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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Takeloo v. Flahmeri,*
2024 BCSC 2380

Date: 20241231
Docket: M188371
Registry: Vancouver

Between:

Arash Naseri Takeloo

Plaintiff

And

Taannia Flahmeri;
Mark Alessandrini;
John Doe;
Jane Doe; and
John Doe Corporation

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	H. Faramarzi
Counsel for the Defendant M. Alessandrini:	J. Peterson K. Wrolson
Place and Date of Trial/Hearing:	Vancouver, B.C. March 25–28, 2024 April 2–4, 8–11, and 15–16, 2024
Place and Date of Judgment:	Vancouver, B.C. December 31, 2024

2024 BCSC 2380 (CanLII)

Table of Contents

I. OVERVIEW **3**
II. LIABILITY **4**
A. Agreed Statement of Facts 4
B. The Plaintiff's Version 5
C. The Defendant's Version 7
D. Security Video 8
1. Expert Evidence 8
2. Evidence about the Video's Authenticity 10
a. Undisputed Facts 10
b. Other Evidence 11
c. Disclosure of the Video and Other Evidence 13
E. Legal Principles about Credibility 13
F. Analysis 15
III. DAMAGES **19**
A. The Plaintiff's Background 19
B. Injuries 22
1. The Plaintiff's Testimony 22
2. Expert Evidence 23
3. Analysis of the Evidence about Injuries 25
4. Non-Pecuniary Damages 26
C. Loss of Earning Capacity 28
1. Loss of Business 30
2. Expert Evidence 32
3. Evidence from BCLC 34
4. Analysis 35
D. Cost of Future Care 38
E. Failure to Mitigate 39
1. Evidence about Treatment Recommendations 39
2. Legal Principles 40
3. Analysis 41
F. Special Damages 41
IV. CONCLUSIONS **42**

2024 BCSC 2380 (CanLII)

I. OVERVIEW

[1] This trial was about a motor vehicle accident that happened on August 27, 2017. Both liability and damages are at issue. The accident was caused by an improper lane change between two vehicles that were travelling eastbound on United Boulevard in Coquitlam, British Columbia, just past its intersection with Fawcett Road.

[2] The plaintiff was driving a Volkswagen SUV, and the defendant Mark Alessandrini was driving a white Mazda owned by his mother, the defendant Taannia Flahmeri (hereinafter, all references to the defendant are only to Mark Alessandrini).

[3] There is no disagreement that immediately before the collision, the plaintiff's vehicle was in the right or curb-side lane, and the defendant's vehicle was in the lane to the immediate left of that lane. After the collision between the two vehicles, the Mazda had spun around and came to rest facing the opposite way to its previous direction of travel (facing westbound) next to the passenger side of the plaintiff's vehicle, which was still facing eastbound.

[4] This case was unusual because of the degree to which the parties' version of what happened to cause the accident in the minutes leading up to the collision differed. Their evidence also differed as to how the parties and other people at the accident scene behaved prior to and after the accident. Their versions have very little in common.

[5] The plaintiff describes the defendant driving too quickly and being forced to cut him off because of a slower moving vehicle that was in front of the plaintiff in the same lane.

[6] The defendant contends he was subjected to a serious incident of road rage consisting of dangerous and threatening behaviour by the plaintiff and another vehicle that he alleged was driven by the plaintiff's friend.

2024 BCSC 2380 (CanLII)

[7] There is video footage that captured the vehicles' movement just before and just after impact. The video footage comes from security cameras at a property adjacent to United Boulevard. The cameras were not focussed on highway traffic, so the images are from some distance. Because of that, and the fact that the accident occurred at night, the quality of the video is poor.

[8] I am unable to determine, looking at that video alone, which vehicle went into the wrong lane to cause the accident. Additionally, neither expert who testified about the video could conclude which vehicle made an improper lane change. Given that and the divergence in the parties' evidence, the credibility and reliability of the parties and witnesses who testified on their behalf are key issues.

[9] The trial also concerned damages. The plaintiff seeks compensation for what he says are the physical injuries and aggravation of his depression caused by the accident, including a substantial claim for future loss of earning capacity and loss of his business.

