IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jandric v. Janzen,*
2023 BCSC 470

Date: 20230328
Docket: M174275
Registry: Vancouver

Between:

Robert Jandric

Plaintiff

And

Lesley Janzen and Maciej Drygalski

Defendants

- and -

Docket: M202429
Registry: Vancouver

Between:

Robert Jandric

Plaintiff

And

Osama Qamar

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

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Place and Date of Trial/Hearing:	Vancouver, B.C. January 16–20 and 23–26, 2023
Place and Date of Judgment:	Vancouver, B.C. March 28, 2023

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I. INTRODUCTION

[1] The plaintiff, Robert Jandric, was involved in two motor vehicle accidents. The first took place on July 13, 2015 (the "First Accident"), and the second on March 7, 2019 (the "Second Accident").

[2] Liability is admitted for the First and Second Accident (collectively referred to as the "Accidents").

[3] The quantum of non-pecuniary damages, cost of future care, and the plaintiff's loss of future earning capacity are at issue.

[4] The parties have, however, reached an agreement with respect to special damages, being the full amount claimed of $4,726.95.

[5] While the defendants acknowledge that the plaintiff sustained some injury as a result of the Accidents, they dispute the nature of the injuries, the degree to which they continued impact his daily life and work, and the extent to which the plaintiff's ongoing symptoms are related to the Accidents.

[6] The defendants argue that as the plaintiff was diagnosed with chronic post-traumatic stress disorder ("PTSD"), and received treatment for it, prior to the Accidents, there is a genuine question as to the extent to which the plaintiff's ongoing symptoms are related to the Accidents.

[7] The defendants also say the plaintiff has failed to follow treatment recommendations with respect to his injuries, and this has impacted the length and duration of his symptoms. The defendants point out the plaintiff has experienced improvement of the symptoms and say, with appropriate treatment, there is every reason to believe he will experience further recovery in the future.

II. ISSUES

[8] The issues in this matter are:

1. What is the nature, extent, and duration of the injuries the plaintiff suffered in the Accidents?

2. What is the appropriate award of non-pecuniary damages for pain and suffering?

3. What is the appropriate award for future loss of income earning capacity?

4. What amount, if any, should be awarded for cost of future care?

III. BACKGROUND

[9] Mr. Jandric is 52 years old and lives in Coquitlam, British Columbia, with his wife Draga, and his adult son Matthew. The couple have recently married and also live with two of his wife's sons. The plaintiff's adult daughter lives with her mother, the plaintiff's former spouse.

[10] In 1990, the plaintiff joined the Canadian Armed Forces. From 1992 to 1993, he served as a soldier in the Balkan conflict. He continued his military service until 1996, when he was honourably discharged following a knee injury and a diagnosis of PTSD.

[11] In 1996, the plaintiff received training as a heavy-duty mechanic. From 1996 to 2007, he worked for Southern Railway where he advanced rapidly through the workforce due to his strong work ethic. During this time, he also undertook union work in his workplace for Local 7000 (the Southern Railway Workers).

[12] Mr. Jandric met his former spouse, Lesley Janzen, in 1991. On May 18, 1996, the couple married. The plaintiff described his strong relationship with Ms. Janzen, both before and after the couple got married. The couple's two children were born: Katelyn in September 2000, and Matthew in September 2002. The family had a warm, fulfilling relationship. They participated in many activities together as a family, including sports and vacations. The plaintiff had an excellent relationship with Ms. Janzen and children.

[13] On July 14, 2000, the plaintiff was recruited by the Canadian Union of Public Employees (“CUPE”) to work full time as a national representative.

[14] While originally reluctant, he and Ms. Janzen discussed the matter and agreed that stable hours, security, and his ability to spend more time with the children would give them a better life and more stability for his family. As a result, he made this transition and was working as a national representative of CUPE at the time of the First Accident.

[15] As a national representative, Mr. Jandric negotiated collective agreements for BC public sector workers in various sectors, including the kindergarten to grade 12 school sector, municipalities, community social services, and the transportation sectors. In addition, he assisted various local CUPE representatives (“local reps”), often helping them resolve issues that arose with various employers, and presented cases at arbitration. Essentially, the plaintiff helped to resolve conflicts in this area.

[16] Prior to the First Accident, Mr. Jandric was in good health and able to fully participate in his work, recreational, and household activities. He had a strong work ethic, and was considered to be the “go to guy” to deal with work-related issues.

[17] After the First Accident, the plaintiff eventually separated from his wife and moved out of the family home on April 30, 2017. Their separation was attributed to the cumulative effect of his accident-related injuries. The divorce was finalized in 2022.

[18] On March 14, 2018, the plaintiff accepted the position of assistant regional director for CUPE, and held that position at the time of the Second Accident on March 7, 2019. He continues in this position to date.

IV. The Motor Vehicle Accidents

[19] On July 13, 2015, the First Accident took place in Abbotsford at or around 6:00 p.m. as the family was driving home from Vernon. The collision occurred in clear conditions, westbound on Highway 1, near the Number 3 Road offramp. The

plaintiff was sitting in the front passenger seat of his 2010 Ford Escape (the "SUV"), wearing his seatbelt and fully restrained. Ms. Janzen was driving the vehicle, and their young children were in the back seats. The plaintiff's son was seated directly behind him.

[20] Just prior to the accident, Mr. Jandric was looking down at his phone, checking emails in preparation for work the next day. He heard Ms. Janzen exclaim, and the SUV broadsided another vehicle that was stopped on the highway and facing perpendicular to the course of travel. After impact, the SUV was rear ended at highway speed by another vehicle which pushed the SUV into a large grassy area in the middle of the highway. On impact, the airbags deployed and hit plaintiff in the face, pushing his head forcefully into the headrest and causing his glasses to fly off. The plaintiff inhaled airbag dust.

[21] The plaintiff's military training kicked in, and he moved quickly to extricate his family members from the SUV. He first removed his son, who had a bloody face, then moved to the other family members.

[22] Fire, police, and ambulance personnel attended at the scene of the First Accident, which had resulted in a seven-car pileup. After attending to his own family members, the plaintiff sought to assist others.

[23] Ms. Janzen called her aunt who lived close by. As none of the family members had broken limbs or appeared to need immediate medical attention, they proceeded to their home. The SUV was declared a total loss.

[24] Following the First Accident, the plaintiff remained off work for approximately three or four weeks. He returned to work full time but said he did so to escape the gloom that had descended upon his family since the First Accident. In retrospect, he concluded his return was too early.

[25] The Second Accident occurred on March 7, 2019, and took place on Foster Avenue and Robinson St. in Coquitlam at or around 9:00 a.m. in snowy conditions. The plaintiff was sitting fully restrained in the driver's seat of a 2016 Dodge Charger

(the “Dodge”) owned by CUPE. The Dodge was fully stopped at a stop sign at a T-intersection. He was rear ended by the defendant Osama Qamar which caused the airbags in the defendant’s vehicles to deploy. The Dodge was pushed forward up onto the curb and sidewalk.

[26] The Second Accident resulted in over $3,000 to the Dodge, and Mr. Qamar’s vehicle was written off. Mr. Qamar has admitted liability for this accident.

[27] Following the Second Accident, the plaintiff suffered disabling lower back pain, headaches, and continued memory and cognition issues. He also suffered an exacerbation of his PTSD symptoms. Details of his injuries are set out later in this judgement.

V. DISCUSSION

A. What is the Nature, Extent, and Duration of the Injuries the Plaintiff Suffered in the Accidents?

[28] As a consequence of the Accidents, the plaintiff indicated he presently experiences a number of significant symptoms. These include headaches, an aggravation of his PTSD, lower back pain, cognitive and memory issues impacting his abilities at work, sleeplessness, and emotional trauma.

[29] The testimony and the documents on record establish the symptoms detailed by the plaintiff. These symptoms are supported by medical evidence, including objective findings by various experts and treating physicians.

[30] I turn to that now.

a) Medical Evidence

[31] A number of medical experts testified in this matter, including Dr. Donald Gregory Passey, the plaintiff’s treating psychiatrist, and Dr. Carolyn Van Schagen, the plaintiff’s family doctor.

[32] Dr. Van Schagen produced a medical legal report for this matter dated October 19, 2022, to which she testified. In doing so, she reviewed the facts and

assumptions found in her medical records. She also reviewed and based her opinion on an independent medical examination by Dr. Soma Ganesan, a psychiatrist.

[33] Mr. Jandric has been a patient of Dr. Van Schagen for over 20 years. At the time of the First Accident, the plaintiff had been diagnosed with chronic PTSD related to his experiences in the Canadian Armed Forces. However, the plaintiff had not been on any medication, nor had he seen Dr. Van Schagen for any PTSD-related complaints during the five to ten years prior to the First Accident.

[34] Dr. Van Schagen reported that during the first three months after the First Accident, the plaintiff experienced headaches, vertigo, upper neck and back pain, irritability, and poor memory. He also had difficulty concentrating, sound and light sensitivity, nightmares, and flashbacks. Coping with the pain was difficult for the plaintiff, and he began to use alcohol and started smoking after quitting 17 years prior.

[35] Throughout the first half of 2016, Mr. Jandric continued to experience low back pain, headaches, and neck pain. He was struggling with anxiety and having panic attacks every few weeks. Dr. Van Schagen noted he was not able to play soccer, golf, sit for longer than one hour, or ride his motorcycle. His pain was aggravated by flying, and he was unable to manage his large property as he previously had.

