IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lidder v. Pearce,*
2024 BCSC 2196

Date: 20241204
Docket: M168196
Registry: Vancouver

Between:

Amar Jas Singh Lidder

Plaintiff

And

Amanda Pearce and Sadar Investment Ltd.

Defendants

- and -

Docket: S187544
Registry: Vancouver

Between:

Amar Jas Singh Lidder

Plaintiff

And

Arif Javed, Super Save Disposal Inc. and HSBC Bank Canada

Defendants

Before: The Honourable Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:	M. Randhawa K.S. Johal H. Minhas
Counsel for the Defendants in both actions:	M. von Antal
Place and Dates of Trial:	Vancouver, B.C. January 22–24, 29 and September 3–6, 9–13, 2024
Place and Date of Judgment:	Vancouver, B.C. December 4, 2024

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INTRODUCTION

[1] The plaintiff, Amar Lidder, was involved in two motor vehicle accidents. The first accident occurred on June 15, 2015 (the “First Accident”) and the second on November 7, 2017 (the “Second Accident”). He claims damages for his injuries. Liability is in issue with respect to the first accident.

[2] In the First Accident, the plaintiff was travelling southbound on 120 Street (Scott Road) in the City of Surrey, BC. He was in a multi-purpose turning lane in the middle of the roadway which was bounded by two lanes going northbound and two lanes going southbound. The plaintiff attempted a left turn in front of a stopped lane of traffic and proceeded across the curb lane at the entryway to the shopping plaza that he was trying to reach, when he was struck by the defendant, Amanda Pearce, who was driving a Smart car.

[3] With respect to the Second Accident, the plaintiff was the driver of a motor vehicle that was rear-ended while stopped at a red light. Liability is not in dispute.

[4] The plaintiff submits that his injuries are ongoing, severe, and restrict his employment and will impact him for the foreseeable future. He claims his injuries are divisible injuries. In respect of the First Accident, he seeks damages for his injuries including non-pecuniary damages, past loss of income-earning capacity, past loss of housekeeping capacity, and special damages. In respect of the Second Accident, the plaintiff claims damages for his injuries, including non-pecuniary damages, past loss of income-earning capacity, future loss of income-earning capacity, past loss of housekeeping capacity, cost of future care, as well as special damages. issues

[5] The key issues in this matter are:

1) Liability for the First Accident;

2) Whether the injuries of the plaintiff are divisible or indivisible; and

3) Damages.

BACKGROUND

[6] The plaintiff is 30 years old. He was 21 years old at the time of the First Accident. He is married and lives with his parents in Surrey, BC. He is employed full-time as a pharmacist with Shoppers Drug Mart's central pharmacy services located in Burnaby, BC.

[7] Born in Ontario, he moved to Surrey when he was still a toddler with his family. He completed school in Surrey and then attended the University of British Columbia ("UBC"), working towards a Bachelor of Science degree in pharmacy and had completed his first year pharmacy in April 2015.

[8] At the time of the First Accident, he was taking two summer courses and working full-time hours as a merchandiser and pharmacy assistant. When he started at UBC, he went to the Okanagan campus, taking the pre-pharmacy program to try to get him accepted into the pharmacy program. The first year he tried to get into the pharmacy program at UBC, he was unsuccessful. He was ineligible because his Pharmacy College Admission Test (PCAT) score, a test which is taken into account in admissions to the pharmacy faculty, did not meet the minimum requirement. However, he persevered. He took an extra year with some courses to ensure he would have a lighter course load for first year pharmacy and had time to study hard for the PCAT. He was accepted into the program the following year in 2014. By April 2015, he had completed his first year pharmacy studies.

LIABILITY

First Accident

[9] The First Accident happened on June 15, 2015 at approximately 12:45 p.m. It occurred at Scott Road (120 Street) in Surrey, BC, when he was trying to make a left-hand turn into a shopping plaza.

[10] Where the First Accident occurred, 120 Street has two lanes northbound, two lanes southbound, and in the middle, there is a lane between opposing traffic lanes that allowed vehicles from either direction to turn left. It was referred to by various

names during the trial. In these Reasons, I will refer to it as a “two-way left turn lane”. The two-way left turn lane in the centre is marked for drivers with left turn arrows on the pavement.

The Plaintiff’s Evidence

[11] The plaintiff testified that at the time of the First Accident, he was operating his mother's grey 2011 Volkswagen Jetta. His mother was the main driver of the Jetta but he was allowed to use the vehicle at times. He had some limited familiarity with the vehicle prior to the First Accident. The plaintiff had exited a parking lot at 84th Avenue and 120 Street, and then proceeded southbound on 120 Street. He was in the left lane of the two southbound lanes. He turned left to enter into the two-way left turn lane in order to do a left-hand turn to enter into a shopping plaza located on the other side of the street. That shopping plaza was located between 80th and 82nd Avenues.

[12] The plaintiff could not see around the cars in the oncoming northbound left lane so as to see Ms. Pearce’s vehicle approaching in the northbound right curb lane. The plaintiff testified that the left lane of the northbound vehicles facing left had stopped. He was motioned to move forward by a driver in a vehicle stopped in in the left-hand lane northbound. The plaintiff testified that he crept forward. He looked once to the right. He did not testify that he ever looked again. He did not see anyone in the right lane northbound and executed his turn. He did not see Ms. Pearce’s vehicle. He did not look again to see if there were any vehicles travelling towards his vehicle.

[13] The plaintiff testified that before starting his turn across the northbound lanes, he came to a complete stop. He saw that northbound traffic between 80th and 82nd Avenues was backing up to where his location was in the two-way left turn lane. He testified the reason for this backup was that there was a red light at 82nd Avenue. The vehicle which stopped facing northbound in the left lane was being driven by Angelo Zenone. There was a large gap, about one to two car lengths, in front of Mr. Zenone’s vehicle. Mr. Zenone waved the plaintiff through. The plaintiff took this

to be an indication that Mr. Zenone was giving him space so that the plaintiff could start to make his turn. The plaintiff slowly inched forward into the northbound left-hand lane. He had looked to his right when he commenced crossing from the left northbound lane to the right lane. He testified that he did not see anybody when he was inching forward and he continued with his turn, inching along. He had just about completed his turn, he testified, when all of a sudden he heard a loud bang followed by his side passenger airbags deploying. The plaintiff believed he was going five to seven km/h before the collision.

[14] When he commenced crossing , the plaintiff could not see whether there were any vehicles in the opposing lane of travel closest to the curb. He did not see Ms. Pearce's vehicle approaching. He was unable to say exactly where his car was on the road in relation to the lanes of travel. He was not able to say where Ms. Pearce's car was or what her speed was leading up to the collision. The plaintiff did not recall what type of vehicle it was that had left the gap for him.

[15] He agreed in cross-examination that from the moment that he commenced his turn, he had to be able to be sure that the right-hand lane northbound was clear. The plaintiff was not able to say exactly where his vehicle was in relation to the two northbound lanes when the collision occurred. The damage to the Jetta vehicle he was driving, however, was at the rear bumper area on the right passenger side of the vehicle as depicted in the photographs in evidence.

[16] In cross-examination, the plaintiff was questioned as to what he could recall about the vehicles that were positioned behind Mr. Zenone’s vehicle which left a gap for him. He indicated that there were cars lined up behind Mr. Zenone’s vehicle. However, the plaintiff’s discovery evidence taken on June 16, 2022 was put to the plaintiff and he had indicated that he could not recall whether there was a vehicle behind Mr. Zenone’s vehicle or not.

Amanda Pearce

[17] The defendant, Amanda Pearce, testified that she was going 50 km/h when she saw the plaintiff's vehicle ahead of her. She tried putting on her brakes but the

vehicle kind of “jerked” because she was too close to the plaintiff’s vehicle to stop.. She testified that she saw the plaintiff to her left hand side and that he was about a car length in front of her vehicle. She saw the plaintiff’s vehicle’s front-end was to her left hand side. She testified that there were vehicles in the lane in front of her, about three car lengths away. Later in her evidence, she said they were two to three car lengths away. After the impact with the plaintiff, they moved their vehicles into the shopping plaza parking area and she got out of her vehicle. The other driver did not mention being injured. She stayed only briefly before leaving. At the time of the accident, she was working for Westcan Auto Parts.

[18] In cross-examination, she agreed that she had indicated in her examination for discovery that she was going 50 or 60 km/h but maintained that she was staying up as the same speed as the traffic around her. She did not believe she was speeding. She denied that there were no vehicles ahead of her.

Angelo Zenone

[19] Angelo Zenone testified that his vehicle was in the left lane facing northbound travelling towards the intersection of 82nd Avenue. He had stopped because there was a red light ahead of him at 82nd and traffic was backed up. He noticed the plaintiff's vehicle in the lane in the left-turning lane. He saw that the plaintiff had his left turn signal on. Mr. Zenone stopped his vehicle to enable the plaintiff to turn left into that shopping plaza complex. He saw ahead that the traffic light had turned green and vehicles were moving ahead. He maintained a gap of two to three car lengths ahead of his vehicle to enable the plaintiff to make his left turn. He had not noted any traffic in the right lane except adjacent to his lane further up. Mr. Zenone testified that once the plaintiff started his turn, about three to four seconds passed while he was travelling in front of his vehicle then into the right lane beside him when he was struck by Ms. Pearce’s vehicle.

[20] Just before the collision, Mr. Zenone noticed in his side mirror Ms. Pearce’s vehicle was approaching and testified it was likely two to three car lengths when he first noticed it before impact.

[21] There was a truck behind him. It was stopped behind him but he could not say for how long. He could not say the speed of Ms. Pearce's vehicle. After the collision, Mr. Zenone drove ahead about hundred metres and entered into the parking lot. He met the plaintiff and provided him with his contact information.

[22] Mr. Zenone was unable to say whether Ms. Pierce was speeding as he indicated that he was stopped and any vehicle moving would have appeared speeding to him.

Credibility and Reliability of Testimony

[23] In cases such as the present, where differing versions of the accident itself exist coupled with the plaintiff claiming soft tissue injuries, the credibility and reliability of the evidence is important.

[24] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon set out considerations to bear in mind assessing credibility and reliability:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); [[*Faryna*] *v. Chorny*, [1952] 2 D.L.R. [354] (B.C.C.A.)] [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

[25] Similarly, in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356 to 357, 1951 CanLII 252, Justice O'Halloran, for the BC Court of Appeal, stated:

> […] the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the

> probabilities affecting the case as a whole and shown to be in existence at the time; […]
>
> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility […] A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.
>
> [Citations omitted.]

[26] Similarly, as noted by Justice Verhoeven in *Buttar v. Hergott*, 2023 BCSC 2043:

> [93] These comments refer to both credibility, in the narrower sense (whether the witness is honestly telling the truth, or at least attempting to do so to the best of his or her ability) and reliability (whether the testimony of the

> witness is factually accurate). Credibility and reliability are not the same thing: *R. v. Plehanov*, 2019 BCCA 462 at para. 51.
>
> [94] The assessment of credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events: *R. v. Gagnon*, 2006 SCC 17.

[27] In general, I have no reason to doubt the credibility of the plaintiff. However, in terms of reliability, he was not able to recall certain details accurately. For example, in cross-examination, he was shown photographs that contradicted his recall of the entrance area to the parking lot. Similarly, respecting absences from work, the plaintiff was unsure and guessed and averaged his absences. As well, he was inconsistent in his evidence of whether there were vehicles behind Mr. Zenone's vehicle. At his examination for discovery, the plaintiff could not recall any vehicles behind Mr. Zenone, however, at trial, he testified that there were vehicles lined up behind Mr. Zenone's vehicle.

[28] Regarding Ms. Pearce, I find that there was no reason to find her evidence not credible. However, respecting the reliability of her evidence, she was cross-examined of inconsistencies she gave. At her examination for discovery held June 15, 2022, she indicated that her speed was about 50 to 60 km/h which was clearly an approximation. At trial, she indicated 50 km/h. She testified she was travelling with the flow of the traffic. She did not believe she was travelling at 60 km/h and, rather, was closer to 50 km/h. I accept that she was travelling the speed limit or slightly over but in keeping with the traffic.

[29] I accept Mr. Zenone's evidence and have no reason to find his evidence not credible. On the points he was able to remember, I accept his evidence as reliable.

Applicable Legal Principles

[30] The applicable sections of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*] are:

> **Definitions**
>
> "highway" includes

[…]

(b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and

(c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited

[…]

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Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

(a) without due care and attention,

(b) without reasonable consideration for other persons using the highway, or

(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

[…]

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Turning left other than at intersection

166 A driver of a vehicle must not turn the vehicle to the left from a highway at a place other than an intersection unless

(a) the driver causes the vehicle to approach the place on the portion of the right hand side of the roadway that is nearest the marked centre line, or if there is no marked centre line, then as far as practicable in the portion of the right half of the roadway that is nearest the centre line,

(b) the vehicle is in the position on the highway required by paragraph (a), and

(c) the driver has ascertained that the movement can be made in safety, having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway.

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Signals on turning

170 (1) If traffic may be affected by turning a vehicle, a person must not turn it without giving the appropriate signal under sections 171 and 172.

(2) If a signal of intention to turn right or left is required, a driver must give it continuously for sufficient distance before making the turn to warn traffic.

(3) If there is an opportunity to give a signal, a driver must not stop or suddenly decrease the speed of a vehicle without first giving the appropriate signal under sections 171 and 172.

Means of signalling

171 (1) Subject to subsection (2), if a signal is required a driver must give it by means of

(a) the driver's hand and arm,

(b) a signal lamp of a type approved by the director, or

(c) a mechanical device of a type approved by the director.

(2) When a vehicle is constructed or loaded in a manner that makes a signal by hand and arm not visible both to its front and rear, or a body or load extends more than 60 cm to the left of the centre of the steering wheel, a driver must give signals as provided by subsection (1) (b) or (c), and a person must not drive the motor vehicle on a highway unless it is so equipped.

