# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bourassa v. Peralta,*
2024 BCSC 113

Date: 20240125
Docket: M1912992
Registry: Vancouver

Between:

**Chad Michael Bourassa**

Plaintiff

And

**Jan Peralta and Kevin Peralta**

Defendants

Before: The Honourable Justice Caldwell

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | B.G. Souza |
| Counsel for the Defendants: | T. Kushneryk<br>J.H. Willcock |
| Places and Dates of Trial/Hearing: | Vancouver, B.C.<br>October 24–28 & 31, 2022<br>November 1–3, 2022<br>January 12–13, 2023<br>Abbotsford, B.C.<br>June 30, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 25, 2024 |

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## INTRODUCTION

[1] This action arises as a result of a motor vehicle incident which occurred on July 5, 2017.

[2] The plaintiff was travelling on his motorcycle, northbound on Laurel Street ("Laurel St.") in Vancouver, approaching Southwest Marine Drive. The street was undergoing construction or repairs. There was single lane traffic with the reduced speed regime posted, and flag-persons were controlling traffic flow. The defendant pulled out of a McDonald's parking lot onto Laurel St., in front of the plaintiff. The plaintiff swerved to avoid a collision and in doing so, "laid down" his motorcycle, slid along the roadway a short distance and came to rest next to or in contact with a vehicle which had been stopped by the flagger on the other side of Laurel St., heading southbound. He alleges various injuries, including injury to his left shoulder, myofascial injury to his left chest, and depression/anxiety.

[3] The plaintiff seeks non-pecuniary damages, past wage loss, future loss of income earning capacity, special damages and cost of future care. He also seeks orders regarding tax gross up and management fees with those matters possibly being addressed after the issue of damages has been determined.

## ISSUES

[4] The issues to be determined are:

1. Liability—Who is responsible for the incident?

2. What injuries did the plaintiff suffer as a result of this particular incident and what is the seriousness, duration and effect of those injuries on his life, including his ability to earn income?

3. How do the plaintiff's pre-existing injuries and personal circumstances come into play with and affect the issues of causation and financial loss?

4. Has the plaintiff taken appropriate steps and actions to mitigate or reduce the effects his injuries suffered in the incident and the damage arising from them?

**BACKGROUND**

[5] The plaintiff was 40 years old at the time of the incident; he was 46 at the time of trial. He lived then and lives now in Regina, Saskatchewan, with his cousin Angela Derr.

[6] He had a very difficult life from childhood which included:

- being raised by a single mother who had a substance use disorder, was a sex-worker and was often absent from the home, leaving the plaintiff and his siblings alone for extended periods;
- stealing from local stores, beginning at age 5, in order to eat and get food for his siblings;
- not meeting his father until he was in his 20s;
- suffering physical and sexual abuse at the hands of his mother's boyfriends and her adopted brother;
- removal from his mother to be re-located to British Columbia to live with an aunt in New Westminster for a period of about 2 years, before being returned to his mother for about a year, only to again return to his aunt at age 10 or 11;
- quitting school in Grade 8;
- entering the gang life-style by age 14/15 and becoming increasingly involved in illegal activities, including: breaking and entering, drug trafficking and violence in many forms; and

- the death of his mother from an overdose or pancreatic cancer (both causes appeared in the evidence), when he was 21 years old.

[7] By his early to mid 20s, he was well established in the gang lifestyle and quickly moved up in the hierarchy. His income was generated solely from criminal activity, mostly the sale of illegal drugs. He was arrested on occasion and has a record for both youth and adult convictions. He described himself at that time as a "horrible person". He was using cannabis daily, he experimented with cocaine and for a period of 2 years or more, was a regular user of heroin.

[8] By his late 20s and early 30s he was, by his own evidence, a high-ranking, management level member of a large criminal gang, overseeing and coordinating literally hundreds of lower level members. He was a "Council Member" helping steer gang decisions and directions.

[9] During the same period of time, about 2005/06, he met and became romantically involved with Violeta Dima. His involvement with her and her "normal" family (in his words), along with his growing awareness that many of his friends were either in jail or dead, prompted him to try to withdraw from the gang lifestyle.

[10] In 2008, he obtained a Heavy Equipment Operator Certificate to help equip himself in that pursuit.

[11] He also suffered at least two significant injury incidents during that general time period. He was in a motorcycle accident in 2008, in which he suffered a broken leg. He was also in a dune buggy which rolled in 2010.

[12] Medical records indicate that by that time he had also suffered a damaged anterior cruciate ligament, requiring medical repair; four herniated discs in his back, resulting in a chronic pain diagnosis; and more than five concussions.

[13] He began and pursued the process of removing himself from the gang life and its associations, but that process proved problematic, lengthy, difficult to navigate and possibly dangerous.

[14] In 2012, two or more people broke into his home in “home invasion” fashion. He was at home with Ms. Dima. He grabbed a sword to defend against the attack but was shot seven times with handguns and a shotgun. He suffered significant permanent injuries from the shooting and has undergone several significant surgeries related to those injuries and complications resulting from them. He continues to have shrapnel from the shooting remaining in his body, making it impossible for him to undergo an MRI examination.

[15] It was never established whether or not the shooting was related to the plaintiff’s gang activities or his desire to leave the gang lifestyle.

[16] The major damage from the shooting involved his legs, particularly the right leg—the femoral artery was replaced and he suffered significant nerve damage. The related continuing symptoms were present prior to and at the time of the 2017 incident, and are agreed to be permanent. The same can be said of the lower back injuries and associated chronic pain.

[17] His Saskatchewan doctors indicated that he was permanently disabled from work as a result of the injuries suffered in the shooting incident and the back injuries.

[18] In addition to the physical injuries, the shooting was a frightening experience which left him with anxiety and depression. He did not like the anti-anxiety and anti-depression medications prescribed by his doctor in Saskatchewan and was not sure whether or not he continued taking them or, if so, in what dosage. He saw a counsellor once but did not find it helpful and so did not return.