[36] In the latter half of 2016, though his back pain improved, the plaintiff continued to have issues with PTSD and was reaching out to the psychiatrist who had treated him previously. Further, he and Ms. Janzen started counselling due to stress arising from the First Accident.

[37] In the first half of 2017, the plaintiff's back pain continued to improve, but he continued to struggle with marital discord, nightmares, insomnia, and intrusive memories. He had started an antidepressant to help with his mental health, but in April 2017, after 20 years of marriage, he separated from Ms. Janzen and moved out of the family home. In April 2017, he reconnected with Dr. Passey, his previous

psychiatrist, and continued taking his medication. He continued to have trouble with memory, emotional lability, flashbacks, and lack of focus, and needed regular reminders in order not to miss meetings.

[38] In the second half of 2017, the plaintiff attended his psychiatrist monthly, and his mental health improved. Throughout 2018 his symptoms continue to improve. His medication was tapered off under the direction of his psychiatrist, and his dreams were minor with just occasional bad ones. He continued to attend his psychiatrist regularly.

[39] As noted earlier, the plaintiff suffered the second motor vehicle collision in March 2019. Dr. Van Schagen reported that as a result of that collision, the plaintiff experienced headaches, generalized neck stiffness, and tingling down the back of his head and neck. He was unable to watch TV or use the computer for more than 30 minutes. He had nightmares and was waking up in a sweat. He started a medication called Amitriptyline to reduce headaches and improve his sleep. He continued to have difficulties with headaches, photosensitivity, memory, and flashbacks for approximately four to six months after the Second Accident. He attended a chiropractor and used medication to help with the symptoms.

[40] In May 2020, Dr. Van Schagen saw the plaintiff in a follow-up and noted his neck and back had improved, though he was not able to play golf, ride a dirt bike, or play soccer. She reported that these limitations made him sad, as they were activities he used to do with his son.

[41] From July 2020 to September 2020, Mr. Jandric experienced an exacerbation of his PTSD symptoms with a lack of concentration, nightmares, fatigue, and panic attacks. This increase in symptoms was triggered by worries about his children and their struggle since the First Accident, as well as his marital breakdown. In August 2020, he restarted his antidepressant as he coped with the transition to working from home. Dr. Van Schagen said the plaintiff was reassessed in January 2022, and appeared to be managing well with working from home. His mood was stable with

only occasional nightmares. He complained of occasional back pain that settled with regular exercise.

[42] Dr. Van Schagen diagnosed Mr. Jandric, as a result of the First Accident, with Whiplash Associated Disorder of neck and back, with symptoms of headaches and memory issues, as well as muscle pain that lasted longer than three months which developed into myofascial pain syndrome requiring prolonged therapy. As a result of this injury, she noted he was disabled from work for two months and disabled from yard work and large household tasks for approximately two years.

[43] With respect to the Second Accident, Dr. Van Schagen said the plaintiff had a relapse of his myofascial pain syndrome and was disabled from work for approximately one week. He was able to return to work by modifying his hours and taking extra breaks for approximately four months after this collision. Dr Van Schagen noted, however, that the plaintiff remains unable to engage in recreational activities such as dirt biking, soccer, and golf since the First Accident.

[44] As previously noted, Dr. Van Schagen said the Mr. Jandric also suffered from a flareup of his chronic PTSD as a result of the First Accident. His symptoms contributed to his disability from work. Due to symptoms being worse, at home he became more isolated from his family, which contributed to his separation and divorce from his wife. He continues to have difficulties with anxiety, low mood, and managing in loud and busy environments. Dr. Van Schagen agreed in cross-examination that this last comment is based on the medical legal report of Dr. Ganesan.

[45] With respect to prognosis, Dr. Van Schagen noted that the plaintiff remained at risk for exacerbation of his myofascial pain syndrome if he has another injury or takes on high-intensity physical labour. In addition, he remains at risk and is still suffering from chronic PTSD. This may be triggered by a lesser stressful event which could result in a full-blown reoccurrence of his PTSD symptoms.

[46] Dr. Van Schagen noted that the plaintiff would benefit from ongoing, intermittent access to psychiatry and counselling. In addition, the plaintiff will likely require medication to manage his symptoms in the future.

[47] Dr. Passey, a psychiatrist with military experience and specializing in PTSD, treated the plaintiff in 1995 for approximately six months on his return from the Balkan conflict. He diagnosed the plaintiff with PTSD as a result of at least one traumatic event in the Balkans, treating him with videotape recursive therapy to habituate him to the trauma and provide him with coping mechanisms. In addition, Dr. Passey educated the plaintiff on other coping mechanisms and how to identify and manage stressors.

[48] Mr. Jandric's symptoms at the time included insomnia, intrusive memories, hypervigilance, irritability, and a tendency to self isolate and avoid social situations. His hypervigilance caused physiological response such as a pumping heart, sweating, and adrenaline associated with the exposure to triggers.

[49] Dr. Passey testified that his notes in 1995 reflect that by the end of those sessions, he considered the plaintiff to be recovered to the point where he did not need any more treatment.

[50] Dr. Passey next saw the plaintiff on April 12, 2017. While Dr. Van Schagen had referred the plaintiff to Dr. Passey in August 2016, Dr. Passey noted a variety of factors, including his office move and the long wait list for a psychiatrist with a specialty in PTSD, led to the delay in seeing the plaintiff.

[51] When Dr. Passey saw the plaintiff in April 2017, the plaintiff had many symptoms that could be classified as PTSD or adjustment disorder with anxiety. The fact his symptoms related to the First Accident led to Dr. Passey's conclusion that it was more likely PTSD. Dr. Passey provided therapy once again, including education about symptoms and treatment, and sleep medication. He testified that disturbed sleep has a direct impact on the success of therapy.

[52] Dr. Passey noted Mr. Jandric had anxiety and stressors, and during their sessions Dr. Passey learned about the plaintiff's exercise, sleep and eating patterns, and how he does in social situations. Mr. Jandric informed Dr. Passey that there was significant discord in his household, including a lot of anxiety as to the effect of the First Accident on his wife and family. The plaintiff felt helpless to do anything, and the fallout from the First Accident directly impacted this issue.

[53] As Dr. Passey and the plaintiff had previously formed a trust relationship in 1995, Dr. Passey said the plaintiff participated regularly and with motivation in his treatment. They discussed stressors such as not sleeping, work, finances and family, along with his performance on the job. Dr. Passey advised the plaintiff to be aware of these stressors and to try to control or minimize their impact.

[54] Dr. Passey said the plaintiff's nightmares from 1995 were reoccurring, but now contained a family element. The plaintiff's difficulties were significant – to the point of suicidal ideation – but the impact of such an action on his family dissuaded the plaintiff from this path. The plaintiff was distressed that these difficulties were now occurring because of the First Accident when he had dealt with much worse in Yugoslavia. Dr. Passey educated him about the themes of the nightmares, which reflected a lack of control, safety, and helplessness in the situation.

[55] Dr. Passey noted, with respect to memory issues at the time, that the plaintiff indicated he sometimes struggled to remember a name. He would also forget what he was about to do.

[56] Dr. Passey saw the plaintiff for the last time December 18, 2018. By this point, Dr. Passey was of the view that the plaintiff had the tools and strategies to deal with his stressors. Two significant ones at the time were his pending divorce, as well as his father's cancer diagnosis. He was now more aware of his anger and what he could do about it. Dr. Passey said the plaintiff indicated he was in good spirits but still needed to manage his stressors.

[57] Dr. Gillian Simonett, a specialist in physical medicine and rehabilitation, examined the plaintiff on two occasions and prepared two reports dated January 5, 2017, and November 1, 2019, respectively.

[58] In her first report dated January 5, 2017, Dr. Simonett assessed Mr. Jandric on December 9, 2016 – a year and a half after the First Accident. In that report she noted specific injuries being sustained in that collision, including neck pain, headaches attributed to whiplash injury, and low back pain. While she deferred to an expert in mental health regarding his changes in mood, including increased PTSD symptoms and his reported use of alcohol and opiates for self-medication, Dr. Simonett noted the cause of the plaintiff's reported change in cognition was likely multifactorial. In particular, she made the following comments:

> Mr. Jandric reports changes to his cognition, most notably following the [motor vehicle accident]. Risk factors at that time include ongoing pain, headaches, changes in mood, and alcohol/opiate use. Mr. Jandric also had airbags hit him in the face during impact, and reports "flying backwards" into the seat. Following such impact, he reported being "dazed" and his clinical records indicate that he had dizziness and was unable to focus. Changes to neurological function following forces to the head is supportive of a concussion (mild traumatic brain injury) which can also contribute to changes in commission. Currently his cognitive changes have improved but he still continues to have ongoing errors, such as not recalling names of colleagues. I will defer to an expert in mental health regarding possible ongoing changes in mood contributing to his cognitive function.

[59] Dr. Ganesan, a qualified expert psychiatrist, assessed the plaintiff on August 31, 2022, and provided his expert report on September 6, 2022.

[60] Dr. Ganesan conducted a mental status examination, reviewed the history of the patient and a number of documents, including medical reports, along with conducting a variety of mental health screening questionnaires in order to come to his opinion. He concluded that the plaintiff suffered from a relapse of PTSD which is currently moderate. He continues to suffer from hyperarousal symptoms, flashback memories, dreams, nightmares, he is super alert, watchful and on guard, and has sleep difficulties on and off.