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Yield signs

173 (1) Except as provided in section 175, if 2 vehicles approach or enter an intersection from different highways at approximately the same time and there are no yield signs, the driver of a vehicle must yield the right of way to the vehicle that is on the right of the vehicle that the driver is driving.

(2) Except as provided in section 175, if 2 vehicles approach or enter an intersection from different highways at approximately the same time and there is a yield sign, the driver of a vehicle facing the sign must yield the right of way to all other traffic.

Yielding right of way on left turn

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

[31] Case law examining these sections considers the duties of the driver having the right of way and the driver in the servient position. In addition to the legislative provisions imposing duties, the cases below set out the common law duties of care in similar situations to the case here.

[32] In *Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450 (S.C.C.), 1952 CanLII 328, the Supreme Court of Canada majority noted:

> [49] While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

[33] As noted in *Stewart v. Dueck*, 2012 BCSC 1729, the court held:

> [38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.
>
> [39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, 2010 BCCA 404 at para. 26.
>
> [40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard of care, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.
>
> [41] While these general propositions are endorsed by the authorities, ultimately, the determination of liability turns on the particular facts of each case.

[34] The parties dispute whether the First Accident took place in an "intersection" for the purposes of the *MVA.* If it was an intersection, as the Plaintiff argues, then s. 174 applies. If it was not, as Ms. Pearce argues, s. 166 applies.

[35] An intersection is defined for the purposes of the applicable Part of the *MVA* in s. 119:

> 119 In this Part:
>
> […]
>
> "intersection" means the area embraced within the prolongation or connection of the lateral curb lines, or if none, then the lateral boundary lines of the roadways of the 2 highways that join one another at or approximately

> at right angles, or the area within which vehicles travelling on different highways joining at any other angle may come in conflict;
>
> […]

[36] To interpret s. 119, the definition of "highway" from s. 1 of the *MVA* is necessary: it includes "every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited".

[37] In *Cyr v. Koster*, 2001 BCSC 1459, a left-turning driver was completing their turn into a parking lot area when they hit someone already in the parking lot. The court noted at para. 15 that a "privately owned parking lot is a highway when used in conjunction with the shopping centre and intended to be used by members of the public […]". Given that a public use parking lot is a highway, the court concluded that the area where it meets the road constitutes an intersection under s. 119 of the *MVA*. Therefore, in that case, s. 173(1) of the *MVA* applied.

[38] Similarly, in *Small v. Kanhai*, 2022 BCSC 1784, two cars collided in a parking lot. Justice Veenstra noted at para. 49 that it was common ground between the parties that the parking lot was a "highway" under s. 1 of the *MVA*. Relying on the definition in s. 119 of the *MVA*, Justice Veenstra treated the meeting point of two roadways within the parking lot as an "intersection" for the purposes of s. 173(1).

[39] Although s. 166 can be applied to left-turning drivers in certain circumstances, the cases where that was done are distinguishable. In *Tale Ramazan v Hilderbrand*, 2024 BCSC 638, the turning driver was crossing three lanes of traffic and was starting the turn from a driving lane. In *Smeltzer v Merrison*, 2012 BCCA 13, the driver was crossing a solid yellow line from a driving lane. In this case, the plaintiff was turning from a designated turn lane and only crossing two lanes of traffic. I analyze the standard of care for the plaintiff informed by s. 174 of the *MVA.*

[40] Instructive on who has the right of way under s. 174 is the decision in *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (C.A.), 1993 CanLII 384, in which Legg J.A. stated:

> [15] In my opinion, a driver who wishes to make a left hand turn at an intersection has an obligation not to proceed unless it can be done safely. Where each party's vision of the other is blocked by traffic, the dominant driver who is proceeding through the intersection is generally entitled to continue and the servient left-turning driver must yield the right of way. The existence of a left-turning vehicle does not raise a presumption that something unexpected might happen and cast a duty on the dominant driver to take extra care. […]

[41] At paras. 16–17 of *Pacheco*, Legg J.A. cited *Bond v. Chernoff* (14 October 1985), Vancouver 27420/73 (B.C.S.C.) where the collision occurred at an intersection with the defendant's vehicle making a left turn in front of the plaintiff:

> [16] I find support for that conclusion in the unreported decision of Mr. Justice McKenzie in *Bond v. Chernoff* (14 October 1985), Vancouver 27420/73 (B.C.S.C.). The accident in that case occurred at the intersection of Broadway and Victoria Drive. The plaintiff was proceeding east on Broadway. When the plaintiff's vehicle had entered the intersection he was confronted by the defendant's vehicle which was heading westbound making a left hand turn in front of his vehicle.
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> [17] Mr. Justice McKenzie said:
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> > I think the accident is readily explainable in that neither of the parties could see the other party because the view to [sic] one another was denied to each of them by the presence of the line of eastbound vehicles that were waiting in the eastbound lane for the foremost of those vehicles to make a left hand turn. It was not until the Plaintiff's vehicle and the Defendant's vehicle got to a point of inevitable collision that they became visible to one another and at that point each driver was helpless to prevent an accident.
> >
> > I think the law is clear under the circumstances that the obligation of the Defendant doing the left turn was an absolute obligation and I am unable to discern, on the facts of this case, that the Plaintiff was negligent.

[42] *Pacheco* was considered in *Nerval v. Khehra*, 2012 BCCA 436. The Court of Appeal held:

> [33] The principles laid down in *Pacheco* lead to the conclusion that the starting point of the analysis is that when a left turning driver is assessing making a left turn in an intersection he or she must yield the right of way to oncoming traffic unless it is not an immediate hazard. Describing a driver as dominant means no more than that driver has the right of way, whereas the servient driver has the obligation to yield the right of way. The obligation imposed by s. 174 on the left turning vehicle is that it "must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard". A left turn

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

[43] Consequently, the Court of Appeal in *Nerval* noted that the driver commencing the turn must demonstrate that when the turn commenced, there was no immediate hazard. Secondly, where the driver executing the left turn claims the through driver is at fault, they must prove that the through driver, who is dominant, was "negligent and at fault for causing or contributing" to the collision. The Court expressed this in terms of immediate hazard as follows:

> [38] Whether a through driver is dominant turns on whether the driver's vehicle is an immediate hazard at the material time, not why it is an immediate hazard. Dominance identifies who must yield the right of way. One consequence of this analysis is that negligence on the part of a through driver does not disqualify that driver as the dominant driver. The through driver remains dominant, even though their conduct may be negligent. Indeed, the through driver's fault may be greater than the servient driver's fault. In other words, a through driver may be an immediate hazard even though that driver is speeding and given her speed would have to take sudden action to avoid the threat of a collision if the left turning driver did not yield the right of way. The correct analysis is to recognize that the through driver is breaching his or her common law and perhaps statutory obligations and to address the issue as one of apportioning fault, not to reclassify the through driver as servient based on the degree to which the through driver is in breach of her obligations.

[44] Similarly, in *Hinder v. Yellow Cab Company Ltd*., 2015 BCSC 2069, Justice Arnold-Bailey discussed the effect of s. 174. She held:

> [64] Furthermore, I note that the effect of s. 174 of the *MVA* is to cast the burden on the left-turning driver to prove the absence of an immediate hazard at the moment the left turn begins. Thus, if a left-turning driver asserts that he or she started to turn when it was safe to do so, then the burden of proving that fact rests with him or her: *Nerval v. Khehra*, 2012 BCCA 436 [*Nerval*] at paras. 33-35.

[45] Justice Arnold-Bailey continued:

> [65] Also in *Nerval* (at paras. 36-37) Mr. Justice Harris outlined the two-part burden placed upon a left-turning driver under s. 174: (1) to demonstrate that when the left-turning driver commenced his or her turn, there was no immediate hazard; and (2) if the through driver is found to be the dominant driver, to show that the through driver nonetheless was negligent and at fault for contributing to the accident.
>
> [66] Madam Justice Devlin recently expounded on the first part of the burden facing the left turning driver in *Pirie v. Skantz,* 2015 BCSC 368 at paras. 37 and 39, as follows:
>
> > [37] An "immediate hazard" has been defined in these terms: if an approaching vehicle is so close to the intersection when a driver attempts to make a left turn that a collision threatens unless there is some violent or sudden avoiding action on the part of the driver of the approaching vehicle (the through driver), then the approaching vehicle is an immediate hazard. The point in time to assess whether the through driver is an "immediate hazard" is the moment before the driver who proposes to turn left actually starts to make the turn: *Raie v. Thorpe* (1963), 43 W.W.R. 405 (B.C.C.A.) at p. 410; *Vukelich v. Vliegenthart,* 2013 BCSC 879 [*Vukelich*] at para. 36.
> >
> > …
> >
> > [39] If the court determines that the through driver was an immediate hazard when the left turning driver commenced his or her turn, the left turning driver is considered the servient driver and the oncoming driver is considered the dominant driver. Any doubt is resolved in favour of the dominant driver. The relevant authorities for this proposition are: *O'Ruairc et al v. Pelletier et al*, 2002 BCSC 601 at para. 28; *Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450 (S.C.C.); *Pacheco*; and *McCowan v. Arjune et al,* 2002 BCCA 267 at para. 20.

[46] In *Hiscox v. Armstrong*, 2001 BCCA 258, the Court of Appeal noted:

> [3] On those circumstances the trial judge ruled as follows:
>
> > [5] The question arises whether under these circumstances is there evidence of negligence by the driver in the curb lane, the defendant, Mr. Aiyum? There is no evidence of speed, but even if there was evidence of speed, it does not

> indicate at what level it was in excess of the posted speed limit. Obviously, Mr. Hiscox relied upon the two drivers in the two opposite lanes giving way to him. And perhaps thinking that if they signal for him to go, they may have assured themselves that it was indeed clear in the curb lane. Perhaps Mr. Hiscox was misled in that regard, and he ventured onto that curb-travelling lane. And under those circumstances, the impact took place.
>
> [6] Section 166 of the *Motor Vehicle Act* clearly stipulates that a person in the position of Mr. Hiscox is obliged to give way to oncoming traffic where it is not in the intersection. And in light of the absence of any other evidence indicating fault, and I think I must accede to the defence contention of there being no evidence and dismiss the question of liability on that third accident. This does not mean in my reasons to say that Mr. Hiscox was at fault. As I have described the evidence that was presented, he quite likely did the right ting. Unfortunately, he was misled under the circumstances in believing by the actions of the two other drivers that perhaps it was safe without personally checking himself.
>
> [7] Accordingly, the defence must succeed on that motion of no evidence.

[4] I am in respectful agreement with this analysis. As a left-turning motorist the plaintiff had to be sure that he could clear each lane in safety. The defendant had the right-of-way. In order for the plaintiff to succeed in attaching any negligence to the defendant he had to present evidence in accordance with the often quoted words of Mr. Justice Fauteux in *Walker v. Brownlee and Harmen*, [1952] 2 D.L.R. 450 at 461:

> While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

Turning Left Through the Gap

[47] Respecting being presented with a gap in traffic, the plaintiff was not laying fault with Mr. Zenone. A driver cannot rely on a person who signals to another to do a turn in any event.

[48] In summary, s. 174 dictates that the left turner must give way to oncoming traffic if it constitutes an immediate hazard. The left-turner must ensure he could clear each lane in safety. The burden shifts to the left-turner to prove that the through driver is not an immediate hazard. The moment to make that assessment is when the turn is started.

[49] Respecting the issue of "gaps" and the expectation that a through driver should notice the gap, a number of decisions have considered the issue.

[50] In *Vahman v. Cutts*, 2015 BCSC 298, the court held:

> [22] I do not accept the plaintiff's submission that Mr. Smith should have expected someone to turn through the gap of 1.5 car lengths. Even at the conservative and modest speed Mr. Smith was travelling, he would have had little if any opportunity to avoid impacting the plaintiff's vehicle once it appeared in front of him, even if he were aware of the "gap" in front of the white SUV. It would have been unreasonable for him to have expected a vehicle would be turning through the line of vehicles waiting in the turning lane.

[51] Similarly, in *Purewal v. Li*, 2016 BCSC 1792, the court held:

> [28] I find that had Mr. Li looked to his right he would have seen Mr. Purewal's vehicle approaching from the west. Mr. Hubbard testified Mr. Purewal's vehicle was one to two vehicle lengths away from the intersection after Mr. Li commenced his turn. Mr. Purewal's vehicle constituted an "immediate hazard" to Mr. Li.
>
> [29] Counsel for the defendant argued Mr. Purewal was also at fault for the accident as he did not slow down as he approached the intersection with traffic stopped on either side. Counsel submits the facts in *Frers v. De Moulin*, 2002 BCSC 408, are on "all fours" with those in the present case. In *Frers* the defendant was found to be 60% at fault for the accident by "sailing" through an intersection in the curb lane.
>
> [30] I do not accept the defendant's position that *Frers* is applicable to the facts in this case. In *Frers* the trial judge found the defendant "was not paying sufficient attention to his driving". While all drivers must drive with due care and attention having regard to the prevailing circumstances, there is no evidence in this case to suggest that even had Mr. Purewal slowed down his vehicle as suggested by the defendant that the accident would not have occurred. The defendant has not established anything Mr. Purewal did or did not do would have prevented or lessened the damages caused by the collision. Simply put, Mr. Li was required to yield the right of way to the plaintiff. He did not look for a vehicle approaching from his right in the curb lane. Had he done so I find it more likely than not he would have seen

> Mr. Purewal's vehicle approaching the intersection and would have been able to stop his vehicle in time to avoid the collision.
>
> [31] I find Mr. Li is 100% responsible for the Accident.

[52] The plaintiff relied upon the decision in *Blundell v. Pfeiffer* , [1994] B.C.J. No. 832 (S.C.), 1994 CanLII 763 as support for the proposition that the through driver was at fault. However, in that decision, in addition to inconsistencies in the evidence between the plaintiff and the defendant, there was a separate engineering reconstruction expert who gave evidence.