[19] Relative to those many incidents, his Saskatchewan PharmaNet printout shows that he was on extensive pain and other medications prior to the 2017 incident. They include:

- Gabapentin;
- Kadian;
- OxyNEO CR;

- Oxycodone;
- Naproxen; and
- Supeudol.

[20] He has discontinued the Oxycodone and Naproxen as of at least April 2022 but has added Duloxetine (Cymbalta).

[21] Until 2015, the plaintiff never really held any form of established, legitimate employment.

[22] In his 20s, he worked as a bouncer for a time. He also worked making or installing windows, but that appears to have resulted in one of his criminal convictions and a 6-month conditional sentence.

[23] Later, he became involved with a tattoo parlour for a very short period of time.

[24] In 2013, he borrowed a tractor type vehicle called a “Bobcat” from his uncle, with the intention of starting a landscaping and snow-removal business in Salmon Arm, B.C. While that project, known as “Buddha Bobcat”, appears to have lasted about 1-2 years, the evidence indicates that he never actually obtained any work at all and earned no income whatsoever during that period.

[25] In 2015, as a result of discussions with the uncle who had lent him the Bobcat, he says that he decided to pursue membership in the Operators Union in Vancouver.

[26] He obtained work with Grandview Blacktop (“Grandview”) through that uncle, Joe Melton. He worked as a labourer and machine operator, sometimes part-time, sometimes more full-time, and in both the concrete and the blacktop sides of the business. His work for Grandview, in 2015, consisted of a few weeks of mostly part-time work. He left that work for a period but later returned, and was working on a Grandview blacktop/paving crew at the time of the incident.

[27] He never actually changed his residence from Saskatchewan to B.C. during this period, nor at any other time save for the period during which he lived with his aunt as a child.

[28] He was off work for about 2 weeks after the 2017 incident. Thereafter, he returned to work with Grandview but testified that he was unable to handle the heavy, physical aspects of the job. He ceased work with Grandview in November 2017, claiming that this was due to his inability to do the job. He further testified that his employer provided false documentation indicating that the layoff was due to lack of work so that he would qualify for Employment Insurance benefits.

[29] No authorized person from Grandview was called to corroborate this allegation or to provide any supporting documentation regarding his employment or termination.

[30] His uncle Joe Melton was not called to testify.

[31] The plaintiff has not been gainfully employed since being laid off by Grandview, with the exception of a period of a few months when he provided personal care to a friend who was dying of ALS. He has explored, to some extent, the phenomenon of crypto currency but that has not resulted in the generation of income.

[32] He testified that he would like to get into a counselling type position, working with children to keep them from becoming involved in the gang life. He provided no evidence of any active pursuit of such training other than saying that he had spoken to a limited number of school classes about the dangers of gang life.

[33] His romantic relationship with Ms. Dima ended in 2019, although they remain close friends and both indicate the possibility that the relationship may be salvaged and re-kindled. There had been significant problems in their relationship prior to the 2017 incident, as testified to by Angela Derr. Ms. Dima is currently completing the final stages of a legal education in Saskatchewan, and hopes to become a lawyer in the near future.

[34] The plaintiff lives with and is fully supported by his cousin, Angela Derr. This current arrangement is similar to his living arrangement with Ms. Derr from approximately 2014 onward. For much of the time, he made little or no financial contribution for his accommodation but has recently begun making a room and board type contribution. Ms. Derr does, and has always done, most but not all of the shopping and household upkeep and maintenance. She provides him with a truck for his transportation and pays all of the associated expenses regarding that vehicle as well.

[35] The plaintiff says that he was managing well prior to the incident—not hampered significantly by his prior life choices or injuries, finally working, and establishing himself towards a position with full union benefits, established in a solid relationship and with an active social and extra-curricular lifestyle of motorcycle riding, and sports/physical pursuits and activities.

[36] Ms. Derr and Ms. Dima echo these claims for the most part. They were able to say that the plaintiff seemed to have a better outlook and attitude during the time he was pursuing work with Grandview.

[37] He says that all ended as a direct result of the incident in July 2017, and that the losses are total, permanent, and attributable to a shoulder injury suffered in the incident, and associated depression and other mental health issues.

**LIABILITY**

[38] The plaintiff says that he left a parked position on Laurel St. and proceeded at appropriate low speed through the construction area. Although that section of road was single lane, the flag person had not signalled him to stop. He says that the defendant drove directly and without warning, into the road from the McDonald’s parking lot, immediately in front of him. He says that he was required to take evasive actions to avoid a collision and that in doing so, even at low speed, he had to swerve and had to “lay his motorcycle down” causing injury to it and to himself.

[39] Photographs of the scene show oil from the motorcycle, at rest after the incident, near the centre of Laurel St. and almost directly across from the extreme right-hand side of the exit from McDonald's, or perhaps a few feet to the north of that. The photos also show cars parked along the east side of Laurel St., almost right up to the McDonald's parking lot entrance/exit.

[40] The plaintiff's version of events was confirmed in most respects by independent witnesses Harry Banton and Thomas Ksik, both of whom observed the events from their vehicles which were stopped on Laurel St., facing southbound. It was also confirmed, to some extent, by Rob Saunders, a member of the crew working on the road repairs and a co-worker of the plaintiff.

[41] Mr. Banton testified that he was familiar with the area and that particular McDonald's and its entrance/exit on Laurel St. He was waiting on Laurel St. to turn left into the McDonald's parking lot. He saw the motorcycle leave its parking spot, by his estimate 40 to 50 feet down the block to the south and on the east side of Laurel St. He noted that it was very loud and was "getting speed" but was, in his view, not exceeding the speed limit. He saw the defendant's car come out of the parking lot and make a "quick right turn", immediately in front of the motorcycle. He watched the motorcycle veer and go down essentially right in front of him. His evidence was not weakened by cross-examination.