[61] With respect to his PTSD, Dr. Ganesan said in his report:

> He was treated with medication and psychotherapy from his psychiatrist, his symptoms were in remission, and he was off medication for a long time. Even during the time he was under treatment Luvox was also modified and he was allowed to adjust it depending on whether he needed it or not, especially when there was evidence of a flareup of memory and sleep difficulty. He said there was a significant length of time when he was not on medication and he managed himself well using modifications in his lifestyle and behaviour to deal with the issue of traumatic memories if needed. However he was off medication and it had been 2 years since he had seen his psychiatrist. However, he did not know exactly when he stopped medication.
>
> After the accident there was a recurrence of symptoms of post-traumatic stress. His flashback memories and nightmares now include the details of the accidents. The first motor vehicle accident was the more important one and resulted in a relapse of his emotional difficulties in addition to his physical difficulties.

[62] Dr. Ganesan also opined Mr. Jandric suffers from moderate anxiety and major depressive disorder. While it was likely that some of the depressive symptoms existed prior to the motor vehicle accident, it appears he was in full remission for significant length of time prior to the First Accident. Currently, his major depressive illness is moderate.

[63] In addition, Dr. Ganesan indicated there was evidence of post-concussion syndrome after the First Accident. There was also evidence of whiplash injury. He noted that the plaintiff "developed sensitivity to light and sound, he was not able to keep his balance, and he had dizziness which according to him he experienced significant improvement in from treatment with chiropractic manipulation".

[64] Dr. Ganesan reported that the plaintiff indicated his symptoms had improved and he had no concern about memory function, especially regarding his concentration and short-term memory. In his testimony, however, Dr. Ganesan noted that he was unable to collaterally validate this point as some of the plaintiff's answers in his questionnaires indicated both a concentration and memory lapse issue. A collateral corroboration could occur through discussion with his partner and/or work colleagues.

[65] With respect to treatment, Dr. Ganesan recommended that the plaintiff go back on Luvox for at least another two or three years, so his PTSD and depressive

symptoms could be brought under control. He noted "[h]opefully he will reach partial remission and then full remission." Dr. Ganesan said ideally the plaintiff would do this in conjunction with counselling, and in particular with the psychiatrist he knows as retelling his trauma could trigger or exacerbate it

[66] With respect to the plaintiff's prognosis, Dr. Ganesan said in his report at page 15:

> It is fairly obvious that Mr. Jandric's post-traumatic stress disorder developed after his traumatic experiences serving in the Balkans during the war and was chronic. There were periods of remission and recurrence depending on psychosocial stressors. He developed a full spectrum of post-traumatic stress disorder again after the motor vehicle accident, and it became more complicated as it now involves bad dreams, nightmares and flashback memories related to the most recent accident, and that is the most troubling thing for him now compared to his past experiences that were in full remission.
>
> He was predisposed to PTSD and now has full symptoms of PTSD. That indicates that, even with successful treatment and his symptoms are under control, when he is exposed to future psychosocial stressors he will re-develop PTSD. It is unpredictable how he will handle it and the intensity of symptoms which can be very troubling when he gets older.

[67] Dr. Ganesan reiterated in his testimony that the plaintiff's recovery prognosis is difficult to predict.

[68] Dr. Premakanthie Laban, a psychiatrist, testified and provided a response report to that of Dr. Ganesan on behalf of the defendants dated December 5, 2022. Dr. Laban undertook a records review but did not assess the plaintiff.

[69] As part of that report, Dr. Laban noted that self rating or reporting scales such as GAD–7, PHQ–9, PCL–5 – which were discussed in Dr. Ganesan's report – are useful tools in the clinical setting to inform on the severity of symptoms and evaluate a treatment response. In independent medical examinations, however, Dr. Laban opined there are limitations with respect to reliability. In addition, she noted that while the plaintiff rated his score for work functioning in the self-report Sheehan disability scale as 5/10, which indicates symptoms "moderately" impairing one's

ability to carry on normal work responsibilities, this is inconsistent with the plaintiff being promoted to a senior position with increased responsibility.

[70] When cross-examined on this latter point, Dr. Laban was relatively insistent that the reporting of moderate symptoms impairing ability to carry on work responsibilities would require corroboration of lost work days and reduced productivity. In other words, moderate symptoms would be accompanied by an inability to do one's job despite accommodation and modification. Matters such as requiring reminders, forgetting meetings. and other limitations would likely only indicate mild impairment. Importantly however, Dr. Laban agreed that information from work colleagues as to limitations at work is useful in determining how a person's present mental health is impacting their functioning at work.

[71] Dr. Laban also noted that the self reporting scales are not useful in an independent medical assessment context due to their disadvantage of positive response bias and social desirability effects, *i.e*., tendencies to exaggerate or conceal symptoms. Dr. Laban agreed, however, that Dr. Ganesan is a well-respected psychiatrist and she would defer to his evaluation of the plaintiff as he had been his patient. She was not asked to provide a diagnosis or prognosis.

b) Prior to the Accidents

[72] Prior to the First Accident, Mr. Jandric was free of pain and able to work and participate in various social and family activities.

[73] At the time of the First Accident, he lived with Ms. Janzen and his daughter and son on a 20-acre farm in Langley. He had built his dream home and regularly carried out heavy chores on the acreage. Mr. Jandric indicated his chores before the First Accident included heavy gardening such as removing blackberry bushes, mowing the lawn, and house maintenance.

[74] On weekends Mr. Jandric would socialize with friends and family, regularly riding dirt bikes with his children and taking them to hockey and soccer practise. In addition, he would take long motorcycle rides with friends, coached his daughter's

soccer team and played soccer himself. The family went on vacation to the Okanagan at least once a year, and tried to vacation annually in Hawaii as well.

[75] Katelyn and Matthew, Mr. Jandric's daughter and son, corroborated much of what the plaintiff said with respect to his family life. They described their family life prior to the First Accident as one that had been happy with lots of activity inside and outside the house. This included that the plaintiff would take his son to hockey games and coached his daughter's soccer team. The family would play board games or video games, and watch movies together.

[76] Katelyn testified that her father would undertake a significant amount of yard work in the 20-acre property: he cleared overgrown blackberries, weed whacked, and cut the grass. In addition, he spent time in his shop – a separate building on the family property – starting to restore an Impala car, and maintaining his motorcycle. She saw him daily and observed no physical limitations. Katelyn said her parents worked as a team, talking to each other regularly, and putting hundred percent into everything associated with the family.

[77] Both described family vacations to Hawaii and the Okanagan, and that their father was happy, with no anger or memory issues. They would see him regularly, and while occasionally he had sleep problems with nightmares, this was rare.

c) After the Accidents

[78] Mr. Jandric testified he is no longer able to participate in many of his pre-Accidents activities. He does not socialize often with friends, and while he now attends family events, he needs to take breaks as the noise can be too much for him.

[79] After the First Accident, the household was depressed. Each member of the family kept to themselves. They no longer watched family movies together, and rarely ate dinner together. When they did eat together, they did so silently. The children corroborated this situation in their testimony.

[80] During this time, Mr. Jandric also became aggravated and irritable. His physical movements became (and still are) stiffer. The plaintiff complained about back pain and headaches. He avoided the house and spent most of his time in his shop. His daughter said at the one time she went to the shop to see what he was doing, he was sitting on a stool and smoking - something she had never seen him do before. Both Matthew and Katelyn described the family as “walking on egg shells” around their father, and that he regularly lashed out at Katelyn. Matthew also noticed similar behavior towards his mother.

[81] In addition, Matthew noticed an increase in his father’s nightmares and his trouble sleeping. While his father had been drinking, Matthew noted after he quit drinking, he was simply never home. He was always at the gym.

[82] Their parents’ relationship deteriorated. Though they tried to be courteous in front of the children, conversations were tense and hostile, and there were a lot more arguments. Matthew also reported hearing yelling and screaming.

[83] The couple separated in April 2017. Katelyn found this to be quite difficult, although she said she saw it coming due to her parents’ lack of affection and communication with each other.

[84] Katelyn now sees her father twice a month for four to five hours. She shared how he tries to be overly happy but, by the end of the visit, has “zoned out”. She testified she is concerned about his memory. She related a recent event where the two had agreed the evening before that they would have dinner the next day. When she showed up at his house for dinner, he asked her what she was doing there. Katelyn said this was scary and noted that her father significantly repeats himself. While she wishes for them to have a good relationship – as does her father – she is finding it difficult, as they have not really discussed the difficulties arising in their relationship immediately after the First Accident.

[85] Matthew testified Mr. Jandric is not the same father he used to be. While his temper is now a lot better, he still gets short with them. Matthew also indicated his

father still has memory issues. For example, though he will advise his father he is going to dinner that evening at his aunt's, his father will text him asking him where he is as he has made dinner for him. Matthew also noted that if someone asks his father a question, as he is responding, he will forget where he is mid story. Further, Matthew's walking behind the Zoom camera while his father is in a Zoom meeting will distract his father to the point that he would lose track of what he was saying on the call.

d) Employment History

[86] Mr. Jandric has had a robust employment history. He has a strong work ethic, and while he has suffered difficulties as a result of PTSD stemming from both his original military service and the two Accidents, he has returned to work and continues to be employed. There are issues, however, as the plaintiff explains, as those injuries have impacted his functionality at work.