[10] The defendant's position is that the plaintiff failed to mitigate his damages because he did not heed medical advice to seek treatment until too long after the accident. The defendant also submits the plaintiff has failed to prove a claim for loss of earning capacity. The parties also have significantly different positions as to the viability of the plaintiff's business at the time of the accident.

II. LIABILITY

[11] As noted, the parties have dramatically different versions of the accident. I agree with counsel that the parties' credibility and reliability will carry significant weight in my overall conclusions on liability.

A. Agreed Statement of Facts

[12] The parties came to an agreed statement of facts. Also, on the first day of this trial, the Court directed ICBC and the defendants to provide a timeline regarding the alleged tampered video of the accident. I provide the following uncontested facts drawn from both documents:

2024 BCSC 2380 (CanLII)

a) On or about August 27, 2017, at or near United Boulevard and Fawcett Road in Coquitlam, BC, the plaintiff and the defendant were involved in a motor vehicle accident.

b) At the time of the accident, the plaintiff was driving a 2006 Volkswagen Toreg.

c) At the time of the accident, the defendant was the driver of a 2010 Mazda. His father Marci Alessandrini was the front-seat passenger. The car is owned by his mother, the defendant Taannia Flahmeri.

d) At the time of the accident, Hami Hafezieh was driving behind the vehicles of the plaintiff and defendant and witnessed the accident.

B. The Plaintiff's Version

[13] The plaintiff testified that he was working at his business until about 8:30 p.m. or 9 p.m. on the day of the accident. He was driving home to Port Coquitlam and decided to stop at the restaurant at the Hard Rock Casino to have dinner. He chose that restaurant because not that many restaurants were open at that time of night for dinner, and he enjoyed the food served there.

[14] He left the casino at about 10:30 p.m. and was travelling eastbound on United Boulevard. He claimed he was driving in the lane on the right-hand side as one travels eastbound (Lane 1). He said at the first intersection of United Boulevard with Fawcett, the light turned red, so he stopped. He recalled that a black pick-up truck (the Truck) came up the lane to his immediate left (Lane 2) and stopped. When the light turned green, the Truck took off travelling faster than him.

[15] Those two vehicles passed the point where a lane from Fawcett Road merges onto United Boulevard from the No. 1 Highway. Before that merge lane ended, he noticed a white Mazda that had been behind him at the intersection (there is no dispute this was the defendant's vehicle). He testified that the Mazda was in Lane 2,

2024 BCSC 2380 (CanLII)

came up next to him, attempted to pass. He speculated that the driver was intending to go into Lane 1 to get ahead of the Truck, which was in Lane 2.

[16] The plaintiff claimed rather than successfully passing his vehicle, the Mazda cut him off and its rear right fender hit the left front fender of his car. The Mazda then spun in front of him, hit the curb on United Boulevard to his right and came to rest facing west.

[17] Pictures entered into evidence show that after the collision the two vehicles are very close to one another facing opposite directions. One can see in the pictures that at the point of rest, the plaintiff's vehicle was actually straddling the two right-hand lanes.

[18] The plaintiff said that he was shocked and he saw two people get out of the Mazda and start yelling. He claimed that he rolled down his window only a bit and did not want to get out of the vehicle. They did not yell for very long, but went back to their own vehicle, at which point he got out of his car.

[19] He then noticed for the first time that a black SUV had stopped some distance behind them. The driver got out, and he realized that was someone familiar to him. That person was Mr. Hafezieh. The plaintiff recognized Mr. Hafezieh as a dealer at the Hard Rock Casino. He explained that he remembered the first time he saw Mr. Hafezieh at the casino was because he noticed Mr. Hafezieh’s name tag, recognizing that to be an Iranian name and they both realized they spoke Farsi.

[20] Mr. Hafezieh testified. He saw the accident and gave the plaintiff his contact information in case the plaintiff needed witness.

[21] The plaintiff called 911, and after about 10 minutes, the police and ambulance arrived. He saw that his right leg had some scrapes or scratches on it, but he was unsure how that happened. He also felt that he had a headache right away and believed he was in a state of shock. However, he declined assistance from the ambulance. He saw that one of the other people from the Mazda was taken by stretcher into the ambulance.

2024 BCSC 2380 (CanLII)

[22] He stayed on the scene for about 45 minutes. The police told him that his vehicle was drivable, and he was able to leave. He drove home.