[42] Mr. Ksik gave his direct evidence by affidavit as he had experienced some significant medical issues involving the worsening of his Parkinson's Disease symptoms following a recent fall. He was cross-examined by defence counsel by video link at the trial. He was also at or near the front of the southbound line of traffic which had been stopped by the flag-person. The oncoming, northbound line of traffic had the right of way and permission to proceed.

[43] His direct evidence was very similar to that of Mr. Banton save that he had more difficulty with estimating how far down the block the motorcycle was parked before pulling into traffic. In his affidavit and attached statements, he estimated that it was 75 to 100 yards to the south of his position but, in cross-examination, he said

that it could have been more like 50 feet south of the McDonald's parking lot entrance/exit. He did not think that the motorcycle was going too fast for the conditions. In his affidavit, he estimated 20 to 25 km/h at most. Again, his evidence was not significantly weakened in cross-examination.

[44] The defendant testified that he was not familiar with the area but was taking a lunch break on his way to a worksite in Richmond.

[45] He said that he was leaving the parking lot. He pulled to the exit, saw traffic stopped, crept to the edge of the road, looked left and right and pulled out onto Laurel St., by a right turn to head north. He said that there were cars parked on the east side of Laurel St. pointed north and that they were interfering with his view to the south from the parking lot exit.

[46] He heard revving and a crash but never saw a motorcycle prior to or even at the time of the incident. After moving along Laurel St. a short distance, he looked in his rear-view mirror and saw the motorcycle laying on the street. He backed up, pulled over and parked.

[47] He agrees that Mr. Banton and Mr. Ksik were in a good position to observe what happened but that they are simply mistaken.

[48] He also acknowledged in cross-examination that he had canvassed witnesses at the scene but that he was only seeking witnesses supportive of him. He found none. All of the witnesses to whom he spoke indicated that he had cut off the motorcycle and that the accident was his fault. He declined to take names or other details from those people.

[49] Mr. Saunders was working on the Laurel St. road repairs and was adjacent to the area where the incident happened. He was a co-worker of the plaintiff. The plaintiff had been working with the crew in the morning and brought his motorcycle to the worksite to show his co-workers. They had been examining it for a few minutes immediately before the plaintiff left his parking spot. He estimated that parking spot to be about 70 to 80 metres south of the crew work area.

[50] Mr. Saunders testified that he had returned to work but saw the plaintiff moving along Laurel St. at an estimated speed of 20 km/h. He saw the defendant's vehicle "zip" out of the parking lot without stopping. He said that he saw that the driver had a drink in his hand, with a straw pointing up. No other witness saw anything in the defendant's hand, nor were they able to indicate whether or not he had stopped before entering the roadway to execute his right-hand turn.

[51] He testified that he ran to the defendant's car and stood in front of it as he was afraid that the defendant was leaving the scene. That part of his evidence appears to be inconsistent with the observations of other witnesses.

[52] Section 176 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*] provides:

> *Emerging from alleys*
>
> 176(1) The driver of a vehicle in a business or residence district and emerging from an alley, driveway, building or private road must stop the vehicle immediately before driving onto the sidewalk or the sidewalk area extending across an alleyway or private driveway, and must yield the right of way to a pedestrian on the sidewalk or sidewalk area.
>
> (2) The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard.

[53] The plaintiff was on the roadway, in the proper lane of travel and proceeding in keeping with the directions of the flag-person. There is no evidence which in any way establishes that the plaintiff was exceeding a posted speed or a speed which was appropriate in the circumstance. He was the dominant vehicle.

[54] The defendant was entering onto the roadway from a parking lot. He was the servient vehicle.

[55] It is clear that the motorcycle was in fact there to be seen. It is equally clear from the defendant's evidence that he did not see it or, if he did, he entered the lane of traffic notwithstanding.

[56] He either failed to look at all for traffic on the road to his left, or looked in an inadequate fashion or from such a position that did not allow him to see oncoming traffic from his left. In any event, he proceeded into a right-hand turn at a time and in a manner which was not safe in the circumstances.

[57] I find that the defendant was 100% responsible for the incident which occurred on July 5, 2017, and I attribute 100% liability to him.

**CREDIBILITY AND RELIABILITY**

[58] In many claims related to personal injury, credibility and reliability are key considerations.

[59] In this case, the issue of liability was capable of determination based largely on assessment of the physical situation surrounding the incident, photographs of the scene, and the evidence of independent witnesses.

[60] The remaining matters regarding injuries alleged to have been suffered as a result of this incident, and their link to various heads of damage, are more closely tied to the plaintiff's evidence and that of his witnesses, including experts.

[61] Those experts received the information upon which they based their opinions, in large part or in total, from the plaintiff.

[62] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), as follows:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally

> (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *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 (*Farnya* at para. 356).

[63] It is important, in my view, to note that Dillon J. referred to the assessment as an art, not a science and she listed some, but certainly not all, of the factors which the court must or should consider in that assessment.

[64] It is also important to note a significant distinction between the court and the experts who provided reports and evidence for the trial.

[65] The experts essentially assume credibility. Dr. K. Fung (psychiatrist) said at page 3 of her report:

> I assume to be true what Mr. Bourassa has told me with respect to his symptoms and history, the events, the impact of his symptoms on his function, and his response to various treatment modalities.

[66] Dr. J. Foley (physiatrist) said at page 17 of her report:

> In forming my professional opinion, I have relied on … and factual assumptions provided by Mr. Bourassa and taken from my review of the medical information …

[67] Ms. Walker (occupational therapist) said at page 5 of her report:

> Facts and Assumptions
>
> a. That the history provided by Chad Bourassa is true and accurate;
>
> b. …
>
> c. That the information contained in the medical information is accurate.