[87] Mr. Jandric described memory and focus issues that have arisen since the First Accident: he has experienced extreme lower back pain and very bad headaches where he felt his head would explode; he became reclusive; his nightmares returned; his sleep was disturbed; and he could not deal with the depression that appeared to be consuming his family life.

[88] The plaintiff became addicted to pain killers, in particular Percocet, and began drinking a lot of alcohol – including during the workday. At some point, having noticed changes in the plaintiff, his boss intervened and told him to see his doctor, which he did. The plaintiff then abruptly stopped consuming alcohol, resulting in a difficult withdrawal process. Shortly thereafter he started smoking again, something he had not done for a long time. He now smokes a pack a day.

[89] Mr. Jandric testified the Accidents had impacted his cognitive performance at work, in particular his focus and memory. Shortly after the First Accident, he said he "begged his boss to let him back to work to get his mind off the difficulties at home". While undertaking his duties as a national representative, he would forget meetings and dates. His support staff kept him on track by reminding him of events. If he had

not made a note reminding him of a particular meeting, he would have to call his staff again to ask the time of the meeting. Further, at meetings the plaintiff would forget the names of people in attendance, and could not absorb information that was discussed.

[90] Mr. Jandric also had issues with sound and light at work. His light sensitivity gave him headaches. His sound sensitivity made him feel like people were yelling in the room. He also had very low energy, and at the end of the day, he would feel mentally and physically exhausted.

[91] With respect to his dependability in the national representative role, the plaintiff relied on his staff, in particular Rachel Roberts. The plaintiff noted his sense of relief when Ms. Roberts covered for another staff member (thus, working with him) while he was in the assistant director role as she had known him for a long time and knew what needed to be done to keep him on track.

[92] Ms. Roberts corroborated much of what the plaintiff said. She was his assistant from 2008 to 2018. Ms. Roberts testified that before the First Accident, the plaintiff had a good sense of humour, was very high energy, very friendly, and was a joy to be around. He was a very personable, friendly guy.

[93] The plaintiff's job duties included assisting all local reps he was assigned with their grievances, arbitration, and collective-bargaining. He also chaired meetings with the local reps with respect to ratification of collective agreements or elections. He also travelled regularly: he went up to Lillooet and Ashcroft, and often flew to Ottawa, Toronto, Winnipeg, or the East Coast where he attended conferences or conventions. He could undertake up to eight trips in a convention year.

[94] The plaintiff's work hours were very long. He would usually arrive before Ms. Roberts, who arrived at 9 a.m., and would be regularly sending emails at 8 or 9 p.m. During collective-bargaining tasks, marathon work sessions could take place. He would work from 7:30 a.m. to 10 p.m. There were no workplace issues, and he was very upbeat and positive to be around.

[95] After the First Accident, on her return to work after vacation, Ms. Roberts noted the plaintiff was much less energetic, struggling mobility-wise, and had difficulty with everyday tasks. He had headaches, which he previously never had, and more controlled movements. His expression was no longer that of the “smiley guy”, and was now more neutral or strained. He was more anxious, appeared to be feeling rushed, and was not as confident or energetic as previously.

[96] With respect to memory, Ms. Roberts noted the plaintiff had more difficulty recalling things and would forget to go to meetings. Local reps would call asking where he was, and she would have to track him down. This occurred at least a dozen times until she stepped in and took on a reminder role. She ensured she reminded him at the end of the day if he had a meeting next morning that he must attend.

[97] The atmosphere in the office changed significantly. She would find she had to remind the plaintiff of work that needed to be done as he would not remember to do it. In addition, she was now creating documents, such as letters and books of documents, which he would previously have done. Though this increased her work load, Ms. Roberts did not wish others to know of this change, so she took on these extra tasks in order to keep the plaintiff organized.

[98] Despite the above-mentioned issues, the plaintiff applied for the regional director position in 2018.

[99] Mr. Jandric said he applied for the job because he had “started to screw up” in his job as a national representative. He was worried about his errors, and was concerned about being disciplined and about repercussions should he remain in the national representative role. The new job would take him from the front lines of the job where he was dealing with union members, government, and local reps, and put him in more of an administrative role. While he was initially awarded the regional director position, this was rescinded after a seniority grievance, and he was awarded the assistant director position with CUPE.

[100] In this role, which is also largely administrative, the plaintiff no longer presents arbitrations, does not bargain, and is not accountable to the local reps. Essentially, he deals with staffing and ensures the work is distributed appropriately. While the new job had different stresses and challenges, the plaintiff indicated he felt relieved after obtaining this job.

[101] By March 2019, Mr. Jandric felt his physical and cognitive ability was improving, but he still had struggles with memory at work.

[102] However, in March 2019, and while in the assistant regional director position, the plaintiff experienced the Second Accident.

[103] Mr. Jandric's symptoms were aggravated by the Second Accident. His headaches returned, and he required complete darkness for a few days post – accident. Though he returned to work, he felt he had relapsed. He felt he had taken one step forward and two steps back. He could not turn the lights on at work, he experienced dizziness and had no ability to focus or concentrate.

[104] Mr. Jandric detailed his head, back, and shoulder problems. He indicated his headaches persist. With respect to his emotional well-being, he noted disturbing recurring nightmares. He detailed these nightmares and said they were more noticeable than before the Accidents, and at least one was new. If he is in a good place, he has less nightmares, though he never knows when they will occur. He noted they could be triggered by stress, anger, or a bad day

[105] The headaches were worse after the Second Accident. The plaintiff said he became an insomniac and could not fall asleep until 3 or 4 a.m. His cognitive abilities were impaired. He needed to be reminded of dates and meetings, and was forgetting names again. He described feeling "zombielike" in meetings and not knowing what people had said. He felt he was dropping the ball a lot. In the summer of 2020, when his boss recommended he take time off, he did.

[106] The employer conducted an ergonomic assessment and he was accommodated with an ergonomic chair and a sit/stand desk. The plaintiff said his

employer has been very accommodating to his disabilities, and he doubts any other employer would have been so.

[107] The plaintiff was cross-examined on his medical records, which at various times over the years indicated that he “felt great”, and at least one reference indicated he had no memory problems.

[108] Mr. Jandric, however, described in more detail his limitations at work. The plaintiff said he would sit through meetings and not remember the conversation. He would approve matters, receive the meeting results, and upon review would indicate changes should be made as he had effectively zoned out at the meeting and could not recall what he had approved. He said these episodes would vary depending on the level of stress he was experiencing.

[109] At times he missed important meetings because he had not written them down, including an important meeting on provincial bargaining. The plaintiff felt embarrassed and incompetent as a result of these lapses. He also indicated these did not occur before the First Accident.

[110] In the spring and summer of 2022, Ms. Roberts filled in for his regular assistant. She indicated, much to her disappointment, that she found his abilities had not improved from 2018. The plaintiff was still subdued, lacked energy, and continued to have memory issues. In addition, he had a hard time speaking and would stammer. His physical movements were still not the same. While he had made some improvements, she noted he continued to suffer from the same issues. Previously, he had the ability to talk about whatever subject he was given, but could not do so in a recent speech, which she found difficult to observe.

[111] The plaintiff applied for the regional director position again in 2022. It had become vacant, and he said as the assistant regional director with the most seniority, everyone expected him to have the job. As the plaintiff was concerned about his limitations and ability to do this important job, he phoned Mark Hancock, the national president of the CUPE to discuss this.

[112] In June 2022, the plaintiff and the union came to a written agreement (the "Agreement") that the plaintiff would withdraw his application for the position and obtain the regional director rate of pay until the earlier date of either his retirement or March 1, 2028.

[113] Mr. Hancock, who has known the plaintiff since the late 1990s, indicated that prior to the First Accident, the plaintiff was a very engaged and dedicated representative, aware of job–related issues, and one of the national representatives that could be relied upon to deal with a crisis or difficult matter. Mr. Hancock was not aware of any physical limitations, issues with substance use, or cognitive issues.

[114] After the First Accident, while he had limited exposure to the plaintiff, Mr. Hancock became aware of the plaintiff's problematic substance use and absentee issues.

[115] Mr. Hancock was aware that the plaintiff was promoted in 2018 to assistant regional director, and that this position was awarded after the plaintiff had applied for and successfully gotten the director position.

[116] Mr. Hancock became aware of some work issues with respect to report writing and the plaintiff's engagement in meetings. In addition, he was showing signs of stress. Despite this, he noted that when the plaintiff applied for the regional director position in 2022, he would likely have been successful due to his seniority.

[117] The June 2022 letter of understanding with respect to the plaintiff on this issue reads:

> The CUPE and the Canadian directors union and the plaintiff on June 9, 2022 reached an agreement which include the following terms:
>
> 1.Brother Rob Chandric agrees to immediately withdraw in writing his application for position number BC – CDU – 22005.
>
> 2.Effective June 16, 2022, brother Rob Chandric's rate of pay shall be adjusted to the regional Dir. rate and shall remain at that rate until the earlier of Rob Chandra asked retirement or March 1, 2028.
>
> 3.The employer acknowledges that the date of March 1, 2028 may be amended beyond that date as a result of exceptional circumstances. Amending the state shall be at the sole discretion of the employer.

[118] Mr. Hancock said this Agreement was unusual, but the regional director position was extremely important for CUPE. He said CUPE agreed to these terms, primarily because when the plaintiff raised these concerns with Mr. Hancock, he and other members of the decision-making group felt it would be better if someone else had the regional director job. CUPE wanted to ensure the person in the job would be able to fulfil the job duties properly.

