IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Matwijec v. Goodridge,*
2024 BCSC 2030

Date: 20241108
Docket: M1911190
Registry: Vancouver

Between:

Andrew Matwijec

Plaintiff

And

Bradley Edward Goodridge

Defendant

Before: The Honourable Justice Hamilton

Reasons for Judgment

Counsel for the Plaintiff:	N.J. Hartney E.H.W. Lay
Counsel for the Defendant:	S.N. Baldwin S.Q. Karim
Place and Dates of Trial:	Vancouver, B.C. July 2-5, 8-12, 2024
Place and Date of Judgment:	Vancouver, B.C. November 8, 2024

Table of Contents

Overview

[1] The plaintiff ("A.")[1] was injured in a motor vehicle accident which occurred in January 2019 in Surrey. He was driving his Mazda 3 vehicle north on 132nd Street when it was t-boned by the defendant's Toyota Yaris vehicle (the "Accident"). A's vehicle was a total loss.

[2] The defendant admits liability and that A. was injured in the Accident. The issue is the quantum of damages.

[3] A. suffered soft tissue neck and back injuries, left and right shoulder injuries, headaches and psychological injuries as a result of the Accident. He was a labourer, returning to modified duties from May of 2019 until June of 2021 but was unable to continue working. A. has withdrawn from most physical and social activities and spends much time in his room. He continues to have daily pain, particularly in his shoulders, low mood and significant difficulties sleeping.

Positions of parties

[4] The plaintiff seeks damages as follows:

(i) Non-Pecuniary Damages of $300,000;

(ii) Past Loss of Income Earning Capacity of $251,394 (gross);

(iii) Future Loss of Income Earning Capacity of $571,031 (gross);

(iv) Past loss of housekeeping capacity of $13,200;

(v) Future loss of housekeeping capacity of $39,242;

(vi) Cost of Future Care of $2,243.25, and,

(vii) Special Damages of $11,972.63,

[1] I refer to the plaintiff and lay witnesses by initials for brevity and intend no disrespect.

Total: 1,189,082.88

[5] The defendant's position is that:

(i) Non-pecuniary damages should be $120,000 less reductions of 10% for pre-existing injuries and 25% for failure to mitigate, or $78,000;

(ii) Past loss of income earning capacity is $174,324 net less 25% for failure to mitigate and 10% for pre-existing health conditions, or $113,310.60;

(iii) Future Loss of Income Earning Capacity: Scenario A, $56,000 based on one year's salary for A. to recover from shoulder surgeries; or alternatively Scenario B, $130,340.45 based on A. assuming a more sedentary occupation;

(iv) Cost of future care is $4,000 (based on Scenario A - including post-surgery treatments);

(v) Special damages are $2968,

Total: $254,438.67 or alternatively $328,619.17 including a 25% reduction for failure to mitigate and 10% for pre-existing injuries.

[6] There are three significant differences between the parties' positions. First, the defendant claims that A. had pre-existing psychological issues, back and shoulder issues, which A. denies. Alternatively, A. maintains that any pre-existing conditions were asymptomatic, only becoming symptomatic as a result of the Accident.

[7] Secondly, the defendant submits that A. failed to mitigate, including by failing to follow medical recommendations such as undergoing shoulder surgeries or taking anti-depressants and A. failing to pursue more sedentary work.

[8] A third difference relates to the parties' positions on future earning capacity. A. submits that he is permanently unable to be employed as a labourer or otherwise for the next 11 years until retirement age. The defendant claims that A. could return to work as a labourer after shoulder surgeries; alternatively, A. could work in a more sedentary capacity as a cashier, security person, driver or building manager.

Evidence of the Witnesses

[9] A. testified and called six lay witnesses and three expert witnesses. The defendant called one lay witness and three expert witnesses. I will summarize their evidence below but first comment generally on credibility.

[10] A. presented in a straightforward, open manner, recognizing the importance of being accurate. He self-corrected his evidence on occasion when he felt he was not completely accurate. He was humble and polite. At times he became embarrassed and frustrated with himself, for example, for not finding tabs in the exhibit books quickly. He made appropriate concessions and at times offered evidence that was contrary to his interests. For example, he made a point of stating that his thoughts about suicide in 2021 were not related to the Accident.

[11] A. was visibly tired when he testified, consistent with his testimony regarding having minimal sleep. He regularly shifted in his seat while testifying, in obvious pain. At times I personally observed that he 'wore his pain on his face', as described by his friend SM. A's evidence was generally consistent with medical records and with the observations of the lay witnesses. He was cross-examined on some discrepancies between what he said at his discovery versus at trial but overall the discrepancies were minor or explained.

[12] I accept A's testimony almost in its entirety as credible and reliable. The one exception is that A. testified that he was on track to be a manager at Retro. A. was clearly excited about landing a job at Retro and saw it as a stepping stone to more pay and a better career. However, he had only been there for a short period of time. I prefer the evidence of the operations manager at Retro, JH, on this point that A.

was a good worker but not on a management track. In any event, A's submissions on income capacity are not based on him being in management.

[13] I found each lay witness credible and reliable. Furthermore, their testimony was consistent with A.'s testimony and amongst the other lay witnesses. I accept the evidence of the various lay witnesses, with one exception relating to A's long-time friend SM on one point. SM gave evidence that A. suffered a brain injury in the Accident and that his memory issues relate to his brain injury. SM is not an expert and as such, I do not rely on that part of his evidence. I did find he, like the others, was credible and reliable in all other aspects.

[14] I will now address my factual findings set out by individual witnesses.

A.'s Evidence

[15] A. was 49 years old at the time of the Accident and 54 at trial. He had a good upbringing in Ontario and played sports. He also played guitar and some drums. He loved to cook since he was six years old and felt "at home" in the kitchen.

[16] A. was not an academic. He is dyslexic and his marks were less than average. He liked cooking class.

[17] A. thoroughly enjoyed working from a young age. He took a year off from high school to work. He worked at restaurants as a teen and after high school attended a college program for culinary arts. He did not complete his degree because he failed the food costing class due to the math.

[18] A.'s employment during the 90s and early 2000s was mostly as a chef/sous chef at a variety of restaurants in Ontario. He also sometimes worked as a bouncer on the weekends. He was big then and his nickname was "Tank".

[19] A. always enjoyed working with his hands. He was a skilled chef and passionate about food. He thrived dealing with the long hours, stress and heat of working in a busy kitchen. A. never had office jobs as he is not good with computers because of his dyslexia.

[20] In the mid-90's, A. was involved in a minor motor vehicle accident. He had right ankle pain for three months but fully recovered.

[21] In 2003, A. moved to British Columbia for a vacation and ended up staying. It was easy to find work as a chef and he worked for several restaurants in Vancouver for $16 per hour.

[22] In early 2006, A.'s father and 'best friend' passed away from cancer. A. had visited his father in Ontario in December 2005 and cooked him all of his favorite foods. A's father passed away after A returned to British Columbia which took the wind out of A's sails, causing him to have a "nervous breakdown" and take a year off work, though he did do some part-time work as a bouncer.

[23] In 2007, A. accepted a job opportunity as a labourer with Astroturf West Distributors Ltd. ("Astro"), an artificial turf-laying company. He worked as a labourer for Astro until 2021.

[24] The work at Astro was physically demanding, and usually outdoors. Astro installed artificial turf for new soccer, football and field hockey fields for schools and municipalities. The intense work season lasted from approximately May through November each year when the weather was good. A. would apply for EI benefits during the off-season.

[25] A. worked 6-7 days per week for 8-10 hours per day during Astro's work season. He first earned $15 per hour but after a couple of weeks of proving himself, he earned $17 per hour, with increases each year thereafter. By 2018 he earned $27 per hour.

[26] A's duties involved unloading trucks, shovelling, rolling out mats of turf weighing thousands of pounds each, holding up turf using clamps to keep pieces of turf in place while they were sewn together and operating machines like forklifts, John Deere spreaders, drum rollers and Bobcats. A. enjoyed the physicality.

[27] In or around 2010, A. learned he had type 2 diabetes. He weighed over 300 lbs then due to his love of cooking and eating cakes. After his diagnosis, A. cut out sweets and started to lose weight.

[28] In 2012/2013, A. spent 16 months in prison for drug trafficking. While incarcerated he decided to change his life, learned to weld and lost almost 100lbs.

[29] A's incarceration did not affect his employment. He worked briefly for Ocean Marker Sport Surfaces (2014) Ltd. in 2015 resurfacing running tracks but quit after a short period and resumed employment with Astro.

[30] In May 2017, A. was involved in a minor motor vehicle accident (the "2017 MVA") in which his vehicle was rear-ended and he suffered a neck sprain. A. attended his family doctor, Dr. K. three times after the 2017 MVA and had physiotherapy. He complained about pain in his left upper neck/scapula region. There were no complaints recorded with respect to his shoulders. I accept A.'s testimony that his injuries from the 2017 MVA were resolved within a few months. He settled his claims regarding the 2017 MVA with ICBC for $15,000.

[31] In late 2018, A. sought a change from the routine of working for Astro. He wanted a year-round job with regular hours. He was hired as a labourer at Retro Specialty Contractors ("Retro"), a concrete restoration company. He kept Astro as a "backup" in case things did not work out at Retro.

[32] The work at Retro was physically demanding. A. used 'Hilti guns' (15-20 pound jackhammers) held overhead while removing old concrete from ceilings. He also used larger jackhammers on concrete on the ground, vacuumed, painted squares and carried 50 pound bags of sand up and down stairs.

[33] A. started at Retro at the end of September 2018. He worked 619 hours (over 40 hours each week) at $27 per hour between then and the Accident. He earned $18,055.98 in total at Retro.

[34] Before the Accident A. planned to work full time with Retro, but after a few years switch to running his own excavator for a company in order to make even more money. A. planned to work until age 65 or 70 or possibly longer, but had no concrete retirement plans.

[35] Before the Accident, A. enjoyed his work which took up much of his time. He also attended the gym almost daily, using the treadmill and weights and doing callisthenics. He enjoyed one to three-hour hikes every few weeks. Sometimes he hung out with friends/colleagues after work.

[36] A. collects die-cast and model toy cars, specifically Volkswagens. He owned 5000 of them prior to the Accident but subsequently had to sell half of them to make ends meet. A. was devastated to have to sell these cars.

[37] A. testified and I accept that he had no physical limitations or complaints prior to the Accident.

[38] Mentally, around the time that A. started work with Retro, he was going through a messy breakup with a partner, Ms. L., who had cheated on him. A.'s mood was not the best during this period because the break up period lingered. Overall, however, he felt that things were looking up. He had secured a good job at Retro which he considered a stepping stone to even more positive things in his career.

[39] Dr. K. prescribed an anti-depressant for A. in 2018 for his relationship troubles. A. was taking the medication at the time of the Accident but later stopped because he felt the medication was not helping him, made him feel ill and he was concerned about the side effects.

[40] Notably, there is no expert evidence tendered concerning the potential impact of any pre-existing depressive symptoms or A.'s decision to go off the anti-depressant. None of the retained experts opined on the issue in their reports.

[41] The Accident occurred on January 9, 2019, when A. was driving himself and his co-worker JU home after work. A. was turning left from 132nd Avenue to 106th

Street when the defendant suddenly darted from his stop sign and T-boned A's vehicle on the driver's side.

[42] A. testified that the Accident "came out of nowhere". His vehicle spun around on impact. Video footage of the Accident played at trial was consistent with A.'s description.

[43] On impact, A.'s body was jarred sideways "like a ping pong ball". When A's body jarred to the right, his right shoulder collided with his passenger JU. When A's body jarred to the left, his left shoulder hit the side of his vehicle.

[44] A's immediate reaction was anger that his vehicle was damaged as he walked to JU's house to phone ICBC. His car was not drivable.

[45] The day after the Accident, A. was in a lot of pain. He was unable to move much in the days following. A. felt severe left shoulder pain, neck pain and headaches initially following the Accident and later also felt pain in his mid/lower back and right shoulder.

[46] A. still experiences pain in his back but that pain has improved somewhat over time. His neck pain has gotten a little better but he still experiences it daily. A.'s shoulder pain has increased since the Accident. He continues to have significant pain when using his shoulders, left worse than right. The pain in his left shoulder is always present while the pain in his right shoulder comes and goes. A. continues to have significant limitations in his function and range of motion in both shoulders.

[47] A. had constant headaches following the Accident. He still suffers headaches approximately 2 or 3 times per week, but they are less severe than the initial migraine-type headaches. He also experiences dizziness. In cross examination, A. was asked about symptoms related to his A1C levels (related to his diabetes), and it was put to him that that dizziness is a symptom potentially related to higher than desired A1C levels. However, A.'s complaints to Dr. K. about dizziness occurred during periods when his A1C levels were within a normal range.

