Ishii's without accident total earning capacity must be raised above his 70-80% of a locksmith career (given an assumed reduction of 20-30% for his residual 2010 Accident injuries) back to a full \$1,989,000 total potential life earning once all his employment capacity is considered.

[346] Taking into account any ongoing pre-accident limitations and all of the residual opportunities to earn income not only from Mr. Ishii's locksmith employment, but also his mechanical skills and his love of driving, less his with accident income, Mr. Ishii submits that his claim for loss of future earning capacity under the capital asset approach should be assessed at \$1,300,000.

[347] Mr. Ishii submits that number is consistent with reference to his current 30% working capacity and the earlier calculations above: 30% of total future earnings of

1,989,000 being \$597,000, and when subtracted from total future earnings of \$1,989,000 equals \$1,392,000.

c) Defendants' Position on Future Loss of Earning Capacity

[348] The defendants submit that the future loss of earning capacity should be calculated on the basis of Mr. Ishii's hourly wage of \$18 per hour for his last full year of work before trial, 2022, and based on 25 hours per week, to age 67. Using Mr. Turnbull's multipliers results in a baseline future loss to age 67 of \$340,715.

[349] Defence counsel then submits that any award should be mitigated by Mr. Ishii's uneven work history, lack of clear plans for future employment, difficulty finding work prior to Tidey, and lack of retraining attempts such as computer training.

[350] Defence counsel submits that these mitigating factors require a realistic assessment of likely future work against Mr. Ishii likely working life after the 2017 Accident, resulting in the award being reduced by two-thirds from \$340,715 to \$113,572, citing *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217.

[351] Finally, defence counsel submits that a further reduction is necessary to take into account the impact on future earnings of Mr. Ishii's pre-existing injuries to his wrist and knee from the 2010 Accident, for a further reduction by 50 per cent of the future loss of earning capacity of \$113,572, for a final future loss of earning capacity award of \$56,786.

d) Analysis of Future Loss of Earning Capacity

[352] An award for future loss of earning capacity represents compensation for a pecuniary loss. The analysis is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of Mr. Ishii if the accident had not happened and Mr. Ishii's likely future after the accident happened, which necessarily involves an assessment of Mr. Ishii's potential earning but for the 2017 Accident.

[353] The three-step test for assessing future loss of earning capacity is:

1. Is there a potential future event that could lead to a loss of earning capacity?
2. Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
3. If there is a such a possibility, what is its value? At this stage consideration must also include the relative likelihood of the future loss occurring and whether any contingencies apply.

Rab v. Prescott, 2021 BCCA 345 at para. 47

[354] Mr. Ishii's pre-existing permanent partial disability relating to his right leg and right wrist injuries from the 2010 Accident lead to a loss of earning capacity.

[355] Divisible from the leg and wrist injuries, Mr. Ishii's injury to his lower back from the 2017 Accident, resulting in chronic pain which may improve, but is unlikely to heal completely, has also resulted in a loss of earning capacity.

[356] For both the pre-existing leg/wrist injuries and the back injury, there is a real and substantial possibility that the effect of these injuries on Mr. Ishii's ability to work will cause a pecuniary loss.

[357] I am mindful of the need to consider an award for the future loss of capacity to earn income based on what is fair and reasonable in all the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at paras. 62–70.

[358] As discussed above, at the time of the 2017 Accident Mr. Ishii had not established a work history or a clear career trajectory; however, by the time of trial Mr. Ishii had mitigated his damages by pursuing a line of work, locksmithing, that fortuitously arose when he met Mr. Wales through Mr. Ishii's listing his Nissan S-Cargo vehicle for sale.

[359] As a result, in this analysis I take into account all substantial possibilities, including driving careers, automotive mechanical work, and locksmithing. As discussed in the section above on past loss of earning capacity, I find that the likelihood of the locksmithing career is the most likely scenario for Mr. Ishii's future working life, to a very high likelihood, because of Mr. Ishii's declared intention to

pursue that line of work for as long as he can, his obvious aptitude and skills suited to locksmithing, and the time and effort he has taken towards fulfilling the requirements of apprenticeship towards locksmith certification.

[360] I analyze the loss of the capital asset on an analysis of the likely future of the plaintiff's working life without accident and compare it to his likely future working life after the accident: See *Rab* at paras. 64–65, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, and *Pololos v Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.

Full time “without accident” earnings

[361] The starting point is to assess the total earnings that Mr. Ishii could have earned but for the 2017 Accident.

[362] The plaintiff's expert, Mr. Turnbull, estimates Mr. Ishii's projected absent accident future earnings after labour market contingencies at \$1,809,000 based on the assumption that he would have worked as a full time locksmith if the accident had not occurred.

[363] Mr. Ishii's submissions add an additional 10% for a total of \$1,989,000, the 10% increase based on Mr. Turnbull's statement that although relatively small companies such as Tidy tend to have limited benefit packages, nevertheless it may be appropriate to increase the earning estimate by 8-12% to account for non-wage benefits, the average being 10%.