[119] Mr. Hancock agreed that his long relationship with the plaintiff likely assisted in coming to the Agreement. It enabled the plaintiff to come to him directly, and Mr. Hancock's position allowed him to help facilitate such an agreement. He agreed, however, that it was unlikely he (Mr. Hancock) would be the national president in March 1, 2028, and he did not know who would hold that position then.

[120] Robin Jones also testified. Mr. Jones has known the plaintiff since 2007 when the two of them worked as national representatives for the union. Mr. Jones became the regional director of CUPE from 2009 until his retirement.

[121] Mr. Jones gave similar testimony to that of Ms. Roberts and Mr. Hancock. He described the plaintiff, prior to the First Accident, as very hard-working and dedicated, with his work being at the top end of performance. He had no health issues, and managed his workload very well. From 2009 until before the First Accident, Mr. Jones said he assigned extra work to the plaintiff, which he handled with no issues.

[122] Mr. Jones described the duties of a national representative as negotiating collective agreements, presenting, resolving or arbitrating grievances, doing research, undertaking communications, having expertise in job evaluation and "putting out fires" internally with respect to the membership and/or the executive. There was significant travel – usually by car – over the region including Whistler and Squamish to White Rock, and in addition, Haida Gwaii. An average work week for a national representative at the time was 78 hours per week.

[123] After the First Accident, Mr. Jones advised the plaintiff to take the necessary time he needed to recover. Approximately three and a half weeks later, however, he received a phone call from the plaintiff indicating he was “going stir crazy” and needed to get back to work. As they did not have a gradual return to work in this position, Mr. Jones told him to return and let him know how it goes.

[124] On his return, Mr. Jones noted that the plaintiff appeared sore and stiff and slow-moving. Over a period of days, it became obvious he was having some struggles. He did not have the presence he used to and appear to have lost his confidence.

[125] Over time Mr. Jones became concerned about the plaintiff’s well-being, to the point where he pulled him aside and counselled him with respect to his increased substance use.

[126] Mr. Jones noticed Mr. Jandric’s communication skills had diminished, and he could not depend upon the plaintiff as he used to. In meetings, the plaintiff would simply agree with the last person who had spoken, and gradually, Mr. Jones could no longer rely upon him for input when he was making any leadership decisions. After the Accidents, the plaintiff was accommodated with business class seating on flights, and with hotels stays rather than driving home at night from meetings.

[127] Mr. Jones retired in 2018. He has kept in touch with the plaintiff and sees him every six months for dinner. The plaintiff has occasionally called him for advice with respect to basic decisions, to which Mr. Jones said he should not really need advice.

[128] Mr. Jones indicated the regional director role is a leadership position which requires an individual to have an air of confidence and competence to lead the organization. In addition, the regional director must be capable of understanding the circumstances of an issue, making decisions and ensuring they are implemented. In his view, the plaintiff is not capable of undertaking this process. In particular, Mr. Jones notes that if the plaintiff made a decision and things went sideways, he would be incapable of sorting it out.

e) Retirement and/or Future Employment Prospects

[129] The plaintiff's initial plan before the First Accident was to work until he was 55 and retire early. The plan was to then start a small business on the farm he and his ex-spouse then owned, and pass on to his children. As noted elsewhere, his first marriage dissolved. Subsequently, the farm was sold. In addition, as per the settlement agreement reached in this family dispute, the plaintiff has an obligation to pay his ex-spouse $2,900 a month in spousal support until he turns 65. As a result, his initial plans changed.

[130] At present, the plaintiff has a well-paying job. However, and as noted elsewhere, due to what he said were his limitations at work, he entered into the Agreement with the union. This Agreement outlines that he is to be paid a higher rate and continue in his assistant director position until the earlier of his choice to retire or March 1, 2028 – at which time he would be 57. He will, however, continue to have his monetary obligation to his ex-spouse until he is 65. While he would have some pension benefits by retirement, those amounts would be significantly depleted by this monthly financial obligation. As a result, he is concerned for the future as the extension of this option is at the sole discretion of the employer.

[131] The plaintiff was cross-examined on the Agreement and its particular wording. It was suggested to him that the Agreement only limited the extra pay, and not his employment, but the plaintiff indicated his understanding of the Agreement was that he would be required to leave by March 1, 2028.

[132] Mr. Hancock was cross-examined on this point. He agreed that the March 1, 2028 date was a commitment that CUPE would pay to the plaintiff the director's rate of pay until that date. Afterwards, it would drop back to the assistant director's rate of pay unless the employer agreed otherwise. He said that this did not mean that after March 1, 2028, the plaintiff would have no job at CUPE, nor did it mean that he had to retire by March 1, 2028. Mr. Hancock agreed that CUPE is a good employer, makes efforts to accommodate the needs of employees, and that there was a robust

employee assistance plan. Ultimately, however, he did not know what the process would be to extend the Agreement after March 1, 2028.

[133] Based on the above evidence, I am satisfied this Agreement sets out the time line for the increased rate of pay. It does not require the plaintiff to retire or leave CUPE by March 1, 2028.

B. What is the Legal Causation for Mr. Jandric's Injuries?

a) Legal Principles

[134] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range: *Athey v. Leonati,* [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 15, 17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9. Causation need not be determined with scientific precision: *Athey* at para. 16; *Zwinge v. Neylan*, 2017 BCSC 1861 at para. 44; *Clements v. Clements*, 2012 SCC 32 at para. 49. As pointed out by the plaintiff, causation is a practical question of fact that can best be answered by ordinary common-sense: *Athey* at para. 16.

[135] The test for causation asks "but for" the defendants' negligence, would the plaintiff have suffered the injury? This test recognizes that compensation for negligent conduct should only be made where a substantial connection is made between injury and the plaintiff's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; *Zwinge* at para. 45.

[136] As pointed out by the plaintiff, defendants often argue that a plaintiff's damages are to be reduced to account for any "measurable risk" that any pre-existing condition would have detrimentally affected the plaintiff even absent the tortious event: see *Athey* at para. 36. The burden of proof lies with the defendants, and "measurable risk" must be based on the accepted evidence and must rise above speculation: *Zacharias v. Leys,* 2005 BCCA 560 at para. 16.

[137] The plaintiff maintains the evidence establishes that the Accidents caused the plaintiff's current physical and psychological conditions. The defendants are, therefore, liable for causing his injuries and for the resultant consequences of those injuries.

b) Application of the Legal Principles

[138] The defendants submit there is a genuine question as to the extent to which all of the plaintiff's ongoing symptoms are related to the Accidents. The defendants point out – as acknowledged by Dr. Passey and Dr. Ganesan – it is not unusual or unexpected for patients with chronic PTSD to be triggered by the presence of various psychosocial stressors over the course of their lives. Dr. Passey gave evidence that these types of triggers are common for veteran patients such as the plaintiff.

[139] Both Dr. Passey and Dr. Ganesan agree that the plaintiff's PTSD developed after his traumatic experiences serving in the Balkans during the war and was chronic. As Dr. Ganesan noted in his report at para. 137, "there [are] periods of remission and recurrence depending on psychosocial stressors."

[140] The defendants say in light of the testimony of both Dr. Passey and Dr. Ganesan as to the potential for psychosocial stressors to trigger symptoms in individuals with chronic PTSD, the plaintiff would likely have struggled with external stressors, such as his father's declining health, even absent the Accidents and would have suffered some degree of mental health symptoms as a result. The defendants also note since the plaintiff's divorce has been finalized, he is in a healthy relationship with a new partner who he describes as very supportive.

[141] The defendants say it is noteworthy that the plaintiff has not returned to counselling with Dr. Passey since December 2018 nor is he taking Luvox. The defendants say this is indicative of his improving mental health since December 2018. The defendants maintain these factors should be taken into account when assessing the plaintiff's claims under all heads of damage.

[142] As set out earlier, causation is essentially a practical question of fact that can best be answered by ordinary common-sense: *Athey a*t para. 16. The trial judge is to take a robust and pragmatic approach to determining if the plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required: *Clements* at para. 46. Furthermore, a plaintiff is not required to establish the defendant's negligence as the sole cause of his injuries. It is sufficient if the defendant's negligence was a cause of the harm: *Athey* at paras. 17, 19.

[143] As is evident above, the defendants in this case argue that the plaintiff's damages are to be reduced to account for any "measurable risk" that a pre-existing condition, in this case PTSD, would have detrimentally affected the plaintiff even absent the tortious event: see *Athey* at paras. 35–36. As noted by the plaintiff, however, the burden of proof on this point lies with the defendants and "measurable risk" of a future event of harm must be: based on the evidence; be established as a "real and substantial possibility'; and rise above speculation: *Zacharias* at para. 16.

[144] The question for the court, therefore, is whether there is sufficient evidence to properly substantiate a reduction of the damages, or, have the defendants met their evidentiary threshold on which the court can assess a "measurable risk".

[145] I agree with the plaintiff that the defendants have not met this burden in this case. As noted in *Clayton v. Barefoot,* 2018 BCSC 239 at para. 23:

> [23] … The tortfeasor must take his or her victim as the tortfeasor finds them, and the tortfeasor is liable even if other causal factors, for which the defendant is not responsible, result in the victim's losses being more severe than they would be for the average person. …

[146] Both Dr. Simonett and Dr. Mike Berger, the defendants' expert, agreed that the plaintiff's neck and back pain were caused by the Accidents. Dr. Berger also went on to state that the plaintiff's ongoing cervical and lumbar myofascial pain is partly contributed to his ongoing difficulties with mental health since there is a strong relationship between uncontrolled mental health conditions and the perpetuation of myofascial pain.