[48] A. attended his family doctor after the Accident. Dr. K's notes indicate:

> [14-Jan-2019: 1st MVA]
>
> Andrew had an MVA on Jan. 9, 2019 at 5,37 min. pm. and he was t-bonned by another car on his green light. The car it not drive able. the police was not there nor ambulance. Feels sluggish and sore.
>
> He walked home. and hsi sleep was horrible,
>
> Now is c/o of pain between his shoulder blades, back of his neck and upper back with tightness, also headaches, hands with numbing and both ankles also painful and numbing on and off. Not working since this happened. Also c/o headaches and blurred vision.
>
> OE: walking slowly and with visible painful body.
>
> Cranial nerves -II-XII are normal.
>
> neck neck ROAM limited both side to 60 degree and lifting his arms up is also very slow and limited. No visible bruises on his head, neck or upper torso.
>
> No bruises on his legs.
>
> IMP: total body concussion, neck and upper back sprain.
>
> P; rest 7-10 days then consider physiotherapy.
>
> "I smoke weed for pain".
>
> (Signed on 14-Jan-2019 15:02 by Djordje Kljajic 26115]
>
> [Quoted verbatim.]

[49] A. began physiotherapy at Mountainview shortly after the Accident for neck, shoulder, and mid back pain.

[50] A's last day at Retro was the day of the Accident. A. testified and I accept that he knew he could not return to such a physical job. He would not be capable of his duties at Retro such as using a Hilti gun with his shoulder injuries. I accept A.'s evidence that it was not physically possible to return to Retro after the Accident.

[51] Instead, A. attempted to return to Astro when the work season started in May 2019 with modified duties such as light lifting and driving machines. Despite lighter duties, A.'s shoulders affected his job immensely. After the Accident, A. was unable to do physical tasks involving lifting or unloading due to shoulder pain. Even driving machines caused him significant pain. Prior to the Accident, A. prided himself as a 'go getter', but afterward, he relied on others.

[52] A. lost his appetite due to pain such that he went from being over 200lbs before the Accident to only 140lbs.

[53] As time passed, A's mood worsened and his work, social life and relationships were negatively affected. He became increasingly angry/frustrated from being in constant pain. A. stopped most social activities. He stopped going to the gym or going on hikes. He sat on the couch a lot, not able to do much, and his depression got worse.

[54] Despite his pain and limitations, in mid-2019, A. started a relationship with MB, the mother of his longtime friend SM.

[55] A. testified and I accept that his relationship with MB was also impacted by his pain from the Accident. A.'s pain and general outlook on his condition became worse and he took it out on MB. He usually slept on the couch because of the pain as he could not find a good position to sleep in/could not get to sleep. He testified (as did MB) that his relationship with MB ended due to his mood issues caused by chronic pain.

[56] A. testified and I accept that he is unable to do heavier housekeeping tasks. For example, in his current residence where he lives with his friend DS, he is unable to mop or put away dishes. He also has trouble dressing himself, particularly pulling a shirt over his head. He puts on jackets in a modified way due to his shoulder pain. He feels lucky that DS currently helps him with chores. His friend C also comes over sometimes to clean and he pays her with a pack of cigarettes or $40.

[57] From 2019 to 2021, A. continued to work modified duties with Astro. His post-Accident earnings each year from employment at Astro and employment insurance ("EI") are as follows:

	T4	**EI**
2019	$44,971	$6,182
2020	$36,001	$17,661
2021	$10,003	$22,669

[58] Despite Astro modifying his duties, A. was physically unable to continue working. His pain and mobility worsened. He was unable to do light duties or drive machines without significant difficulty and pain. At the same time, co-workers increasingly made snide remarks about his light duties which upset A. Finally, in June 2021 A. told his boss at Astro that he could no longer do the job.

[59] During his testimony, A. expressed frustration about how his family doctor handled his care/treatment after the Accident. For example, over the course of approximately two years, A. repeatedly asked Dr. K to send him for imaging of his shoulders to find out why his pain was getting worse instead of better. A. testified that he knew something was very wrong with his shoulders but Dr. K. did not order imaging. Instead, Dr. K recommended calisthenics/kinesiology and massage which A. tried but they caused him so much pain in his shoulders that he stopped.

[60] A. also struggled in pursuing treatment after March 2020 when the COVID-19 pandemic moved certain treatments online. He had just started counselling in March of 2020 and attended two sessions. However, he is not good with computers or remote sessions so he did not continue counselling or online calisthenics. Online treatment was not for A.

[61] Finally, searching for answers himself, A. attended a naturopath in 2021 who recommended a full upper body scan. As such, A. scraped up several thousand dollars to obtain private MRIs of his shoulders, head, neck, and back. The imaging showed that A. had full rotator cuff tears in each of his shoulders.

[62] Dr. K referred A. to an orthopedic surgeon, Dr. Moola. Dr. Moola spoke to A. regarding surgery for his shoulders but A. was not confident in Dr. Moola or Dr. K. A. also did not like that Dr. Moola could not guarantee that surgery would alleviate his pain.

[63] After his relationship with MB ended, A. lived in a van for a while in 2021 until his friend offered him a bus. A. was not able to work and was in dire financial circumstances. He sold half of his toy collection to make ends meet and lived in the

bus until December 2022. When the weather became too cold he was invited by his friend DS to live with her.

[64] In 2023, A. switched family doctors to attend Dr. L. He also consulted pain specialist Dr. Pamela Squire, but was disappointed to learn that her approach was to teach patients to “turn the pain off” using their minds. A. thought this meant that she thought his pain was in his mind, not real.

[65] In March 2024, A. started receiving CPP-Disability payments. He applied earlier but he and his family doctor initially completed the forms incorrectly. A. also began receiving disability payments from ICBC in late 2023/early 2024.

[66] A. testified about his current daily routine. He cannot play sports or go to the gym. He tries to avoid driving because it is painful to hold the steering wheel, difficult to turn his neck and he has anxiety about driving since the Accident. A. sits in his bedroom a lot, pets his cat and goes for light walks. He takes his medications: Trazodone (for sleep), Gabapentin, and a pill he calls the ‘little yellow house’ (for pain). He also smokes cannabis for pain, although I accept that he has reduced his cannabis use recently.

[67] A.’s sleep has been extremely poor since the Accident despite medication. He cannot find a good sleeping position due to his shoulder pain. He usually cannot fall asleep until 5 am and then sleeps into the afternoon. He gets between 1.5 hours and 4 hours of solid sleep per day.

[68] He used to go to karaoke regularly but now rarely goes because he is worried about people bumping into him. A few months ago, a small but intoxicated woman bumped into him, causing him great pain. He feels fragile and fears being injured.

[69] His memory is also affected. He often forgets things and has to write everything down now. He regularly forgets his bank PIN.

[70] In terms of mood, A. is generally sad and withdrawn from social activities but when he is with people, he is impatient and snaps at them.

[71] A. is sad to be unable to work as it gave him a focus. Once the pain starts, his day is over. He locks himself in his room for hours and ‘shuts off’. His life largely consists of sitting in his room with his cat.

[72] I will now summarize the key evidence provided by the lay witnesses.

Evidence of SM

[73] SM has been friends with A. for over 20 years since they worked security together. He considers A. like an uncle. SM is also MB’s son.

[74] Prior to the Accident, SM did not observe A. to have any physical issues, limitations or pain. Before the Accident, A. was happy, outgoing and always willing to help people.

[75] SM saw A. shortly after Accident and observed him in extreme pain, not able to lift his arms above his shoulders. He testified that A’s pain has gotten worse since the Accident. SM could see the pain in A’s face during the period that A. lived with his mother.

[76] SM testified that A. displays memory loss since the Accident. For example, A. could not recognize his own childhood belongings when they were sorting items.

[77] SM testified and I accept that since the Accident, A’s personality has changed dramatically. He is a ‘shell of the man he once was’ and is now hard to be around.

Evidence of GJ

[78] GJ became fast friends with A. in 2016. A. was vibrant and full of life before the Accident. He and A. are “empaths” and share similar views on social change.

[79] Before the Accident, A. had no physical limitations, was fit and agile and nicknamed Tank. GJ was unaware of A. having any mental health or mood issues before the Accident. A. discussed his relationship issues with Ms. L with GJ at the time and GJ was supportive of A. ending the relationship sooner than he did.

[80] Since the Accident A. has become frail. Even hugs have to be gentle to avoid hurting him.

[81] A. has issues getting out of bed and walking a few steps from his bedroom to the washroom. GJ changed the tires on A.'s vehicle and built a better base for his bed because A. cannot do these types of things since the Accident.

[82] GJ testified and I accept that A's personality has changed drastically since the Accident. He no longer attends social outings like karaoke. A.'s friends now have to walk on eggshells and cannot raise their voices around A. A. is now short on tolerance, more distant and generally not the same guy. A's depression got worse after he had to sell part of his toy collection to fund expenses.

Evidence of MB

[83] MB is A.'s former partner and the mother of SM. She is retired, but previously worked as a care aide in a group home.

[84] She met A. in 2019 after the Accident when they went on a date. She noticed his physical limitations immediately. He would wince in pain. Initially, she was attracted to A's mood and personality, but noticed that they degraded over time.

[85] MB and A. lived together for three years but the relationship was not romantic for long. Being in a relationship with A. reminded her of caring for a patient.

[86] A was physically unable to do certain housework tasks so MB did 70% of them. She also helped A. with cooking as he could not open jars, chop vegetables, mash potatoes or lift things out of the oven. He overcooked food because he forgot he was cooking. She had to help him dress.

[87] A. could not sleep due to his pain which disturbed her sleep too. He often left their bedroom to try to sleep on the couch.

[88] A. had outbursts of anger and frustration and would leave the house to calm down. MB broke up with A. after an argument in the car in which he snapped at her and drove erratically. They remain on good terms despite the break-up.

Evidence of DS

[89] DS is a manager for initiatives for Indigenous youth. She lives in a 3-bedroom mobile home with her partner and A.

[90] She met A. in 2020 at karaoke. She testified that A. has a super big heart, is generous and open. They used to attend karaoke regularly but recently he stopped coming.

[91] DS observed quickly that A. had physical limitations. He struggles to cook, reach for a drink, wash dishes, load the washing machine, mop and even got stuck in the bathtub. DS installed a hook in the tub to assist A. get in and out of the tub. DS hired a housekeeper twice a week to help with chores.

[92] DS testified that A.'s pain causes him to become upset and isolate himself. A. appears very sad, depressed and his physical struggles and pain leave him mentally and physically depleted. DS has observed that A.'s sleep schedule is poor.

Evidence of JH

[93] JH was called by the defendant. He is an operations manager for Retro and hired A. in 2018.

[94] JH testified that A's role involved physical labour at construction sites including operating hand and power tools of all types, cleaning and preparing sites, digging trenches, erecting scaffolding, cleaning up rubble, debris and other waste materials and all else required at the job sites.

[95] A. was fit with no physical limitations before the Accident. A's role was physically demanding and he was capable of the work.

[96] JH did not consider A. a candidate for a management.

[97] JH never spoke to A. directly after the Accident. JH was not asked about the availability of modified duties, accommodations, or part-time work at Retro.

[98] JH indicated that sometimes the most junior employees are laid off during the winter but during the past two years there have not been any lay-offs because Retro has been busy throughout the year.

Evidence of JU

[99] JU works for Retro. He worked with A. for 6 months prior to the Accident. JU worked for Retro for about a year before A. started.

[100] JU was the passenger in the Accident. JU could not confirm or deny A's testimony of what happened with their bodies on impact as his memory was fuzzy.

[101] JU testified A. was a good worker. They were work friends at Retro but after the Accident, they did not speak again.

[102] JU testified about the physical nature of the work at Retro and that A. had no issues doing the job and never complained of pain.

[103] JU testified he also sustained significant injuries in the Accident. JU was off work for eighteen months. When he returned, he was scheduled to do a twelve week return to work program but Retro did not have enough light duties, so he returned to full duties after six weeks.

[104] JU testified that junior employees at Retro may be laid off during the winter slow season but he has worked year-round each year.

Evidence of BH

[105] BH has been an operations manager for Astro for the past 15 years.

[106] Physical labour is part of every aspect of the work at Astro. BH explained that the process of installing Astroturf fields is largely done by hand. Laying down of turf rolls requires using a clamper all day, which involves lifting a "fair amount of weight".

Each piece of turf weighs between 15-20 pounds and these pieces have to be physically carried and laid in place. The machines used for applying the ‘lines’ to the field (the generator and glue machines) weigh 500 pounds each.

[107] Before the Accident, A. was a good, reliable worker who understood the processes and enjoyed the work. He was a ‘jack of all trades’ and a helper to the foremen on the job sites.

[108] Before the Accident, A. did not have any physical limitations, mood issues or performance issues and was well-liked by co-workers.

[109] A. returned to work in the 2019 season after the Accident and complained a lot about pain in his shoulders. A. attempted some of his former duties but was not able to do them. As such, he was placed on light duties, primarily operating machinery such as forklifts and John Deere machines. However, machines are only about 20% of the job so much work was not available to A.