[364] Mr. Turnbull states that “locksmith” is not a separate occupational category, it is included in the national occupation classification (NOC) category 7384 entitled “other trades and related occupations”. Mr. Turnbull opines that the expected earnings of locksmith probably fall in about the middle of the occupations that form part of NOC 7384, and he assumes the average earnings are a good estimate of the average earnings of a locksmith.

[365] A difficulty with Mr. Turnbull's opinion is that he does not provide the range of earnings for NOC category 7384, and his assumption that the average earnings are a good estimate of a locksmith is based on his view of the different occupations and earnings within the occupational group, with limited reference to the other occupations in the category, and with no reference to the range of earnings of the occupations in that category, and with no reference to the specific earnings of the different occupations in that category.

[366] The defendants' expert, Mr. Timbol, also questions Mr. Turnbull's reliance on the broad occupational group, including several occupations with varying earnings. Mr. Timbol is critical of Mr. Turnbull's failure to assess the range of earnings of the occupations within the occupational group, which includes locksmiths.

[367] An expert's opinion is only as valid as the proof of the assumptions upon which the opinion is based: see *Wilson v. Potter*, 2005 BCSC 807 at para. 17.

[368] I do not question the accuracy of the calculations in Mr. Turnbull's tables in his report, and I make use of his multipliers and tables in my analysis; however, for Mr. Turnbull's opinion of the critical assessment of the full time earnings of a locksmith (set out in column 3(b) of Mr. Turnbull's Table A), given the limitations in the proof of the assumptions upon which that opinion is based, as described above, I have reduced the weight to be given to that opinion.

[369] As noted above, the earnings used by Mr. Turnbull for the first full year of the full time earnings of a locksmith, \$76,881, is approximately \$37 per hour at full time hours. Adding 10% non-wage benefits results in an annual salary of approximately \$84,000, or approximately \$40 per hour for full time work.

[370] Mr. Skellenger gave evidence he earned \$22 an hour at the time of trial, plus the use of a vehicle, a Kia Soul, for work outside the shop, which he also uses for his personal use.

[371] Considering the 10% average for non-wage benefits that Mr. Turnbull suggests may be appropriate for a small company like Tidey, Mr. Skellenger's hourly

wage, including non-wage benefits, would be approximately \$24 per hour. For full time work, at that hourly rate the annual salary is approximately \$50,000, including the 10% non-wage benefits.

[372] Mr. Turnbull's estimated current dollar full time figure for the earnings of a locksmith starting for the first year at \$76,881, is significantly higher than Mr. Skellenger's apparent earnings, and the hourly rate is significantly higher than Mr. Ishii's and Mr. Skellenger's present hourly rates.

[373] As a result, I do not consider it a real and substantial possibility that Mr. Ishii will double his present \$19 hourly rate to \$37 or \$40 per hour, specifically considering Mr. Skellenger's present hourly rate of \$22, or approximately \$24 including 10% non-wage benefits.

[374] I consider that Mr. Skellenger's evidence to be the best evidence of what a locksmith in Mr. Ishii's position will make for the purpose of an assessment of Mr. Ishii's loss of future earning capacity because Mr. Skellenger is a certified locksmith with ten year's experience working as a locksmith at Tidey.

[375] For these reasons, I consider it a real and substantial possibility that the annual without accident full time earnings of a locksmith, for the assessment of Mr. Ishii's loss of future earning capacity, is very likely to be \$50,000 including a 10% non-wage benefit, the relative likelihood of that figure, based on the evidence of Mr. Skellenger's earnings, to be very high, expressed as a percentage at 80%.

[376] I also consider it a real and substantial possibility, by giving some weight to Mr. Turnbull's opinion, but much less likely, that the full time earnings of a locksmith expected to be earned by Mr. Ishii, will be higher than \$50,000, but less than the \$84,000 of Mr. Turnbull's assessment, including 10% for non-wage benefits.

[377] I consider that the average of the two figures, \$50,000 and \$84,000, or \$67,000, to be a real and substantial possibility, the relative likelihood of that figure to be low, expressed as a percentage at 20%.

[378] The resulting figure for the purpose of assessing full time annual earnings is approximately \$54,000 based on: \$40,000 ($\$50,000 \times .8$) plus the rounded up figure of \$14,000 ($\$67,000 \times .2$).

[379] Applying the multiplier in Mr. Turnbull's Table B from two years post trial to age 63 for full time earnings of \$54,000 equals a present value of approximately \$1,347,000 for the full time without accident earnings of a locksmith.

[380] Mr. Ishii is not yet a certified locksmith. His hourly wage is presently \$19, for potential full time earnings of approximately \$40,000 annually, which is less than \$54,000. In the assessment below of Mr. Ishii's residual capacity to earn income, which is to be deducted from the without accident earnings of \$1,347,000, I have considered it a real and substantial possibility that Mr. Ishii will complete his apprenticeship in two years.