[68] Opinions on testing effort and similar issues were contained in Ms. Walker's report and those could certainly be taken as being relevant to her assessment of credibility and reliability, at least as they relate to the plaintiff's performance and efforts put forth during testing.

[69] The court does not operate on the same basis. It does not assume the truth or accuracy of statements made by any witness.

[70] The court must assess the credibility and reliability of witnesses, including the plaintiff, based on a critical analysis of all of the evidence presented at trial, including the documents and expert opinions, and in light of cross-examination. That assessment becomes the lens through which the court views the claims and evidence of the parties and witnesses, and ultimately the scale upon which the evidence is placed in order to determine the weight, if any, to be assigned it.

[71] If, after such assessment by the court, the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49–50.

[72] Counsel for the plaintiff concedes in his closing submissions that "the court should use caution when assessing the plaintiff's credibility", but says that he should ultimately be found to be credible.

[73] Counsel for the defendants submits that the plaintiff is simply not credible.

[74] Overall, I found the plaintiff to be a poor witness and a poor historian.

[75] His evidence on direct examination was reasonably clear and responsive to questions. His evidence in cross-examination was not.

[76] He frequently, and for periods almost universally, required questions to be repeated. His most frequent response to questions was that he "could not recall"—a response which he provided, by my estimate, well over a hundred times.

[77] In general, I found his evidence to lack spontaneity, candor and consistency—the latter particularly when compared to the information which he provided to his various experts and to the documents entered in evidence, including his employment records.

[78] The information which he provided to his experts regarding sexual abuse, previous depression, previous anxiety and prior drug use was in many cases inconsistent with that provided to other experts and with the plaintiff's evidence at trial.

[79] In at least one case, the expert seemed unaware of the existence or extent of previous drug use, particularly involving heroin and the daily use of cannabis over the course of several years.

[80] The information which he provided to the experts regarding his employment, particularly the extent of hours worked, was, quite simply, wrong when compared to his employment records.

[81] The documents produced regarding his employment did not corroborate his evidence of a full-time plus overtime work schedule with Grandview prior to and at the time of the incident.

[82] All experts indicated that their understanding was that he was working full-time, often with additional overtime.

[83] The employment documentation showed sporadic, part-time employment at best for most of his time at Grandview. I note that on the day of the incident, he had worked a few hours in the morning but was leaving the work crew at noon to take his spouse on a motorcycle trip towards Whistler.

[84] Two of the claimant's paving crew associates testified. Both indicated that the crew, including the claimant, was working full-time plus at least some overtime. This, again, was not borne out by the claimant's time/pay sheets.

[85] He called no evidence from the management or "employer" level of Grandview as to his employment, his hours worked, the reason for the apparent sporadic nature of his shifts or his level of performance—or even to explain the apparent inconsistency between the plaintiff's claims and the business records.

[86] He called no evidence from any Union representatives to support any of his evidence regarding the possible pursuit of union membership, its requirements, steps which he was required to or had taken to pursue it, or even the benefits which would flow should he accomplish that goal.

[87] I find that the claimant tended to exaggerate matters favourable to his cause and tended to minimize those which were not helpful. I find that he was selective and, at times, misleading regarding the information which he provided to the various experts who were retained to assess and opine on the claimant's situation.

**CAUSATION**

[88] The plaintiff must establish, on a balance of probabilities, that the defendant's negligence caused the injuries in question. In other words, but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23. The defendant's negligence does not need to be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[89] Causation need not be determined by scientific precision: *Athey v. Leonati* at para. 16.

[90] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

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

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

[92] The plaintiff says that, in spite of his pre-existing injuries and symptoms from the previous motor vehicle incidents and the 2012 shooting, he was completely capable of performing the heavy work required for that position. He testified that, although he was in pain, he could do most things. This included specific reference to his concrete and paving work with Grandview—he experienced pain in his leg and low back but says that he did not have to take time off as a result.

[93] He says that the incident which occurred in July 2017, and particularly the injuries which he suffered to his left shoulder as well as related depression and anxiety, derailed any hopes he had of carrying on in his trade, obtaining a position with the Union and enjoying the short and long-term benefits and security associated with such a position, through to retirement in his 60s.

[94] I consider this claim in the context of the fact that he did actually have significant periods of time off between shifts at Grandview prior to the motorcycle incident. While he claims to have been working full-time plus overtime, I have already noted that the time records of Grandview simply do not bear that out.

[95] One very plausible conclusion on the evidence is that the plaintiff was in fact scheduled to work full-time shifts and overtime as he claims, but was simply unable to perform such work due to his existing injuries and disabilities.

[96] The defendant admits that the plaintiff suffered a left ankle fracture, left knee pain, left shoulder and pectoral pain, neck pain and headaches as a result of the incident of July 5, 2017.

[97] He says however, that:

- the plaintiff's credibility is poor, including as it relates to the extent and severity of the injuries suffered in this incident;
- that his pre-existing injuries, which were chronic, symptomatic and required extensive medication, were and are in themselves the cause of his inability to work full-time and/or long-term;
- that he did not have anything like an established full-time employment position at or prior to the incident, and that his credibility on that issue should also be found wanting;
- that his plans regarding Union qualification were nebulous and not established on the evidence; and
- that he has residual capacity to seek and obtain other work.

[98] Importantly, he says that the plaintiff provided his experts with incomplete and, at times, misleading or clearly wrong information. He says that renders the expert opinions of limited, if any, weight.

[99] I find that the plaintiff was seriously physically compromised prior to the July 2017 incident. His legs, lower to mid back and other areas of his torso had suffered serious damage over the years. He was in chronic pain from such damage. He was heavily medicated against such pain. He had suffered significant periods of depression, anxiety and other emotional issues as a result of those situations. He was on significant medications for his conditions. His doctors in Saskatchewan indicated that he was disabled from work as a result of these injuries.

[100] He had suffered at least five concussions. He had a history of heavy use of street drugs including cannabis, cocaine and heroin.