[110] BH hoped that A. would recover and be able to return to normal duties but he could not. A.’s mood soured pretty quickly after the Accident and co-workers found him hard to be around. Co-workers increasingly complained that A. was unable to do the job and was dragging the team down.

[111] In 2021, his third season of modified duties, A. told BH that he could not do the job anymore.

[112] BH testified that at Astro overtime is mandatory and part-time work was likely impossible given the nature of the work. Trying to schedule A. to only work machinery would also be “near impossible”. BH noted too that although A. was “capable” of driving the machines, it did not mean he was “comfortable” (ie, without pain) while driving.

[113] BH testified that salaries for A’s role have increased by 30% since A. worked.

[114] I will now address the evidence of the expert witnesses.

Evidence of Physiatrists

Evidence of Dr. Harpreet Sangha

[115] The report of physiatrist Dr. Harpreet Sangha was tendered in A's case. He was qualified as an expert in physical medicine and rehabilitation, and pain medicine. I found him to be a helpful, reliable witness. His opinions withstood cross-examination.

[116] After examining A., Dr. Sangha diagnosed him with:

> 1. Cervicothoracic strain - resulting in chronic regional myofascial pain syndrome.
> 2. Left greater than right rotator cuff strain - resulting in bilateral high grade rotator cuff tears with left greater than right pain, reduced range of motion, and weakness.
> 3. Cervicogenic headaches.
> 4. Disordered sleep.
> 5. Psychoemotional distress.
> 6. Chronic pain syndrome.

[117] In his physical examination of A., Dr. Sangha found 'palpable trigger points', namely, tight bands of muscle that he could feel on palpation. In Dr. Sangha's opinion, the Accident caused A.'s injuries listed above.

[118] Dr. Sangha was challenged on cross-examination as to whether A.'s rotator cuff tears were actually caused by the Accident. Dr. Sangha testified and I accept that the type of tears that A. has are high grade and full thickness tears which tend to be traumatic. It is not normal to see this type of rotator cuff injury in men in their 50's. He also confirmed that the tears are not caused by A.'s diabetes.

[119] Dr. Sangha was also cross-examined about A.'s shoulder imaging showing pre-existing calcification and bony findings and whether these were the cause of A.'s pain and functional limitations. Dr. Sangha explained that A's shoulder problems relate to the tendons that lift the arm up. He testified and I accept that the pre-existing calcification and bony findings in the shoulder are irrelevant to A.'s pain and limitations. Furthermore, Dr. Sangha stated that age-related changes do not

normally cause neck pain. Dr. Sangha's opinion is that the rotator cuff tears as well as the psycho-emotional distress and disordered sleep, which continue to cause A. most of his issues, were all caused by the Accident.

[120] During cross examination, Dr. Sangha testified that he would defer to a psychiatrist in regard to a specific DSM-5 diagnosis, but stated there is an obvious psychological component in A's presentation which is a relevant component in examining a patient with chronic pain.

[121] Dr. Sangha also testified in cross examination that in his opinion A. likely suffered a concussion or mild traumatic brain injury in the Accident, but did not believe his current cognitive issues were caused by that. Instead, A's ongoing cognitive issues are likely the result of his chronic pain and troubled sleep. He also noted that A's initial headaches were likely caused by a concussion, but his current headaches are more likely cervicogenic.

[122] During cross examination, Dr. Sangha explained that the vast majority of A's current state can be explained by the initial injuries deteriorating over time into a chronic pain state, though his cannabis use to deal with the pain may also play a role.

[123] While Dr. Sangha opined that A's symptoms may have been "potentially ameliorated to some degree" by A. receiving more treatment in 2020, this was not expanded on in cross examination. In re-examination, Dr. Sangha noted that if treatments actually made the pain worse (as A. testified in respect of certain treatments he engaged in such as callisthenics), they can cause a risk of 'cocooning', where injuries and maladaptive postures are propagated.

[124] Overall, in terms of prognosis, Dr. Sangha did not expect A.'s symptoms to improve given the time elapsed. The vast majority of recovery for these types of injuries is achieved in the first year and maximum recovery is achieved by the end of two years following the Accident. Any treatment strategies would be aimed at trying

to minimize A.'s symptoms and maximize function within the parameters of A.'s chronic pain presentation.

[125] Dr. Sangha would defer to an orthopedic surgeon to assess whether surgery is an appropriate treatment option. However, he has seen in practice numerous patients who have chronic pain after non-optimal surgical outcomes, and he notes that in A's case, his degree of pain and his mood are "red flags" for his surgical outcome.

[126] In terms of non-surgical treatments, I accept Dr. Sangha's opinion that cortisone injections might improve A's shoulder pain for about three months at a time but will not improve the weakness or range of motion in his shoulders.

[127] Dr. Sangha's opinion is that A. will need to be transitioned to a sedentary role but is skeptical as to whether A. is competitively employable in light of his chronic pain and significant psycho-emotional distress. Considering all of the evidence, I share Dr. Sangha's skepticism.

Evidence of Dr. Gillian Simonett

[128] Dr. Gillian Simonett's report was tendered by the defendant. Dr. Simonett was qualified as an expert physiatrist. I found Dr. Simonett's evidence to be balanced and reliable.

[129] In Dr. Simonett's opinion, A. sustained headaches, neck pain, shoulder pain from the Accident. Dr. Simonett gave no opinion in her report regarding A's rotator cuff tears.

[130] With respect to whether A. should have surgery, Dr. Simonett defers to orthopedic experts and cannot offer an opinion as to the outcomes of shoulder surgery. However, she, like Dr. Sangha, Ms. Aggarwal, and also Dr. Regan whose evidence is summarized below, does not anticipate A. returning to highly physically demanding jobs, particularly jobs with overhead activity or increased use of the left shoulder, unless surgical repair is successful.

[131] With respect to the possibility of pre-existing injuries, Dr. Simonett confirmed that there is no evidence suggesting that A. had any pre-existing pain from the 2017 MVA at the time of the 2019 Accident. When she reviewed the family doctor's records, she was looking for pre-existing injuries and she saw notes regarding car accidents and diabetes and "a bit about mood".

[132] Dr. Simonett testified that A.'s family doctor's records are consistent with what A. discussed with her that the left neck periscapular pain from the 2017 MVA had resolved before the Accident. She confirmed that the shoulder pain is new, only arising after the Accident. She did not see anything in the records that contradicted what A. reported to her.

[133] Dr. Simonett testified that she sometimes prescribes anti-depressant medication to her patients but not the anti-depressant that Dr. K prescribed for A. She noted that there are significant side effects with that specific anti-depressant.

[134] She agrees that Dr. Sangha's diagnosis of 'chronic pain syndrome' is a legitimate syndrome associated with mood dysfunction, sensitization, and kinesiophobia. She uses different words than Dr. Sangha but agrees with his report and his conclusion with respect to A. having chronic pain.

[135] Dr. Simonett testified that A. has chronic pain involving his upper back which includes his neck and chronic pain in his "shoulder girdle" which includes his shoulders and surrounding areas. He also has headaches. He has chronic myofascial regional pain syndrome which means the same as chronic pain syndrome. His prognosis is poor.

[136] Dr. Simonett also testified that when she reviewed Dr. K's records, she wondered why there was a delay in obtaining imaging of A's injuries.

Evidence of Orthopedic Surgeons

Evidence of Dr. William Regan

[137] The report of Dr. Regan was tendered by A. Dr. Regan was qualified as an expert orthopedic surgeon, with a specialty in the causation, etiology, diagnosis, and prognosis of injuries to the shoulder and upper extremities.

[138] Dr. Regan has been a practicing orthopedic surgeon specializing in shoulders for over 30 years. He runs the arthroscopic reconstruction surgery division at UBC, and designs the coursework for shoulder arthroscopy residents. He is an associate professor and teaches numerous courses at UBC. I found him to be a very experienced, balanced, helpful and reliable witness. His opinions withstood cross-examination.

[139] Dr. Regan interviewed and examined A. and read A.'s medical records. He diagnosed A. with:

a) Mysofacial pain of his cervical and thoracic spine/ left and right periscapular muscles;

b) Rotator cuff tears, left greater than right associated with limited bilateral shoulder dysfunction left worse than right;

c) Chronic pain and mood disorder.

[140] Dr. Regan's states in his report: there is overwhelming evidence as cited by review of Dr. K's records, as well as independent evaluators including evaluators from both the Plaintiff and Defendant's expert opinions including Dr. Sangha, Ms. Aggarwal, and Dr. Simonett that A's ongoing issues were caused by the Accident.

[141] Dr. Regan referred to the one contrary expert opinion with respect to the causation of A.'s rotator cuff injuries, as follows:

> Dr. Arneja is the orthopaedic surgeon expert called by the defendant. He provided a document review report which was tendered by the defendant. Dr. Arneja did not ever meet, speak to or examine A. and he was only given limited medical records. Regardless of these limitations, Dr. Arneja's opined that is that the Accident would not likely cause A's rotator cuff tears.

[142] When questioned in cross-examination, Dr. Regan was definitive that A.'s rotator cuff tears were caused by the Accident. A's evidence is that his left shoulder hit the side of the vehicle and his right shoulder collided with his passenger JU (who is tall and weighs approximately 350 pounds). Dr. Regan testified that the mechanism of the Accident described by A. could definitely cause the rotation cuff tears. However, Dr. Regan explained that it is not actually even necessary for A. to have physically impacted anything because the sheer torqueing of the body is enough to have caused A.'s rotator cuff tears.

[143] I accept Dr. Regan's opinions as reliable and I far prefer Dr. Regan's evidence to Dr. Arneja's evidence where they differ. Unlike Dr. Regan and the other experts, Dr. Arneja:

a) Did not interview A. for his medical history;

b) Was not provided with all the relevant medical records;

c) Did not physically examine A.; and

d) And was required to produce a report within a couple of days.

[144] Dr. Regan admits that, as Dr. Simonett (the defendant's physiatrist expert) states, one never knows with 100% certainty as to how rotator cuff tears occur because that would require imaging immediately before and after the Accident.

[145] However, Dr. Regan's opinion, is that A.'s rotator cuff tears, with the left worse than the right, were caused by the Accident. Further, Dr. Regan testified that in the alternative, if it could be somehow proven that A. had smaller, asymptomatic tears prior to the Accident, those tears would have been worsened and rendered symptomatic due to the force of the Accident. As well, if A. had smaller, asymptomatic rotator cuff tears prior to the Accident, it would require less force in the Accident to render them larger or worse.

[146] Dr. Regan agreed on cross-examination that it was possible for asymptomatic rotator cuff tears to become symptomatic even without the Accident, however, no

further evidence was elicited regarding whether this possibility was anything more than remote. I accept the evidence of Dr. Regan that the Accident more likely than not caused A.'s rotator cuff tears in his shoulders.

[147] Dr. Regan was cross-examined about A's consultation with Dr. Moola who first diagnosed A.'s rotator cuff tears in late 2021 and raised the possibility of shoulder surgery. He was questioned as to whether A.'s refusal to undergo or even discuss surgery has prevented A. from recovering/ improving. Dr. Regan testified that it is unclear whether A's decision not to pursue surgery in December 2021 worsened the prognosis for his shoulders. Dr. Regan added that A's rotator cuff injuries had not actually changed much since 2021, and that the nature of these shoulder injuries is not comparable to cancer, for example, where delay is to be avoided.

[148] I accept Dr. Regan's opinion regarding whether A. is a candidate for shoulder surgery, that A's pain is so widespread that even the controlled trauma of surgery may be too much for him and more likely than not worsen his overall pain condition. Dr. Regan would not recommend rotator cuff tear surgery at this time or at anytime until A.'s chronic neck and periscapular pain is under control. I accept Dr. Regan's opinion that due to the length of time A. has had chronic pain, it is hard to tell how successful these efforts might be and that surgery may be unsuccessful and make A.'s pain worse.

[149] Dr. Regan was asked in cross-examination about A. consulting with pain specialist Dr. Squire but not following through with her approach to try to forget about pain. Dr. Regan's evidence was that in his experience, Dr. Squire's approach works for some but not others, commenting that A. "may not have been into that".

[150] Dr. Regan also agreed in cross-examination that A. likely had a vulnerable spine before the Accident which contributed to his current myofascial symptoms. He agreed that A's vulnerable spine could possibly have become symptomatic even if the Accident did not occur, but no further evidence was elicited regarding whether this possibility was material or just remote.

[151] Dr. Regan's opinion, like Dr. Sangha's, Ms. Aggarwal's and Dr. Simonett's, is that A. is disabled from a vocational viewpoint and cannot return to his previous occupations at Astro or Retro. He simply cannot use his upper extremities and shoulders due to chronic pain disorder.

[152] Dr. Regan recommended at least trying injections to A's shoulders to try to temporarily alleviate pain.