[147] There is effectively no evidence of Mr. Jandric having any physical concerns prior to the First Accident in this area with the exception of Dr. Van Schagen noting neck pain or tension and suggesting massage therapy. The evidence of the plaintiff, his coworkers, and family doctor was that he was in good physical condition prior to the First Accident. He had no headaches or physical issues that interfered with his ability to work or other aspects of his life.

[148] Both Dr. Simonett and Dr. Van Schagen opined that the plaintiff likely sustained headaches attributed to whiplash injury following the First Accident. A resurgence of those headaches followed after the Second Accident with more distinct migraine features.

[149] With respect to his PTSD, Dr. Ganesan opined that the plaintiff was in full remission from his former PTSD condition at the time of the First Accident. This means that the symptoms were not happening frequently, or happening very rarely, and did not require ongoing treatment. In addition, it was not affecting his ability to function in the community, at work or at home, or socially. Dr. Passey also indicated that subsequent to the first course of treatment, he considered the plaintiff's PTSD to be in remission or cured.

[150] The admissible Medical Service Plan (MSP) and Pharmacare printouts demonstrate that the plaintiff was not taking any psychotropic medications or seeing a psychiatrist or counsellors in the many years (close to 20) prior to the First Accident. There is also no evidence before this Court showing the plaintiff's function in the workplace was impaired in any way prior to the First Accident. All the evidence points to the plaintiff's functioning at a high level in the workplace. None of the experts opined that the plaintiff's PTSD absent the Accidents would have materially impacted his functional ability at work or other aspects of his life.

[151] The plaintiff was diagnosed with moderate depressive disorder by Dr. Ganesan, and this has not been challenged by the defendants. There is no indication of this disorder prior to the First Accident.

[152] In my view, the evidence clearly establishes the Accidents caused the plaintiff's current physical and psychological conditions. The defendants are, therefore, liable for these injuries and the consequences of those injuries.

C. Mitigation

a) Legal Principles

[153] The defendants argue strongly that the plaintiff's failure to act in accordance with the medical advice he received is unreasonable and constitutes a failure to mitigate, which should be taken into account in assessing all heads of damages.

[154] The defendants say a plaintiff in a personal injury action has a positive duty to take reasonable steps to limit their loss: *Graham v. Rogers,* 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467.

[155] Furthermore, a plaintiff can only claim damages in respect of losses that they could not have avoided by taking reasonable measures including undergoing treatment to alleviate or cure her or his injuries: *Danicek v. Alexander Holburn Beaudin & Lang,* 2010 BCSC 1111 at para. 234.

[156] In this case, the defendants submit that the plaintiff has been recommended a number of treatments, including physiotherapy, active rehabilitation, counselling, and medication over the years since the Accidents occurred. While he is engaged in some of those treatments with delay, he has not participated in any treatment modality for some time.

[157] As set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, the onus is on the defendants 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 his doctors, the defendant must prove two things: first, the plaintiff acted unreasonably in not following the recommended treatment; second, the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[158] As noted in *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26, while the test is objective, the mitigation question must be "what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment."

[159] At the outset, I agree, as pointed out by the plaintiff, this is not a case where the plaintiff was indifferent to, or cavalier about, the treatment recommendations made by his family doctor. The plaintiff testified he is ready and willing to follow recommendations and has done so. Dr. Van Schagen testified she had no concerns about his compliance, and neither did Dr. Passey. Both testified he was compliant with their recommendations, with Dr. Passey noting he had worked hard on his recovery.

[160] The plaintiff's treatment over the years has included visits with Dr. Van Schagen; physiotherapy with intramuscular stimulation (IMS); registered massage therapy; chiropractic treatment; prescription psychiatric medication, and psychiatric treatment.

[161] Of significance is the fact that the plaintiff has identified certain treatments that have been particularly helpful and has followed those. As an example, the plaintiff indicated physiotherapy was not particularly helpful until it involved IMS. At that point he saw significant improvement. In addition, the plaintiff sought out a psychiatrist (Dr. Passey) who had treated him successfully in the past in order to do so again.

[162] The defendants point to the delay in the plaintiff receiving treatment from Dr. Passey until April 2017. This was, however, eight months after Dr. Van Schagen first made the referral, and Dr. Passey was clear that the delay was due to his extensive wait list and due to his moving office locations at the time.

[163] Much of the defendants' argument regarding medication focused on clinical entries which reflect that Dr. Van Schagen recommended the plaintiff take Luvox,

but he declined. As an example of this, the defendants pointed to a clinical entry of November 18, 2016.

[164] On this point, Dr. Van Schagen testified that every discussion with the patient about treatment, including medication, is a partnership. Together, they discussed the pros and cons of the available treatments and decided on the appropriate course of action considering all factors such as: side effects, the level of dysfunction of the patient, and other available treatments. She also noted that Luvox is not a cure-all, and while it can help alleviate some of the plaintiff's symptoms, it also causes unwanted sexual side effects.

[165] In support of its argument, the defence relies upon a number of cases where individuals were diagnosed with a mental health condition following an accident and did not pursue recommended counselling or medication: see *Peacock v. Battel*, 2013 BCSC 958; *Cathro v. Davis*, 2008 BCSC 1645; *Dhadda v. Bradley*, 2019 BCSC 1840; and *Johal v. Fazli*, 2021 BCSC 1896. I have not found these cases persuasive as each contain a constellation of factors, including repeated or multiple refusals to follow a course of treatment, which ultimately led to the courts in those cases to conclude mitigation had not been adequately pursued.

[166] The defendants also rely upon comments made in Dr. Ganesan's recommendations to the effect that the plaintiff knows the dose of Luvox he can tolerate; it has been helpful to him in the past; and it would be helpful for him to continue on that medication for two to three years.

[167] There is, however, a distinction between recommendations from a treating physician and those from a medical legal report. The authorities have established this important distinction in mitigation analysis. In *Thomasson v. Moeller*, 2016 BCCA 14, the Court of Appeal refused to reverse the trial judge's finding that the plaintiff's failure to pursue cognitive behaviour therapy ("CBT") was not unreasonable as the doctor who recommended CBT was not a treating physician whose recommendations the plaintiff was obliged to follow.

[168] In view of all the above, I am not satisfied that the plaintiff acted unreasonably with respect to any treatment advice.

[169] Furthermore, the defendants in this case have not met the burden of proof with respect to the second step in this issue. The defendants have not demonstrated the extent to which the plaintiff's injuries would have been lessened if he received psychological counselling sooner after the First Accident or if he took Luvox on an ongoing basis. None of the treating experts opined to this effect.

[170] As similarly noted in *Wong v. Au*, 2021 BCSC 58 at para. 51, while the defendants have established that continuing medication might reduce the effects of the plaintiff's psychological injuries, the defendants have not established that the plaintiff would have eliminated his psychological disorders if he had continued taking medication. To find that undergoing a treatment might have reduced symptoms is not sufficient.

[171] Ultimately, I conclude that the evidence does not establish that the plaintiff acted unreasonably or that there would have been any reduction in his damages if he had acted differently. The defendants' argument that the plaintiff failed to mitigate his damages therefore fails.

D. What is the Appropriate Award of Non-Pecuniary Damages for Pain and Suffering?

[172] The plaintiff seeks an award of $200,000 in non-pecuniary damages, arguing that his injuries fall within the scope and severity of the injuries in the following cases:

a) *Ranahan v. Oceguera*, 2019 BCSC 228;

b) *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410; and

c) *Pololos v. Cinnamon-Lopez,* 2016 BCSC 81.

[173] In contrast, the defendants submit that an award in the amount of $90,000 to $120,000 is appropriate and rely on the following cases:

a) *Resendiz v. D'Alessandro,* 2017 BCSC 1274;

b) *Jokhadar v. Dehkhodaei,* 2010 BCSC 1643;

c) *Lomax v. Weins,* 2003 BCSC 1354; and

d) *Paterson v. Hindle,* 2017 BCSC 1104.

[174] The defendants point out that in the *Paterson* case, the plaintiff's injuries and ongoing symptoms have had a more severe impact on her life in comparison to the plaintiff in this matter. She was awarded non-pecuniary damages of $125,000. In assessing non-pecuniary damages in *Paterson*, attention was paid to the plaintiff's age, cognitive and psychological problems, her guarded prognosis for recovery, and minimal improvement over the years since the accident.

[175] In this case, the defendants say the medical experts suggest potential for significant improvements with appropriate treatment and the plaintiff has acknowledged that he has experienced improvement in his symptoms over the years since the Accidents, particularly when engaging in counselling and medication use in periods of flareup. The defendants point out that Dr. Berger notes that the plaintiff has yet to engage in an active rehabilitation program, which could significantly, if not completely, improve his physical symptoms. As a result, the defendants submit that non-pecuniary damages in this matter should be less than those awarded in *Paterson*, and indeed in many of the cases it references.

[176] The principles for an award of non-pecuniary damages are set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref'd, 31373 (20 October 2006). In *Stapley*, the Court of Appeal at para. 46 outlined an extensive list of factors to consider, including the plaintiff's age, the nature of injury, the severity and duration of pain, impairment of life, impairment of family and social relationships, and impairment of physical and mental abilities, amongst other things. The Court of Appeal also noted that the plaintiff's stoicism should not penalize him in the assessment of damages.