[381] As a result, although there could be a small reduction in the without accident earnings for the two years of Mr. Ishii working as an apprentice locksmith rather than a certified locksmith, since this is an assessment, not a calculation, I consider the \$1,347,000 figure used for the full time without accident earnings to be fair and reasonable.

General contingencies

[382] Regarding general contingencies, Mr. Turnbull's report states that using the Table B multiplies by assuming retirement at age 63, which does not include contingency adjustments, is roughly equivalent to assuming retirement at age 70 with adjustments. The adjustments in Mr. Turnbull's report include labour market contingencies of participation, unemployment and part-time work. The present values are also adjusted for Mr. Ishii's probability of survival, assuming normal life expectancy.

[383] For these reasons I have used Mr. Turnbull's Table B multiplier to age 63 to take into account general contingencies for this assessment of future loss of earning capacity, above, and below.

Specific contingencies – residual with accident earnings

[384] Regarding specific contingencies, a deduction is required for the contingency that Mr. Ishii is working at Tidey, which includes consideration of his capacity to work.

[385] Regarding Mr. Ishii's hourly rate of pay, he was earning \$19 an hour at the time of trial, his hourly rate having increased annually by \$1 from the \$15 per hour he earned in 2019.

[386] As noted above, I consider it a real and substantial possibility, and the relative likelihood very high, that his hourly rate as a licensed locksmith, upon completing his apprenticeship, will rise to the \$22 per hour Mr. Skellenger is making, plus 10% in non-wage benefits.

[387] Two related questions for this assessment of Mr. Ishii's residual capacity to earn income are: (1) when Mr. Ishii will complete his apprenticeship; and (2) how many hours he is capable of working.

[388] In the credibility section above, I referred to the evidence of Mr. Ishii's work history at Tidey, which is documented in the Tidey Calendar from September 2019 to August 2023. The Tidey Calendar documents that for some periods of months, Mr. Ishii worked consistently up to and exceeding 20 hours per week, and up to 24 hours, specifically in late 2019 and 2021, respectively. Also, Mr. Ishii gave evidence he believes he can work 20-24 hours per week.

[389] Given Mr. Ishii's skills, mechanical aptitude, expressed interest in a career as a locksmith, and his investment in time and training to date, I consider it a real and substantial possibility, and highly likely, that Mr. Ishii will finish his apprenticeship.

[390] I also consider it a real and substantial possibility, and highly likely, that Mr. Ishii has the capacity to work 24 hours per week as the starting point for the assessment of Mr. Ishii's with accident future earnings.

[391] If Mr. Ishii works 24 hours per week, it will take him less than two years from the date of trial to work the approximately 1,800 hours needed to complete the required 3,600 hours to fulfil the requirements to become a certified locksmith.

[392] I also consider it a real and substantial possibility, and likely, that if Mr. Ishii undertakes the recommended active rehabilitation and psychological counselling recommended by the experts, he has the potential to increase his hours of work.

[393] Dr. Anton refers to the duration of Mr. Ishii's pain and the complicating role of psychological factors as negative prognostic factors. His opinion is that Mr. Ishii is unlikely to have significant improvement, but there may be some benefit to the active rehabilitation and psychological counselling.

[394] Dr. Helper's opinion is that Mr. Ishii is capable of moderate improvement, expressed as a percentage of 50%, and capable of working 30 hours per week.

[395] Given the evidence of the experts of the possibility of some improvement, I consider it a real and substantial possibility that Mr. Ishii will be able to increase his hours of work from 24 hours per week. Given a range of 10 to 20% improvement, which is based on something less than Dr. Helper's opinion that Mr. Ishii is capable of 50% improvement, and taking into account Dr. Anton's less optimistic opinion, a conservative range of 10-20% results in an approximate range of approximately 26-30 hours, with the average being approximately 28 hours.

[396] It is possible that Mr. Ishii will improve the point where he can work greater than 28 hours per week. It is also possible that he will not improve and he will work less than 28 hours per week; however, based on all the evidence and the factors considered above in assessing Mr. Ishii's likely future capacity to work, I consider the relative likelihood of those positive and negative contingencies of hours of work greater and lesser than 28 hours to be relatively equally likely, cancelling each other out and not requiring further adjustments to the 28 hours per week.

[397] 28 hours is 70% of full time work of 40 hours per week.

[398] Based on \$54,000 full time annual earnings, including 10% non-wage benefits, 70% equals approximately \$38,000.

[399] Applying the multipliers in Mr. Turnbull's Table B equals a present value of approximately \$948,000.

[400] Similar to the full time without accident earnings analysis above, although there could be a reduction for the first two years post-trial assessed at 24 hours per week rather than 28 hours per week, since this is an assessment, not a calculation, and the reduction was not made for the without accident earnings analysis, I consider the 948,000 to be fair and reasonable for the assessment of with accident future earnings.