Evidence of Dr. Shalinder Arneja

[153] A records review drafted by Dr. Shalinder Arneja was tendered by the defendant. Dr. Arneja was qualified as an orthopedic surgeon. I did not find Dr. Arneja's report/opinions helpful or reliable due to serious limitations.

[154] Unlike the other experts, Dr. Arneja did not interview A. to obtain a history nor did he examine A. As well, he was only provided with seven documents to review, which did not include any records from A's family doctors, physiotherapist, chiropractor, occupational therapist or MSP. Dr. Arneja also had approximately 24 hours to prepare his report.

[155] Despite these limitations, he diagnosed A. with having suffered whiplash and WAD2 -chronic, bilateral shoulder strain and "aggravation of pre-existing rotator cuff disease, possible adhesive capsulitis".

[156] Dr. Arneja was cross-examined extensively on the limitations of his report. He conceded that (1) he would have benefitted in his opinion by having further documentation; (2) interviewing the patient for history is important; and (3) examining the patient is ideal.

[157] He agreed that Dr. Regan, who interviewed and examined A. and had more extensive documentation, was in a better position to give an opinion.

[158] He conceded that Dr. Regan is a well-respected orthopedic surgeon who was part of the faculty when Dr. Arneja received his training at UBC.

[159] Though Dr. Arneja opined that surgery would "likely" benefit A., his opinion was based on the following conditions:

(i) establishing full range of motion in A.'s shoulders before surgery;

(ii) no ongoing concern for adhesive capsulitis;

(iii) A's A1C levels being less than 7.0 (relating to his diabetes);

(iv) A. being fully compliant with pre and post-operative recommendations including post-operative rehabilitation.

[160] Dr. Arneja's opinion is that *if* all of the above conditions were met, *then* A. would "probably" be a suitable candidate for rotator cuff surgery.

[161] Given the serious limitations of Dr. Arneja's report, I do not find his opinions reliable except to note that even Dr. Arneja's opinion regarding surgery is highly qualified. I prefer Dr. Regan's evidence to Dr. Arneja's where the evidence differs.

Evidence of Occupational Therapists

Evidence of Neeru Aggarwal

[162] A. tendered the report of Neeru Aggarwal, an occupational therapist with expertise in functional capacity evaluation. I found Ms. Aggarwal's evidence to be helpful and reliable and her testimony withstood cross-examination.

[163] Ms. Aggarwal put A. through a wide variety of tests. Her testing showed a high, consistent level of effort and that A. was not faking. In Ms. Aggarwal's opinion, A. is unable to continue to be a labourer which requires heavy strength or even a machine operator which requires medium strength.

[164] A. can only lift a 10-pound object from the floor and only 5 pounds to shoulder height. He has various positional limitations as well. Sitting causes increased pain in his neck and back. Standing still causes increased pain in his back. Longer periods of standing cause increased pain in his back, left shoulder and neck.

[165] Functionally, A. cannot sit for extended periods of time for driving nor can he stand and carry things. He also has difficulty with stooping that would make activities that require prolonged neck positioning such as welding, concrete work, using power tools difficult. These positional limitations are a significant contributing factor for him being unable to work at this time at any of his previous occupations as a labourer, machine operator or chef.

[166] A. does not meet the job requirements for his prior employment, either in strength or positional requirements. She also noted that his pain ramping up through the day indicates he would not be able to manage his job duties over the course of the day. She agrees with Dr. Sangha, stating:

> Unless [A.'s] symptoms improve, it is unlikely that he will be able to return to work at any of his previous employment without significant pain consequences and most likely being unable to complete his job duties. Following the MVA, he attempted to return to work with Astro Turf on June 4, 2020. His pain worsened with working and he stopped working completely in June 2021. Dr. Sangha opined that [A.], "cannot perform work activities to anywhere near the same capacity and he has been left with permanent limitations." Dr. Sangha also stated, "I am doubtful that he would be competitively marketable to a potential 'real world' employer". Dr. Şangha indicated [A.'s] "struggles with chronic pain taken in conjunction with significant psycho emotional distress have left him with diminished capacities and therefore as mentioned, likely not marketable". Dr. Sangha specified that [A.] "should be considered to have significant permanent limitations".

Evidence of Dr. Quee Newell

[167] Dr. Quee Newell’s report was tendered by the defendant. She was qualified as an expert in vocational rehabilitation and counselling psychology. One area of concern I have with Dr. Quee Newell’s evidence is regarding A.’s ability to work in particular sedentary jobs. I found this aspect of Dr. Quee Newell’s evidence lacking as it was not fully explained and it was not consistent with the wealth of evidence regarding A’s physical and psychological limitations. I am unable to accept that portion of her evidence which I will address further below.

[168] Dr. Quee Newell’s vocational testing of A. showed he was roughly average in reading. However, he scored in the 5th percentile in spelling and math, which is roughly equivalent to grade 4. He scored equivalent to grade 9 in sentence

comprehension. I accept her opinion that A. is “unlikely to be a good candidate for further formal education or training”. This is consistent with A.’s own evidence.

[169] Absent the Accident, Dr. Quee Newell would have expected A. to have continued work as a labourer or equipment operator.

[170] In Dr. Quee Newell’s opinion, absent surgery, A. will not be able to return to work as a heavy equipment operator, construction worker or cook. She conceded, however, that she was unable to offer any opinion on whether A. was a suitable candidate for surgery. She would defer to an orthopedic surgeon.

[171] Dr. Quee Newell then set out some more sedentary direct-entry occupations for older adults that might be potential employment options for A. post-Accident, namely, select positions as a cashier, security person, Uber or community driver or residential apartment building manager. This was one portion of her testimony that I do not accept.

[172] Notably, Dr. Quee Newell did not provide detailed job descriptions to explain what she means by “select” cashier, security, driver or building manager jobs. I am left unable to reconcile Dr. Quee Newell’s opinion with the large body of evidence regarding A.’s ongoing physical and psychological symptoms, including the evidence of A., each of A.’s lay witnesses, Dr. Sangha, Dr. Regan and Ms. Aggarwal. I will address this aspect in further detail under the analysis of loss of future earning capacity.

[173] Dr. Quee Newell was also cross examined with respect to A. qualifying for CPP-Disability payments. She agreed that in order to qualify to receive these payments, A. had to be found to have a severe, prolonged disability which made him unsuitable or incapable for any gainful employment.

[174] Dr. Quee Newell testified that she works with CPP-Disability recipients who later wish to return to work. The candidates for her program are screened in advance, although she did not provide details regarding her screening. Under cross-examination, Dr. Quee Newell was (oddly) unable to say how many Canadians

actually qualified for CPP-Disability or estimate what percentage of CPP-Disability recipients ever successfully return to work. It was suggested to her that 300,000 Canadians receive CPP-Disability payments and that less than 5% of them return to the workforce. In response she said she would "defer to Service Canada" and agreed that only a minority of CPP-Disability recipients are able to return to work. Her inability to answer these questions causes me additional concern regarding her opinion that A. could return to work in select alternative jobs.

[175] In her report, Dr. Quee Newell cited a study (Sullivan and Hyman (2014)) concerning return-to-work outcomes in chronic pain cases. In cross-examination, she confirmed that she agreed with the following statement from the study:

> The emphasis on return-to-work as a primary treatment objective is not simply relevant to reducing the economic burden of chronic pain. Return to work is associated with a multitude of health and mental health benefits. Conversely, prolonged absence from work is associated with a multitude of adverse health outcomes [8,9]. For example, research from Australia showed that unemployment leads to increased mortality [10]. Similar increased mortality linked to unemployment was seen in Sweden [11], Denmark [12], Greece and the USA; these findings are not explained by the healthy worker effect. A Canadian study showed not only increased mortality, but increased cardiovascular disease and suicide associated with unemployment [13]. Many population studies show being out of work as placing someone at increased risk of substance abuse, divorce and violent behaviour.

Causation

The Defendant's Position

[176] The defendant agrees that A. suffered soft tissue injuries to his neck, back and shoulders in the Accident and that he suffers chronic pain. However, the defendant denies that A.'s rotator cuff tears were caused by the Accident. The defendant's position is that A. had pre-existing shoulder damage that would have become symptomatic in a matter of time even if the Accident did not occur. The defendant also maintains that A. had pre-existing depression and back issues that were not caused by the Accident.

[177] The defendant further submits that absent the Accident there is a real and substantial possibility that had A. continued to be employed with Retro or as a

construction labourer generally and given his age, weakened/degenerated shoulders and ligaments, repetitive overhead tasks and labour-intensive tasks would have caused shoulder symptoms or further shoulder symptoms including pain, weakness and loss of range of motion as well as back and neck pain. The defendant maintains that these symptoms would have manifested themselves in the future to some extent regardless of the Accident. The defendant submits that A.'s damages award be reduced to reflect his pre-existing injuries.

A's Position

[178] A. maintains that all of his injuries were caused by the Accident including the rotator cuff tears in his shoulders. A. states in the alternative that if the rotator cuff tears are proven to be pre-existing injuries, they were asymptomatic but for the Accident would have remained asymptomatic.

[179] A. admits there is evidence that he had some pre-existing degenerative back issues but says that there is no evidence that his back issues would have become symptomatic in the future absent the Accident. His back issues had no impact on his functioning or enjoyment of life.

[180] Finally, A. agrees that he had some mood issues prior to the Accident due to his break up with Ms. L. However, despite this he was optimistic and fully functional until the Accident. His mood issues prior to the Accident had no impact on his overall enjoyment of life or functioning. A. submits that his post-Accident depression is of a totally different nature and has dramatically impacted his functioning and enjoyment of life.

The Law on Causation

[181] A. must establish on a balance of probabilities that the defendant's negligence caused an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not

be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[182] 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; *Zenone v. Knight*, 2024 BCCA 200 at para. 55.

[183] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58:

> 78 … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey.*

[184] A basic principle of tort law is that the plaintiff must be placed in the position they 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). A defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes: *Dornan v. Silva*, 2021 BCCA 228 at para. 41. 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 v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 32-35.

[185] Where a plaintiff has a pre-existing condition that was active or was likely to become active, the defendant is liable only to the extent that the accident caused an aggravation to the existing condition: *Filsinger v. ICBC*, 2009 BCSC 232 at para. 26.

[186] In *Debruyn v. Kim*, 2021 BCSC 620, the Court held:

> [129] The overall assessment of damages can be reduced if there is a measurable risk that a plaintiff's pre-existing condition would have detrimentally affected her in the future regardless of the Accidents: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at 473–74.

Discussion on Causation

[187] I find that A.'s rotator cuff/shoulder injuries were caused by the Accident. A. testified and I accept that he was tossed side to side during the Accident. His right shoulder collided with JU and his left shoulder hit the side of his vehicle. Dr. Regan's expert opinion which I accept is that the Accident likely caused A.'s shoulder injuries/rotator cuff tears. Dr. Regan testified that not only could the impact of A.'s shoulders hitting the side of the vehicle and JU cause A.'s rotator cuff tears, but the sheer torqueing of A.'s body during the Accident could cause the tears without any actual impact.

[188] Dr. Regan's evidence is consistent with Dr. Sangha's expert opinion which I accept that the particular type of tears that A. has tends to be caused by trauma, not age or wear and tear. Dr. Sangha testified that he does not normally see this type of tear in men of A.'s age.

[189] Alternatively, even if the Accident did not cause the tears, Dr. Regan's opinion which I accept is that the Accident caused them to become symptomatic. Dr. Regan's opinion is consistent with A.'s evidence and the lay witnesses who knew A. before the Accident including JU, BH, JH, GJ and SM who all testified that A. did not have any physical injuries or limitations prior to the Accident.

[190] The defendant highlights that during cross-examination Dr. Regan admitted there was a *possibility* that *if* A.'s rotator cuff tears were not caused by the Accident, they may have become symptomatic over time even without the Accident. However, considering Dr. Regan's evidence as a whole, I find that the possibility is only remote, not material. Finally, the only expert who opined that the rotator cuff tears were not caused by the Accident was Dr. Arneja whose opinion I reject as unreliable for the reasons mentioned above.

[191] With respect to A.'s back, imaging showed some pre-existing degenerative issues. However, A.'s back issues were asymptomatic at the time of the Accident. I accept Dr. Regan's opinion that the back issues only became symptomatic because of the Accident. This is consistent with A.'s evidence and with the lay witnesses who knew A. before the Accident (including operations manager at Retro called by the defendant), all of whom testified that A. had no apparent physical injuries or limitations before the Accident. While Dr. Regan admitted during cross-examination that there was a *possibility* that A.'s back issues would have become symptomatic even without the Accident, as with the rotator cuff tears, on the whole of the evidence, I do not find that there is any material or significant possibility of A.'s pre-existing back issues impacting his life in any significant way but for the Accident.

[192] Finally, there is a wealth of evidence that A.'s psychological injuries were caused by the Accident. I accept A.'s evidence that he was a little depressed prior to the Accident because of his relationship difficulties with Ms. L. A. was upset that she lied to him, cheated on him and was generally not a good partner in other ways. The break up took longer than A. wanted and A. sought help from his family doctor to get through the break up. However, in other aspects of his life, A. was doing very well. He was otherwise in a good place mentally and happy to land a job at Retro.