[53] I find this case distinguishable. No independent engineering evidence was offered. While the plaintiff in submissions submitted that Ms. Pearce would have been at least 200 feet away had she been travelling at 55 km/h when he started his turn, this proposition was not put to her and does not accord with the evidence of Mr. Zenone, who similarly was not cross-examined on this point apart from the issue of whether Ms. Pearce was speeding.

[54] The plaintiff also relies upon the decision in *Kelly v. Yuen*, 2010 BCSC 1794. I find that that decision is distinguishable from the case at bar. In *Kelly*, traffic lights were at the intersection and an issue arose of whether there was running the red light. Additionally, the driver in *Kelly*, unlike Ms. Pearce, was travelling in a restricted right-curb lane and was found to be at an excessive rate of speed. I find this case is distinguishable from *Kelly* and does not assist in the circumstances of this case apart from the broad general principles.

[55] In *Tale Ramazan v. Hilderbrand*, 2024 BCSC 638, each driver was found 50% of fault in the following circumstances:

- the plaintiff was travelling in the curb HOV (high occupancy vehicle) lane eastbound on East Hastings Street at a speed of 10 to 15 km/h;
- the plaintiff did not recall that the cars in the lane to her left had stopped, creating gap in traffic;
- the defendant testified that he was travelling westbound on East Hastings Street, intending to execute a left turn; and

- the drivers in the inside and middle eastbound lanes had stopped to create a gap in traffic and waved him through;

[56] The court found, as a fact, that the defendant's evidence considered as a whole indicated that his vehicle had likely travelled part way into the HOV lane, perhaps approximately half of the way across when the collision occurred: para. 20. The court found this on the basis of the location of damage to each vehicle—the defendant's vehicle was impacted on the front right corner while the plaintiff's vehicle was impacted on the front left corner.

[57] The court noted the defendant's evidence that he did not see the plaintiff's vehicle in the HOV lane when he started his turn and that approximately two to three seconds passed between that time when he started his turn and the collision. The court reasoned that even though the plaintiff was in the right of way but was changing lanes just before the collision as follows:

> [28] There is no question that Mr. Koshowski had a duty to ensure that it was safe for him to turn left across East Hastings Street. Section 166(c) of the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 [*MVA*], requires drivers to ascertain that such a movement can be made safely "having regard to the nature, condition and use of the highway and the traffic that actually is at the time or might reasonably be expected to be on the highway."
>
> [29] Mr. Koshowski took some steps to ensure that he could make a left turn safely, such as stopping, signalling and proceeding forward slowly. He acknowledges that he did not, as he could have done, inch forward as he passed the first two oncoming lanes of eastbound traffic. Rather, he proceeded forward in a continuous motion into the eastbound HOV lane of East Hastings Street. He submits that he should be found 50% responsible for the First Accident.
>
> [30] Ms. Tale Ramazan submits, in effect, that she was entitled to be in the HOV lane, was established in that lane and had no duty to watch out for vehicles turning from her left to cross this lane. She submits that Mr. Koshowski should therefore be found 100% liable for the First Accident. As set out earlier I find it unlikely that Ms. Tale Ramazan was established in the HOV lane before the collision but find it more likely that she made her lane change and Mr. Koshowski commenced his left hand turn at around the same time.
>
> [31] Ms. Tale Ramazan was executing a lane change passing the vehicles in the middle eastbound lane of East Hastings Street on the right. Section 158(2) of the *MVA* requires that a driver not overtake and pass a vehicle on the right unless they can do so safely.

> [32] Ms. Tale Ramazan testified, in effect, that she was not paying attention to the vehicles on her left as she was passing them and was only looking straight ahead. As a result, she failed to see that the center and middle lanes of eastbound traffic to her left had stopped and that a gap was created ahead of these vehicles. In my view, Ms. Tale Ramazan should have observed these circumstances. She was in the process of completing a lane change adjacent to one or more entrances to a gas station—an area where she should have known that vehicles may be entering or exiting.
>
> [33] Although I find it more likely than not that she started her lane change closer to the second entrance to the gas station, the precise location is not determinative. In my view, Ms. Tale Ramazan's liability rests primarily on her failure to note that traffic to her left had stopped at around the time she started to pass those vehicles on the right.
>
> [Emphasis added.]

[58] As a result, each party was found equally liable in accordance with s. 1 of the *Negligence Act*, R.S.B.C. 1996, c. 333. Justice Mayer, in *Tale Ramazan*, reasoned as follows:

> [37] Drivers have a common law duty to recognize that vehicles around theirs have either stopped or are slowing down as they approach an intersection, and to approach the intersection with caution at a reduced speed in order to determine why the other vehicles have stopped. This is part of their general duty to keep a proper look out and take reasonable precautions in respect of potential hazards: *Coffey v. Sabbaghan*, 2020 BCCA 335 at para. 36, citing *Julian v. Joyce*, 2016 BCSC 1417 at para. 13, aff'd 2017 BCCA 217.
>
> [38] Although *Coffey* involved a collision between a left turning vehicle and an oncoming vehicle at an intersection in my view, the duty of a driver to be aware of traffic coming to a stop beside them also applies to situations involving potential left turns completed mid-block, in areas where such turns should reasonably be expected.

Finding Fault under the Negligence Act

[59] Respecting the *Negligence Act*, in *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505, the Court of Appeal stated:

> [40] Both parties referred us to *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 1997 CanLII 2374 (BC CA), 43 B.C.L.R. (3d) 219 (B.C.C.A.) as to the correct interpretation of "fault" in the *Negligence Act*, R.S.B.C. 1996, c. 333, and the distinction to be drawn between "blameworthiness" and "causation".
>
> [41] This case is governed by s. 1(1) of the *Negligence Act* which provides:

> Apportionment of liability for damages
>
> 1(1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[42] In *Cempel*, supra, this Court held that the learned trial judge had erred in applying s. 1 based on an assessment of the extent to which the parties could be said to have caused the loss or injury suffered by the plaintiff. In rejecting that approach, Mr. Justice Lambert for the majority said:

> [19] I think that such an approach to apportionment is wrong in law. The *Negligence Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.
>
> …
>
> [23] I do not think that the fact that the fault on the part of the plaintiff was an active fault, whereas the fault on the part of the defendant was a passive fault, at least at the time of the incident itself, should form any basis in this case for attributing more of the fault to the plaintiff than to the defendant.
>
> [24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. In making that apportionment in this case I would apportion 60% of the fault to the defendant, Harrison Hot Springs Hotel, and 40% of the fault to the plaintiff, Cassandra Cempel.

[…]

[45] In my view, the test to be applied here is that expressed by Lambert, J.A. in *Cempel*, *supra*, and the court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each.

[Emphasis added.]

Analysis

[60] I find that the plaintiff had looked once to the right after having started his left-hand turn and inching across the first lane before entering the curb lane. He did not stop his vehicle but continued inching across, he testified. He had testified that he looked, once, before continuing into the curb lane and was struck by Ms. Pearce's vehicle.

[61] The evidence was that it was a clear sunny day. The evidence of Mr. Zenone was clear that he could see in his side mirror Ms. Pearce approaching and, consequently, had the plaintiff turned again to see while proceeding forward, he would have seen her vehicle approaching. Ms. Pearce would have been an imminent hazard at the moment he commenced his left turn. Ms. Pearce would have been unable to see the plaintiff's turn signal because her view of him commencing his left turn would have been blocked by Mr. Zenone's vehicle and the truck that was behind it.

[62] I find that Ms. Pearce had the right-of-way. However, as aptly noted by Justice Ker in *Rothenbusch v. Van Boeyen*, 2010 BCSC 1518 at para. 149: "[w]ho has the statutory right-of-way is informative; however, it does not determine liability in an accident. Drivers with the statutory right-of-way must still exercise caution to avoid accidents where possible". The gap in traffic was there to be seen. As in *Tale Ramazan*, Ms. Pearce had a duty to recognize that gap and proceed cautiously. Nonetheless, the plaintiff correspondingly should have seen Ms. Pearce's vehicle as she was there to be seen.

[63] In the circumstances, I find that the plaintiff did not exercise sufficient caution to ensure that it was safe to proceed, Ms. Pearce was an immediate hazard. Ms. Pearce, however, did not exercise sufficient caution in light of the stopped lane of traffic. I find myself in similar circumstances to those of Hunt JA in *Coffey v. Sabbaghan*, 2020 BCCA 335, who concluded at para. 43:

> I am unable to conclude that the conduct of either party fell so significantly below the standard of care expected of that party relative to the conduct of

> the other party that a meaningful distinction can be made in respect of their respective fault.

[64] Having determined that both the plaintiff and defendant were at fault for the happening of the second accident, I turn to the *Negligence Act*, specifically s. 1, which provides:

> **Apportionment of liability for damages**
>
> 1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> (2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
>
> (3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[65] In respect of blameworthiness, I find that each of the parties were equally to be blamed and, consequently, neither party is more culpable than the other. The blameworthiness of each is 50%.

The Second Accident

[66] As noted, the plaintiff was involved in the Second Accident on November 7, 2017. He was the driver of vehicle proceeding northbound on 176 Street in Surrey, BC. He was stopped at a red light at the intersection of Fraser Highway when his vehicle struck from behind by the defendant, Arif Javed.

[67] Liability has been admitted by Mr. Javed. The plaintiff was wearing his seat belt at the time of the Second Accident. He did not go to the hospital or immediately seek medical attention. No emergency vehicles attended. After exchange information, the plaintiff returned to his vehicle and drove to his pharmacy practicum.

[68] The plaintiff testified that the Second Accident’s impact on collision was not as hard as the First Accident but was definitely “a jolt”.

CAUSATION

[69] The reasoning on the applicable law and causation is set out in *Athey v. Leonati*, [1996] 3 S.C.R 458, 1996 CanLII 183:

> [13] Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

[70] I find here there is no issue with respect to the plaintiff's pre-accident health and the injuries he sustained following the accidents and that the two motor vehicle collisions were the cause of the plaintiff's injuries.

[71] He had no pre-existing injuries that nor any pre-existing conditions. The plaintiff was not challenged in this regard. I find the plaintiff has proven on a balance of probabilities the two accidents were the cause of the plaintiff’s injuries.

WHETHER THE INJURIES SUSTAINED BY THE PLAINTIFF WERE DIVISIBLE OR INDIVISIBLE INJURIES

[72] The BC Court of Appeal has defined indivisible injuries in *Bradley v. Groves*, 2010 BCCA 361 (leave to appeal dismissed 2011 CanLII 20960 (S.C.C.)). At para. 20, our Court of Appeal draws upon the reasons Justice Major (for the S.C.C.) in *Athey*:

> [20] In the course of the discussion, Major J. (for the Court) described injuries produced by more than one cause as either “divisible” or “indivisible”. Divisible injuries are those capable of being separated out and having their damages assessed independently. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes. At paras. 22-25, he commented on apportionment between multiple causes and the issue of divisibility:
>
> > *(1) Multiple Tortious Causes*
> >
> > [22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the

> plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.
>
> [...]
>
> *(2) Divisible Injuries*
>
> [24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
>
> [25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

[Emphasis added by the Court of Appeal.]

[73] This paragraph of *Bradley* explaining apportionment has been reaffirmed in *Khudabux v. McClary*, 2018 BCCA 234 at para. 32 as well as at *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at para. 87.

[74] While specific factors have not been identified when considering the assessment of divisibility, two Supreme Court of BC decisions are helpful in determining whether an injury is divisible.

[75] In *Grabovac v. Fazio*, 2021 BCSC 2362 at paras. 204 to 209, Chief Justice Hinkson provided a summary of the law in this area noting in *Bradley*:

> (c) Divisibility of the Injuries
>
> […]
>
> [204] Whether an injury is divisible is a question of fact. Divisible injuries are those where damages can be assessed independently.
>
> […]
>
> [205] Later in the judgment, the Court stated:

> [34] … If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the *Negligence Act*, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.
>
> […]
>
> [37] … If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[206] More recently, in *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 [*Neufeldt*], the Court of Appeal considered whether the trial judge erred in law in concluding that the damages suffered in two motor vehicle accidents were indivisible. In that case, the plaintiff suffered injuries in the first accident that caused pain in his low back, mid back, neck and headaches that remained unresolved at the time of the second accident. The plaintiff suffered a mild traumatic brain injury, pain, and depression in the second accident. The Court of Appeal applied a three-part analysis regarding the divisibility of the plaintiff's injuries and damages.

[207] Writing for the Division, Justice Willcock J.A. stated as follows:

> [68] A second insult that aggravates an existing injury is frequently and correctly considered to contribute to an injury indivisible from the initial injury…
>
> [69] The injuries sustained in the first accident had not entirely resolved and were aggravated by the second accident. There was support in the evidence and in the law for the trial

> judge's conclusion that the respondent's back and neck injuries were indivisible.
>
> [70] In my view, it was not an error to find the back and neck injury suffered by the respondent as a result of the two accidents to be indivisible.

[208] Willcock J.A. explained at paras. 72-78 that the trial judge erred in law by failing to grapple with the question of whether the mild traumatic brain injury and its symptoms were a distinct, divisible injury, for which the first tortfeasor could not be held liable. In particular, Willcock J.A. held that the trial judge erred by failing to address whether the first accident in any way caused the plaintiff's concussion symptoms, or consider uncontradicted evidence to the contrary: *Neufeldt* at paras. 72-73.

[209] In addition, Willcock J.A. declined to follow the reasoning in *Lakatos v. Lakatos*, 2017 BCSC 1990 [*Lakatos*], a case in which the plaintiff's initial injuries were aggravated by a subsequent accident. In *Lakatos*, the trial judge found the injuries to be indivisible, but did not attribute any loss of future income earning capacity to the first accident. Willcock J.A. held that such a "result is difficult to reconcile in principle with a finding that there is only one injury" and that "[i]f injuries are truly indivisible, then it will be impossible to attribute specific heads of cumulative (post-second accident) damages to one injury or the other": *Neufeldt* at paras. 90, 94.