## THE PLAINTIFF'S EXPERTS

### Dr. K. Fung

[101] Dr. Fung is a psychiatrist. She diagnosed the plaintiff as having Major Depressive Disorder and Post Traumatic Stress Disorder. She opined that the nature of the incident, chronic pain and unemployment contributed to the development of these conditions and that in the absence of the incident, it is unlikely that his psychiatric symptoms would exist at the same level.

[102] She noted specifically that the plaintiff identified this subject motor vehicle incident as being "the most traumatic event in his life". I find such assertion to be very difficult to accept as true, given the extensive and extreme stresses and traumas experienced by the plaintiff during his lifetime.

[103] She found him to have opiate use disorder predating the incident, and cannabis use and alcohol use disorder also predating the incident and in remission.

[104] She opined that his limitations working as a labourer, as well as his household and self-care limitations, are due to his physical injuries rather than his psychiatric diagnoses. She felt that his recreational limitations arose from both physical and psychiatric issues.

[105] On cross-examination, certain issues arose which bear on and may well affect her conclusions. They include:

- she had no access to medical or other records from after 2019 and thus was completely unaware of medical documentation which had arisen since that date. Information regarding matters after 2019 came only from the self-reporting of the plaintiff, including references to counselling and nightmares, which information was inconsistent with that provided to others and at trial;

- she did not have accurate information about the plaintiff's history regarding childhood sexual abuse and thus did not consider its effect

on his mental health issues including depression and anxiety. The records which she reviewed mentioned the history but when she asked the plaintiff about it, he denied such history and thus she proceeded on the assumption that he had not experienced childhood sexual abuse. Early in the trial, he testified that he had in fact been sexually abused as a child;

- she was operating on the plaintiff's assertion that, at the time of the incident, he was and had been working at least full-time on a paving crew with the co-related financial compensation. Time records produced at trial clearly showed that his work schedule was one of significantly less than full-time and did not provide full-time equivalent income;

- she was unaware that the plaintiff's long-time spouse had engaged in an intimate relationship with another person resulting in a "break up" in or about 2019; and

- she records that the plaintiff reported attending physiotherapy, massage and active rehabilitation sessions in 2020, which appears at odds with the evidence presented at trial.

[106] Quite simply, Dr. Fung's assessment, report, and evidence were based on incomplete and inaccurate information provided by the plaintiff. I find this report and the evidence of Dr. Fung to be of modest assistance at best.

**Dr. J. Foley**

[107] Dr. Foley is a physiatrist. She opined that the plaintiff had sustained a mild traumatic brain injury, a fractured left ankle, a left mechanical shoulder injury, myofascial injuries to the upper chest and back, and a bruise on his left knee, all as a result of the incident.

[108] Counsel for the plaintiff indicated throughout that the mild traumatic brain injury is of little or no significance to the plaintiff's claim, and that the ankle and knee injuries resolved shortly after the incident. The ankle and knee injuries are admitted by the defendant.

[109] His major physical complaints relate to the left shoulder injury. In spite of this, Dr. Foley spent considerable time in her report dealing with the traumatic brain injury issue as well as headaches, depression and anxiety—matters generally outside of her area of expertise.

[110] The primary focus of the Foley report and testimony as presented by the plaintiff at trial was the left shoulder; and the myofascial injuries to the upper chest and back to a somewhat lesser degree.

[111] She opined that the plaintiff's pre-existing chronic pain from previous injuries placed him at greater risk of developing chronic pain with centralization of the pain symptoms after his injuries from the July 5, 2017 incident.

[112] She recommended a multi-disciplinary approach to treatment including a CT arthrogram of the left shoulder and assessment by an orthopedic surgeon to determine if surgical repair is possible or recommended. I note that this process was recommended and a referral made for the plaintiff in October 2018 but nothing was done by the plaintiff to pursue the recommendation. No CT arthrogram was ever done.

[113] She opined that as the pain had become centralized, he would continue to experience residual symptoms and his vocational disability is permanent.

[114] In considering her opinions and evidence, I have also considered:

- as with Dr. Fung, Dr. Foley was provided with very little in the way of medical records after 2019, and no treatment records after that time;
- she also recalled being told that he was working full-time at the time of the injuries;

- her comments that he had no pre-existing cognitive symptoms were based largely or entirely on the plaintiff's self-reporting to her, but she acknowledged that daily use of cannabis over a period of years, as well as the use of "street heroin" for 2 years could lead to cognitive problems;

- she made no note regarding sexual abuse in the report and was unable to say whether she considered that issue, at least as it might have related to the depression, anxiety and cognitive issues; and

- she testified, in cross-examination, that she felt that the plaintiff would benefit from physiotherapy, that had he gone for treatment earlier he may well have improved sooner and had a better outcome overall, including that the centralization of pain would not have gotten as solid a foothold and become such a problem.

[115] As with Dr. Fung, I find that this assessment, report, and the evidence of Dr. Foley was based on incomplete and inaccurate information provided by the plaintiff. I find it to be of some, but limited, assistance.

**Darren Benning**

[116] Mr. Benning is an economist. His calculations and evidence as to past and future income loss were based on employment, income, and other such information which was provided to him by the plaintiff. I find that such information was not accurate, or was not proven to be accurate on a balance of probabilities or even to the level of being reasonably likely.

[117] I find this report and Mr. Benning's evidence to be of no assistance.

**Claudia Walker**

[118] Ms. Walker is an Occupational Therapist. She assessed the plaintiff in mid-July 2022, over the course of two days. She provided a Functional Capacity Evaluation (FCE) and a Cost of Future Care (CFC) opinion.

[119] She notes at page 3 of her report that “The FCE is not diagnostic in that it cannot determine the cause of any identified deficits.”