[177] The defendants point out that prior to the Accidents, the plaintiff was diagnosed with chronic PTSD as a result of his military service in the Balkan conflict. He was treated with counselling by Dr. Passey and the use of Luvox.

[178] The defendants say, as acknowledged by Dr. Passey and Dr. Ganesan, it is not unusual or unexpected for patients with chronic PTSD to be triggered by the presence of various psychosocial stressors over the course of their lives. As an example, the plaintiff admitted to experiencing some PTSD symptoms in the years leading up to the Accidents, including nightmares. He also noted that even prior to the Accidents, he experienced symptoms on or around Remembrance Day each year.

[179] As noted elsewhere, following the First Accident the plaintiff attended counselling with Dr. Passey from April 12, 2017, to December 18, 2018. By the last session, Dr. Passey said that plaintiff had been taken off Luvox and was in good spirits. In addition, he was well-versed in identifying and managing his stressors.

[180] Dr. Passey noted, however, that at the time the plaintiff completed his counselling in December 2018, he was still dealing with two major stressors: the pending settlement of his divorce and his father's declining health. As noted elsewhere, the defendants say that the plaintiff would likely have struggled with his father's declining health even absent the Accidents and would likely have suffered some degree of mental health systems as a result.

[181] The cases relied upon by the defendants, in my view, are not sufficient to address the pain, suffering, loss of enjoyment of life, and loss of amenity suffered by the plaintiff in this matter. Indeed, the defendants argue that the plaintiff in this case suffered lesser injuries to those set out by the defendants and, therefore, the award should be in a lower range of damages. I conclude the defendants have not sufficiently acknowledged the pain and suffering experience by the plaintiff, much of which he continues to experience to date.

[182] After reviewing the decisions awarding damages where the plaintiffs have sustained injuries of a similar nature as the present case, and after applying the factors in *Stapley*, I conclude that an award of $200,000 is appropriate.

[183] At the time of the First Accident, the plaintiff was 44 years old. At the time of the Second Accident, he was 48 years old. He was 51 years old at the time of trial, turning 52 by its end.

[184] The plaintiff suffered a number of injuries in the First Accident which were exacerbated by the Second Accident. Those included the recurrence of PTSD, moderate nightmares and flashbacks, hyperarousal symptoms, hyper alertness, difficulty sleeping in conjunction with moderate major depressive disorder, concussion and post concussion syndrome, alcohol and substance use disorder, mechanical neck and low back pain, headaches associated with whiplash injury, and distinct migraines following the Second Accident along with myofascial pain syndrome.

[185] The plaintiff was off work for about one month after the First Accident, two weeks following the Second Accident and for another two months in July and August 2020 due to increased PTSD symptoms at the time.

[186] The plaintiff continues to experience PTSD symptoms, ongoing headaches, persistent neck and back pain, sleeplessness, cognitive issues, and moderate major depressive disorder.

[187] All of this has significantly affected his regular activities. He testified that he has been unable to return to dirt biking with his children, something he regularly did, unable to return to his yard clearing routine on his large property, and remains unable to undertake long motorcycle rides. While his symptoms have improved, he is also limited in socializing with friends and family due to the return of his PTSD symptoms and his need to avoid noise and lights.

[188] In addition, the plaintiff's relationship with his family was irretrievable altered. The re-triggering of his PTSD, his negative coping mechanisms along with his

overall irritability and short fuse, contributed to the dissolution of his previously happy family life. While he now has a supportive partner and his relationship with his children has improved, this loss cannot be undone.

[189] Finally, in his testimony, the plaintiff provided some insight into the truly painful nature of his PTSD and his recurring nightmares which, since the First Accident, now involve his family members. This pain and suffering cannot be easily described in a judgment, but suffice it to say the plaintiff's description of his pain was compelling.

[190] In considering the jurisprudence cited by the parties, I accordingly prefer the cases provided by the plaintiff. While all have different fact patterns, the compensable injuries are generally similar to those suffered by the plaintiff. In addition, as reflected above, the mental anguish of certain PTSD symptoms should not be underestimated.

[191] Furthermore, the plaintiff has ongoing persistent chronic pain symptoms which have limited him both vocationally and recreationally, and he is at higher risk of re-triggering his PTSD symptoms. The medical evidence establishes that his pain symptoms will likely persist and his PTSD prognosis, including the re-triggering of symptoms, is difficult to predict. Both Dr. Van Schagen and Dr. Ganesan referenced the fact that the recurrence of PTSD symptoms could be more likely as he has suffered recurrences since his initial treatment.

[192] In view of all the above, I award the plaintiff $200,000 for pain and suffering.

E. What is the Appropriate Award for Future Loss of Income Earning Capacity?

[193] In a trilogy of cases, our Court of Appeal has clarified the law relating to the assessment of future losses of earning capacity: see *Rab v. Prescott*, 2021 BCCA 345; *Lo v. Vos,* 2021 BCCA 421; and *Dornan v. Silva*, 2021 BCCA 228.

[194] More recently, in *Boucher v. Bemister*, 2023 BCCA 17 at para. 5, the Court of Appeal confirmed the trilogy of cases as follows citing *Rab* at para. 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 ... must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[195] With respect to the claim for future loss, the defendants submit that the evidence does not support the plaintiff's claim for loss of earning capacity in this matter. The defendants say it is clear the plaintiff enjoys seniority with a supportive and accommodating employer and has significant job security. There is simply no evidence to support the existence of a real and substantial possibility of a future event which will cause the plaintiff to suffer a pecuniary loss; thus, the plaintiff's claim does not meet the requisite tests for the award of loss of future earning capacity.

[196] With respect to the first step, I note, as per *Rab* at para. 47, the Court of Appeal has confirmed that a "chronic injury" can be sufficient to satisfy the first evidentiary step of the test. While the injuries to the plaintiff in *Rab* were predominantly physical in nature, this does not preclude chronic psychological or cognitive injuries from satisfying this test. In this case, the plaintiff has both chronic physical and psychological injuries leading to the conclusion that the evidence discloses a potential future event that could lead to a loss of capacity. Both Dr. Ganesan and Dr. Van Schagen discussed the potential of such a future event and the reality with the recurrence of PTSD, a lessor trigger or stressor may resurface the symptoms associated with PTSD.

[197] With respect to the second step, the plaintiff must establish entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to

a future loss. 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.

[198] The case of *Bemister* contains similarities to the one at bar. The expert evidence was that the 61-year-old plaintiff was not likely to recover from his soft tissue injuries to his neck, back, and shoulder and would have intermittent pain flares and exacerbations from certain activities going forward. Though the plaintiff had not missed any work by the time of trial, as he had an accommodating employer and was working full time and carrying out full duties, the trial judge accepted that the second step of the test was satisfied. The judge concluded she could not discount the possibility that circumstances might arise at work that he could not competently handle because of his physical limitations, that he may be precluded from working until 65 due to his continuing pain, and that such limitations would make him less marketable and, therefore, represented a loss of capacity, all of which possibilities were beyond the realm of speculation. The Court of Appeal confirmed the trial judge committed no error in making these findings.

[199] I am satisfied that the first two steps are met in the present case. First, there is clearly a real and substantial possibility that the plaintiff has suffered a loss of capacity that will continue into the future. In particular, he has a chronic injury and the evidence discloses a potential future event that could lead to a loss of capacity because of that chronic injury. Dr. Ganesan’s report confirms that the plaintiff will likely continue to have ongoing disability in the future as his prognosis is unpredictable.

[200] While the plaintiff has had a history of slowly recovering from previous injuries, he has not done so to his pre-Accidents condition: See *Mannella v. Obregon*, 2020 BCSC 715, on this point. In addition, given his present age of 52 and given the length of time that has elapsed without a return to full functionality, there is a concern about his prospects and economic future. This is as expressed, and I accept the views of Dr. Ganesan and Dr. Van Schagen to the effect that the plaintiff

may well suffer from repeat episodes due to stressors going forward. In addition, Dr. Van Schagen has noted that it may indeed take less stressful events to adversely affect his PTSD symptoms.

[201] In addition, while there is no doubt the plaintiff has what can be considered a "good" and accommodating employer in CUPE, I am not prepared to assume that this amounts to a job for life: *Mannella* at para. 43. There are a variety of plausible hypotheticals including a change in leadership or possible reorganization which could impact his abilities in the workforce should he be required to move from that position.

[202] In addition, it may well be entirely possible that he will have to retire early because of the accelerated wear and tear on his body caused by the Accidents: *Mannella* at para. 44.

[203] Second, I find that there is a real and substantial possibility that this loss of capacity will lead to pecuniary loss. The standard of a real and substantial possibility is a lower standard than a balance of probabilities but a higher threshold than mere speculation, as noted in *Bemister*. In his report, regarding the impact of the plaintiff's ongoing psychological injuries on his vocational pursuits, Dr. Ganeson notes at page 15:

> The prolongation of those symptoms could cause a worsening of his emotional difficulties, which would affect his physical difficulties and may interfere with his work…
>
> …
>
> He was predisposed to PTSD and now has full symptoms of PTSD. This indicates that, even with successful treatment and his symptoms are under control, when he is exposed to future psychosocial stressors, he will redevelop PTSD. It is unpredictable how he will handle it and the intensity of his symptoms, which can be very troubling as he gets older.