[76] In *Conarroe v. Tallack*, 2020 BCSC 626 at para. 132, Justice Marzari provided some examples of how one might determine divisibility. The paragraph noting the examples was quoted by our Court of Appeal of BC in *Neufeldt* with a caution against the final portion:

> [89] The appellants, in support of their argument, direct us to Justice Marzari's summary description of divisible injuries in *Conarroe v. Tallack*, 2020 BCSC 626:
>
> > [132] The principle of divisibility can apply most obviously to injuries to different parts of the body. Divisibility may also be possible where injuries are to the same part of the body where the evidence is sufficient to establish distinct causes of each aspect of the injury: *Khudabux v. McClary*, 2018 BCCA 234 at para. 34; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 19; *Fleming v. McAllister*, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: *Uppal v. Judge*, 2016 BCSC 642 at para. 86; *Dunne v. Sharma*, 2014 BCSC 1106 at para. 99. Finally, even where a physical injury is indivisible, specific heads of damages may still be divisible where the evidence permits such a division: *Scoates v. Dermott*, 2012 BCSC 485 at paras. 164–169; *Rajan v Hudon*, 2014 BCSC 1678; *Lakatos v. Lakatos*, 2017 BCSC 1990.
>
> [Emphasis added by the Court of Appeal.]

> [90] In my view, the final proposition in this passage must be treated with caution. It must refer only to damages arising before the second accident "where the evidence permits such a division". If injuries are truly indivisible, then it will be impossible to attribute specific heads of cumulative (post-second accident) damages to one injury or the other.

[77] The question of whether the injuries are divisible or indivisible is a finding of fact based on the evidence.

The Plaintiff's Evidence

[78] The plaintiff testified that he was 21 years of age at the time the First Accident. He was a full-time student at UBC in the pharmacy program. The accident occurred during summer break when he was also taking two courses in his pharmacy program. At that time, he was responsible for various household chores of his parents' home, including vacuuming, cleaning the bathroom, dishwashing, and lawn care. He was an active recreational soccer player. He would attend the gym between three and five times a week and would go snowboarding a few times a year.

[79] As a consequence of the First Accident, he indicated that he suffered the following symptoms:

a) Headaches;

b) Neck pain;

c) Upper back pain;

d) Deep mid-back pain;

e) Pain in the rib cage;

f) Low back pain; and

g) Sleeplessness.

[80] Following the Second Accident, he experienced:

h) Aggravation of headaches, which were more frequent and more intense;

i) Aggravation of neck pain which again was more frequent and more intense;

j) Aggravation of upper back pain, which was more frequent and more intense;

k) Aggravation of mid-back pain;

l) Aggravation of low back pain, which he indicated was most problematic for him and range from mild to severe.

m) Low mood and anxiety; and

n) Sleeplessness.

[81] Dr. Mark Adrian, a specialist in physical medicine and rehabilitation was the only medical doctor who testified. He had indicated in the course of his evidence that the plaintiff's symptoms were "more of a problem after the Second Accident". Dr. Adrian further testified in cross-examination that the Second Accident "permanently aggravated his symptoms".

[82] Dr. Adrian noted in his report that before the Second Accident, the plaintiff was still "experiencing ongoing symptoms involving his neck, upper mid back, mid back, and lower back".

[83] In these circumstances, I find the fact that the plaintiff had indicated that he was not fully recovered supports the finding that the Second Accident was an aggravation of his injuries. He was on a path to recovery and believed he was somewhat 90% recovered. The Second Accident, however, resulted in an aggravation of his injuries. Given the aggravation to all of his existing injuries, I find as a fact that his injuries are indivisible.

[84] The plaintiff testified that he experiences headaches one to two times a week when his neck pain is severe, and one to two times a month when his neck pain is not severe. He continues to take medication to manage his headaches.

[85] Following the First Accident, the plaintiff was transported by BC Ambulance Service to Surrey Memorial Hospital. He was released home and continued to see his family physicians, Dr. P. Aulakh, Dr. M. Anderson, and Dr. P. Dhillon.

[86] Following the Second Accident, the plaintiff testified that he experienced a significant aggravation of his neck and upper back pain. He testified that he continues to experience neck and upper back pain about four to five a week with the severity varying between mild to severe.

[87] He testified that he continues to take medication for his neck pain with a home-based exercise program and recently attended massage therapy following a flare-up after he commenced working full-time.

[88] The plaintiff also testified that his mid-back pain was significantly aggravated following the Second Accident. He continues to experience back pain one to two times a week with the severity being mild to moderate.

[89] He also experienced significant aggravation of his low back pain following the Second Accident. He continues to experience low back pain on a daily basis with severity varying between mild to severe.

[90] He takes medication for his low back pain and continues a home-based exercise program and had massage therapy for this additionally.

[91] He suffers from sleeplessness and wakes up one to two times a month due to his pain. His sleep was affected after the First Accident. He indicated “there were times where I would actually wake up in the middle of the night and just due to the pain” but he indicated he responded well to treatments.

[92] The plaintiff said, however, he was not referred to a physiatrist.

[93] He had commenced chiropractic treatments after the First Accident without a referral.

[94] In his testimony, the plaintiff referred to his appointments with Dr. Aulakh. He indicated that he would relate his symptoms to the doctor.

[95] Respecting his attendance to his family physician, Dr. P. Aulakh, the records were tendered into evidence. The plaintiff was cross-examined on the fact that he was self-directing his care treatments. It was suggested by the defendants that there was a danger to that. However, I find that the plaintiff had continued to see his family doctor and had there been anything significant, that would have been addressed by his ongoing treating therapist as well as Dr. Aulakh.

Ms. Subhreet Randio, the plaintiff's spouse

[96] The plaintiff called two witnesses with respect to their observations of him. His wife, Ms. Subhreet Randio was called. She is also a pharmacist. They began dating in April 2016,began living together in January 2019 and were married July 2, 2021.

[97] Ms. Randio testified that following the Second Accident, the plaintiff appeared to be in physical pain, grimacing and holding onto his neck and back when they were sore. She saw him taking Advil/Tylenol prescription medication. There were occasions when she had to assist him because he could not turn his neck due to it "seizing up". She helped him with his course work by reading notes to the plaintiff when had an examination coming up.

[98] Following the Second Accident, Ms. Randio observed the plaintiff to be frustrated and in pain. She would observe him taking hot showers after work as a result of pain in the neck and the back. She also testified that he requires extra support when sitting on a chair, couch, or bed. He uses pillows to support his back. She has also seen him using a Theragun, which is a percussion massager, and she would see him doing stretching.

[99] On occasion, she had to assist him getting out of bed when his back is spasming and helped putting his socks on. She noticed that in there are nights when he is tossing and turning in bed and appears to be tired went on waking.

[100] Ms. Randio testified that the plaintiff had to miss some social events because of his pain. She and the plaintiff's mother had assumed responsibility for heavier household chores, including cleaning the bathroom, vacuuming, and washing dishes.

***Mr. Steven Hopp, the plaintiff's* employer**

[101] Mr. Steven Hopp was the plaintiff's employer at the Shoppers Drug Mart in Osoyoos, BC at the time of the First Accident. Mr. Hopp was the owner and manager. He is presently an owner and the manager of Rutland Medical Pharmacy and Budget Pharmacy.

[102] Mr. Hopp first came into contact with the plaintiff when the plaintiff responded to an ad Mr. Hopp placed for a new pharmacist in the Osoyoos Shoppers Drug Mart pharmacy. The plaintiff travelled to Osoyoos and accepted Mr. Hopp's offer of a one-year contract from September 2018 to September 2019. The plaintiff commenced his employment there on September 4, 2018.

[103] Mr. Hopp described the plaintiff as a reliable employee and excellent in his job but would observe him struggling with pain and discomfort during his shift. He said that the plaintiff would appear to be stoic, but he would often observe the plaintiff leaning against the counter rubbing his lower back and trying to stretch as well as rubbing his neck, shoulder, upper back, and temple areas. They had discussed the plaintiff's headaches and back pain. Mr. Hopp said that during the latter part of his shifts, the plaintiff would try to sit down just to take a break and get off his feet.

[104] Mr. Hopp noted that his pharmacy was a busy one and there were not a lot of opportunities for the pharmacist to sit down. Mr. Hopp, who owns more than one pharmacy, worked at the Osoyoos location four days a week and had opportunity to observe the plaintiff. During the period from September 2018 to September 2019, the plaintiff missed about six shifts, he testified. Because it is a small pharmacy, he is aware of what is happening with his staff. The plaintiff would also have had to directly contact him in order to find a replacement. Mr. Hopp observed the plaintiff

taking anti-inflammatories and Advil during his shifts. No accommodations were requested by the plaintiff and nor did he observe him requiring assistance, which he would have considered had the plaintiff requested that.

Dr. Travis Meier, chiropractor

[105] Dr. Travis Meier, a chiropractor, was called by the plaintiff. He testified that at the first appointment he conducts an assessment which includes a personal health profile completed by the patient as a means of obtaining a history from the patient.

[106] Dr. Meier's first appointment with the plaintiff was on January 8, 2018. Dr. Meier testified that the plaintiff had described the Second Accident being a rear-end collision which occurred unexpectedly, but being a minor bump. The plaintiff indicated that through the day, he started to feel sore and he began feeling worse.

[107] The plaintiff indicated to Dr. Meier that following the First Accident, there had been a lot of chiropractic treatments as well as physiotherapy.

[108] Dr. Meier testified that the plaintiff's complaints were lower back pain aggravated by sitting, standing, and bending which is treated with Tylenol 3s and cyclobenzaprine (a muscle relaxant). The plaintiff described his lower back pain as a constant achy dull pain which is sometimes sharp. He quantified it to being 7 to 8 on a 1 to 10 scale when bending, and 4 to 5 on an average day.

[109] Dr. Meier testified that the plaintiff also complained of occasional right shoulder pain, which he described as achy in nature and quantified it as 4 on a scale of 10.

[110] His next complaint was headaches which were not too bad. Dr. Meier said that the plaintiff also described left knee pain that was not too bad. He testified that the plaintiff scored 26 on his physical testing of him, which was a moderate range of disability.

[111] Dr. Meier noted on his physical examination of the plaintiff that he had reduced flexion and extension. The range of motion was with pain and restriction

and rotational restriction on the right cervical rotation was at 50% whereas the normal range is 60. Rotation to his left and to the right were both reduced at 40%. The lumbar range of motion was reduced to 60% where the normal range is 90. Dr. Meier noted the plaintiff's T1 to T5 is very tight and “hypertonic” with weakness pain and tenderness to his shoulder, soreness and tightness to the lower back. There were no significant findings with respect to reflexes or orthopedic testing.

[112] Dr. Meier indicated that if the plaintiff follows through with physiotherapy and other treatments, the plaintiff should have a good prognosis.

[113] Dr. Meier also testified that the tomography scan, an imaging tool which is a rolling thermal scan, he took of the plaintiff was within “normal range”. However, there were dark bands at the C, T1 spine which show hypertonicity of the muscles along the spine. A tomography (a rolling thermal scan) was performed which showed a slight temperature imbalance, meaning warming in the upper part of the neck and lower part of the spine on the right greater than on the left.

[114] Dr. Meier completed a chiropractic treatment plan that consists of two times a week for six weeks chiropractic treatment with a myofascial release to restore mobility and physiotherapy. He had indicated there should be a use of a Denneroll foam pillow to help with the curvature of his neck. Dr. Meier noted that all of these would be reviewed at the second appointment.

[115] The plaintiff continued treatment with Dr. Meier until his last one on May 22, 2018 where 60 to 70% improvement of his condition and subjective symptoms were noted. Dr. Meier indicated that was his maximal medical improvement and he had plateaued with chiropractic treatment. Dr. Meier recommended that the plaintiff return for follow-up and continue chiropractic treatments once a month or as needed.

[116] Dr. Meier confirmed with the plaintiff that the plaintiff had finished his physiotherapy program on July 17, 2018 and his active rehab on August 21, 2018. While he would have shown him some stretching, the more detailed stretching would been shown to the plaintiff by a physiotherapist or kinesiologist.

Dr. Mark Adrian, physical medicine and rehabilitation specialist

[117] The plaintiff was assessed by Dr. Adrian on October 12, 2023 at the request of plaintiff's counsel. He noted that the plaintiff experiences clinical features consistent with the diagnosis of chronic mechanical spinal pain. Dr. Adrian indicated that that can imply a structural damage to the tissues of the spinal column. He also indicated that it "implies that the source of the pain stems from these tissues when they are physically (mechanically) stressed as occurred with activities that involve prolonged static and awkward spinal positioning, bending, lifting, carrying and jarring activities".

[118] Dr. Adrian noted that the findings of the physical examination were consistent with the symptoms experienced by the plaintiff and the diagnosis of mechanical neck and back pain. He noted that the plaintiff did not experience pre-motor vehicle accident regularly occurring or physically-limiting spinal pain. He noted that these symptoms had developed, involving his neck and back, shortly following the First Accident. He stated:

> …The symptoms were probably aggravated as a result of the [S]econd [A]ccident. He does not recall injury to the spinal column since the accidents that have worsened his condition.

[119] It was Dr. Adrian's opinion that the plaintiff's injuries were related to the accidents and that his headaches are cervicogenic as being related to his spinal injuries. Dr. Adrian noted that while the plaintiff indicated the accidents had affected his mood, that he would defer to his family doctor or specialist in psychology and psychiatry to provide comments on the nature of that.

[120] Dr. Adrian's prognosis was that individuals suffering from mechanical spinal pain following an injury experience improvement over time. Some individuals experience persistence of symptoms, however, despite the passage of time. In his experience, individuals suffering beyond two years from the injury date are unlikely to experience further meaningful improvement.

[121] Given that the plaintiff has suffered his symptoms for several years since the First and the Second Accidents, Dr. Adrian opined that the "prognosis for further recovery of the injury suffered to the tissues of the spinal column into the future is poor".