[23] He confirmed that it was not raining that night and the road was dry. He denied that he changed lanes before the collision. One of the reasons he said he was anxious to get home was because at the time he had a young dog that was less than a year old and he wanted to get home to look after it.

C. The Defendant's Version

[24] The defendant testified that he had worked a 10-hour shift at his job at a construction site (he was a flag-person) and he was heading home around 9 or 10 p.m. His father was with him. They decided to stop at Tim Horton's as it was one of the few places that would be open to serve food at that time. After finishing their meal in the restaurant, the defendant and his father went back to their vehicle.

[25] The defendant pulled out of the parking stall and headed towards the exit from the parking lot. He saw a black SUV reversing out of a parking stall, but that driver did not notice his vehicle, so the defendant honked. The black SUV continued to reverse, so the defendant had to swerve around it. The defendant then exited the parking lot, turning right onto Brigantine Road, heading toward its intersection with United Boulevard. He said the black SUV sped up to get ahead of him, and cut him off before stopping at that intersection. He said a silver SUV was revving its engine behind him.

[26] He turned right onto United Boulevard, entering Lane 1. He testified that both SUVs engaged in potentially dangerous driving amounting to a type of harassment. He said the black SUV sped up and went in front of him in Lane 1 with the silver SUV behind him. He said someone in the black SUV was yelling and swearing at him and his father as it passed ahead of him in Lane 2. He was scared. He switched lanes into Lane 2, and said the two SUV' did the same, essentially boxing him in, and that continued as the vehicles drove east.

2024 BCSC 2380 (CanLII)

[27] As they approached and went through the intersection at Fawcett Road, the silver SUV was in Lane 1, preventing the defendant from switching into that lane, and the black SUV was behind him in Lane 1. He says the accident was caused by his car being clipped on the right, rear end causing his car to spin a number of times. He felt another impact on the side of the vehicle before the cars to a stop.

[28] He checked on his father and got out of his vehicle. He said the driver of the silver SUV was swearing, and yelling at the driver in the black SUV, telling him to back up. The defendant also noticed the driver of the silver SUV was talking on a phone. By this time, the defendant's father was out of the vehicle taking pictures. The defendant began to get dizzy and sat down on the curb.

D. Security Video

[29] Four videos were introduced into evidence. These videos capture the accident, albeit from quite a distance and with low quality images. All four videos record images from approximately the same time, but from different angles depending on where the cameras were located.

1. Expert Evidence

[30] The plaintiff adduced expert report from an engineer, Dylan Rochon, who was qualified as an accident reconstruction engineer. The defendant adduced opinion evidence from Thomas Flynn who was qualified to give opinion evidence on the analysis of video evidence and collision reconstruction.

[31] While I find the experts credible and reliable, their evidence did not assist me in determining which version of the accident was more likely.

[32] The defendant submits I should prefer Mr. Flynn's evidence over Mr. Rochon's for two reasons: Mr. Rochon was not qualified as an expert in video analysis, and Mr. Rochon commented on inconsistencies in the witnesses' account of the accident, thus stepping closer to being an advocate father than a neutral expert.

2024 BCSC 2380 (CanLII)

[33] I do not agree and do not discount Mr. Rochon's evidence for either reason.

[34] The defendant also submits aspects of Mr. Flynn's opinion weaken the plaintiff's version of the accident. Specifically, they point out that Mr. Flynn opined that all three vehicles were going much faster than 50 km/hr. This contradicts Mr. Hafezieh's testimony that he was only travelling at about 40 to 45 km/hr. However, Mr. Flynn's estimate also contradicts the defendant's evidence that he was travelling at the speed limit.

[35] Mr. Rochon criticized Mr. Flynn's conclusion about the vehicles' speeds. Mr. Flynn's estimations of the vehicles' speeds were based on comparing their movement in time to a vehicle visible in the video travelling on an exit ramp from the highway (so further away from cameras). Mr. Flynn assumed that vehicle was travelling at 50 km/hr and then based his calculations about the other three vehicles on that assumption.

[36] However, Mr. Rochon pointed out that one can see a vehicle travelling on the highway (not the ramp) obviously going slower than the vehicle on the ramp, meaning a vehicle was driving on the highway at a speed less than 50 km/hr.