[401] Subtracting the \$948,000 representing Mr. Ishii's capacity to earn income in the future, from the full time absent accident figure of \$1,347,000 equals \$399,000, representing the assessment of the value of Mr. Ishii's estimated loss of capacity from the 2017 Accident, before taking into account his pre-existing condition from the 2010 Accident.

[402] I note that this assessment of the present value of the future loss of capacity absent the accident at \$1,347,000, which is based on absent accident annual full time earnings of \$54,000, assuming zero actual earnings, is closely consistent, by interpolation, with Mr. Turnbull's Table 4 alternative method for estimating loss of future earnings.

[403] Also, the assessment of the present value of the loss of future capacity with accident at \$399,000, which is based on the same assumed without accident full time annual earnings of \$54,000, and assumed post-accident estimated actual annual earnings of \$38,000, is also closely consistent, by interpolation, with Mr. Turnbull's Table 4 alternative method for estimating loss of future earnings.

[404] The reduction for the 2010 Accident, as assessed above, is 35%. Reducing the \$399,000 by 35% equals approximately \$260,000 as an assessment of the award for Mr. Ishii's loss of future earning capacity.

[405] I address one further submission of the plaintiff, which is that Mr. Ishii's without accident total earning capacity must be raised above his 70-80% of a locksmith career taking into account the impact of the 2010 Accident injuries (or 65% based on my assessment), back to a full 100% total potential life earning once all his employment capacity is considered, having lost the capacity to work at driving jobs and light auto mechanical work.

[406] In my view this submission does not accurately reflect the application of the *Rab* tripartite test to assess damages for the loss of future earning capacity.

[407] In *Ploskon-Ciesla* at para. 14, the Court of Appeal for British Columbia stated:

Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence or any real and substantial possibility of a future event leading to income loss: *Rab*; *Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

[408] The second step is whether the future event will cause a pecuniary loss, followed by the third step, which is the value of the loss.

[409] Mr. Ishii's reference to the valuation of \$1,809,000 for full time without accident earnings is the total potential life earnings assessed by plaintiff's expert, Mr. Turnbull, without 10% non-wage benefits, is based on a higher annual income for a locksmith than the estimated income of a driving job.

[410] The assessment of the earnings for a driving job was based on the Domino's Pizza delivery income of approximately \$25,000 per year, the present value of which, according to Mr. Turnbull's multipliers to age 70, is approximately \$705,000, significantly less than the plaintiff's reference to 70% of full locksmithing capacity at \$1,266,000 from Mr. Turnbull's multipliers.

[411] As a result, plaintiff's counsel submits that Mr. Ishii's without accident total earning capacity must be raised above his 70-80% of a locksmith career (or 65% based on my assessment), back to a full 100% total potential life earning once all his

employment capacity is considered, taking into account loss of capacity relating to driving jobs and light automotive work.

[412] I very well understand that the valuation of an award for future loss of capacity to earn income is an assessment, not just a mathematical exercise, and must consider all the circumstances, but plaintiff's submission that the assessment should be increased back to 100% effectively neutralizes the impact of the pre-existing injuries of the 2010 Accident, and ignores the third *Rab* step, which is valuation of the possible future loss, including the relative likelihood of the possibility occurring.

[413] What counsel's submission does is overvalue the possible future loss based on the possibility of a driving career. It is not just a question of percentage capacity, the further step not taken by counsel's submissions is the valuation of that loss of the driving capacity, which is less than his locksmithing capacity.

[414] In addressing this submission of the plaintiff on valuation of the capital asset, I am not relying simply on assessing the plaintiff's loss on an arithmetical basis. I recognize the importance of taking into account all relevant evidence.

[415] Paraphrasing *Parypa* at para. 80, my assessment above is not an attempt at mathematical certainty. Like plaintiff's counsel, I have considered the likelihood of hypothetical future events and proceeded to estimate the dollar amounts corresponding to the most likely scenario.

[416] One example of considering all the scenarios is with reference to one of the defendants' final submissions that the assessment of the loss of capacity should be reduced by two-thirds based on a "mitigation" for Mr. Ishii's uneven work history, his lack of clear plans for future employment, his difficulty finding work before Tidey, and his lack of retraining attempts such as computer training. This submission that the assessment should be reduced is effectively a counter-submission to the plaintiff's submission above that the amount of the assessment should be increased.

[417] In this respect, the defendants appear to be applying a reduction on account of negative contingencies arising out of Mr. Ishii's work history, as the defendants cite *Ploskon-Ciesla*.

[418] In that case, at paras. 54–61, the Court of Appeal for British Columbia reduced an assessment of future income loss by 50% to reflect the uncertainties associated with the plaintiff's future plans, and an additional 20% discount to reflect negative conventional contingencies such as the risks of future unemployment and illness.