[122] In respect of his functional capacity, Dr. Adrian indicated that the plaintiff would probably continue to experience difficulty performing activities that "place physical forces onto the painful and injured tissues involving spinal column". He indicated that the plaintiff would specifically probably continue to experience difficulty with "scholastic, employment, recreational, and household activities that involve prolonged sitting, standing, and stooping; prolonged static or awkward spinal positioning; heavy lifting, or carrying, and prolonged or repetitive bending".

[123] Dr. Adrian indicated that those limitations will likely continue into the future and that the plaintiff is permanently, partially disabled due to the injuries suffered in the First and the Second Accidents. Dr. Adrian said that if the plaintiff were required to work in more physically demanding jobs or work in a less flexible employment, then he will probably experience difficulty performing.

[124] Dr. Adrian indicated that he "will probably continue to require time away from work during flares of his symptoms".

[125] The defence noted that Dr. Adrian's opinion has to be read in conjunction with his observation in his statement as follows: "Mr. Lidder may benefit with [sic] periodic chiropractic treatments or physiotherapy treatments during flares of the symptoms, that may assist with reducing the intensity or duration of flares".

[126] Dr. Adrian was cross-examined with respect to the gains made by the plaintiff due to treatments and the records which supported the same.

[127] I accept Dr. Adrian's opinion. He gave his evidence in the forthright manner and did not resile from his stated opinion. While not entirely consistent, the indication of chiropractic and physiotherapy treatments was made in respect of flares of those symptoms but not in respect of an overall improvement of the plaintiff's symptoms.

[128] I accept that the plaintiff has had a significant degree of recovery following the Second Accident. What he does suffer though is flare-ups and he has had a limited overall recovery over the years. He is failing to return to his pre-accidents level.

[129] No medical or chiropractic expert evidence was tendered by the defence.

FINDING ON INDIVISIBILITY

[130] I find from a review of the medical evidence and the plaintiff's evidence coupled with the opinion of Dr. Adrian, that the Second Accident aggravated the plaintiff's existing injuries and that the plaintiff's injuries are indivisible upon my review of the evidence as a whole. While there had been some improvement, the plaintiff was still experiencing ongoing symptoms involving his neck, upper mid back, mid back, and lower back.

[131] In *Alragheb v. Francis*, 2021 BCCA 457, the BC Court of Appeal held:

> [21] Counsel for Mr. Alragheb argues "the fact that some of the symptoms overlapped does not preclude a finding of divisible injuries or mandate a finding of indivisibility". He says, citing *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630, that judges must discern divisible injuries where there are overlapping symptoms from successive accidents. It is correct to say judges "can" discern divisible injuries arising from sequential accidents. In fact, they should make a concerted effort to do so. But to say they "must" do so is a misstatement of the law.

[132] I also refer to *Bradley v. Groves*, 2010 BCCA 361 at paras. 20-37. Here, I find the plaintiff's injuries while largely improved from the First Accident, were aggravated and rendered permanent by the Second Accident.

[133] Given the circumstances and the medical evidence, I find that the plaintiff's injuries are indivisible.

APPORTIONMENT OF LIABILITY

[134] The question of apportionment of liability was as noted above reviewed by the Court of Appeal in *Alragheb*:

> [26] First, the law does not apportion liability for damages between tortious and non-tortious conduct: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 22–23.
>
> [27] Second, the rule that damages are assessed with a view toward putting the plaintiff in the position they would have occupied but for the tort is a rule that governs the assessment of damages, not the apportionment of liability. It is the means by which allowance is made for non-tortious causes. Cases in which pre-existing conditions or prior injuries are weighed in the assessment of damages are not of assistance in understanding the principles of apportionment.
>
> [28] Third, where by the fault of two or more persons damage or loss is caused to one or more of them (as is the case where concurrent torts cause an indivisible injury), the liability to make good the damage or loss is in proportion to the degree to which each person was at fault. That is our statutory regime.
>
> [29] Fourth, where the plaintiff is one of the persons at fault, the liability of all parties at fault (which in the absence of contributory negligence would have been joint and several) is severed. Contributory negligence severs the liability of the separate tortfeasors, in effect causing the plaintiff to bear the pain caused by absent, impecunious or uninsured tortfeasors. The *Act* does not otherwise call for the application of distinct rules of apportionment where there is contributory negligence (except that where there is several rather than joint liability, the court may have to determine the extent to which non-parties may have been at fault: see *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.), *Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481 at 491–2 (B.C.C.A.), and *Hongkong Bank of Canada v. Touche Ross & Co.* (1989), 74 C.B.R. (N.S.) 164 at 170 (B.C.C.A.)). The fact that liability is severed does not affect the rule that liability is apportioned by degrees of fault.
>
> [30] Last, where liability and damages arising from a prior tort have been finally assessed, that effectively severs liability, even where a subsequent tort causes aggravation and contributes to what might otherwise have been considered to be an indivisible, cumulative injury. The issue was addressed by this Court in *Ashcroft v. Dhaliwal*, 2008 BCCA 352. In such a case, the first judgment is taken to have effectively apportioned damages between accidents. It does not assist in identifying the guiding principles of apportionment to consider how rules of apportionment may unsettle or be inconsistent with prior assessments of liability.

[135] Here, the First Accident was caused by the negligence of Ms. Pearce and of the plaintiff equally, thus, an apportionment of 50% will be to the plaintiff and 50% to the defendants, Ms. Pearce and the corporate defendant, Sadar Investment Ltd. Liability for the Second Accident was 100% to the defendants. I find that the plaintiff suffered injury that was found to be indivisible. In *Alragheb*, the Court of Appeal held at para. 76:

> Where the court concludes that an indivisible injury has been caused by the fault of two or more persons, and s. 1 of the *Negligence Act* is therefore applicable, liability is apportioned between those at fault in proportion to their blameworthiness. That is equally true where the plaintiff is one of the parties at fault. The applicability of that rule is open to question where the fault has not been assessed in relation to a contributing accident (as in *Sharma*) or where the plaintiff alone is responsible for one contributing injury (as in the conflicting decisions in *Lane v. Ou*, [2019, BCSC 928] and *Demidas* [*v. Poinen,* 2012 BCSC 416]). [Emphasis in original.]

[136] Following the approach laid out in *Alragheb*, I must assess holistically the blameworthiness of all the parties, including the plaintiff. If the plaintiff, Ms. Pearce, and Mr. Javed all departed equally from the standard of care, then the three of them should each bear responsibility for a third of the award. If Mr. Javed's conduct was more or less blameworthy than that of the parties to the First Accident, then his share of the award should be increased or decreased as the case may be. This is the approach taken in *Bilanik v. Ferman*, 2014 BCSC 732 on similar facts, and endorsed by the Court of Appeal in *Alragheb*.

[137] Mr. Javed has admitted liability for the Second Accident, but it remains to be considered how his blameworthiness compares with that of the parties to the First Accident. Although evidence as to the Second Accident was limited, it is sufficient to make a finding of blameworthiness.

[138] Mr. Javed recounted the events of the Second Accident in his ICBC claims form. He was stopped behind the plaintiff at a red light. After the light turned green, but before the plaintiff began to drive, Mr. Javed proceeded forward and collided with the plaintiff's rear bumper. He commendably admitted that his lapse in judgment caused the accident. The plaintiff's testimony aligned with Mr. Javed's account.

[139] As compared with the parties to the First Accident, Mr. Javed's actions departed more significantly from the standard of care expected of road users. Whereas the parties to the First Accident were navigating a complex, dynamic traffic situation involving multiple busy lanes of traffic and limited visibility, Mr. Javed was stopped in traffic and had an unimpeded view of the plaintiff's car. To cause a collision in that context necessarily reflects a greater degree of carelessness.

[140] If fault is to be determined in percentages then I would apportion the respective degrees of fault for the indivisible injury as follows: for Mr. Javed to bear 50% responsibility for the total damages. The plaintiff and Ms. Pearce should each bear 25% responsibility.

NON-PECUNIARY DAMAGES

[141] An award for non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. The compensation awarded should be fair to all parties. Fairness is measured against awards made in comparable cases. Such cases, while helpful, will only serve as a rough guide. Damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[142] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal held:

> [44] Thus, we are left to apply the so-called "horizontal" comparative approach outlined in *Boyd* [*v. Harris*, 2004 BCCA 146] at para. 41:
>
> > [41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.
>
> [45] Before embarking on that task, 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,* [[1981] 2 S.C.R. 629] 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* [*Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267] at p. 284 of S.C.R.).
>
> [Emphasis added by Kirkpatrick J.A.]
>
> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[143] The plaintiff also relies on the following decisions in support of his non-pecuniary damages claim:

- *Chawla v. Lambright*, 2017 BCSC 1884 - the plaintiff was a 29-year-old Delta police officer who was involved in two motor vehicle accidents. As a result of the collisions, he was left of chronic soft tissue pain symptoms affecting his right side, low back, neck, and ankle. He was limited in participating in lifting heavy weights and running, and sitting in one position for long periods of time became problematic for him. He was, however, able to return to work and altered his lifestyle to accommodate for his injuries. He was awarded $125,004 for non-pecuniary damages.

- *Slocombe v. Wowchuk*, 2009 BCSC 967 - the plaintiff was 25 years-of-age at the time of the accident and 29 at the time of trial. The plaintiff was a construction worker. He was energetic and a physically-active outdoorsman. He had pre-existing asymptomatic lower back condition and spondylosis. After the accident, he suffered from headaches, neck pain, low back pain, and sleep disturbance. As a direct result of the accident, the plaintiff suffered from ongoing chronic pain which

dramatically altered his lifestyle. He was awarded hundred $125,000 in non-pecuniary damages.

- *Benson v. Day*, 2014 BCSC 2224 - the plaintiff was 57 years old who worked as a drywaller for Burnik Drywall. The plaintiff suffered from anxiety, muscle strain, neck pain, mid back pain, low back pain, soft tissue injury to both cervical and lumbar spine. The court awarded the plaintiff $110,000 in non-pecuniary damages.

- *White v. Wiens,* 2015 BCSC 188 - the plaintiff was 49 years old at the time of the motor vehicle accident. He was previously employed with Coast Mountain Dairy. The plaintiff suffered from headaches, neck strain, and exacerbation of degenerative disc disease of the lumbar spine. The plaintiff did not suffer from low mood or irritability. The court awarded the Plaintiff $100,000 for non-pecuniary damages.

[144] The plaintiff also relied upon the decision in *Ferguson v. Watt*, 2018 BCSC 1587. I find, however, that the plaintiff's injuries in *Ferguson* were substantially different, given that she was additionally suffering from injuries to her knee, hip, tongue as well as nightmares, that the non-pecuniary damages award of $140,000 does not reflect a similarity to the plaintiff in the within matter.

[145] The defendants submit that appropriate cases would indicate that an award in nature of $50,000 to $60,000 would be appropriate in non-pecuniary damages. They relied on the following cases:

- *Lambert v. Dong*, 2021 BCSC 249 - the plaintiff was 22 years old at the time of the motor vehicle accident. The court found that his prognosis for full recovery is guarded, although if he were to continue with physical rehabilitation, he may find still some improvement. The impact of his condition caused him pain and suffering when he over-exerted himself at his work and he found it difficult to sit in classroom for long periods of time, having to move around and relieve pain. The court held at para. 138:

> [138] When I consider the findings of fact I have made regarding the injuries sustained and the ongoing impact on this young person's life, particularly his employment, I am satisfied that a fair and reasonable award is $60,000 for non-pecuniary damages. I make that determination based on his relative youth at the time of the MVA and the fact that he has tried to soldier on with his employment and life generally. I have also considered the severity and duration of the injury and the impact on his

> ability to engage in more strenuous physical employment. In my view, Mr. Lambert presented as someone who was managing as best as he could in the circumstances and was not prone to complain.

- *Gartner v. Baumeister*, 2019 BCSC 1291 - the plaintiff was a university student. He sustained soft tissue neck and back injuries and continuing headaches following a motor vehicle accident. He suffered from persistent and sometimes severe headaches which interfered with his life but were only on a transient basis. He had not been materially prevented from engaging in any activities that he had engaged in before the accident. The court awarded the plaintiff $50,000 in non-pecuniary damages.

- *Carleton v. Warner*, 2020 BCSC 436 - the plaintiff was 29 years old at the time of trial. As a result of a motor vehicle accident, she suffered from mild but chronic neck back, back and shoulder pain, and headaches. She had sleep disturbances and her pain was expected to continue indefinitely. Her ability to engage in recreational activities and her work was somewhat limited after the accident. Justice Verhoeven awarded the plaintiff $60,000 for non-pecuniary damages.

[146] As noted by Mr. Hopp, the plaintiff is still working and continues to persevere in his work as a pharmacist, although he has missed days from work on account of flare-ups. As noted, it is thought that he will have continuing difficulties as a consequence of his injuries.

[147] I find, in all of the circumstances, that an appropriate award for non-pecuniary damages would be $90,000 based upon the ongoing difficulties the plaintiff is having as well as his inability to enjoy the activities he did before the accidents. This award is subject to a 5% deduction for the plaintiff's failure to mitigate, as discussed below.

Mitigation

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

> Counsel for Lombard argued the plaintiff has failed to mitigate. A plaintiff has an obligation to take all reasonable measures to reduce her or his damages. The duty to mitigate includes undergoing treatment to alleviate or cure injuries: *Kero v. Love* (1994), 90 B.C.L.R. (2d) 299 (C.A.).

[149] Once the plaintiff has proved the defendant's liability for his or her 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. The court in *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202 set out the following:

> [202] Once a plaintiff has established that the defendant is liable for causing his or her injuries, the burden of proof shifts to the defendant. To succeed on a mitigation defence, the defence must prove that the plaintiff acted unreasonably and reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question. Its answer depends on consideration of all of the surrounding circumstances: *Byron v. Larson*, 2004 ABCA 398.