[37] I agree that raises a legitimate concern about the reliability of Mr. Flynn's speed estimates.

[38] The defendant emphasized that Mr. Flynn's expertise was video analysis, suggesting Mr. Rochon's criticism should carry little weight. However, the criticism is not on the methodology, calculations or measurements Mr. Flynn conducted, but rather on his assumption that a vehicle on the exist ramp was travelling at 50 km/hr. There is nothing about that assumption that is tied to his expertise.

[39] In any event, as noted, I do not find the expert evidence to be of assistance in determining which vehicle made an unsafe lane change to cause the accident.

2024 BCSC 2380 (CanLII)

2. Evidence about the Video's Authenticity

[40] The plaintiff raises a number of issues that he characterizes as reprehensible conduct relating to the defendant's (and ICBC's) possession of the video and its disclosure. He submits these issues impacted trial fairness.

a. Undisputed Facts

[41] The parties submit the following agreed facts that are relevant to this issue:

a) On August 29, 2017, the defendant viewed security footage at Maple Leaf Storage, which is situated near to the site of the accident.

b) In approximately late October 2017, the defendant received the security footage in the mail.

c) Ms. Flahmeri dropped off the CD of security footage of the accident from Maple Leaf Storage's cameras at ICBC's Coquitlam Claim Centre on April 26, 2018.

d) From 2018 to August 2021, ICBC and the defendants' lawyers placed the videos of the accident in a folder and did not disclose its existence to the plaintiff's counsel.

e) The notice of civil claim was filed on July 20, 2018. The response to notice of civil claim was filed on September 19, 2018.

f) On November 20, 2018, the videos were saved to previous defence counsel's file.

g) Defence counsel produced a list of documents on February 14, 2019, which did not include the videos of the accident.

h) The defendant provided an amended list of documents on August 20, 2021. Listed under Part 4 as privileged were 54 photographs and video clips (some duplicates) provided by Ms. Flahmeri.

2024 BCSC 2380 (CanLII)

i) At some point between August 20–23, 2021, defence counsel provided the plaintiff with four videos of the accident, confirming it had been obtained by the defendant's mother and given to ICBC.

j) The examination for discovery of the defendant was conducted on August 23, 2021. The defendant gave evidence that the video of the accident was "tampered with and edited".

k) On August 24, 2021, defence counsel sent the third amended list of documents of the defendants to the plaintiff, which included four video clips received from the defendants, electronic copy only.

l) The first trial of this matter was scheduled for May 24, 2022. This trial did not go ahead due to lack of a trial judge. The second trial was scheduled for July 17, 2023.

m) On May 1, 2023, the plaintiff obtained a consent order for obtaining the RCMP file.

n) March 30, 2023, the plaintiff' lawyer filed a trial brief specifically referencing cross-examining witnesses regarding the alleged tampering with the videos.

o) The July 2023 trial did not go ahead because it had been scheduled for five days, but the parties agreed they needed 12.

b. Other Evidence

[42] The defendant's expert, Mr. Flynn, testified that he received the CD containing the video clips directly from ICBC (not through counsel). He testified it did not have the correct frame rate and frame timing, and he noted it was possible that there were a number of frames were "missing". He also noticed that the CD on which the videos were stored had the logo of a post-production company that apparently specializes in video editing.

2024 BCSC 2380 (CanLII)

[43] During his examination for discovery (XFD), the defendant testified about the video and gave the following evidence:

a) A day or two after the accident, he attended at Maple Leaf Storage to view their surveillance footage. He claimed that what he saw at that time was the plaintiff's vehicle hitting the back of his vehicle.

b) However, he said the CD he received a few months later was "completely different and edited", including that an entire section was missing. He believed the video had been "tampered with".

c) At first, he claimed the CD was sent to him by the RCMP, but he then claimed he did not know who sent it to whom, only that it arrived in an envelope and he did not check to see who the sender was.

[44] At trial, the plaintiff's counsel asked the defendant how he knew at the examination for discovery the video had been tampered with. He defendant said he could not recall.

[45] At no point did anyone inform the plaintiff that the video handed to ICBC by the defendant's mother was on a CD with a video production company's logo on it, until Mr. Flynn provided that evidence on the last day of evidence in the trial.