[120] Overall, her findings are consistent with the injury diagnoses of Dr. Fung and Dr. Foley, the self-reports of the plaintiff, and her testing results. They include:

- range of motion and pain issues in the left shoulder, neck, and upper back;
- reduced grip strength;
- reliance on non-dominant right side;
- reduced walking speed;
- problems with reaching, sitting and standing or stooping;
- presence of anxiety and depression;
- mental fatigue; and
- problems with retention, processing and organization of information.

[121] Ms. Walker summarizes at page 18:

> In summary, my opinion is that Mr. Bourassa is experiencing a significant level of ‘symptom burden’. This phrase refers to the combined and compounding impact of a set of possibly disparate symptoms. Typically, these are considered separately however the lived experience is more complex. For Mr. Bourassa, he experiences constant neck and left shoulder pain as well as frequent headaches. His function is further limited by cognitive fatigue, slowed speed of processing and difficulties learning new information. He is aware of these deficits and experiences depression and anxiety as well as trauma related symptoms. These issues compound each other, are inextricably linked and create substantive barriers to his performance.

[122] Based on her findings, she opines that the plaintiff is not employable in his prior position on a paving crew due to his left shoulder/arm issues. She further finds him unemployable at all in the competitive market due to “the combined impact of his physical, cognitive and psychosocial restrictions”.

[123] Ms. Walker comments, at page 29 of her report, on two important matters:

> 1. Physical effort testing – Maximum effort is important for proper evaluation. In order to test for maximum effort, four specific strategies are employed by the tester. Effort testing may be less reliable when diagnoses involve depression, trauma and/or traumatic brain injury. Scores on two of the claimant's tests were indicative of submaximal effort but Ms. Walker formed the overall impression that he was exerting genuine effort and that the results are valid.
> 2. Reliability of self report – The interview and questionnaire are self-report tools. Self-reported information is compared and considered with collateral information and objective findings. He was found to be a reliable historian and his self reporting was relied upon in the evaluation.

[124] In addition to her FCE, Ms. Walker provided significant recommendations regarding future care which will be addressed when dealing with that head of damage.

[125] I find Ms. Walker's reports to have been of considerable assistance, especially regarding somewhat more objective testing and assessment, physical performance parameters, and considerations of future care options.

## THE DEFENDANT'S EXPERTS

### Dr. Zarkadas

[126] Dr. Zarkadas is an orthopedic surgeon. He assessed the claimant in late July 2022.

[127] His physical examination of the plaintiff revealed definite pain, reduced motion, and reduced musculature in the left shoulder.

[128] He diagnosed the plaintiff as suffering from left-sided upper chest and trapezius myofascial pain and moderate rotator cuff tendinitis in his left shoulder.

[129] He opined that these injuries and symptoms were more likely than not caused by and related to the July 2017 motorcycle incident.

[130] He recommended that the claimant return to an active rehabilitation program once per week for six months, and that he consider receiving a subacromial injection of cortisone. He opined that surgery is not indicated, that his recommended regime is likely to improve the claimant's shoulder range of motion but not resolve the problem entirely, and that the plaintiff should "consider pursuing a more sedentary occupation rather than road construction".

[131] It should be noted that in cross-examination, Dr. Zarkadas acknowledged that:

- the plaintiff did participate in more active rehabilitation sessions and independent rehab activities that Dr. Zarkadas was aware of or considered in his opinion;
- if early treatment, including active rehabilitation sessions, did not help, it is less likely that they will help now;
- the concept of centralized pain is one related to physiatry, not orthopedics, and thus is not something that he is involved with or familiar with to any great extent; and
- no treatment or active rehabilitation is likely to return the claimant to a position of being able to do heavy labour type work.

**Dr. Lari**

[132] Dr. Lari is a psychiatrist. He assessed the claimant by Zoom interview in early June 2022 and produced his report of opinion in late July. He provided a responsive report to that of Dr. Fung in early September 2022.

[133] Dr. Lari opines that the claimant experienced depression following the shooting in 2012 and related to his pre-2017 chronic pain. He developed further depression as a result of the 2017 incident and its repercussions, improved over time, and currently does not meet all of the criteria of Major Depressive Disorder at this time.

[134] He recommends aggressive treatment with therapeutic (increased) doses of antidepressants and with Cognitive Behaviour Therapy.

[135] The claimant has opted not to increase his dosage of Cymbalta as recommended.

[136] Dr. Lari disagrees with Dr. Fung in that he does not believe that the claimant suffers from Post Traumatic Stress Disorder.

## DAMAGES

### Duty to Mitigate

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

[138] 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: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[139] In this case, the plaintiff participated in active rehabilitation over a significant time period following the incident. He indicated to the court and to the experts that the results were not favourable. Aside from that self-reporting, there is some objective evidence from at least Ms. Walker, that such is the case.

[140] He did not pursue a CT arthrogram, but even the defence expert opines that such testing was not necessary and in fact he does not recommend it.

[141] The plaintiff has not pursued cortisone injections or certain recommended medication adjustments, particularly related to his allegations regarding depression and anxiety.

[142] He has not, until very recently, pursued no-fault/income benefits through his Saskatchewan insurer. The results of such recent application were unknown at the time of trial.

[143] There is no evidence that he has sought alternate employment or training in the six years since the incident.

**Non-Pecuniary Damages**

[144] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities.

[145] The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[146] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] 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).

[147] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[148] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.) by then-Chief Justice McEachern (quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, he said:

> In *Butler v. Blaylock* … I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[149] In this case, I consider the injuries relevant to the claim for non-pecuniary damages to be the following:

- left ankle fracture which resolved over a few months;
- left shoulder injury—rotator cuff tendonitis—which continues to this day;
- myofascial/soft tissue injury to left upper chest, left upper back and neck area all of which continues to some extent today;
- swelling and tenderness of the left bicep or upper arm which continues; and

- a modest level of increased depression and anxiety following the 2017 incident which has lessened over time but returns periodically.