[150] In *Buttar*, Verhoeven J. noted the legal principles on failure to mitigate as follows:

> [129] The test for a plaintiff's failure to mitigate loss is set out in *Chiu v. Chiu,* 2002 BCCA 618. The defendant must prove:
>
> 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 they acted reasonably: *Chiu* at para. 57; *Haug v. Funk,* 2023 BCCA 110 [*Haug*] at paras. 22, 56.
>
> [130] In *Haug*, the Court of Appeal held that the onus on the second part of the *Chiu* test is a balance of probabilities, notwithstanding that the consequences of failure to mitigate are past hypothetical events: at para. 55. The Court disagreed with my analysis in *Forghani-Esfahani v. Lester,* 2019 BCSC 332 at para. 69, in this respect.
>
> [131] The reasonableness of the plaintiff's mitigation efforts is assessed on a subjective/objective test. The plaintiff's personal circumstances may properly play a role in assessing the reasonableness of his or her mitigation efforts: *Gill v. Lai,* 2019 BCCA 103. There, Willcock J.A. stated:
>
> > [26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person *in that plaintiff's circumstances* would do. As stated above, where a trier of fact applies

> the correct test, this Court must defer to their determination on this question of fact.
>
> [27] The trial judge in this case found the respondent had made a reasonable attempt to follow the recommended course of treatment but was constrained by her circumstances from fully engaging in the exercise program recommended to her. In my view, he did not err by taking into account her personal circumstances or by distinguishing *Friesen* [*v. Pretorius Estate (*1997), 37 B.C.L.R. (3d) 255 (C.A.)] as a case where the plaintiff refused to consider reasonable employment options. *Friesen* was a case where this Court found the plaintiff's course of action was arbitrary and unreasonable

[151] The defendants submit that there should be a 25% reduction in respect of an award given that they take the position that the plaintiff has failed to mitigate his loss.

[152] The defence relies upon the decision in *Chiu v. Chiu*, 2002 BCCA 618 where the Court of Appeal held the test with respect to mitigation:

> [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. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[153] The second element of the test was expanded upon in *Liu v. Bipinchandra,* 2016 BCSC 283*,* where the court held:

> [102] The legal question of whether a plaintiff would have been assisted by a procedure or course of treatment is to be determined on a subjective basis. Nevertheless, a defendant need not lead direct evidence that the particular plaintiff at issue would have benefitted from a specific treatment. The outcomes of many treatments, or therapies, or procedures are uncertain. A plaintiff who acts unreasonably in the face of the medical advice they are given cannot take refuge in that uncertainty.
>
> [103] Instead, it is open to a defendant to establish the second aspect or branch of the mitigation test indirectly. Thus, if most persons are assisted by a particular treatment the Court can, as a matter of inference, determine that it is probable that a particular plaintiff would have benefitted from that treatment.

[154] The defendants sought the reduction on the basis that firstly, the plaintiff has been unreasonable in failing to follow the treatment recommendations and,

secondly, his injuries would have been significantly reduced had he followed treatment recommendations as they had been recommended. Further, the defence argues that the plaintiff has not treated his flare-ups and has not gone to treatments for his flare-ups such as physiotherapy and chiropractic treatment as recommended by Dr. Adrian.

[155] I find on the whole of the evidence that the plaintiff has generally complied with the recommendations of health professionals. However, he was recommended to attend a chiropractor to reduce the length and severity of his flare-ups and the evidence is he has not done so since 2018. In this respect he has failed to mitigate. The conclusion of Dr. Adrian was that the treatment would not further heal the plaintiff but would rather relieve and manage his symptoms. Consequently, a realistic assessment of the impact of that failure leads me to conclude his non-pecuniary damage award should be reduced by 5% rather than 25%

Decision

[156] In light of the above, I discount the non-pecuniary award by 5%. Accordingly, the award of this head is $85,500.

PAST LOSS OF INCOME-EARNING CAPACITY

[157] Compensation for past loss of income-earning capacity is to be based on what the plaintiff would have earned but for the injury that was 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.

[158] 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. The trial judge has a discretion to determine what period or periods of time are appropriate for the determination of net income loss: *Lines v. W.D. Logging Co. Ltd*., 2009 BCCA 106 at paras. 181–186. In exercising this discretion, the trial judge should keep in

mind that the plaintiff is to be put back in the position he or she would have been in had the accident not occurred: *Lines* at paras. 185–186.

[159] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Dornan v. Silva*, 2021 BCCA 228 at para. 94.

[160] The plaintiff claims past loss of income-earning capacity relating to the First Accident in the amount of $6,500 subject to statutory deductions noted above.

[161] The plaintiff claims in respect of the Second Accident a gross past loss of income-earning capacity in the amount of $15,174.40 subject to statutory deductions.

The Plaintiff's Position

[162] The plaintiff submits that he would have worked full-time following his graduation as a pharmacist and during his summer breaks and that there was a real and substantial possibility of loss which was not speculative. Had he not been injured, he would have worked shifts.

[163] At the time of the First Accident, the plaintiff was a full-time student at UBC in their pharmacy program. He had completed the first year. He worked typically one shift per week at Shoppers Drug Mart as a merchandiser and pharmacy assistant while the pharmacy program was in session. He submits that he would have worked full-time for the summer break but for the First Accident.

[164] As a result of the injuries in the First Accident, he submits that he was unable to work and remained off work until November 2015. His effective hourly rate at that time was $12.50.

[165] He claims past loss of income-earning capacity for the period of June 15, 2015 to the resumption of school on September 1, 2015 in the amount of $5,500 (11 weeks x 40 hours x 12.50/hour).

[166] After the school resumed in September 2015, the plaintiff did not return to work until October 2015.

[167] The plaintiff claims past loss of income-earning capacity for the period between September 1, 2015 and October 4, 2015 in the amount of $500 (5 days x 8 hours/week x $12.5/hour).

[168] The plaintiff claims past loss of income-earning capacity for a period of five days in July 2016 for the amount of $500 (5 days x 8 hours/week x $12.5/hr).

[169] Accordingly, the plaintiff claims a total of $6,500 ($5,500 + $500 + $500) for past loss of income-earning capacity in relation to the First Accident.

[170] Following the Second Accident, the plaintiff was still in school and worked one shift per week. He missed one shift from work following the Second Accident. The plaintiff claims past loss of income-earning capacity in the amount of $152 (November 2017: one shift of 8 hours x $19/hr).

[171] The plaintiff graduated from this pharmacy program with his degree in July 2018. Following graduation, he began working in a casual position at Shoppers Drug Mart where he had been a pharmacy assistant.

[172] The plaintiff obtained a full-time position with Shoppers Drug Mart in Osoyoos the summer of 2018 and commenced full-time work in September that year. He worked an average of 40 hours a week but testified he missed approximately six shifts during the course of the year to September 2019. He could not be certain what days those were but that was his estimate. He submits there was an income loss of $2,256.

[173] In September 2019, he returned to the Lower Mainland. He commenced work at Shoppers Drug Mart in Langley. He remained there until January 2020, initially

working 40 hours a week. He reduced his time to 32 hours a week effective November 29, 2019. He submits he has suffered a past loss of income-earning capacity of $3,200 in respect of that period from November to January 2020 for the reduce income.

[174] The plaintiff then took time off work between January 2020 and May 2020 for personal reasons. Following that, he recommenced working at the Shoppers Drug Mart in Osoyoos where he worked until June 2021, missing six shifts during that period. This was his best estimate of the number of shifts that he missed due to the injuries he sustained in the accidents. He submits a past loss of income-earning capacity of $2,304.

[175] The plaintiff was married in June 2021 and took one and-a-half months off following his wedding.

[176] In September 2021, the plaintiff returned to work on a contract basis at the Shoppers Drug Mart in Brooks where he was responsible for administering COVID vaccinations and flu vaccines. That work was on a relief basis. The plaintiff gave evidence that, during this period of time, his hourly rate of pay was $41 per hour.

[177] He testified that between September 2021 and February 2022, while working as a relief pharmacist, he began to learn about the nature of employment as a relief pharmacist. Relief pharmacist travels to different areas of the province depending on where the demand is. The hourly rate of pay for relief pharmacist is higher than that of an employee. He was paid $100 per hour.

[178] In February 2022, the plaintiff was hired as an independent contractor, working as a pharmacist at the Osoyoos Shoppers Drug Mart. He worked in this position until October 2022.

[179] The plaintiff testified that during this time period of February 2022 to October 2022, as a result of pain in his neck and back, he missed approximately four to six shifts that were available to him. He seeks loss of income in respect of five shifts, eight hours per shift at $100 an hour at $4,000. From October 2022 to February

2023, he took time off for personal reasons unrelated to the injuries sustained in the accidents.

[180] He then returned to the Shoppers Drug Mart in Osoyoos working as an independent contractor pharmacist. His schedule required him to work 24 hours in Osoyoos and then eight hours in all over BC for a total of 32 hours a week.

[181] The plaintiff testified that in May 2023, he elected to discontinue his shift outside Osoyoos resulting in a work week of 24 hours. He testified that from the period May to October 2023, he missed approximately two to three shifts. He seeks $2,400 in respect of three missed shifts.

[182] In October 2023, the plaintiff with his wife returned to the lower mainland to find a permanent position.

[183] He took time off between October 2023 and January 2024 for personal reasons unrelated to the injuries sustained in the accidents. He gave evidence that between January to May 2024, he worked several relief shifts at various pharmacies in the lower mainland.

[184] The plaintiff obtained full-time employment with Central Pharmacy Services (“CPS”) in May 2024. His hourly rate of pay at CPS is $53.90.

[185] He testified that he has had two flare-ups since starting with CPS, which resulted in him having to not work and a loss of income of $862.40 at the hourly rate of pay he is getting.

[186] Accordingly, the plaintiff claims $15,174.40 ($152 + $2,256 + $3,200 + $2,304 + $4,000 + $2,400 + $862.40) for past loss of income-earning capacity in relation to the Second Accident.

[187] In summary, the plaintiff seeks $21,674.40 for past loss of income-earning capacity with breakdown as follows:

First Accident	$6,500.00
Second Accident	$15,174.40

The Defendants' Position

[188] The defence submits there is no evidence supporting that the plaintiff was ever recommended to take time off work or limit his activities on account of the Second Accident. It is accepted that following this Second Accident, there is no documentation that the plaintiff sought treatment for over three weeks after that accident.

[189] The defence points to the fact that the plaintiff did not mention to his family physician, Dr. Aulakh, of the Second Accident until January 1, 2018.

[190] Dr. Meier's evidence was that the plaintiff did not indicate missing any time from work. He noted that the plaintiff had referred to the Second Accident is a "minor bump".

[191] The defence further submits that the periods missed after the Second Accident appear to be approximately 18 shifts on the low-end and 23 shifts on the high-end. They submit that the time missed from work following the Second Accident had no medical support. The difficulty with that submission is that Dr. Meier, the chiropractor, agreed in his evidence that would be reasonable for him to attend for a follow-up visit and potentially seek some treatments in the event of a flare-up.

[192] Similarly, Dr. Adrian indicated that the plaintiff would have difficulty with flare-ups unless he continued with treatments.

[193] The defendants make this submission in support of their claim that there should be some deduction for past loss of income-earning capacity in respect of the plaintiff's failure to seek treatment when he is suffering a flare-up, which is a failure to mitigate.

Analysis and Decision

[194] I accept that the plaintiff has suffered a loss of income due to flare-ups from the accidents.

[195] However, it is difficult to quantify this loss as there are no records given of shifts loss. Given that there is no documentation, precise calculations of the loss are impossible. However, I accept that there were certain shifts taken off due to the flare-ups. The plaintiff claims for 24 shifts based on averaging and his memory. He also seeks a compensation for the reduction of his hours from 40 hours to 32 hours a week in the amount of $3,200 as noted at para. 173 above.

[196] In all of the circumstances, given the plaintiff's inability to confirm the shifts missed due to injuries from the accidents, I find on the balance of probabilities that the plaintiff lost 20 full time shifts as a result of both accidents. I find that he missed out on summer employment in 2015 ($5,500) and subsequent part time opportunities from 2015 to 2016 ($1,000) and 2017 ($152). I also find that from November 2019 to January 2020 the plaintiff reduced his weekly hours from 40 to 32 ($3,200). I find that the plaintiff missed six shifts at the Osoyoos Shoppers Drug Mart between September 2018 and September 2019 ($2,256) and six shifts between May 2020 and June 2021 ($2,304). I find that while working as a relief pharmacist the plaintiff missed six shifts ($4,800), and while working at CPS he has missed two shifts ($862.40). The corresponding amount I award is $20,074.40.

FUNCTIONAL WORK CAPACITY EVALUATION

[197] Ms. Ditson testified that she performed a functional work capacity evaluation ("FCE") and cost of future care assessment in respect of the plaintiff on October 27, 2023. When she assessed him, the plaintiff was then 29 years of age. He reported to her that his current symptoms included mild lower back pain aggravated with prolonged sitting and standing, bending and stooping, and heavier lifting. He also reported that the pain can become more severe in a weekly to bi-weekly basis, depending on his level of activity.

[198] The plaintiff reported to her that he suffered neck and upper back pain four to five days per week, that was aggravated when looking down. Over the course of his work week, his neck pain worsens because his work requires a lot of looking down. The pain can become moderate to severe at the end of the week. He also reported that he gets headaches one to two times a week when his neck symptoms are aggravated. They are typically mild headaches but can become more moderate when his neck pain is more severe.

[199] Ms. Ditson testified that the plaintiff also reported to her intermittent tightness with discomfort and soreness in his mid back about one to two times per week. He reported that the pain was mild in nature but that he thinks that it is aggravated with standing and bending. While he had had rib pain, that had resolved.

[200] Ms. Ditson noted that he had attended chiropractic treatment after both accidents and experienced improvement in his condition over time. She also noted that he went to active rehabilitation after both accidents with the physiotherapist and the kinesiologist. His program was focused on core strengthening and he transitioned to a home-based program. He continues to perform his mobility and strength with his active rehabilitation program and he has noticed improvement in his mobility and strength.

[201] Ms. Ditson reported that he continues to perform an exercise program at the gym in Surrey, primarily weight and strength training and that he goes three to six times a week.