[193] Despite his relationship difficulties with Ms. L, A. was fully functioning in terms of his physical activities, social activities and work prior to the Accident. GJ and SM who knew A. before the Accident both gave detailed and compelling evidence that A. was vibrant and fun to be around before the Accident (despite the relationship problems with Ms. L) but the Accident changed his personality and mood dramatically and he is now hard to be around. BH of Astro employed A. both before and after the Accident and confirmed that A. had a positive mood before the Accident and was well-liked by co-workers but that after the Accident, A.'s mood quickly soured and co-workers did not want to be around him.

[194] I find that A.'s mood issues before the Accident were of a completely different nature than those caused by the Accident. A. gave compelling evidence as did lay

witnesses that as a result of the Accident and the resulting chronic pain and sleep issues, A. suffers deeply from depression, low mood and low tolerance/irritability. His personality and mood changed dramatically.

[195] A.'s psychological injuries are real. They do not somehow arise from A. desiring sympathy. A.'s depression/low mood is clearly not something he can overcome by will-power or his own inherent resources. A. does not enjoy sitting for hours in his room just petting his cat, not being able to work or engage in the activities he used to do.

[196] To summarize, I find that A.'s rotator cuff tears were caused by the Accident. I find that A.'s back condition was asymptomatic at the time of the Accident and rendered symptomatic because of the Accident. I also find that A.'s psychological injuries/mood injuries were caused by the Accident. In the alternative, if there were pre-existing injuries, there is no real evidence that any such pre-existing physical or psychological injuries would have affected A.'s functioning or enjoyment of life absent the Accident occurring. The defendant's request to reduce A.'s damages award due to pre-existing injuries is denied.

Duty to Mitigate

[197] A plaintiff has an obligation to take all reasonable measures to reduce their damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[198] Once the plaintiff has proved the defendant's liability for their injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted

reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[199] *Chiu v. Chiu,* 2002 BCCA 618 sets out the test for failure to mitigate by not pursuing recommended treatment:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably…

[200] A defendant bears the onus of proving both branches of the *Chiu v. Chiu,* 2002 BCCA 618 test on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 55 and 61.

[201] The consideration as to whether damages would have been reduced is a hypothetical event requiring the defendant to prove a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided and assess damages accordingly. See: *Forghani-Esfahani v. Lester*, 2019 BCSC 332, cited in *Ladhani v. Lundy*, 2021 BCSC 449 at para. 62

The Defendant's Position

[202] The defendant submits A. failed to mitigate his damages by:

a. discontinuing his use of the anti-depressant sertraline in 2020;

b. not pursuing his family doctors' referral to a psychiatrist;

c. not continuing counselling, kinesiology and physiotherapy after 2020;

d. not seeing Dr. Squire after the initial consultation;

e. not undergoing rotator cuff surgeries;

f. not seeking accommodation from Retro or further accommodation from Astro or applying for alternative, lighter duty jobs after the Accident.

[203] The defendant submits that part of A's loss associated with shoulder symptoms could have been avoided if he had received non-surgical orthopedic injections to the shoulder or at least continued kinesiology and physiotherapy as recommended by Drs. Moola and K.

[204] The defendant submits that A. ought to have had rotator cuff repair surgeries. The defendant says surgery was recommended by Dr. Moola and that A. did not want the surgery unless it was guaranteed to be 100% successful.

[205] The defendant maintains that non-surgical and surgical treatment is likely to have lessened A's symptoms and cured them. The defendant highlights Dr. Regan's opinion that A. might receive significant benefit from intra articular local anesthetic injections and if the injections are successful in controlling A.'s neck and periscapular pain, then A. could proceed with rotator cuff surgeries.

[206] The defendant submits that A. acted unreasonably by failing to treat the exacerbation of his pre-existing psycho-emotional distress and had he sought treatment, his symptoms likely would have improved. The defendant maintains that A. should have continued with psychotherapy with a licensed professional in 2020 and continued to take anti-depressant medications in 2020, not cannabis.

[207] The defendant further submits that A. should have sought treatment from Dr. Squire or a multidisciplinary pain clinic. The defendant notes that Dr. Sangha admitted in cross examination that it was an oversight in his report not to include psychotherapy as a treatment recommendation, that duloxetine would be a good choice of antidepressant to try, not cannabis.

[208] The defendant seeks to reduce A.'s awards for non-pecuniary damages, past wage loss and loss of future income earning capacity by 25% due to A's failure to mitigate.

[209] The defendant relies on a number of cases in which the court has reduced damages for failure to mitigate: *Ladhani v. Lundy,* 2021 BCSC 449; *Redmile v. Beaulieu*, 2019 BCSC 1571; *Mullens v. Toor,* 2016 BCSC 1645; *Padgham v. Ram*, 2024 BCSC 72; *Qiao v. Buckley*, 2008 BCSC 1782; *Naidu v. Mann*, 2007 BCSC 1313; *Hauer v. Clendenning*, 2010 BCSC 366; *Erdem v. O'Brien*, 2023 BCSC 1233.

A.'s Position

[210] A's position is that he has acted reasonably throughout.

Discussion on Mitigation

[211] I will address the various treatment options that the defendant submits A. should have pursued. What is reasonable in A.'s circumstances requires some context in terms of the treatments that A. actually pursued/received.

[212] A. could hardly move in the days following the Accident and sought his family doctor's assistance. Dr. K. prescribed medication for pain and to help A. sleep. A. took the medication and continues to, but the medications did not take away the pain nor have they alleviated A.'s sleeping issues.

[213] A. was referred to various therapies including physiotherapy, kinesiology/calisthenics and massage. A. tried all these treatments but remained in pain. Worse yet, these treatments caused A. additional pain. The kinesiology/calisthenics in particular caused A. excruciating pain in his shoulders. A. returned to Dr. K. several times but Dr. K. reiterated the same treatments.

[214] A.'s pain was getting worse instead of better over time, particularly in his shoulders. He "knew" something was wrong and asked Dr. K. repeatedly over a period of two years to order imaging for his shoulders to determine what was wrong. Unfortunately, Dr. K. did not send A. for imaging. Dr. Simonett, an expert called by the defendant, commented that when she read Dr. K's records, there was a notable delay in sending A. for imaging.

[215] When Dr. K. was unable to alleviate his pain, A. searched for answers himself. On a friend's recommendation, A. attended a naturopath for pain in 2021. The naturopath recommended a full upper body scan before starting any treatment. A., who is of very limited means, scraped up several thousand dollars for private imaging. The imaging showed full rotator cuff tears in each of A.'s shoulders, something that Dr. K. had not found previously because he had not sent A. for imaging.

[216] Following A. obtaining private imaging, Dr. K. referred him to a consultation with an orthopedic surgeon, Dr. Moola. Counsel disagree as to whether Dr. Moola found A. to be an appropriate candidate for shoulder surgeries. Dr. Moola was not called as a witness. His consultation report states that he attempted to discuss surgical and non-surgical options with A. but A. was not interested. A. admitted during cross-examination that Dr. Moola had recommended surgery. However, I accept A.'s testimony that he did not have confidence in Dr. Moola, had lost confidence in Dr. K. A. was also worried about the risk that surgery would not work. In my view based on the evidence of Dr. Sangha and Dr. Regan, A. had good reason to be concerned about whether surgery would be successful.

[217] Dr. Regan's opinion with respect to shoulder surgery is guarded. In Dr. Regan's view which I accept, A.'s pain needs to be under control first before he is even considered a candidate for surgery. Dr. Regan states that injections are worth a try to try to get A.'s pain under control. Dr. Sangha is of the same view. However, if injections actually work to reduce A.'s shoulder pain, the relief would be temporary for three months or so. Furthermore, even if the injections alleviated the pain enough to attempt surgery, Dr. Regan's evidence, which I accept, is that shoulder surgery may not be successful and may actually make A.'s pain worse. Dr. Sangha had similar concerns given the time that A. has suffered chronic pain and his psycho-emotional issues which are red flags for A.'s prognosis.

[218] I cannot on the evidence conclude that A. acted unreasonably in failing to pursue surgery. Alternatively, if I am wrong and A. should reasonably have pursued

this option, the defendant has not demonstrated that surgery would have reduced A.'s pain. As Dr. Regan stated, surgeries may have actually made A.'s pain worse.

[219] In addition to the medication and treatments Dr. K. recommended, A. attended a pain specialist, Dr. Squire, in 2023 based on a friend's recommendation. He paid privately for the consultation and waited a year for an appointment. When he finally met with Dr. Squire, she told him that her approach is to teach people to turn off pain using their minds. A. thought Dr. Squire was telling him that his pain was in his mind. A. was very disappointed and did not go back. I cannot conclude that this was unreasonable. Dr. Regan was questioned about Dr. Squire's technique and I accept his evidence that the technique does not appeal to everyone with chronic pain. I accept Dr. Regan's evidence that a good number of chronic pain patients do not find Dr. Squire's technique helpful.

[220] The defendant also claims that A. acted unreasonably by ceasing to take the antidepressant sertraline. Dr. K had prescribed sertraline when A. was breaking up with Ms. L. A.'s evidence which I accept is that he took the medication as prescribed while dealing with the break up but later stopped because it did not help his mood and also made him feel ill. Dr. Simonett who was as mentioned called by the defendant, testified that she does not normally use sertraline for patients with mood disorders due to its negative side effects. I cannot on the evidence conclude that A. acted unreasonably in ceasing to take sertraline. Furthermore, there is no evidence that A. would have reduced the impact of his psychological injuries resulting from the Accident had he continued sertraline. The opposite is true: A. said sertraline did not help his mood.

[221] In terms of counselling, A. attended in-person counselling in March of 2020 but shortly thereafter counselling was only offered online due to the COVID-19 pandemic. A. testified and I accept that he did not find online treatment sessions effective. He attempted virtual kinesiology sessions and struggled to engage, quickly discovering that online treatment was not for him. He is not good with computers and does not own a computer. I do not find that A. acted unreasonably by failing to

pursue counselling after March 2020. In the alternative, there is no evidence that counselling would have reduced the impact of A.'s psycho-emotional injuries. A.'s mood/psychological issues are complex and relate to his chronic pain.

[222] The defendant also maintains that A. failed to mitigate by using cannabis for his pain. A. used cannabis to try to help his pain when painkillers did not eliminate his pain. He told Dr. K. he used cannabis for pain. He did not hide his use. There is no evidence that Dr. K. or others treating A. told him to stop using cannabis. At trial, Dr. Sangha and Dr. Simonett testified that they would not recommend continuing cannabis to treat pain because it is a downer. I accept A.'s evidence that he now recognizes that cannabis is not an answer to his injuries and while it gave him some pain relief previously, he has now reduced his use. I cannot conclude that A. has acted unreasonably.

[223] With regard to his post-Accident employment efforts, it is clear to me that A. made valiant efforts to work modified duties at Astro but after three seasons, he was not physically or mentally able to continue. It is clear on the evidence that it was not physically possible for A. to return to employment at Retro due to the overhead work and the heavy lifting. Further, modified duties at Retro would not have been available to A. JU who was off work at Retro for 18 months and was supposed to complete a 12-week return to work program with modified duties testified that Retro could not actually offer him modified duties even for 12 weeks and he had to return to normal duties early.

[224] Further, JH who manages Astro, testified the company did not have an ongoing ability to keep A. on modified duties let alone further modify A.'s duties. In my view, A. acted wholly reasonably in returning to his former employer post-Accident and attempting modified duties. He worked through pain and even as it became worse. A.'s mitigation efforts in terms of work were valiant.

[225] The defendant has not demonstrated that A. acted unreasonably or that his actions/lack of actions would have reduced his damages. To the contrary, I find that A. acted reasonably throughout. He tried many different treatments recommended

by his doctor and also sought out private treatments despite his limited financial means. He also returned to work and worked as hard as he could until he could not do so anymore. I cannot conclude on the evidence that A. has failed to mitigate.

[226] I will now address the various heads of damages starting with non-pecuniary damages.

A. Non-Pecuniary Damages

[227] In *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*], the Court of Appeal addressed the proper focus when assessing non-pecuniary damages:

> [45] ... I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from ***Lindal v. Lindal****, supra*, at 637 is a helpful reminder:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
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> [Emphasis in original.]

[228] The Court of Appeal in *Stapley* sets out the non-exhaustive list of factors to be considered in assessing non-pecuniary damages, namely, the plaintiff's age, the nature of the injuries, the severity and duration of pain, extent of disability, loss or impairment of life, impairment of physical abilities and loss of lifestyle.