[419] Here, Mr. Ishii was 25 years old at the time of the 2017 Accident, without an established work history and a clear career trajectory. At the time of trial he was 31 years old and more established by having worked at Tidey for 5 years. He has completed about half of the apprenticeship hours needed to complete locksmith certification, he is happy with that work, he gave evidence he intends to continue with the locksmith work for as long as he can, and his skills, aptitude, and abilities are well-suited to that work. As a result, Mr. Ishii's employment with Tidey provides a strong basis for assessment of his future loss of earning capacity.

[420] As stated above, in assessing Mr. Ishii's future loss of earning capacity I have considered all of the evidence of Mr. Ishii's work history. I have considered different scenarios for Mr. Ishii's future work, and I have used Mr. Turnbull's Table B multipliers, specifically with reference to the multipliers to age 63 in Table B, which is roughly equivalent to assuming retirement at age 70 with the labour market adjustments of participation, unemployment and part-time work, which include the negative contingencies referred to by the defendants.

[421] I have also considered the negative contingencies of the possibility of the Tidey business failing, or that Tidey work will not be available to Mr. Ishii; however, I consider those negative contingencies to be balanced by the positive contingencies referred to by Tidey's principal, Mr. Wales.

[422] Mr. Wales identified positive contingencies as including a steady demand for locksmithing work, the development of the industry towards more electronic locking devices, which suit Mr. Ishii's mechanical and computer interests and abilities well, Mr. Ishii's demonstrated skill with the more advanced locks at Tidey, and the possibility that Mr. Ishii could advance to management of the shop with some help with management and sale skills, potentially taking over the company from Mr. Wales.

e) Conclusion – Future Loss of Capacity to Earn Income

[423] As I have referred to above, the assessment of a future loss of capacity to earn income needs to what is fair and reasonable in all the circumstances: *Parypa* at paras. 62–70.

[424] I have considered all the evidence and circumstances of the impact of the 2017 Accident on Mr. Ishii, and the pre-existing issues of the 2010 Accident, and, importantly, the credibility issues which have also factored into the assessment.

[425] As a result, I consider the award of \$260,000 assessed for Mr. Ishii's future loss of earning capacity, having considered all the relevant factors, to be fair and reasonable.

5. Future Cost of Care – loss of housekeeping capacity

[426] Mr. Ishii claims an award for loss of housekeeping capacity.

a) Legal Principles

[427] The legal principles applicable to a claim for the loss of housekeeping capacity were recently considered in some detail in *McKee v. Hicks*, 2023 BCCA 109.

[428] Two key points are: first, the loss of housekeeping capacity is the plaintiff's, and not a loss of a family member or friend who assists the plaintiff. Second, such a claim may be addressed as part of the non-pecuniary loss, or as a segregated

pecuniary head of damage. The Court of Appeal in *McKee* addressed these points as follows:

[98] In *Liu v. Bains*, 2016 BCCA 374, the Court cited para. 63 of Justice Huddart's judgment at para. 25, and said:

[26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

[Emphasis in original.]

[429] At para. 101, *McKee* then refers to *Kim v. Lin*, 2018 BCCA 77 at paras. 27–37, where the “Court again grappled with the somewhat vexing issue of when a pecuniary award should be made for a loss of housekeeping capacity,” including the following at para. 30 of *Kim*, quoted from Jamie Cassels & Elizabeth Adjin-Tetty, *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187–188:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

[Footnotes omitted in *Kim*. Emphasis in original.]

[430] *McKee* concludes:

[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.

[431] With these principles in mind, the parties' positions and my analysis on the claim for loss of housekeeping capacity are as follows.

b) Plaintiff's position on loss of housekeeping capacity

[432] Mr. Ishii submits he is less capable of housework, including cooking and low level cleaning.

[433] Mr. Ishii also refers to the evidence of two of his two roommates, Shannon Drake and Sean McKenna; the occupational therapist, Neha Bhardwaj; and the recommendations from the physical capacity and work evaluation assessment of Bruce Hunt.

[434] Mr. Hunt recommends the support of a housecleaner twice a month, or \$3,600 per year.

[435] Mr. Ishii submits that based on Shannon Drake's evidence he will need much more assistance, and claims \$7,200 per year, based on once a week, for life.

[436] Further, based on Mr. Hunt's recommendation, Mr. Ishii claims \$1,000 over 10 years to "chart his future home and domestic support services should he purchase a home."