[202] He reported to Ms. Ditson that he takes the following medication per month:

Medication	Amount
Ibuprofen (extra strength)	10 tablets/month
Acetaminophen	10 tablets/month
Tramacet	1 tablet/month of 37.5/325 g
Cyclobenzaprine	2 to 3 tablets/month of 10 mg

[203] During the FCE test, Ms. Ditson noted that the plaintiff had limitations with respect to his capacity to perform work within certain parameters, which included

changing positioning and stretching and taking standing breaks when needed to manage the symptoms. Based on the information that she outlined, she found that "it is my opinion that his overall ability to compete for work in an open job market is reduced due to his ongoing physical and functional limitations related to his neck, upper back and lower back". She noted the physical demands of a pharmacist. In terms of functional strength, she indicated that while the plaintiff meets the full functional strength requirements of the work, "test results reveal that he demonstrated limitations with respect to activities involving increased stress on the lower back, including standing, especially in combination with prolonged periods of mild bending in and stooping".

[204] Ms. Ditson opined that, overall, test findings reveal that should a position be available, the plaintiff is "likely not competitively employable on a full-time basis as a pharmacist in a sustainable manner". However, he would likely be able to work as a pharmacist on a part-time and full-time basis in an accommodated environment. Those included an ability to change positions, to take microbreaks, to consider ergonomic considerations to reduce the strain through his neck and lower back in order to help promote symptom management sustainability of his work over the long term.

[205] Based on her examination and review, Ms. Ditson concluded that:

> [Plaintiff's] ability to compete against his cohorts for other pharmacist positions has been reduced due to his ongoing functional limitations related to his neck, upper back and lower back. While he may not be required to directly compete with his cohorts for contracted or self-employed position, in his circumstances, his functional limitations will likely negative really affect his overall productivity at work.

FUTURE LOSS OF INCOME-EARNING CAPACITY

Legal Principles

[206] The central task before the court in considering damages for loss of future earning capacity is to compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Rab v. Prescott*, 2021 BCCA 345 at para. 65. A plaintiff is not

entitled to an award for loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 14.

[207] The Court of Appeal issued a trilogy of decisions in 2021 regarding the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan*; *Rab*; *Lo v. Vos*, 2021 BCCA 421. The Court of Appeal identified a three-step process for assessing damages, described in *Rab* as follows:

> [47] […] a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in [*Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)]). 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 v. Silva*, 2021 BCCA 228] at paras 93–95.

[208] At the first step from *Rab*, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and for the foreseeable future; and (2) less straightforward cases, for example, those in which a plaintiff's injuries have led to continuing deficits or exposed them to future problems, but the plaintiff's income at trial is similar to what it was at the time of the accident: paras. 29–30. In the former set of cases, the first and second steps of the analysis may well be foregone conclusions: *Ploskon-Ciesla* at para. 11. However, it will be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, and the court may make allowance for positive and negative contingencies: *Rab* at para. 29; *Ploskon-Ciesla* at para. 11.

[209] The second step of the analysis requires the plaintiff to prove there is a real and substantial possibility that the future event in question will give rise to pecuniary loss. Here, after determining that the plaintiff may suffer a loss of capacity, the court

evaluates the likelihood that it will affect the plaintiff's ability to earn income. The standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Ploskon-Ciesla* at para. 15.

[210] At the third step—the valuation stage—there are two possible approaches to assessing loss of future earning capacity, being the earnings approach and the capital asset approach: *Davies* at para. 28; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable: *Lamarque v. Rouse*, 2023 BCCA 392 at para. 38; *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: *Perren* at para. 12.

[211] The approach taken to the assessment of loss must be based on the evidence: *Rab* at para. 75. The ultimate award is a matter of judgment as opposed to purely mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The assessment includes consideration of general contingencies as well as any specific contingencies relied on by the plaintiff or defendant: *Hartman* at para. 71, citing *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.). Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence establishing them as realistic possibilities: *Dornan* at paras. 92–95. To the extent possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185.

[212] As noted by Verhoeven J in *Buttar* at para. 167:

> [167] In cases where no better estimate is available, the courts sometimes use a proportion or a multiple of the plaintiff's annual salary as a tool for assessing loss of earnings on a capital asset approach. This approach may be appropriate "where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff's ability to continue doing so at some point in the future": *Gill v. Davis*, 2023 BCCA 381 at para. 17, citing *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (B.C.C.A.), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43, and *Rab v. Prescott*, 2021 BCCA 345 at para. 72. This method makes some sense, since the plaintiff's pre-accident or current earnings offer, at least, an indication of the value of the plaintiff's work capacity, and hence,

> the amount of the potential loss: *Hadley v. Pabla*, 2021 BCSC 238 at para. 109.

[213] In respect of an analysis such as found in *Brown*, in *Firman v. Ashadi*, 2019 BCSC 270, Verhoeven J. set out specifically the legal principles on analysis for loss of earning capacity:

> [172] The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; *Pett v. Pett*, 2009 BCCA 232 (CanLII).
>
> [173] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII), at para. 18.
>
> [174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Pallos and the "capital asset approach" in Brown. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 12.
>
> [175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert*, [2011] B.C.J. No. 1931 at para. 233.
>
> [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert*, at para. 233.
>
> [177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 (CanLII), at para. 101:
>
> > [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the

> accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79. ...

The Plaintiff's Position

[214] The plaintiff claims for future loss of income-earning capacity on the basis that he misses one shift approximately every two months which equates to an annual loss of six shifts.

[215] The plaintiff submits that an award of $585,000 is appropriate. He submits that he has established a potential future event that could lead to a loss of capacity. He has permanent chronic functionally-limiting symptoms resulting in permanent partial disability. The plaintiff also submits that he has proven a real and substantial possibility that the future event in question will cause a pecuniary loss. Finally, the plaintiff submits that he has quantified the loss by assessing the relative likelihood of the possibility of the loss becoming a reality.

[216] The plaintiff additionally claims for a reduction in his work hours on a permanent basis to be a 20% reduction in capacity. At present, he is working full-time at CPS. However, he had testified, while he intends to work on a regular basis, that as a result of his chronic ongoing pain and flare-ups, it will affect his ability to work full-time hours.

[217] He testified that he plans to buy a house and have children and have financial responsibility and financial needs requiring him to work until he reaches the age of 67.

[218] In support of his claim of 20% reduction in capacity, he relies upon the evidence of Ms. Ditson who indicated that there was a realistic possibility that he was unlikely to sustain full-time work.

[219] The plaintiff also argues this is consistent with the evidence of Dr. Adrian in whose opinion the plaintiff is “permanently partially disabled” due to the injuries suffered in the subject accidents.

[220] Dr. Adrian also opined that the plaintiff would be unable to modify his work to be more demanding:

> If Mr. Lidder were required to perform work activities with greater physical demands, or work in a less flexible role, he would probably experience difficulty performing that type of employment. He will probably continue to require time away from work during flares of his symptoms.

[221] Ms. Ditson also opined based on her testing that the plaintiff's overall ability to compete for work in an open job market was reduced. He had demonstrated “limitations with respect to activities involving increased stress on the lower back, including standing, especially in combination with prolonged periods of mild bending and stooping”. As a consequence, Ms. Ditson is of the opinion that he was not competitively employable on a full-time basis as a pharmacist in a sustainable manner.

The Defendants’ Position

[222] In response, the defence notes that the situation of the plaintiff is similar to that found in *Kostecki v. Li*, 2014 BCSC 1056, where the court noted that symptoms can be addressed with medications and accommodations which he is already using:

> [108] In these activities, with their limited physical demands, I cannot see the moderate and now intermittent symptoms that I have found she suffers from would impair her earning prospects, since we have evidence that they can be addressed with basic accommodations like standing up and moving around regularly, analgesics and, occasionally, additional rest. I take notice that back and neck problems are ubiquitous in the modern workplace and find the likelihood of sustainable hiring discrimination based on her minor additional needs to be minimal.

[223] The defence argues additionally that the plaintiff has taken substantial amounts of time off from work for personal reasons unrelated to the accidents. The defendants say that the plaintiff took the following time off for personal reasons following the Second Accident:

- From January 2020 to May 2020;
- In June 2021, he took one and-a-half months off following his wedding; and
- From October 2022 to January or February 2023.

[224] The defence argues that none of the time off work the plaintiff is claiming is as a consequence of the accidents.

Analysis

[225] I find that the plaintiff continues to experience functionally disabling and limiting symptoms when he suffers from flare-ups. Dr. Meier's and Dr. Adrian's medical evidence shows that he has likely reached his full recovery in relation to the accidents and that this will be an ongoing issue for him.

[226] I find that at the time of the first trial the plaintiff was still in school and studying and by the time of the second accident he was working. I also find that there is a real and substantial possibility that plaintiff's future income-earning capacity will be adversely affected by the injuries he sustained from the accidents. As noted, Dr. Adrian accepts this, as does the occupational therapist, Ms. Ditson. As well, Dr. Meier, the chiropractor, envisioned that he would be seeking treatment for flare-ups when they occurred. Therefore, there is a real substantial possibility that the plaintiff's injuries from the accidents will continue to limit his work capacity.

[227] While the defendants argue that the plaintiff has not established a real and substantial possibility of a future event that would cause a pecuniary loss, in the alternative, they note that negative contingencies exist here such as the amount of personal time that the plaintiff has taken indicating that this pattern would likely continue in the future.

[228] While the defence has also indicated that past events such as the plaintiff's records referring to osteoarthritis may have been responsible for some of his past health issues, I reject this submission as there was no medical opinion on this issue. Nor was there an indication that his rhinitis or his knee issues cause loss of income and that they are responsible for his ongoing flare-ups. In the only note on the knee issue ,the plaintiff was not “overall concerned”.

[229] I am mindful, however, that they plaintiff has not taken steps to mitigate the damages in terms of seeking treatments as recommended by Dr. Meier to address flare-ups.

[230] With respect to Dr. Adrian and the issue of whether ongoing treatments would manage or relieve the plaintiff’s symptoms, he indicated in his report as follows:

> Mr. Lidder has participated in courses of physiotherapy, chiropractic treatments, and active rehabilitation. He performs a home exercise program, I encourage Mr. Lidder to continue with his home exercise problem program to maintain his level of fitness. It is unlikely, however, that exercise will lead to further healing of his injuries.
>
> Mr. Lidder may benefit with periodic chiropractic treatments or physiotherapy treatments during flares or symptoms, that may assist with reducing the intensity or duration of flares. It is unlikely, however, that these treatments will lead to further healing of his injuries.

[231] Consequently, the plaintiff submits on the basis of that and on the evidence of Dr. Adrian in court in which Dr. Adrian indicated the plaintiff attending ongoing treatments is management of his symptoms only and not a cure. However, I note that Dr. Adrian does address the duration of the flare-ups in his opinion by the treatments.

[232] In *Parypa v. Wickware*, 1999 BCCA 88, the BC Court of Appeal noted that there is a duty on the plaintiff to mitigate damages by seeking a line of work that can be pursued in spite of her injuries.

[233] Here, I find that the plaintiff is working at present full-time for the pharmacy company that he has started with and worked at for several years now. I do not find it to be in the circumstances that the plaintiff pursue a different line of work.

However, the issue does exist with respect to the plaintiff's avoiding the recommended treatments.

[234] I am persuaded that the defendants have established that the plaintiff failed to mitigate his loss in terms of failing to seek treatment following flare-ups.

The Economists' Multipliers

[235] As noted, Mr. Lakhani of Peta Consultants Ltd. gave evidence respecting the loss of income multiplier.

[236] The defendants also adduced evidence from an economist, John Timbol, to comment on Mr. Lakhani's report.

[237] The income loss multiplier arrived at by Mr. Lakhani are 27,407. The plaintiff submits that his multiplier is more applicable to the facts in the case at bar over Mr. Timbol's limited critique report as the positive contingencies likely outweigh any applicable negative contingencies.

[238] The defence submits, however, that the income loss multiplier of Mr. Lakhani is inaccurate as they factor in survival contingencies only. They submit that Mr. Timbol's report properly factors in contingencies for disability, labour force contingencies, unemployment, part-time employment, and part-year employment. To age 67, Mr. Timbol's income loss multiplier is 24,140.

[239] As noted by Mr. Timbol, his multiplier had factored in the contingencies that included a part-year employment as the plaintiff had years where he voluntarily took significant periods of time off work as noted earlier in these reasons and time periods where he missed work due to losing family members and choosing to work on a contract basis for less than a full year, I find that Mr. Timbol's income loss multiplier more accurately capture the plaintiff's likely contingencies. I accept Mr. Timbol's multiplier of 24,140 to age 67.

[240] The plaintiff submits that an award should be made on the loss of earning capacity basis. Given his ongoing symptoms and the impact on his ability to sustain

work and the nature of his job, an award representing five years of annualized earnings is a fair and reasonable assessment of future loss of income-earning capacity and diminishment of earning capacity.

[241] Based on his current hourly rate of pay of $53.90, the plaintiff's annualized earnings equate to $112,112. He seeks five years on an annualized earnings, which amounts to $560,560 (5 years x $112,112/year). He based this on his inability to sustain work and the nature of his job and submits that it would be a fair and reasonable assessment of his future loss of income-earning capacity and diminishment of earning capacity.

[242] Respecting the earnings approach, the plaintiff submits that given his current hourly rate of pay of $53.90, on a full-time basis, this equates to $112,112 per annum. The plaintiff submits he will not likely be able to sustain work more than 32 hours per week which results in a 20% loss of capacity. This equates to an annual loss of $22,422.40. Taking Mr. Timbol's multiplier, which I considered contingencies not indicated by Mr. Lakhani as noted above, it amounts to $541,276.74 ($22,422.40/1,000 x 24,140).

[243] I find that earnings approach is useful in this case given the plaintiff's existing work.

[244] I find on the facts of this case, that it is likely the plaintiff will continue to work as a pharmacist to age 67.