[46] The plaintiff submits the following scenario is likely. After the accident, the defendant (perhaps with his mother) watched the video at Maple Leaf storage. They discussed what they saw with the defendant's father, and they decided to alter their version of the accident to better match the video. They got a copy and took it to the video postproduction company, and the company edited the video and mailed it to them. There is no dispute the defendant's mother dropped off the video at ICBC. The plaintiff speculated this is why on August 23, 2021, the defendant speculated the video had been "tampered" with.

2024 BCSC 2380 (CanLII)

c. Disclosure of the Video and Other Evidence

[47] The plaintiff also submit trial fairness was compromised by the failure of the defendant to list the video on his list of documents. There is no dispute it had been in possession of ICBC since April 26, 2018, before the notice of civil claim was filed. Its existence was not disclosed to the plaintiff until August 2021, and at first the defendant claimed privilege over it.

[48] Additionally, for some reason, in letters from the defendant's counsel in September 2021 and March 2023, the plaintiff's counsel was told there was no written statement from the defendant to ICBC. That statement was not true.

[49] The plaintiff also points out that at the two previously scheduled trials, defence counsel did not intend on relying on the videos, the plaintiff's counsel believed that was based on the defendant's evidence at his XFD that the video had been "tampered with". It was not until the deadline for serving expert reports for the current trial that the plaintiff received notice that the defendants intended to rely on the video and had it analyzed by its expert Mr. Flynn.

E. Legal Principles about Credibility

[50] The burden is on the plaintiff to establish the defendant was liable for the accident. As noted, the parties' credibility and reliability in their recounting of the accident is the key to resolving this issue.

[51] It is important to recognize the distinction between credibility and reliability. Credibility refers to the truthfulness of a witness, whereas reliability refers to the accuracy of a witness's testimony. A witness that is not credible, is not reliable, but the opposite is not necessarily true: unreliable witnesses are not necessarily being dishonest. It may be that other factors have intervened to negatively affect the accuracy of their recall or perceptions.

[52] The legal test for assessing credibility is well known, and has remained settled for a long time. The parties referred to a number of cases, including *Bradshaw v. Stenner*, 2019 BCSC 1398 at para. 186; *Faryna v. Chorny*, [1952] 2

2024 BCSC 2380 (CanLII)

D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.); *Bridgewater Tile Ltd. v. Copa Development Corporation,* 2022 BCSC 310 at paras. 140–141; and *Han v. Yan,* 2018 BCSC 1450 at paras. 61–62.

[53] From those cases a number of principles can be distilled. Chief among those, is that a court should assess the credibility of a witness in light of all the evidence, shaped by the perspective of what a practical and informed person would consider reasonable were they in the same circumstances. Additionally, the court may believe all, part of, or none of a witness's evidence, or attach different weight to different parts. The following consideration are also important when assessing a witness's credibility:

a) The witness's ability and opportunity to observe events;

b) The firmness of the witness's memory;

c) The ability of the witness to resist the influence of interest to modify his or her recollection; in other words, whether the testimony seems self-serving;

d) The extent to which the witness's evidence harmonizes with independent evidence that has been accepted;

e) Whether the witness changes his or her testimony during direct and cross-examination;

f) Whether the witness' testimony seems unreasonable, impossible, or unlikely;

g) Whether a witness has a motive to lie; and,

h) The demeanour of a witness generally, including whether the witness was evasive or argumentative during their testimony.

2024 BCSC 2380 (CanLII)

F. Analysis

[54] Both sides challenge the credibility of the opposing party, as well as witnesses who testified on their behalf. The plaintiff has the burden to persuade me on a balance of probabilities that the defendant caused the accident.

[55] The plaintiff's position is that the defendant is 100% responsible for the accident because he attempted a lane change when it was unsafe to do so. The defendant's position is that the plaintiff is 100% liable because he engaged in dangerous driving with Mr. Hafezieh, which led directly to the accident.

[56] Having heard all the witnesses and carefully considered all the evidence, I find on a balance of probabilities that the accident was caused by an unwise lane-change initiated by the defendant, and therefore he is 100% liable.