[437] Using Mr. Turnbull's cost of future care tables based on the claim for \$7,200 per year, Mr. Ishii calculates his total claim at a present value of \$223,358.40.

c) Defendants' position on loss of housekeeping capacity

[438] The defendants submit there should be no award for housekeeping.

d) Analysis of loss of housekeeping capacity

[439] There were a number of references in the evidence to housekeeping, including Mr. Ishii's evidence, and the evidence of his two roommates, Shannon Drake and Sean McKenna, the occupational therapist Neha Bhardwaj, and physiatrist Bruce Hunt.

i. Mr. Ishii's evidence

[440] Mr. Ishii's evidence at trial regarding housecleaning was that before the 2017 Accident he had moved from his mother's residence in March 2017 to a basement suite with Sean McKenna and Shannon Drake. For that move he received help from his friend, Conner, and his soon to be roommate, Sean. He needed help with lower level cleaning activities, he said he had a little bit of a mess that needed cleaning up at his mother's place before they could move everything.

[441] At the basement suite before the 2017 Accident he was able to keep his own personal area clean, as well as any tasks needed in the common areas, he could load and unload the dishwasher, he could do his own laundry, and just generally sweep and tidy up.

[442] In the weeks following the 2017 Accident, he could still do things at chest level such as cleaning counters and sorting out the desk in his room. Anything below chest level requiring him to lean over was difficult, such as putting dishes in the dishwasher. He described the laundry as challenging. Putting clothes into one or the other of the washer and dryer was usually not a problem, it was transferring anything from the washer on the bottom to the dryer on top, explaining that in a fully seated position he could not reach the dryer, and standing he could not reach the washer.

[443] Since 2017 he described how he and his roommates had figured out ways around certain things, certainly the sort of low level work. He has been able to improve a little, like he now has a standing dustbin for sweeping, and in the dishwasher the utensils tray is removable so that often becomes his responsibility.

[444] Summarizing Mr. Ishii's evidence, before the 2017 Accident he had been assisted by others with lower level cleaning at his mother's house before he moved to the basement suite. At the basement suite he could keep his own personal area clean, and could do tasks in the common area, he could load and unload the dishwasher, and do his own laundry and sweep and tidy up.

[445] After the 2017 Accident he found laundry to be challenging, he continues to require assistance with lower level cleaning, and he can contribute to upper level cleaning and some aspects of the dishwasher, and his abilities have improved a bit to help with sweeping tasks.

ii. Shannon Drake and Sean McKenna

[446] Mr. Ishii's roommate, Shannon Drake, gave evidence that before the 2017 Accident, since she and her partner had lived together there was not much that Mr. Ishii had to do. There was a general roommate division of labour. Mr. Ishii cleaned his own room, was expected to generally pick up after himself in the common areas, help load and unload the dishwasher, and do his own laundry.

[447] After the 2017 Accident, Mr. Ishii would ask for help with his laundry, and she would help him put it in the washer and dryer. She continues to assist him with his laundry. Right after the accident he could not put things in the dishwasher or help unload the dishwasher.

[448] In the credibility section above, I conclude that I place little weight on Ms. Drake's evidence because she appeared to be in part motivated to assist her friend, Mr. Ishii, in her emphasis on her view that Mr. Ishii needs a lot of money to become independent, and her opinion that Mr. Ishii's knee and hip pain relate to his back pain. For these reasons, I can place little weight on her evidence regarding housekeeping.

[449] Mr. Ishii's second roommate, Ms. Drake's partner, Sean McKenna, was asked in direct examination if he helped him with anything around the house after the 2017 Accident. He stated he believed he changed over some laundry for him, took the

garbage out for him, “those kinds of things.” When asked if Mr. Ishii asks for help around the house, Mr. McKenna replied that he tries not to, but yes.

iii. Neha Bhardwaj

[450] Neha Bhardwaj is an occupational therapist who wrote an initial assessment report dated January 11, 2018 based on her assessment conducted at Mr. Ishii’s basement suite on January 4, 2018. She wrote a discharge report dated May 21 2020.

[451] At trial, Ms. Bhardwaj described some of her observations from her visit to the suite Mr. Ishii shares with his two roommates. She described the living environment as “highly unkempt”, with boxes in the living room Mr. Ishii had not yet unpacked; his bedroom was incredibly messy and unclean; he shared cleaning duties with his roommates; and he had difficulty cleaning floors.

[452] Ms. Bhardwaj’s reports make no recommendations for living assistance or household management.

[453] Ms. Bhardwaj recommended that Mr. Ishii attend an active rehabilitation program to improve his range of movement, strength and endurance for his daily activities and employment.

iv. Bruce Hunt

[454] Bruce Hunt is the physiatrist called by Mr. Ishii. I summarized Mr. Hunt’s evidence above and expressed my concern about his opinion on the need for housekeeping assistance because it appears to be based in part on Mr. Hunt’s interpretation of Mr. Ishii’s mental state, which appears to be based on his mistaken view that Mr. Ishii was unable to work “for several days” following his work capacity assessments, focussed on low level cleaning, and a speculative view regarding the reason why Mr. Ishii did not respond to his follow-up email for two weeks. His opinion on housekeeping appeared to be directly related to his perception of Mr. Ishii’s mental state, and how he did not consider it fair to his roommates to have

to cleanup for him, and it can become contentious when a roommate is not pulling their own weight.