[150] I do not consider any of the cognitive complaints to have been proven, on the balance of probabilities, as being related to the 2017 incident. The evidence of several previous concussions, the history of extensive drug use as addressed by the experts in cross-examination, and the position of the plaintiff's counsel that no claim was being pursued regarding allegations of mild traumatic brain injury raise more than sufficient doubt that such complaints are causally connected to this incident.

[151] The noted injuries have increased the plaintiff's already significant pain level and that increased pain has inhabited a different part of his body than was the case prior to the incident. His trunk and lower body were significantly affected by prior injuries. This incident compromised his left shoulder area, adding a new pain location and associated limitations. It clearly also caused some level of emotional response in terms of periodic depression and anxiety.

[152] I accept, when addressing non-pecuniary damages, that when one is already compromised by injury, one's remaining capacities may be considered more dear or treasured. The loss of an eye is serious, but the loss of one's only remaining eye is more so.

[153] He has suffered a reduction in some of the recreational activities which he previously enjoyed, but I am of the view, from the evidence and my assessment of the plaintiff's credibility, that such reduction is somewhat exaggerated.

[154] His counsel points out that he currently lives off of family and government benefits. The evidence, however, establishes that prior to the incident he was, and had been for years, living with and off of family—Ms. Derr and Ms. Dima—with minimal or no contribution. Ms. Derr testified that the plaintiff rarely even assisted with domestic tasks related to daily living.

[155] I have considered the cases provided to me by the plaintiff's counsel. I consider them, on the whole, to be significantly different than the present case. In

those cases, the plaintiffs had established and probably long-standing work records along with existing and ongoing family obligations in at least some of the cases.

[156] The defendant's cases, on the other hand, do not take sufficient account of the effect of this injury to this already physically compromised plaintiff.

[157] I award the plaintiff $90,000 in non-pecuniary damages.

**Past Loss of Earning Capacity**

[158] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49. The entitlement is limited to recovery for net income loss.

[159] 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.

[160] 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 standard of proof for hypothetical events, both past and future, is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38; *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[161] The plaintiff's counsel suggests two scenarios for calculating past loss—first with the plaintiff working full-time as a general labourer with Grandview; and second, with the plaintiff successfully entering the Union and continuing with Grandview as a full-time Union member employee. He suggests a 30% reduction contingency

relating to the uncertainty of the plaintiff “maintaining” full-time employment with Grandview.

[162] There are significant problems with those approaches:

- the plaintiff never obtained full-time employment with Grandview, making it impossible for him to “maintain” that status;
- no witness from Grandview management was called to testify that full-time work was available to the plaintiff;
- the plaintiff never, with the possible exception of one or two weeks, worked anything close to full-time hours with Grandview over the period prior to the incident in 2017; and
- the plaintiff spent considerable time in his evidence complaining that Grandview was a poor employer with a poor reputation, had great difficulty getting or keeping contracts for work and had a high worker turn-over rate.

[163] I am satisfied that there is a real and substantial possibility that but-for the accident, the plaintiff may well have intended and attempted to continue working for Grandview on a part-time and somewhat sporadic basis. Contingencies must however be applied, relative to the effects of his pre-existing injuries in limiting his involvement in heavy work, as well as his past history of never having maintained any form of legitimate employment. These considerations apply to past loss and will also apply to future loss. In my view, a contingency reduction of 50% for past loss of earning capacity is appropriate to account for this work history and the effect of prior injuries. I calculate his past loss as follows:

| | |
|---|---|
| $22,000 (average of 2016 and 2017 income) x 6 years: | $132,000.00 |
| Contingency reduction for work history/effects of prior injury: | $66,000.00 |
| Reduction for income earned as care aide | ($6,000.00) |
| Sub-total: | $60,000.00 |
| Add 10 days lost time 2017 post-incident: | $1,637.83 |
| **Total:** | **$61,637.83** |

**Loss of Future Earning Capacity**

[164] A claim for loss of future earning capacity raises two key questions:

1. has the plaintiff's earning capacity been impaired by his or her injuries; and, if so

2. what compensation should be awarded for the resulting financial harm that will accrue over time?

[165] The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.); *Pett v. Pett*, 2009 BCCA 232.

[166] The assessment of such damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[167] Insofar as 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.

[168] The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working

life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.

[169] In the present case, this task as identified in the cases of *Lines* and of *Gregory*, is extremely difficult.

[170] The plaintiff had, to a large extent, no past legitimate working life or history. Most of his life was spent in gang associations and criminal pursuits to support his lifestyle. After leaving that life, he drifted without employment, relying on the generosity of family and friends to support him.

[171] He had suffered significant previous injuries and disabilities earlier in life. His doctors indicated that he was disabled from working and certainly from any form of heavy work.

[172] With the assistance of a relative who was apparently a management level employee, he obtained work—heavy work—as a member of a paving crew for Grandview Paving. He testified that he was physically able to handle the work and that he worked full-time plus overtime.

[173] He did not. He worked, at best, part-time and somewhat sporadically over the course of approximately two years. His pay sheets show that his pattern of work in the period prior to the 2017 incident was one that saw him generally working two to four days per week, often less than eight hours per day.

[174] As previously indicated, I find that there is a real and substantial possibility that but-for the accident, the plaintiff may well have intended and attempted to continue working for Grandview on a part-time and somewhat sporadic basis. Even if employment with Grandview did not continue for many years, I find that there is a real and substantial possibility that but-for the accident, he may have found similar part-time or sporadic employment for years after the accident.

[175] However, I find there is also a strong likelihood that even in the absence of the 2017 accident, the plaintiff’s pre-existing conditions would at some point have

become exacerbated to the point that he would be unable to perform paving or similar work, even on a part-time or sporadic basis.

[176] In *Rab v. Prescott*, 2021 BCCA 345, Justice Grauer reviewed previous decisions on future income loss and set out a preferred process for assessing such claims:

> [47] From these cases, 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*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras 93–95.
>
> [Emphasis in original.]