[229] Loss of the enjoyment of work can be considered in assessing non-pecuniary damages as relating to a plaintiff's impairment of life or loss of lifestyle. In *Frahm v. Laci*, 2016 BCSC 1162 the Court said:

> [28] The importance of work has previously been recognized as fundamental to a person's life, her sense of identity, self-worth and emotional well-being (Dickson C.J.C. in a widely quoted dissenting opinion in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 368). Further, the ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life. As explained in Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough: Carswell, 1996) at p. 553:
>
> > In the vast majority of cases a plaintiff is entitled to an award for loss of working capacity together with a sum for non-pecuniary loss assessed on a functional basis. The two heads of damage are designed for different purposes. The first is a replacement of what otherwise would have been received. The second is a solace to allow the plaintiff to enjoy substitute amenities to replace lost enjoyment and to counteract the negative effect of pain and suffering.

[230] Justice Dickson's quote from *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC) is included below:

> 91. Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self worth and emotional well being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity", in Studies in Contract Law (1980), has described it as follows, at p. 324:
>
> > As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self respect and self esteem.

Analysis of Non-Pecuniary Damages

[231] Prior to the Accident, A. was 49 years old, physically fit, fully functional and at a good point in his career. He socialized with friends and co-workers, engaged in recreational activities and was optimistic about his future. Other than some relationship difficulties, he was happy and content.

[232] As A. submits, he had a simple life, but a life of independence, physical health and physical vigor. All of that has been taken away. The lay witnesses all testified about the dramatic changes to his physical abilities, mood and personality and his ability to work. A. is now 54 years old, in constant pain, not able to work or engage in social activities, has low mood and spends much of his time in his room.

Comparable Non-Pecuniary Cases

[233] A. relies on six cases in support of his claim for $300,000 in non-pecuniary damages which are summarized as follows:

a. *Grabovac v. Fazio*, 2021 BCSC 2362, a case involving a 26-year-old dental hygienist Plaintiff who was involved in two accidents that caused musculoskeletal injuries to her neck, shoulders and back, which over time progressed into a chronic pain condition, major depression, PTSD, and somatic symptom disorder, the ongoing cumulative effects of which rendered her competitively unemployable. Hinkson C.J.B.C. (as he then was) awarded the plaintiff $350,000 ($400,000 with inflation). The non-pecuniary award included an unknown amount for loss of housekeeping capacity.

b. *Moen v. Grantham*, 2024 BCSC 937 involved a 33-year-old plaintiff (25 at the time of the accidents) suffered chronic pain caused by mechanical back and neck injury in three accidents all of which caused him significant functional and occupational impairment, major depression and severe emotional distress to such an extent that the plaintiff contemplated suicide twice. The plaintiff had always worked in physically demanding jobs and his inability to do so caused him distress, contributed significantly to his depression and effected his self-esteem. The plaintiff's wife's evidence was that they no longer planned to have children as a result of the accident and its impact on them. The plaintiff was awarded non-pecuniary damages of $300,000 which included a modest amount for loss of housekeeping capacity.

c. *Meckic v. Chan*, 2022 BCSC 182, involved a 53-year-old plaintiff who was suffering from chronic pain and depression and who was no longer employable because of her injuries (but with the possibility of future improvement) was awarded $225,000 ($239,000 with inflation) in non-pecuniary damages. In my view, the award in this case seems low compared to other similar cases. Interestingly, the non-pecuniary damages awarded were higher than Plaintiff's request for $200,000.

d. *Steinlauf v. Deol*, 2021 BCSC 1118, involved a 29-year-old police officer (26 at the time of the accident) who suffered a concussion, mild traumatic brain injury, chronic pain and serious psychological problems including depression, somatic symptom disorder, and disruptive sleep, and whose career was now limited to sedentary, administrative duties with the RCMP. He was awarded $225,000 ($257,000 with inflation) in non-pecuniary damages and separate from the non-pecuniary award, an amount for past and future loss of housekeeping capacity.

e. *Lewis v. Gibeau*, 2023 BCSC 784, involved a 59-year-old, previously healthy plaintiff who suffered from a concussion, mild traumatic brain injury syndrome, persistent pain in the neck, shoulder and back, headaches, sleeping dysfunction and significant functional impairment, although she only missed 10 days of work and continued to work as a hair stylist and salon owner. She was awarded $220,000 ($226,000 with inflation) in non-pecuniary damages.

f. *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, involved a 41-year-old construction worker suffering from persistent soft tissue injury to the neck and back, ongoing pain, dizziness and nausea, sleep disturbance, anxiety and depression, with an exaggerated sense of his disability limiting activities and producing deteriorating relationships, anger and isolation who was awarded $180,000 ($225,000 with inflation) in non-pecuniary damages.

[234] The defendant relies on the following three cases in support of the defendant's submission that $120,000 is appropriate for non-pecuniary damages (subject to reductions for pre-existing injuries and failure to mitigate which I address below):

a. *Erdem v. O'Brien*, 2023 BCSC 1233, involved a 58-year-old plaintiff who sustained personal injuries in two motor vehicle accidents including to his right shoulder, left shoulder, neck, low back as well as headaches, some sleep disturbance, anxiety and a depressed mood. At the time of trial, the plaintiff's back pain, headaches and left shoulder issues were resolved or getting better, but the plaintiff continued to suffer from neck and right shoulder pain, which negatively affected his sleep and mood. More than one expert surgeon had recommended shoulder surgery to assist the plaintiff and surgery was actually booked; however, the Plaintiff cancelled the surgery.

   The Plaintiff had worked as a scaffolder prior to the accidents, but since had not worked since the accidents. Unlike A., this plaintiff had credibility issues and there was surveillance video contradicting the plaintiff's evidence about the nature and extents of his shoulder issues. The Court assessed the plaintiff's non-pecuniary damages at $120,000 ($123,439 with inflation).

b. *Carrillo v. Deschutter*, 2018 BCSC 2134, involved a 55-year-old plaintiff, who suffered soft tissue injuries to his neck and low back, left arm, left shoulder (including adhesive capsulitis or "frozen shoulder") and left leg. He had injections to assist his left shoulder pain. He still experienced "stabbing pain" on an intermittent basis. It was uncertain whether he would need shoulder surgery. The plaintiff's ongoing symptoms included intermittent headaches every two or three days, persistent and significant chronic neck and low back pain which varies in intensity and some

numbness in his left hand. The issues with his left leg resolved prior to trial.

The plaintiff was found to have serious pre-existing depression, anxiety and post-traumatic stress disorder which were being actively treated at the time of the accident. After the accident, the plaintiff was no longer able to participate in his sporting and recreational activities that he enjoyed with his family. He was required to rely on his son to help with laundry, grocery shopping, and heavier house cleaning chores. This plaintiff did not work prior to the accident and relied on social assistance. He used cocaine to self-medicate pain post-accident and was charged with selling cocaine while he awaited trial. The Court assessed the plaintiff's non-pecuniary damages at $115,000 ($139,224 in 2024 dollars).

c. *Sidhu v. Panasar*, 2021 BCSC 890, involved a 66-year-old plaintiff (60 at the time of the 1st accident) who suffered physical injuries in two accidents. The first accident caused injuries to his back, neck, a sprained shoulder, and headaches, which injuries were aggravated by the second accident.

This plaintiff did not suffer any significant psychological injuries. Initially, the plaintiff was limited to short walks, watering plants, and helping his wife with some household duties. By trial he was 50% improved and therefore able to go for longer walks and attend temple, but had not resumed playing golf or mowing the temple lawn. He continued to suffer from disabling neck, back, and shoulder pain, as well as headaches, with the right shoulder/arm symptoms being the worst. The plaintiff was disabled from working at his prior mill job and any other moderate to heavy labor position. The plaintiff missed his job but not nearly to the extent that A. does. The plaintiff was awarded $90,000 ($103,085 with inflation) for non-pecuniary damages.

[235] The injuries of the 26-year-old plaintiff in *Grabovac* were significantly worse than A's injuries. The injuries in *Moen* were also worse. In *Moen*, for example, the accident led to the plaintiff attempting suicide twice and prevented plans of the Plaintiff and his wife to have children. In both *Grabovac* and *Moen*, the awards also included an amount for loss of housekeeping capacity as part of the non-pecuniary award which I intend to address separately in this case.

[236] The injuries set out in all three of the defendant's cases are far less serious than A's. The plaintiff in *Erdem* also had significant credibility issues unlike A. There was video surveillance of the plaintiff in that case that called into question the scope, severity and duration of the plaintiff's injuries. This effected the assessment of the non-pecuniary damages and undermined the reliability of the expert reports: see *Erdem* at para. 245.

[237] The injuries in *Carillo* involved "frozen shoulder" affecting one shoulder, not full rotator cuff tears in both shoulders. As well, the plaintiff in *Carillo* had serious and active mental health issues prior to the accident versus A. (which I will address further under the heading of pre-existing injuries below). In addition, unlike the plaintiff in *Carillo*, A. has suffered the loss of the enjoyment and focus that his employment as a labourer provided. Work was extremely important to A. and his lifestyle has been impaired as a result of not being able to work productively as a labourer with his hands, feel like a go-getter and socialize with co-workers. Work has been an important part of A's life and identity since he was a teenager.

[238] In *Sidhu*, the plaintiff suffered a shoulder sprain of one shoulder which is far less serious than A's injuries to both shoulders. As well, the plaintiff in *Sidhu* does not suffer the psychological and mood issues that A. does. Mr. Sidhu was able to resume some of his activities including going on long walks. A. has not been able to do so.

[239] The plaintiff's injuries in *Pololos* are also less serious than A's. A. misses his work significantly and he also suffers serious impairment of both shoulders not just one.

[240] The cases most similar to A's are *Steinlauf* and *Lewis*, with *Lewis* being the most similar. In *Steinlauf*, the plaintiff was much younger in his 20's and on top of similar physical injuries had suffered a mild traumatic brain injury and contemplated suicide due to the accident. On the other hand, the plaintiff in *Steinlauf* was able to and was working at a sedentary position at the time of trial and A. is not currently working at all. In *Lewis*, the 59-year-old plaintiff suffered injuries to her shoulders and back, persistent pain from her neck, headaches, sleeping dysfunction and significant functional impairment. However, she only missed 10 days of work and was still able to do some of her pre-accident activities so in my view, A's situation, while similar to *Lewis*, warrants a slightly higher award than the $220,000 ($226,000 with inflation) awarded in *Lewis*.

[241] I conclude that A. ought to receive $235,000 in non-pecuniary damages considering the relevant factors including his age, level of pain, duration of pain, level of physical restrictions, emotional injuries and level of impairment to his life and lifestyle.

B. Past Income Loss

[242] Compensation for past loss of income/earning capacity is based on what the plaintiff would have earned but for the injuries that were sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[243] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.

Discussion

[244] Both parties agree for the purpose of past income loss, that A. but for the Accident, would have continued working at Retro for the five and a half years from the date of the Accident to the date of the trial.

[245] A. was working full-time for Retro when the Accident occurred. His first day at Retro was September 27, 2018 and his last day of work at Retro was January 9, 2019.

[246] A. had switched from Astro to Retro in order to have full-time work throughout the year. He earned $27 per hour. He kept ties with Astro as his back-up plan in case Retro did not work out. Astro paid $27 per hour at the time as well.

[247] A. did not return to Retro following the Accident. He knew that he was unable to handle the physicality of the job. He returned to Astro a few months after the Accident where he could perform light accommodated duties.

[248] In 2018 A. earned $63,334 in employment income which A. submits is the fairest baseline to use as his but-for collision earning trajectory. A. submits that the appropriate calculation for past loss of income is 5.5 years x $63,000 = $346,500 which does not include any wage increases that A. would have received at Retro or Astro had the Accident not occurred.

[249] The defendant submits that had A. worked 40 hours per week for 52 weeks of the year at Retro at $27 per hour, his gross annual salary would be $56,160. I agree with the defendant that it is fair to use $56,160 as opposed to $63,334 as the latter figure includes both A's salary from the intense work season at Astro in 2018 and his earnings at Retro in 2018. Using $56,160 multiplied by 5.5 is $308,880 gross.

[250] From the above $308,880 that A. would have earned but-for the collision, we need to reduce it by the amount he actually earned at Astro from 2019 through June 2021 when he ceased working:

> In 2019 he earned $44,971 income from Astro;
>
> In 2020 he earned $36,001 income from Astro;
>
> In 2021 he earned $10,003 income from Astro,
>
> which totals $90,975.

[251] Therefore, the appropriate calculation is $308,880 - $90,975 = $217,905.

[252] The defendant states the above number should be reduced by 10% for pre-existing health issues and 25% for failure to mitigate. I have already dismissed those arguments above. I award A. $215,00 ($217,905, rounded) for his past income loss.

[253] $215,000 is the “gross” number. The parties need to agree on the appropriate amount of income tax to be deducted and post-trial deductions to be made in accordance s. 83 of the *Insurance Vehicle Act*, R.S.B.C. 1996, c. 231 for employment insurance, ICBC TTD payments, and CPP Disability payments. If the parties are unable to agree, they can return to court.