v. Dr. Steven Helper

[455] Dr. Helper, the physiatrist called by the defendants, reported on Mr. Ishii's activities of daily living are provided in his report at page 11, as follows:

1. Post-MVC, Mr. Ishii states that he is functional with his activities of daily living (ADLs). He has varying degrees of pain with dressing activities, but he is functional.
2. As it relates to his instrumental activities of daily living (iADLs), he has decreased endurance for driving. ... For housework, he performs most daily task independently with caution. He is cautious with bending activities because of his low back and kneeling and squatting activities because of his pre-existing right knee issues. The combination of the two plays off each other and makes his ability to bend or crouch difficult. He defers some duties to his roommate, such as cleaning the floor or cleaning the cat litter. ... He is mostly independent with his grocery shopping activities.

[456] Considering all the evidence about housekeeping, Mr. Ishii is not unable to do any housework, and difficulties he is having with housework are not only related to the injuries he suffered in the 2017 Accident. Mr. Ishii benefits to some degree from his roommates in assisting him with some household chores, but he can perform household work, with some difficulty or frustration. Further, the evidence indicates that for some or all of Mr. Ishii's difficulties, limitations on his cleaning abilities are focussed on lower level cleaning, which was something that he required assistance with before the 2017 Accident.

vi. Conclusion

[457] Mr. Ishii has suffered a degree of loss of housekeeping capacity as a result of the 2017 Accident, and also the 2010 Accident.

[458] It lies in the Court's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage: *Liu v. Bains*, 2016 BCCA 374 at para. 26.

[459] I have considered Mr. Ishii's injuries and his corresponding physical and mental limitations in assessing general damages, including those which impair his ability to perform domestic chores: *Riley v. Ritsco*, 2018 BCCA 366 at paras. 96–103; and *Liu* at paras. 16–34.

[460] I find that Mr. Ishii is not incapacitated from doing routine housework or cooking, and I decline to award a separate amount for diminution of housekeeping capacity.

[461] I conclude that the non-pecuniary award is sufficient to compensate Mr. Ishii for any past and future loss of housekeeping capacity. The figure that I have proposed for non-pecuniary loss takes into account all of the general damages Mr. Ishii has suffered and will suffer. It should not be augmented by a segregated award for loss of housekeeping capacity

6. Future Cost of Care – personal trainer, psychotherapy, medication

a) Introduction

[462] The parties agree that Mr. Ishii requires future care comprising of a personal trainer, psychotherapy and medication.

[463] The parties disagree on the scope of the care, and consequently the amount of the award for such care.

b) Legal Principles

[464] The legal principles applicable to an assessment of a cost of future care claim are summarized in Justice Adair's judgment in *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, as follows:

[107] An award for cost of care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's

recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[465] In considering a cost of future claim, the Court is concerned in ensuring that the plaintiff is provided with adequate future care for which the plaintiff has objectively demonstrated need based on the evidence tendered: *Andrews* at 261; and *Gregory* at para. 39.

[466] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition, or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[467] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21.

c) Plaintiff's position on future care costs for a personal trainer, psychotherapy and medication

[468] Mr. Ishii submits that it is unanimous among the experts that he will require future physical therapy/active rehabilitation.

[469] Mr. Ishii refers to the following recommendations of experts:

- Bruce Hunt's recommendation of ongoing physical therapeutic treatment: 2-4 times per month, at \$90 per session, or \$2,160 to \$4,320 per year, with Mr. Ishii submitting that 10 years would be an appropriate length of time; the present value, according to the multipliers in the report of Mr. Turnbull, being a range of \$49,290 to \$98,496;

- Dr. Anton recommends psychological treatment combined with active rehabilitation, as many as 24 additional counselling sessions.

d) Defendants' position on future care costs for a personal trainer, psychotherapy and medication

[470] The defendants submit that an award of \$9,884.00 is appropriate, based on the defendants' written submissions on the following experts' recommendations, summarized by the defendants as follows:

- Dr. Helper's recommendation for psychological support and kinesiology:

\$83.00 x 20 kinesiology appointments:	\$1,660
\$207 x 12 psychological appointments:	<u>\$2,484</u>
Total:	\$4,144

- Dr. Spivak's recommendation for cognitive behavioural therapy: \$207 x 20 sessions = \$4,140;
- Dr. Spivak's recommendation for psychiatric medication, covered under MSP, but up to \$1,000;
- Dr. Kiraly's recommendation for psychotherapy, cognitive behavioural psychotherapy, mindfulness meditation or yoga, psychiatrist, psychotropic medications = \$3,000 - \$4,000 per year (duplicates Dr. Spivak recommendation for cognitive behavioural therapy);
- Dr. Anton's recommendation for occupational therapy = \$120 x 5 sessions = \$600.
- **Total: \$9,884**

e) Analysis of future care costs for a personal trainer, psychotherapy and medication

[471] An award for cost of care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The

award must (1) have medical justification, and (2) be reasonable: *Golkar-Karimabadi* at para. 107.