[177] In *Dorman v. Silva*, 2021 BCCA 228, another of the trilogy of decisions by Justice Grauer, he noted at para. 64:

> … [T]he process is one of determining whether, on the evidence, the contingency or risk is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood.

[178] At para. 75, he continues:

> … The question is whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[179] Clearly, in the present case, an income loss is indicated or claimed as at the date of trial and is alleged to be continuing. The injury to the shoulder is claimed as the sole cause of the loss. That loss is claimed to be total and permanent.

[180] Additionally, there are significant pre-existing conditions which must be accounted for as contingencies. I must examine whether there is a real and

substantial possibility that the pre-existing conditions would have caused future debilitating symptoms absent the accident, and if so, determine the relative likelihood that this would have occurred.

***Future Event Potential***

[181] The evidence clearly discloses the potential for a future event that could have led to a pecuniary loss.

[182] The potential future event is the exacerbation of his pre-existing injuries to the point that he would be unable to perform the paving work, even on a part-time or sporadic basis, had the accident not occurred.

***Real and Substantial Possibility***

[183] The plaintiff was already in chronic pain from a series of serious prior injuries including four herniated discs; had suffered serious head trauma resulting in at least six concussions; had a long history of drug use which the experts agreed could result in cognitive problems; had a history of depression and anxiety; and had been advised by his doctors in Saskatchewan for years that he was not capable of work, particularly heavy work.

[184] His evidence indicated that his work at Grandview already caused him pain but that he was able to manage and work through it. His pre-incident work pattern—part-time and sporadic—is at least suggestive, although not persuasive, that his pre-existing injuries and disabilities may already have been causing problems to the extent that he required rest and recovery time.

[185] I am satisfied that there is a real and substantial possibility that the future event may have led to pecuniary loss.

***Relative Likelihood***

[186] On the evidence, I am satisfied that the future event is not only a substantial possibility but is almost a certainty to occur within five years, being some 11 years from the incident.

[187] Again, his pre-existing injuries were serious. The pain was controlled by heavy medications—so heavy that they were regularly monitored by his Saskatchewan doctors. Those same doctors indicated that he was not capable of physical work well before the incident. The plaintiff's own evidence indicated that he was working in pain, even with the support of a back brace.

[188] In addition to these factors, I consider that the plaintiff had virtually no prior work history, was at best working part-time at the time of the incident, and expressed active discontent with his employer. I also note that the evidence indicated that the cause of disability from work was the plaintiff's physical limitations and not mental health issues.

### *Award*

[189] I proceed on the basis then, of the principles in *Rosvold*, *Lines* and *Gregory* in assessing the plaintiff's loss regarding future income.

[190] On the basis of his average income, as previously noted, in the amount of $22,000 per year, I calculate his loss over the course of five years of work as being $110,000. I reduce that figure by 40% to take into account the plaintiff's work history, as well as the likelihood of exacerbation within that five year period of pre-existing injuries such that he could not work.

[191] I award $66,000 for loss of future earning capacity.

### Cost of Future Care

[192] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition, in so far as that is possible. 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 medical evidence to preserve and promote the plaintiff's mental and physical health.

[193] The test for determining the appropriate award under the heading of cost of future care is an objective one, based on medical evidence.

[194] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future.

[195] If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74. However, if the evidence shows that previously rejected services will not be (able to be) rejected in the future, the plaintiff can recover for such services: *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68–70.

[196] 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.

[197] I have reviewed the Cost of Future Care tables contained in Ms. Walker's report. In those tables, she catalogues and costs out various recommendations from the plaintiff's experts.

[198] In my view, based on the evidence and my assessment of the plaintiff's overall credibility, including as it relates to symptomology, the following are the appropriate awards for this head of damage:

| | |
|---|---|
| Clinical psychologist: | $3,000 |
| TENS machine: | $120 |
| Physiotherapy: | $5,000 |
| Kinesiology: | $3,500 |
| **Sub-total:** | **$11,620** |

[199] To this sub-total I add a modest, global allowance for household assistance in the amount of $5,000.

[200] The evidence indicates that the plaintiff did little if any work around the home prior to the incident.

[201] The same contingencies which applied to future income loss are applicable to this head and I have considered such contingencies in arriving at the $5,000 figure. He was already physically compromised prior to the incident and I am not satisfied, on the balance of probabilities, that the 2017 incident has significantly affected his ability to perform all but the more physically demanding household and yard tasks. I accept that he may require assistance with those matters on a piecework basis and make this award accordingly.

[202] The total award under this head is therefore $16,620.

### Special Damages

[203] I am satisfied with the evidence supporting the plaintiff's claim for $6,407.57 and make that award accordingly.

## SUMMARY

| | |
|---|---|
| Non-pecuniary damages: | $90,000.00 |
| Past loss of earning capacity: | $61,637.83 |
| Loss of future earning capacity: | $66,000.00 |
| Cost of future care: | $16,620.00 |
| Special damages: | $6,407.57 |
| **Total:** | **$240,665.40** |

## MITIGATION

[204] I make no deduction for failure to mitigate.

[205] I am satisfied that the plaintiff pursued active rehabilitation reasonably, albeit not perfectly.

[206] I am satisfied that his overall circumstances seriously limit his ability to seek, obtain and maintain gainful employment. I have recognized those limitations in arriving at the above awards and relating them to the specific injuries arising from the 2017 incident within the global context of the plaintiff's overall disabilities. To further reduce those awards under the guise of failure to mitigate would, in essence, double count the consideration of those limitations.

## COSTS

[207] If the parties are unable to agree on costs, they may speak to the issue.

## OTHER MATTERS

[208] The parties have liberty to apply before me if further directions are required. This will include the plaintiff counsel's request to address the issue of tax gross-up and management fees should he still wish to pursue those matters.

"Caldwell J."