[204] In addition, and in a similar vein to Dr. Ganesan, Dr. Van Schagen also expressed concern for the plaintiff's mental health in the future. In her testimony she noted that going forward, it will likely require less for the plaintiff to have a full-blown

reoccurrence of his PTSD symptoms, which would put him at risk of greater intensity of symptoms, potentially requiring time off work and further medical supports.

[205] The medical opinion evidence points to a real and substantial possibility beyond speculation that the plaintiff's ongoing psychological injuries may lead to a future event resulting income loss.

[206] Further, I agree with the plaintiff that the lay witness evidence from CUPE witnesses supports a real and substantial possibility beyond speculation that the plaintiff's ongoing impairments will continue to affect the quality of his work and his long-term value to CUPE.

[207] Accordingly, I conclude that a real and substantial possibility of a future pecuniary loss is established in the totality of the evidence tendered and the second step of three-part test has been met.

[208] The final step is to assess the plaintiff's loss.

[209] As argued by the plaintiff, his capacity to earn income has been undermined. While he still has some capacity to work, and he has remained employed, this is – to a great extent – due to accommodation by his employer and his colleagues. Accordingly, taking into consideration his defined financial responsibility to his ex-spouse, but for the Accidents, I am satisfied there is a real and substantial possibility that his loss of capacity will lead to a pecuniary loss. Accordingly, the task for this Court is to determine what that loss of capacity would likely be.

[210] The plaintiff has set out two different approaches to estimate this loss. The first is the earnings approach in the second is the capital asset approach.

[211] In *Bemister* and *Rab,* the capital asset approach was used. In both of those cases, the plaintiff continued working at their pre-injury occupations at or near their preinjury rate of pay, similar to the plaintiff in this action. In addition, similar to the present case, the plaintiffs in those cases had suffered impairments that could affect

their ability to continue working at some point in the future. I agree with the comments as noted by the court in *Rab* at para. 72:

> [72] These are the sort of cases this court had in mind in *Pallos*, with the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect the plaintiff's ability to continue doing so at some point in the future. In such cases, using the plaintiff's immediate pre-accident income as a tool in assessing her lost capacity make sense: see *Mackie v. Gruber*, 2010 BCCA 464, where the court upheld the trial judge's award of twice the plaintiff's average income in the five years leading up to the accident, which employment she continued thereafter but only with accommodations required by her injuries.

[212] In *Rab,* the Court of Appeal reduced the trial judge's award and reassessed the plaintiff's losses at $40,000 representing roughly two years of income with a 60–70% discount to take into account the relative likelihood of the possibility of loss occurring, resulting in an award of $40,000 for loss of future earning capacity. In *Bemister*, the Court of Appeal upheld the lower court's findings. The trial judge applied the capital asset approach and awarded the 61-year-old plaintiff $45,000, representing six months of his average annual income for loss of earning capacity.

[213] In our case, the plaintiff submits that $210,000 – roughly 1.5 years of his current salary – for his future losses, including loss of pension benefits, is an appropriate award.

[214] In my view, the capital asset approach is the most reasonable in the circumstances. It is difficult, however, to determine whether that amount should be one or 1.5 years of his current salary. This does support, in this case, award of 1.5 years as the plaintiff in this case has only recently turned 52 and still has significant period of working life before he turned 65. That lends to a higher award as the probability of the occurrence of difficulties in his work life is effectively higher with a longer period before retirement.

[215] Recently in Kania v. Evans, 2021 BCSC 797, the court noted this regarding the years in *Pallos*:

> [90] …The so-called "*Pallos* approach" of awarding the plaintiff's annual income for "one or more years" has been followed in cases where the

> individual continues to work after the accident, but there is a real and substantial probability of future income loss that is difficult to calculate with any mathematical certainty.
>
> [91] In most cases that apply the *Pallos* approach, a range of one to two years of income is applied: *Birrer v. Thomas*, 2019 BCSC 1642 at paras. 70–71 [one year]; *Manky v. Scheepers*, 2017 BCSC 1870 at paras. 142–143, 147 [approximately two years]; *Deol v. Sheikh*, 2016 BCSC 2404 at para. 191 [approximately 1.5 years]; *O'Brien v. Cernovec*, 2016 BCSC 1881 [approximately 1.5 years]; *Ali v. Rai*, 2015 BCSC 2085 at para. 159, aff'd *Ali v. Glover*, 2016 BCCA 446 [two years].

[216] While there was a difference of opinion concerning future income loss multipliers between Mr. Darren Benning and Mr. Sergiy Pivnenko, who were both qualified as expert economists in this matter, as the Court has adopted the capital asset approach for future income loss in this case, it is unnecessary to resolve this issue.

[217] I am, accordingly, satisfied an award of $210,000, or roughly 1.5 years of his current salary, for future loss of income is appropriate in the circumstances of this case.

F. What Amount, if any, should be Awarded for Cost of Future Care?

[218] As set out in numerous cases, including *Warick v. Diwell*, 2017 BCSC 68 at paras. 203–204, aff'd 2018 BCCA 53, there must be a medical justification for cost of future care and the claims must be reasonable:

> [203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health": *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at paras. 199 and 201; aff'd (1987), 49 B.C.L.R (2d) 99 (C.A.).
>
> [204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact": *Harrington v. Sangha*, 2011 BCSC 1035, at para. 151.

[219] Furthermore, 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.

[220] Ms. Louise Craig, an expert in the field of the functional capacity evaluation, cost of future care analysis, and physiotherapy, testified in this matter. She completed a cost of future care report on October 21, 2022, to determine the current and future care needs and costs associated with any residual limitations of the plaintiff. In conducting this task, she relied upon certain intake forms, the medical, collision and work history collected from the plaintiff during her clinical interview, the findings of a functional assessment that she completed, and the virtual home visit. In addition, she reviewed the facts from medical reports as part of her task.

[221] Both her functional capacity evaluation and her home visit were undertaken virtually and consisted of an interview of 30 minutes, a functional capacity evaluation of a few minutes, and a virtual home visit conducted on October 12, 2022. As she did not conduct an in-person assessment, the usual tools and equipment that she would use in making this assessment could not be utilized. The virtual nature of this assessment makes it somewhat less weighty.

[222] In making her recommendations, she followed the medical recommendations and, in certain areas, made her own recommendations.

[223] In setting out her summary table of costs, Ms. Craig identified certain one-time cost such as: psychological counselling; vestibular physiotherapy; ergonomic desk and chair; and kinesiology. In addition, she identified ongoing annual costs or services such as: physiotherapy; chiropractic; gym membership, and the ongoing cost of the medication Luvox. While she identified certain other costs, those are no longer being sought by the plaintiff.

[224] The plaintiff relies on Ms. Craig's cost of care recommendations in her report for this head of damages.

[225] While I agree with the one-time cost for ongoing psychological counselling and kinesiology, it is not clear to me that vestibular physiotherapy is something related to the matter. The plaintiff has, however, participated with positive success in chiropractic sessions and physiotherapy with IMS (both ongoing costs). I also agree

the upper range of ongoing medication amounts as requested can be medically justified.

[226] In addition, while the plaintiff is not presently attending a gym, he has successfully done so in the past. The one-time cost for kinesiology of $3,555 is also present.

[227] The total of the one-time expense for psychological counselling as reflected in Ms. Craig's report is $8,955.00. The total of the ongoing costs per annum for physiotherapy, chiropractic services, and medication as reflected in Ms. Craig's report is $2,442.00. The cost of attending a gym is $475.00.

[228] Mr. Benning provided a report dated October 20, 2022, which sets out the future cost of care multipliers and expresses the present value of a future cost of care expenditures stream. In the report, multipliers are expressed per thousand dollars of annual cost of care expenses in year 2023 over the plaintiff's remaining lifetime. Table 2 sets out the calculation of applicable multiplier values, with provision only for the contingency respecting premature death. Mr. Benning notes that this is the traditional way in which such multiplier values have been expressed litigation matters.

[229] The resulting cumulative lifetime multiplier is $22,512.

[230] Mr. Benning provides the following example to illustrate how to use the multipliers: if the plaintiff will incur an ongoing future cost of care expense of $2,000 per year over his remaining lifetime, the present value of that expense may be computed as ($2000/$1000) x $22,512 = $45,024, where $22,512 is the cumulative multiplier in Table 2.

[231] As noted above, the total of the ongoing medically justified expenses as set out in Ms. Craig's report is $2,442.00. Using Mr. Benning's future care multiplier of $20,343 to age 81 yields a present value of approximately $55,000.

[232] Accordingly, I award $63,955.00 for the plaintiff's cost of future care.

G. What Amount, if any, should be Awarded for Special Damages?

[233] The parties have agreed on special damages as claimed being the full amount claimed of $4,726.95.

VII. CONCLUSION

[234] In summary, the plaintiff is awarded as follows:

a)	non-pecuniary damages:	$200,000.00
b)	future loss of earnings capacity:	$210,000.00
c)	cost of future care:	$63,955.00
d)	special damages:	$4,726.95
	TOTAL:	**$478,681.95**

[235] In closing, I thank counsel for their thoughtful, professional presentation and very civil approach during this trial.

[236] In the normal course, the successful party is awarded costs. If the parties are unable to agree on costs and there is something the court should be aware of and consider, they are at liberty to apply to have that matter determined if such an application is filed within 30 days of this judgment.

"Burke J."