C. Future Loss of Earning Capacity

[254] The law for proof of loss of future earning capacity is set out in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 10:

> Justice Grauer in *Rab* described the three steps to assess damages for the loss of future earning capacity:
>
> > [47] ... The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[255] There are two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that cause the plaintiff to be unable to work at the time of trial and in the foreseeable future; and (2) less clear cut cases, including those in which a plaintiff’s injuries have led to continuing deficits, but their income at trial is similar to the time of the accident. In the former set of cases, the first and second step of the analysis can be foregone conclusions.

[256] The parties agree that this is a more straightforward case where there has been a loss of capacity. Specifically, the defendant concedes that A's mechanical neck and shoulder girdle pain prevent him from working as a laborer where repetitive and sustained overhead work is required.

[257] A. has not returned to work in his previous role as a labourer at Retro since the Accident and is currently not working at all; therefore, the defendant concedes that the second step in the assessment is also satisfied in that there is evidence of a real and substantial possibility of a future loss.

The Earnings Approach

[258] The parties agree that an earnings approach is appropriate to value A's loss.

[259] In *Evans v. Keill*, 2018 BCSC 1651, the Court discusses the difference between the earnings approach and the capital asset approach:

> [189] The defining distinction between the earnings approach and the capital asset approach is the extent to which the loss is measurable. If there is little or no evidence of what the plaintiff's post-accident earnings will be, the earnings approach may not be appropriate. Although the earnings approach is more mathematical, both approaches are a matter of judgment, not "mere calculation": *Hosseinzadeh v. Leung*, 2014 BCSC 2260 at para. 126.
>
> [190] The earnings approach is often used where the plaintiff had an established earnings pattern or career trajectory prior to the accident, and after the accident the plaintiff continued to work in the same position with either reduced hours or modified duties, or took early retirement from that position as a result of accident-related injuries: see, for example, *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 25.
>
> [191] The capital asset approach is used where there is a level of uncertainty making it difficult to measure the loss in a pecuniary way. As this Court stated in *Riding-Brown* at para. 26, this approach is "usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult."

[260] The assessment of A.'s loss (third stage of the analysis) involves a consideration of positive and negative contingencies. In *Dornan v. Silva,* 2021 BCCA 228, the Court of Appeal discussed the role of contingencies:

> [92] …The importance of evidence in cases involving a specific contingency was discussed in *Graham* (and cited with approval by this Court in *Hussack*):

> 46 ...[C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> 47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.

[Emphasis in original.]

[261] The Court in *Dornan* further explained:

> [64] It follows that the process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood. This was explained succinctly by Justice Major in *Athey*:
>
> > 27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> [Emphasis added.]

[262] The burden of proof in establishing that a contingency should apply lies on the party seeking to assert it: *Lo v. Vos*, 2021 BCCA 421 at para. 39.

[263] A's position is that he is permanently disabled and is therefore unable to work even part-time at a more sedentary job until retirement age.

[264] The defendant makes two alternative submissions regarding the assessment of damages for future loss of earnings capacity. Scenario A assesses damages based on A. returning to work post recovery after having two rotator cuff surgeries. Scenario B assesses damages based on ongoing impairment. I will address both of these scenarios.

Defendant's Scenario A - Earnings Assessment no further impairment post treatment

[265] The defendant invites me to apply a contingency for residual income earning capacity with or without recovery, the likelihood of improvement in physical and mental health, and labor market contingencies of unemployment caused by lack of work or sickness unrelated to the Accident. The defendant submits that with shoulder injections, A. would be able to have surgeries to repair his rotator cuff tears, recover and return to his former employment within a year.

[266] In my view, the defendant's submissions are far too optimistic. First, they presuppose that A. would be a good candidate for surgery. Dr. Regan was clear that A's neck and scapular pain must be under control first before surgery is even considered. In relation to using corticosteroid injections to get the pain under control in order to consider surgery, Dr. Regan's evidence is that injections are "worth a try". That is, they may or may not provide A. with pain relief. Dr. Sangha's evidence was that such injections might have some moderate impact, not that they would bring A's pain under control. Dr. Arneja, who was called by the defendant, was even more guarded than Dr. Regan with respect to whether A. would be a good candidate for surgery. Furthermore, Dr. Regan's opinion, having met and examined A. and reviewed all the records, was that surgery may be unsuccessful and may make A's pain even worse.

[267] For these reasons, I reject Scenario A.

Defendant's Scenario B - Earnings Assessment with ongoing reduced earnings

[268] The defendant submits that A. even without surgery to repair his rotator cuff tears, could obtain employment in a more sedentary role and be employed in that role from the date of trial to the date of retirement. As such, the defendant submits that the loss of future income award must deduct an amount representing this residual earning capacity.

[269] The defendant submits that A. would be able to earn at least the median wage working entry level positions on a part-time basis. In support, the defendant relies on Dr. Quee Newell's opinion that A. is limited to less physically demanding occupations that can be accessed on a direct entry basis such as select cashier positions, select security positions, retail sales clerk, apartment building manager, Uber driver or community shuttle driver.

[270] In further support of his position that A. can work as a driver specifically, the defendant notes that A. stated on his CPP- Disability application that his ability to drive was good.

[271] I do not agree with the defendant's position. Dr. Quee Newell did not testify as to what she meant by "select" jobs in the above categories nor did she mention the specific physical or mental requirements for the select jobs. Considering the testimony of A. and others, I do not find that there is a real or substantial possibility that A. would be able to be employed in any of these positions even part-time between now and retirement age. I will address this further in the context of the potential jobs Dr. Quee Newell mentioned.

[272] The defendant maintains that A. could seek employment as a driver. Somewhat ironically, the defendant relies on A.'s CPP-Disability application form for support that A. can work as a driver, when the form was accepted by the government as proof that A. was indefinitely impaired for any type of gainful

employment. In any event, instead of relying on an answer on a form, I prefer the rich detail of A's testimony at trial. A. testified and I accept that holding the steering wheel of a vehicle is painful, putting on a seatbelt is painful and even sitting in a vehicle for a while is painful. I also accept his evidence that he is anxious about driving since the Accident and tries to avoid driving. Ms. Aggarwal found that A. cannot sit for extended periods of time while driving. Given the evidence before me, I do not find it a real or substantial possibility that A. would be able to withstand the hours of driving an Uber or shuttle even part-time.

[273] I also do not find a real or substantial possibility that A. could be a cashier. First, the evidence of A. and of Ms. Aggarwal is that A. finds it hard to sit, stand or stoop for long. Second, according to MB, A. has trouble even reaching for a drink. I do not anticipate A. would be able to reach for items that customers purchased. Furthermore, the evidence is that he is poor with math (5th percentile), is dyslexic and not good with computers.

[274] I do not find it a substantial or real possibility that A. would be capable of being a retail sales clerk either. Again, he is unable to sit or stand for long. I cannot imagine him reaching for retail goods for customers when he cannot reach for a soda without pain. Furthermore, he is described by several lay witnesses as moody and hard to be around which would not fare well for him in a retail, customer service job.

[275] In terms of a security position, A. worked in security in the past with his friend SM. SM and GJ describe A. as frail and unable to do much. I cannot imagine how A. could be physically fit to do security even part time. He is unable to sit or stand for long. He also has a past criminal conviction which may or may not affect his ability to seek this type of work. If A. could go back to security, I believe that he would have already done so. He thoroughly enjoyed working from a young age as it gave him a focus in his life and a sense of pride.

[276] I also am not convinced that there is any real possibility that A. would be capable of an apartment building manager. Presumably that role would involve

dealing with tenants and responding to their problems. Again, the evidence is that A. is moody, short with people and hard to be around. He is not good at computers so I am unsure as to how he would communicate with tenants or contractors or even prepare building notices. Dr. Quee Newell did not provide a detailed job description for a select apartment building manager, but presumably there would be some physical aspects to a building manager role such as cleaning or fixing things. I am not sure how A. would physically do such tasks when, based on Ms. Aggarwal's testing, he cannot pick up anything remotely heavy, raise his arms, stand or stoop for long. Finally, A. has no experience as an apartment building manager and according to Dr. Quee Newell is not a good candidate for formal training. I am not sure how he would possibly retrain for the role.

[277] I therefore do not accept the defendant's submissions to reduce A.'s award for loss of future earnings based on the defendant having any residual ability to work. In my view, this is speculative.

Discussion

[278] As mentioned above, there is no evidence that would indicate a real and substantial possibility that A. will ever return to work even part-time in a sedentary role. I agree with A. that he is likely permanently disabled.

Assessment of Loss of Future Earnings Capacity

[279] The present value of A's loss of earnings is calculable through s. 56 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the *Law and Equity* Regulation, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of future earnings is 1.5%.

[280] Assuming A. would retire at age 65, he would have had approximately 11 more years of employment until retirement age. I note that the defendant submits that I should use 10 years of employment not 11. However, A's evidence was that while he did not have a retirement plan set in stone, before the Accident, he

anticipated that he would continue to work until age 65 or 70. I accept A's suggestion to use 11 years as fairest.

[281] The multiplier for the period of 11 years at 1.5% is 10.0711 (see Appendix E of *CIVJI: Civil Jury Instructions, 2nd ed.* (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update)).

[282] For reasons already set out above under past income loss, I agree with the Defendant that the benchmark ought to be $56,160 which represents steady full-time work year-round at $27 per hour. In fact, this is conservative as the evidence is that remuneration at both Retro and Astro has increased by 30% since 2021 when A. last worked.

[283] Therefore, the present value of A.'s without-accident earning stream could be calculated as, assuming he would have earned $56,160 per year until retirement:

> (Annual Income) x (11-year multiplier)
> $56,160 x 10.0711 = $565,592.98

[284] Contingencies should be applied. The defendant submits that the award should be reduced for the contingency that A. may undergo medical treatments that will reduce his pain and/or functioning and/or help his sleeping and mood. I accept that this is a possibility. However, there is an equally real and substantial possibility outlined by Dr. Regan that A.'s treatments may fail and cause his pain and mood to become worse which may cause A. to further spiral and 'cocoon.' In my view, these two positive and negative contingencies cancel each other out. There are also general negative contingencies to consider such as A. becoming ill or even dying from other causes, suffering injuries on the job and market job fluctuations. On the other hand, there are general positive contingencies such as A. receiving promotions or otherwise earning more income and thereby suffering a loss significantly higher than the number above.

[285] In *Gray v. Lanz*, 2022 BCSC 2218, Justice Gomery discussed general labour market contingencies, stating:

> [93] Having regard to the recent appellate caselaw, I doubt that a 20% adjustment for general labour market contingencies could now be justified as a general rule. The recent cases that have applied such an adjustment in this Court all involved younger plaintiffs at or near the start of their working careers, and the risks of future disability or early retirement may loom larger in such a case; *Montazamipoor* at para. 108; *Dunn* at para. 206; *Hann* at paras. 10 and 111.
>
> …
>
> [105] I will allow a 10% general negative contingency for early retirement and other labour market contingencies, such as the possibility that Koolhaus may fail or be wound up on Mr. Hamann's retirement. Mr. Gray concedes that a 10% negative contingency is appropriate. I do not think that the contingency should be larger than 10% because:
>
> a) As discussed, the cases direct that general contingencies should be modest; and
>
> b) Mr. Gray is a middle-aged man, well established in his career, and his position is to be contrasted with that of a younger plaintiff who is just starting out.
>
> [Emphasis added.]

[286] I accept A's submission that due to him being in his 50's and having had a well-established career path as a labourer, a 10% negative general contingency is appropriate.

[287] I decline to reduce the award further because there are positive contingencies that need to be considered. Not only is there a possibility of hirer wages but the evidence is that both Astro and Retro are already paying 30% more for A's role than the $27 per hour that A. received and that I have been invited by both parties to use in assessing damages. Additionally, A. has always enjoyed working and may well have worked until he was 70 years old or even longer but for the Accident.

[288] Using a 10% negative general contingency, the future loss of earnings is calculated as follows:

$565,592.98 x 0.9 = $509,033.68, rounded to $500,000.

[289] I award A. $500,000 for future loss of income earning capacity.

D. Loss of Housekeeping Capacity

[290] In *Mckee v. Hicks*, 2023 BCCA 109 the Court of Appeal at para. 112 summarized when to consider making a separate pecuniary award for loss of housekeeping capacity:

> [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.

[291] The evidence supports A.'s claim for a separate pecuniary award for loss of housekeeping capacity. A. is physically unable to do many housekeeping tasks and will continue to rely on someone else to help him. MB testified that when she lived with A., she did 70% of the housework because A. was unable to. She testified that she felt like she was a care aide looking after a patient. DS who lives with A. currently testified that A. is unable to mop, load the washing machine, wash dishes, put away dishes on higher shelves or lift certain items for cooking. She has hired someone to help clean the place as a result. GJ testified that the plaintiff worries about who will help him do these things in the future.

Past Loss of Housekeeping Capacity

[292] A. submits that he is entitled to an award for loss of housekeeping from the date of the Accident to trial.