[57] The defendant's position relied almost exclusively on an overall attack on the plaintiff's credibility based on evidence about, among others, his gambling history, business plans, business records, work history and the reasons he gave for not following up with certain health care treatments.

[58] The defendant contends that the plaintiff's lack of credibility in testimony about damages negatively affects his credibility on how accident happened, citing *Park v. de la Garza*, 2023 BCSC 1180 at paras. 52–53. I take no issue with Justice Iyer's statement of the proposition in that case, but it was clearly tailored to the facts before her. It is implicit that Justice Iyer had serious credibility concerns about all of the plaintiff's evidence in that case.

[59] I do not come to the same conclusion about the plaintiff. In my view, both parties' evidence suffered from deficiencies to varying degree on different issues, but I am not persuaded that the plaintiff's credibility was severely eroded to the degree suggested by the defendant.

[60] The defendant submits the plaintiff's' version of the accident should not be accepted because the plaintiff and Mr. Hafezieh were not truthful about the nature of

2024 BCSC 2380 (CanLII)

their relationship. The defendant submits because of that, their testimony about how the accident happened should be rejected in favour of the defendant's version.

[61] Both the plaintiff and Mr. Hafezieh claimed that they were not friends before the accident. They were only acquainted with one another since meeting at the casino where Mr. Hafezieh worked. They became friends after the accident, including a period of time when Mr. Hafezieh lived with the plaintiff.

[62] The defendant submits their disavowal of being friends at the time of the accident was a deliberate attempt to support the false narrative that the two of them did not jointly engage in the road rage incident as described by the defendant. The defendant also submits that Mr. Hafezieh was combative and vague in his evidence, and that the estimates he gave about vehicles' speed and distances on the road made little sense.

[63] Mr. Hafezieh was not a perfect witness, and I do find some of his evidence about speed and timing was difficult to reconcile with the rest of the evidence, but I do not find his reliability or credibility so diminished as to discount his evidence completely.

[64] His account of the vehicles' movements before the accident was largely consistent with the plaintiff's version.

[65] The plaintiff's evidence about how the accident happened made sense. I also find his testimony was not significantly weakened during cross-examination.

[66] This contrasts to the defendant's evidence about the accident. I find there were numerous inconsistencies between his testimony in direct and cross-examination and between his trial testimony and evidence at XFD. Significantly, at trial he said the version he gave at his XFD was wrong because he had mixed up the colour of the two SUVs when describing the "boxing-in. He also testified at trial that his evidence at the XFD was wrong about certain distance estimates, including how far his car travelled after the first impact while it was spinning, and how far it was from a power pole when it came to rest.

2024 BCSC 2380 (CanLII)

[67] During his direct testimony, he said he went to Tim Hortons between 9 and 10 p.m., whereas at his XFD, he said he had not finished work at 10:40 p.m.

[68] Individually, these issues may not have raised concerns about the defendant's credibility and/or reliability. His mistakes relate to matters upon which people's memories and even observations at the time can reasonably vary (estimates of distance, speed and time), but cumulatively, I do find they negatively affect the reliability of the defendant's trial testimony. I also find it relevant that the defendant claimed at one point that his memory about some details was better at trial than during the XFD, which took place three years earlier. We know that is contrary to how human memory operates.

[69] I add that portions of the defendant's version were simply difficult to accept. For instance, he said the discrete incidents of the two SUV's "boxing him in" happened at least 20 times over the course of the three intersections they passed when leaving Tim Horton to where the accident happened. That seems highly unlikely. Also, he could not recall how many times his car spun around, and his evidence at trial differed from what he said at the XFD about that.

[70] Critically, both the defendant and his father insisted that the plaintiff got out of his vehicle and instructed Mr. Hafezieh to back up his SUV immediately after the impact. The problem is that I cannot discern movement of Mr. Hafezieh's vehicle consistent with that version in any of the videos.

[71] As noted, I find the videos to be of little probative value in terms of which vehicle caused the accident. I also find the concerns raised by the plaintiff about the videos' authenticity to be sound. There is a reasonable basis for the plaintiff to believe the defendant obtained the video and had it edited in some fashion before delivering it to ICBC, although I am not making that finding.

[72] Nevertheless, the witnesses watched the videos, during their testimony, and commented on it. The lack of movement of Mr. Hafezieh's vehicle after impact is

2024 BCSC 2380 (CanLII)

notable, and lends support to the plaintiff's version of events, but I do not find that to be determinative.