[245] However, it is of note that he has taken significant personal time off in the past for family related matters and other personal reasons. It is likely that that pattern will continue particularly when he starts his family and as his parents age given that the family is a close one.

[246] I do not find that the plaintiff will likely work full-time every single year given his history of taking time of for family and personal reasons.

[247] In respect of time off required due to symptoms I find it is likely that he will not work several shifts annually from flare-ups but again that these periods off could be shortened by treatments and consequently the plaintiff is failing to mitigate could be mitigated by treatments. He is a conscientious worker and a valued employee and I believe that he will always be able to find a position that will accommodate his needs as they are being presently met.

[248] On the other hand, there are positive contingencies. Should the plaintiff attend treatments as suggested by Dr. Adrian, he could manage his symptoms and the duration of his flare-ups. While the treatments would not be a cure they could impact the duration of his symptoms while he is suffering a flare-up. Dr. Adrian notes the plaintiff is permanently partially disabled due to the injuries suffered in the subject accidents and his prognosis for further recovery is poor.

Decision

[249] I adopt the income approach using Mr. Timbol's multiplier. I find it is more likely than not that the plaintiff will continue to take personal time off during his career lifetime of several months over every few years period. This time off would be unconnected to the accident and reflects his evidence that before and after the accident he took significant personal time off. I factor this into the final figure by reducing the total lost income figure by 20 percent (541,276.74*0.8 = 433,021.39) to reflect the fact that the plaintiff would not be working 100 percent of the time even if he had not been injured.

[250] I find, in all the circumstances, that an appropriate award for future loss of income-earning capacity is $433,021.39.

COST OF FUTURE CARE

Legal Principles

[251] The plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. When full restoration cannot be achieved, the court must

strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the available medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 (S.C.), 1985 CanLII 179; *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43.

[252] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58. For an award of future care: i) there must be a medical justification for claims for cost of future care; and, ii) the claims must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62–63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92, citing *Paur v. Province Health Care,* 2017 BCCA 161 at para. 109. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[253] An award of damages for costs of future care is partly prediction and prophecy: *Pang* at para. 58. In *Pang* at para. 57, Justice Voith identified three additional considerations of which the court must be satisfied in this analysis: i) that the plaintiff would, in fact, make use of the particular care item; ii) that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and, iii) that there is no significant overlap in the various care items sought.

[254] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Paur* at para. 109.

[255] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or

increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.

[256] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang* at para. 58.

[257] In *Gao*, the Court of Appeal summarized the law with respect to cost of future care claim as follows:

> [68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:
>
> > In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "*restitutio in integrum*" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.
>
> [69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.
>
> [70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).
>
> [71] In *Ali v. Glover*, 2016 BCCA 446, and *Reimer v. Bischoff*, 2017 BCCA 4, this Court overturned awards for future care because there was no evidence from a health care professional recommending a treatment item.

[258] Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108 held:

> The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y.* at para 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care will be required: *O'Connell v. Young*, 2012 BCCA 57 at paras. 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

Ms. Ditson's Report

[259] With respect to cost of future care, Ms. Ditson had indicated that some ergonomic equipment would assist the plaintiff.

Long handled motorized scrubber

[260] The plaintiff claimed for the long handled motorized scrubber which cost $64.99 plus applicable tax, amounting to $72.79. This equipment has to be replaced every four to six years. I permit this expense, which has to be replaced every four to six years for the next 45 years. At a mid-point of five years, that is $655.11.

[261] Respecting the scrubbers themselves, they must be replaced on a year basis in the amount of $22.39 plus applicable taxes. On the basis of Mr. Lakhani's multiplier, the plaintiff seeks $573.44 ($22.39 per annum/1,000 x 28,672).

Anti-fatigue mat

[262] Ms. Ditson also recommended an anti-fatigue mat for home use which can cost between $35 to $60 plus applicable taxes so for $39.12 to $67.20 and will need to be replaced about every five to seven years.

[263] In this regard, I find that there is clearly a need for the plaintiff to have the anti-fatigue mat for use at home given his employment requires much standing. At a cost of between $39.12 and 67.20 with replacement required every five to seven

years, at the mid-point of every six years for the next 45 years results in a cost of $425.28.

Kinesiology and non-pharmacological pain management

[264] Ms. Ditson estimated the total yearly cost for kinesiology to supplement his exercise program would cost of $432 to $664 annually. In respect of non-pharmacological pain management, she estimated the yearly cost for chiropractic, physiotherapy, and massage treatments, given their cost of $69 per chiropractic follow-up, and $95 per physiotherapy follow-up, that the annual cost would be $360 to $1,140.

[265] Respecting kinesiology and non-pharmacological pain management, being chiropractic, physiotherapy, and massage treatments, given that the plaintiff has not availed himself of these treatments recently in the past, I find it is more likely than not that he will only seek these following extreme flare-ups.

[266] In respect of treatments, the plaintiff ceased going to chiropractic treatments in 2018. Since that time the Plaintiff has not sought out treatment. He may benefit from treatments in dealing with his flare-ups but has failed to consistently seek treatment even when it was recommended that he do so. The plaintiff must show that he would expend the monies for the treatment.

[267] It could be that the plaintiff will completely change and take these treatments more frequently, however, given that he has not in the past, I find it unlikely that the plaintiff would consistently use these modalities except in the case of a severe flare-up. I find there is only a 25% chance that the plaintiff would seek this treatment for all flare-ups and consequently, allow only $400 per annum

Provisional yard work assistance

[268] Ms. Ditson further recommended provisional yard work assistance but noted the plaintiff does not presently own his own home.

Gym pass

[269] She also recommended a gym pass but this is not being pursued.

Medication

[270] Respecting medication, the annual cost for Tramacet's would be at $8.40 to $9.12; Cyclobenzaprine would be at $2.64 to $4.68; Acetaminophen would be at $10.80; and extra strength Ibuprofen would be $18.

[271] In respect of other considerations that she had on ergonomic matters, Ms. Ditson testified that the plaintiff had already done those at his work so they are already in place.

[272] Ms. Ditson said that for the non-pharmacological pain management modalities, applying the cost of future care multiplier of Mr. Lakhani, the plaintiff seeks $21,504 per annum ($750 per annum/1,000 x 28, 672) to age 75.

[273] The largest amount sought by the plaintiff in respect of cost of future care for yard work, incorporating assistance with heavy housework, including yard work, is at $5,600 per annum (two hours/week x 40 weeks x $70/hour). Applying Mr. Lakhani's cost of future care multiplier, this amounts to $160,563.20 per annum ($5,600/1,000 x 28,672) to age 75. Consequently, the plaintiff claims $160,000 for the yard work.

The Plaintiff's Position

[274] The plaintiff submits that, due to the chronic nature of his symptoms, he will require ongoing treatments and care.

[275] Further, the plaintiff seeks the ergonomic equipment to assist the strain on his back and the degree and frequency of bending and stooping.

[276] The yard work cost of future care award is sought on the basis that the plaintiff and his wife are looking for a family home.

[277] Ms. Ditson's evidence is that the cost of yard work can range between $42 to $85 an hour. The plaintiff seeks two hours a week for yard work at an hourly rate of $70.

[278] Applying Hassan Lakhani of Peta Consultants Ltd.'s multiplier, that figure is $160,563.20 to age 75.

[279] In summary, counsel for the plaintiff submitted that the plaintiff be awarded cost of future care in the sum of $185,461.12 with breakdown as follow:

Long handled motorized scrubber	$655.11
Replacement scrubbers	$573.44
Anti-fatigue mat (for home)	$425.28
Yard work	$160,000.00
Kinesiology	$548.00
Non-pharmacological pain management	$21,504.00
Prescription medication	$929.54
Non-prescription medication	$825.75
Total	**$185,461.12**

The Defendants' Position

[280] The defendants in response submit that the plaintiff would be unlikely to make use of any of the recommended treatments to the extent they are referable to the accidents as he has failed to return to chiropractic treatments. Similarly, Dr. Adrian, the only medical expert called by the plaintiff, questioned the utility of treatment this long after the fact.

[281] Dr. Adrian made no recommendations for assistance with housekeeping or yard work. No evidence was led by the plaintiff that any treating physician has ever recommended or provided a referral for assistance with that task.

[282] Further, the defence submits that the appropriate multiplier for this cost would be that of Mr. John Timbol, an economist, of 24,140 to age 67.

Analysis

[283] The cost of future care is a global assessment taking into account whether there is a medical justification and whether those claims are reasonable.

[284] While the yard work claim can be considered, it must also be reasonable.

[285] I do not agree, however, with the defence's submissions, the fact that a treating physician has not made a recommendation for assistance with housekeeping or yard work should result in no award for yard work.

[286] There was no evidence before the court that the plaintiff's incapacity would result in actual expenditures in the amounts sought for yard work. At present, the plaintiff does not own a home with a yard and the expenditure is entirely hypothetical. It may be that the yard is low maintenance and required only minimal attention for lawn care during the summer months. It may be as well that the plaintiff is not solely responsible for yard work. I discount the plaintiff's claim for yard work by 70 percent to account for these contingencies ($160,000x0.3 = $48,000)

[287] In respect of treatments, the plaintiff ceased going to chiropractic treatments. He may benefit from treatments in dealing with his flare-ups but has failed to consistently seek treatment even when it was recommended that he do so.

Decision

[288] The claims must be reasonable. In all of the circumstances, I find that an appropriate award for cost of future care of all items would be $73,461.12.

PAST LOSS OF HOUSEKEEPING CAPACITY

[289] The defendants note the plaintiff's claim for past loss of housekeeping capacity and yard work, and submit that it is not being established on the evidence and cite *Cochran v. Bliskis*, 2023 BCSC 710, where Verhoeven J. stated:

> [151] In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal endorsed the test for whether a discrete pecuniary award for loss of housekeeping capacity should be made, or whether the plaintiff's loss should be assessed as part of

the plaintiff's loss in the award of non-pecuniary damages, set out in *Kim v. Lin,* 2018 BCCA 77. In *McKee*, the Court stated:

> [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.

[152] In *Haug* [*v. Funk*, 2023 BCCA 110] the Court of Appeal also endorsed the *Kim* test (at para. 98), and also made reference to the considerations set out in *Riley v. Ritsco*, 2018 BCCA 366:

> [98] There was no evidence that any incapacity on the part of Mr. Riley would result in actual expenditures, or of family members or friends routinely undertaking functions that would otherwise have to be paid for. If it existed, such evidence could have supported a segregated award of pecuniary damages on the basis of *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178 (C.A.).

[290] As noted, the plaintiff claims past loss of housekeeping capacity in the amount of $5,000 over a one-year period with respect to the First Accident and $35,000 reflecting $5,000 per annum for seven years over the Second Accident, for a total of $40,000.

[291] The plaintiff relies on *Tombe v. Stfulj*, 2002 BCSC 154 at para. 78. He relies on the evidence that he gave that he was unable to perform various heavy household chores, including vacuuming, cleaning the bathroom, and washing dishes along with yard work after the Second Accident for a period of approximately six months.

[292] The defendants claim that there is no evidence that the plaintiff has been forced to pay for housekeeping tasks or for yard work. Again, the plaintiff lives with his parents in their home. While there was evidence that he did not do the heavier tasks for the six month period, he can still do the tasks albeit with difficulty and with the assistance of the scrubber and a special lawn mower.

[293] An award of a claim for housekeeping is a discretionary one in terms of the award being a segregated pecuniary damage or whether it is part of the non-pecuniary loss: *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100. Note that in *Riley*, Groberman J.A. stated at paras. 101 and 102:

> [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non-pecuniary damages.
>
> [102] I acknowledge what was said in *Kroeker [Jansen* (1995), 123 D.L.R. (4th) 652 (B.C.C.A.)] about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[294] As noted by the court in *Firman*, duplication of such an award must be avoided:

> [236] Duplication in the award must be avoided. Where potential costs for housekeeping assistance are awarded, in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case. In this case a minor award for housekeeping assistance has been made.

[295] The plaintiff bases this claim on Ms. Ditson's evidence. However, no evidence was before the Court respecting the cost for household work. There was no evidence that the plaintiff paid for household work. The plaintiff was, however, unable to perform difficult household chores for periods of time. In the circumstance, I make an award of $5,000 under this head of damage.

SPECIAL DAMAGES

[296] The plaintiff claims $4,350.19 in special damages in relation to the First Accident and $3,655 in relation to the Second Accident for a total of $8,005.19.

[297] The defence does not dispute the special damages apart from the self-propelled lawn mower given that it assists the plaintiff in assisting his parents with the yard work task he normally did and making it easier for him. I find $8,005.19 is an acceptable expense and award that the special damages in the amount sought.

SUMMARY OF AWARD OF DAMAGES

[298] In summary, the plaintiff is entitled to damages award of $625,062.10 consisting of:

a) Non-pecuniary damages ($90,000 x 95%):	$85,500.00
b) Past loss of income-earning capacity:	$20,074.40
c) Future loss of income-earning capacity:	$433,021.39
d) Cost of future care:	$73,461.12
e) Loss of housekeeping capacity:	$5,000.00
f) Special damages:	$8,005.19
Total:	**$625,062.10**

[299] The plaintiff will be entitled to 75% of the aforementioned damages: $468,796.57 ($625,062.10 x .75). The defendants from the First Accident are liable for 25% of the damages: $156,265.52 ($625,062.10 x .25). The defendants from the Second Accident are liable for 50% of the damages: $312,531.04 ($625,062.10 x .50).

COSTS

[300] Unless there are offers to settle which impact upon the question of costs, the plaintiff is entitled to costs as against Arif Javed, the defendant of the Second Accident. Costs in respect of the First Accident are governed by the *Negligence Act*. The plaintiff is entitled to 50% of assessed costs as against Amanda Pearce, the defendant of the First Accident. There should be one set of costs in respect of the

trial. I leave to the parties to calculate the appropriate percentages having regard to apportionment of liability.

[301] If the issue of costs needs to be addressed, arrangements should be made with trial scheduling within 60 days of the release of this judgment.

"Maisonville J."