[472] Here, the parties agree that Mr. Ishii requires future care comprising of a personal trainer, psychotherapy and medication.

[473] The expert evidence also establishes that Mr. Ishii is in reasonable need of a personal trainer, psychotherapy and medication.

[474] The need for psychotherapy is established by the recommendations of Dr. Spivak, Dr. Anton and Dr. Kiraly.

[475] The defendants' submissions refer to Dr. Kiraly's recommendation for \$3,000 - \$4000 per year for psychotherapy, cognitive behavioural psychotherapy, mindfulness meditation or yoga, psychiatrist, psychotropic medications.

i. Physical rehabilitation / Kinesiology

[476] There are references in the expert reports to deconditioning, for example Dr. Anton's diagnosis that Mr. Ishii has lost strength, endurance and flexibility as a result of reduced participation in exercise and activity, which probably contributes to Mr. Ishii's back pain from the 2017 Accident.

[477] As a result, for Mr. Ishii to improve his function and quality of life, in Dr. Anton's opinion an exercise based active rehabilitation program, coupled with psychological treatment, is essential.

[478] Dr. Anton recommends at least 24 kinesiology sessions before Mr. Ishii can continue exercising independently.

[479] Bruce Hunt recommends 2-4 physical rehabilitation sessions a month, at \$90 per session, or \$2,160 to \$4,320 per year.

[480] In my view, to allow for a significant opportunity for Mr. Ishii to move towards an independent exercise regime, 48 sessions of kinesiology will provide for 2

sessions a month for two years, or 4 sessions per month for one year, that 2-4 range being consistent with Bruce Hunt's recommended range, for a total of \$4,320.

[481] Given the nominal effect of the use of multipliers for a present value figure for this future care cost, and for psychotherapy and medications below, I consider the amounts assessed to be fair and reasonable.

ii. Psychotherapy

[482] The experts' recommendations for psychological treatment are expressed in a variety of ways, but all confirm that an important aspect of a hoped for improvement in Mr. Ishii's physical pain and emotional issues is counselling. Dr. Helper recommends 12 psychological sessions at \$207 per session; Dr. Spivak recommends 20 sessions of cognitive behavioural therapy at \$207 per session, Dr. Kiraly recommends psychotherapy, cognitive behavioural psychotherapy, mindfulness meditation or yoga, and a referral to a psychiatrist, at a cost of \$3,000 to \$4,000 per year, without reference to a time frame other than the comment that Mr. Ishii may need the treatments off and on for the rest of his life.

[483] Dr. Anton recommends as many as 24 psychological sessions.

[484] Dr. Anton states that psychological treatment is an important part of the management of chronic pain. The recommended 24 psychological or psychiatric therapy sessions will cost approximately \$4,800, which I consider to be fair and reasonable for this component of the award for future cost of care.

iii. Medication

[485] Dr. Kiraly recommends psychotropic medications, some of which may be covered under the medical services plan, but may can be about \$100 per month. Two years of medications will cost approximately \$2,400, which I would consider an appropriate award for the cost of medication.

f) Conclusion

[486] The awards for future cost of care described above are summarized as follows:

- 1. 48 kinesiology appointments at \$90 per session (\$4,320);
- 2. 24 psychological or psychiatric therapy sessions at \$200 per session (\$4,800);
- 3. Medication (\$2,400);

Total: \$11,520.00

[487] The prospect for improvement in Mr. Ishii’s condition depends on a treatment regime including physical rehabilitation and psychological or psychiatric counseling.

[488] In order to allow Mr. Ishii to take advantage of the recommended treatment, and to provide the best potential for improvement, I consider it appropriate to not reduce the award by 35% on account of the pre-existing injuries from the 2010 Accident.

[489] As a result, the total award for future cost of care is \$11,520.00.

7. Special Damages

[490] The parties agree on special damages to the date of trial totalling \$4,026.05.

VII. CONCLUSION

[491] In summary, the plaintiff is awarded, and entitled to judgment against the defendants, the following damages:

Non-pecuniary damages (reduced by 35%):	\$100,750.00
Past loss of earning capacity (reduced by 35%):	\$ 26,300.00
Future loss of earning capacity (reduced by 35%):	\$260,000.00
Future care costs:	\$ 11,520.00

Loss of housekeeping capacity:	\$ 0.00
Special damages:	<u>\$ 4,026.05</u>
Total:	<u>\$402,596.05</u>

VIII. COSTS

[492] Subject to any submissions the parties may wish to make, Mr. Ishii is entitled to his costs of the action from the defendants at Scale B.

[493] If the parties wish to make further submissions on costs, they may arrange a further hearing before me for that purpose through Supreme Court Scheduling within 30 days of the date of this judgment.

“Jones J.”