[293] The defendant maintains that the necessity for this award is not warranted. The defendant points out that when A. was living in a bus, he did not require help and even in his current residence, he only has one bedroom for himself and some communal spaces and is not relying on paid help. The defendant states that A. admitted stating at his discovery that he could do household chores. The defendant further submits that the non-pecuniary award includes an amount for housekeeping.

[294] In *Steinlauf v. Deol*, 2022 BCCA 96, the Court of Appeal upheld an award for loss of housekeeping capacity, and stated:

> [116] Tying the award to the actual loss of capacity found, as the judge was obliged to do, it was in my view entirely reasonable for the judge to assess it on the basis of a requirement of assistance for five hours per week.
>
> [117] As to the cost of such assistance, this Court has previously endorsed the approach of basing it on a reasonable market rate as discussed in other cases: see *Kim* at para 44, and the trial decision, *Kim v Lin*, 2016 BCSC 2405 at para 196. Again, no error has been demonstrated, and the appellants provided no basis for suggesting that the rate of $20/hour used by the judge was unreasonable. If anything, it seems to me to be a conservative estimate.
>
> [Emphasis added.]

[295] In *Steinlauf*, it was not necessary for the plaintiff to have incurred the costs of housekeeping. In that case the plaintiff was relying on help from his parents. In A's case, he benefitted from help from others including MB and DS in addition to his friend C. I agree with A. that the law does not require him to have hired anyone to do the housekeeping chores that he could not do.

[296] Furthermore, A. may have had far less housekeeping to do when he lived in a van or a bus but his claim for 10 hours per month throughout the five and a half years to trial seems conservative (both in terms of hours and rate claimed) even considering the period of time he lived in his van or bus.

[297] Finally, as mentioned above, I found that A. was a credible and reliable witness. There were some discrepancies with his discovery transcript evidence and his evidence at trial. However, he also testified that his pain became worse over time. Further, he testified that he has good days and bad days.

[298] Here A. claims 10 hours per month at $20 per hour or $2,400 per year for five and a half years from the date of the Accident to trial which I find reasonable. As such, I award the plaintiff $13,200 in past loss of housekeeping capacity.

Future Loss of Housekeeping Capacity

[299] In BC, 1.5% is the rate of interest that must be used to calculate the present value of any future income loss. According to the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56; and the Law and Equity Regulation, B.C. Reg. 352/81, I must apply the rate of interest of 2% to calculate any other future losses such as loss of future housekeeping capacity.

[300] A. seeks and I accept that 20 years of loss until he is approximately 74 years old as appropriate. The multiplier for 20 years at 2% is 16.3514.

[301] A. claims $2,400 per year for housekeeping for 20 years which totals $39,242 for future loss of housekeeping capacity. I find this reasonable on the evidence and award A. what he seeks under this category.

E. Cost of Future Care

[302] A. uses Gabapentin, Trazodone, Cyclobenzaprine and cannabis to manage his pain and assist with sleep.

[303] Using a rough-and-ready approach A. seeks the following for his prescriptions:

a) $57.90 per year for Gabapentin, for the next 25 years.

b) $40 per year for Trazodone, for the next 25 years.

c) $17 per year for Cyclobenzaprine, for the next 25 years.

[304] The discount rate for future care items is 2%. The multiplier for 25 years is 19.5235.

[305] Therefore, the present value of the above annual amounts can be calculated as follows:

a) 19.5235 x $114.90 = $2,243.25

which A. claims for his costs of future care.

[306] The defendant submitted that A. should receive $4000 for costs of future care ($1500 for return to work sessions and $2500 for physiotherapy and kinesiology) but only if I accept the Defendant's Scenario A regarding future earning capacity which assumes that A. would have surgeries on both shoulders a few months apart and return to his old employment as a labourer within a year. I have already rejected Scenario A.

[307] In terms of the prescriptions claimed by A., they were all prescribed by his family doctor for his pain and sleep issues after the Accident, he continues to take them as prescribed and I find he will continue to do so in the future. This claim of A. is modest and reasonable. Therefore, A. will receive $2,243.25 for his costs of future care.

F. Special Damages

[308] The parties agree the plaintiff is entitled to certain of his special damages totalling $2,968.

[309] However, they disagree on four items: (1) the appropriate mileage rate; (2) whether the cost of private MRI's that A. paid for ought to be recoverable; (3) whether cancellation costs for missed appointments are recoverable; and (4) whether the costs for cannabis that A. purchased is recoverable.

[310] The test for special damages is reasonableness.

Mileage Rate

[311] With respect to mileage, 14 years ago the Court in *Grewal-Cheema v. Tassone*, 2010 BCSC 1182 said the following:

> [60] The plaintiff claims special damages of $2,683.50. The defendants take issue with only a few things. The defendants say that the amount allowed for mileage should be $.30 per kilometre not $.50 per kilometre. Both counsel refer to the Schedules that form part of the Rules of Court. I am not bound by the Rules on this point. I say that what matters is that judges live in

> the real world. In this day and age $.50 per kilometre is, if anything, too little. I am against the defendants. $.50 per kilometre it will be.

[312] In *Trafford v. Byron*, 2022 BCSC 1896, Madam Justice Wilkinson found that the $.50 per kilometer rate set out in *Grewal-Cheema* no longer reflected reality in light of the increased costs of operating a vehicle and applied the rate of $.60 per kilometer: *Trafford* at para.121.

[313] I agree with Madam Justice Wilkinson. It is common knowledge that practically all costs have increased including fuel costs and the price of vehicles since 2010. As such, I find the plaintiff's claim for $.60 per kilometer reasonable and indeed, conservative.

Private MRI's

[314] The cases go either way on whether or not the costs of private MRI's are recoverable. In *Owen v. Peljhan*, 2017 BCSC 423, the Court did not permit the cost as a special damage saying:

> [112] In my view, a good portion of the expenses claimed by Ms. Owen justifiably fall within the special damages category. However I agree with the defendant that some of the expenses are not justified. For example, there is insufficient evidence of why Ms. Owen needed to obtain a privately funded MRI, as opposed to having one conducted using the public health care system. Moreover, I have taken into consideration that Ms. Owen has had access to Mr. Thomas' health care benefits since their marriage and consequently some of the costs associated with the therapies or treatments she has followed would have or could have been paid under that plan.

[315] However, in *Pupo v. Hua*, 2020 BCSC 1682, the Court allowed the cost saying:

> [125] I also find the private MRI to be justifiable and reasonable. The defendants refer to *Cooknell v. Quinn*, 2013 BCSC 1653 at para. 39 where the court stated that a publicly-funded scan was available and there was no evidence that such investigation was necessary or proper.
>
> [126] Dr. Salvino sent the requisition for the MRI which was suggested by Dr. Cortese. That is clearly sufficient to establish the MRI was proper, and necessary. The defendants focused on lack of evidence of medical urgency to seek out a private MRI. With respect, that is not the only consideration. The MRI was helpful to both medical experts in diagnosing the injuries -- experts relied on by the defendants.

> Moreover, the evidence does not support a finding that Mr. Pupo could have received an MRI in time for those reports, or in a timely way at all.
>
> [127] Moreover, the MRI was important to determine if there was an actual disc injury. Given how active Mr. Pupo is at the gym and the fact that he experienced a significant injury when doing a dead lift, I accept that both the swiftness and certainty of getting an MRI quickly was to his benefit. I find it was reasonable and necessary. Therefore, I allow the cost.
>
> [128] For those reasons, I award the full amount claimed by the plaintiff for special damages.

[316] In *Laybolt v. Baylis*, 2021 BCSC 1798 the Court also allowed the MRI under special damages, saying:

> [85] In terms of the MRI bill, the defendants say that expense is a legal disbursement because it arises from Dr. Cameron's July 19, 2018 medical-legal report, the MRI was not completed until May 10, 2019 and the plaintiff's lawyer was billed for it. The plaintiff says that she has yet to pay the bill for the MRI but that is compensable as an accident-related medical expense because the MRI scan was requested by her family physician, Dr. Bos, on the recommendation of Dr. Cameron. In support of her position, she relies on, among other authorities, *Pupo v. Hua*, 2020 BCSC 1682 [*Pupo*], at paras. 125-126, in which Sharma J. found a private MRI expense to be justifiable and reasonable.
>
> [86] Here I find that the private MRI is a reasonable expense. The reason the plaintiff had the MRI scan was because Dr. Cameron had questions regarding whether there were residual changes following a brain injury which would have occurred at the time of the November 2016 accident. Dr. Bos made the referral on that basis. Accordingly, I am of the view that it was necessary for the plaintiff to obtain an MRI. It was considered to be important by Dr. Cameron to diagnose the plaintiff's injuries from the accident (although in his July 2019 report he concluded that the changes on the MRI scan were "probably not resultant from the brain injury" but that a normal MRI scan did not alter his opinion regarding the diagnosis of a mild traumatic brain injury because MRIs are unable to detect microscopic brain injury). I share the view of Sharma J. in *Pupo* that urgency is not the only consideration and I find that the MRI scan is a legitimate medical expense.

[317] I find the costs of the private MRI's sought should be allowed. A. was searching to find out what was wrong with him. He had asked his family doctor Dr. K repeatedly to send him for imaging as he knew that something was very wrong with his shoulders. None of the treatments were helping him and his pain was getting worse. Dr. K did not send him for MRIs despite his requests. The defendant's expert

witness Dr. Simonett testified that when she reviewed Dr. K's records, she wondered why there was a delay in obtaining imaging.

[318] In 2021, A. met with a naturopathic doctor who advised him to have full upper body scan in order to determine what was wrong. As suggested, A. called a private facility and managed to scrape together the funds to pay for the MRIs to find out what was wrong and try to alleviate his pain. As it turns out, the MRIs were extremely helpful. They showed the rotator cuff tears in his shoulders. They were reviewed by the various experts in this case. I find it was entirely reasonable for A. to have incurred the cost of the private MRIs.

Cancellation Fees for Missed Appointments

[319] Respecting cancelled or missed appointment fees, A. relies on *Mac v. Liao*, 2024 BCSC 609 where the Court allowed a cancellation fee for a missed appointment. I agree with the defendant that the cancellation fees in this case ought not to be recoverable. In *Mac*, the Court found that the plaintiff missed the appointment as a result of the accident and therefore the cancellation fee was recoverable: see *Mac* at para.178. Here, the evidence does not support that the missed appointments being as a result of the Accident. It is therefore not reasonable for A. to expect the defendant to pay for missed appointments.

[320] A. seeks special damages for the cost of cannabis in managing his pain. He seeks reimbursement for a small portion of the costs he incurred for cannabis where he retained receipts.

[321] In *Holt v. McLatchy*, 2022 BCSC 1421, the Court allowed the cost of cannabis:

> [141] The Defendants dispute the Plaintiff's claim of expenditures for the medical use of cannabis in the amount of $835.47. The Defendants submit that no expert has opined that cannabis is required, therefore, they deny all claims for cannabis.
>
> [142] Courts have considered claims for reimbursement for cannabis. The medical use of cannabis can be reimbursed as special damages: *Joinson v. Heran*, 2011 BCSC 727 [*Joinson*]. A finding that the use of cannabis is reasonably necessary, can be made if the medical evidence supports it: *Joinson*, at para. 420. In *De Groot v.*

> *Heller*, 2018 BCSC 14 at para. 134, the plaintiff was not awarded any special damages for the regular use of cannabis edibles, due to this form of medication not being approved by her attending physicians.
>
> [143] The Plaintiff claims she had medical cannabis prescribed by Dr. Chu following the 2015 Accident, as well as refills provided by the same. It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281: *Milina v. Bartsch*, at 78.
>
> ***Conclusion***
>
> [144] The claim for medical cannabis is allowed, as are the claims for the adaptive dog leash and the bicycle. Total special damages awarded are $17,272.17.

[322] In this case, I agree with the defendant's position that the cannabis costs are not reasonable. Unlike in *Holt*, A's treating physicians did not prescribe cannabis nor was there evidence from any of the experts that cannabis would assist A's symptoms. To the contrary, Dr. Sangha's evidence was that A's self-medication with cannabis was suboptimal.

[323] I was not provided the breakdown of the four disputed items. As such, I will leave it to the parties to calculate the total of the special damages to counsel in accordance with my reasons.

Conclusion

[324] In summary, A. is entitled to the following in accordance with the reasons above:

a) Non-pecuniary damages:	$235,000
b) Past loss of earning capacity:	$215,000 (gross)
c) Future loss of earning capacity:	$500,000 (gross)
d) Past loss of housekeeping capacity	$13,200
e) Future loss of housekeeping capacity:	$39,242
f) Cost of future care:	$2,243.25
g) Special Damages:	to be calculated
Total:	**$1,004,685.25**

[325] The issue of costs was adjourned. If the parties cannot agree on this issue and need to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving to schedule a costs hearing.

Hamilton J.