[73] The defendant's father testified, and his general description of two SUV's boxing in their vehicle was mostly consistent with the defendant's testimony. However, it was revealed during cross-examination that he gave a signed statement to ICBC two days after the accident that was significantly different from what he told the police at the accident scene. On its own, that raises concerns about his credibility.

[74] The defendant also claimed the police told his mother that Mr. Hafezieh could not be a witness because he was friends with the other driver. However, he admitted in cross-examination, as confirmed during his father's testimony, that his father gave that information to the police.

[75] Their impression was based on the claim that the plaintiff instructed Mr. Hafezieh to back up his vehicle, which I have found is unsupported by any other evidence.

[76] The defendant also claimed Mr. Hafezieh and the plaintiff were speaking to each other on their cell phones while they were out of the vehicles at the scene, which they denied. That claim is also dubious. As the plaintiff's counsel pointed out, why would two people so close in proximity talk to one another by cell phone? Combined with the knowledge that the defendant's father told the police the two men were friends, there is the possibility the claim about them talking on the phone was speculation designed to support their assertion. I also note that the defendant's father brought a lawsuit against Mr. Hafezieh for damages.

[77] Taking all the preceding evidence into account, I find the defendant's version suffers from many inconsistencies internally, as well as being contradicted or inconsistent with other evidence.

[78] For all those reasons, on a balance of probabilities I prefer the plaintiff's version of how the accident occurred and find the defendant 100% liable.

2024 BCSC 2380 (CanLII)

III. DAMAGES

[79] The plaintiff seeks the following damages:

a) Non-pecuniary damages - $200,000;

b) Past loss of earning capacity as a truck driver - $369,660 (subject to deductions for residual earning capacity);

c) Loss of Future Earnings as a truck driver (subject to deductions for residual earning capacity) - $1,464,316;

d) Loss of business - $1,000,000;

e) Special Damages - $5,000; and,

f) Cost of Future Care - unspecified.

[80] The defendant submits the following awards are appropriate:

a) Non-pecuniary damages - $50,000 with reductions for failure to mitigate and for negative contingencies.

b) No damages for past or future loss of earing capacity as a truck driver, loss of business or cost of future care and no amount for special damages.

A. The Plaintiff’s Background

[81] The plaintiff was born and raised in Iran. His family are members of the Baha'i faith. The family faced many challenges because of the prejudicial treatment of Baha’i in Iran, including his mother being imprisoned because of her faith.

[82] The plaintiff started working at a very young age (10 or 11 years old) for a friend of his father, repairing and making electronic devices. He did well in school and graduated with good marks in 1999, but as a Baha’i he could not enter university. After moving and being forced out of other occupations, his father

2024 BCSC 2380 (CanLII)

became a truck driver. The plaintiff did well at his job at first assisting his father's friend, but eventually running his own business making devices that regulated electric current for appliances. He also installed car and house alarms.

[83] When the plaintiff was 20 years old, his father had a bad car accident and broke both of his legs. At that point the plaintiff became responsible as the oldest male to earn income. He closed his electronic shop and took over his father's business. He hired someone else to drive the truck until he was able to get the appropriate license after a few months. He then worked as a truck driver for about a year and a half until his father recovered. At that point, they bought another truck, and the two worked together.

[84] Unfortunately, the plaintiff's mother passed away from cancer in 2005. His father remarried, but this caused some disruption within the family, especially for the plaintiff's two sisters. Given that and the restrictions on their education and job prospects because of their faith, he decided to move with them out of Iran.

[85] They moved first to Turkey in 2010 and, through the United Nations, were accepted as convention refugees, eventually being accepted to immigrate to Canada. They landed in Vancouver in March 2012.

[86] The plaintiff took English classes, and started working right away, at first in construction. Through a friend, he also got work installing drapes and curtains for a company that got work through Home Depot.

[87] His goal was to continue in the trucking industry, so he decided to get his class 5 driver's license. He could not apply for his class 1 class in British Columbia until he obtained his driving record from Iran, which took a number of months. Once that was done, he proceeded rapidly through a training program and got his class 1 license in 2013.

[88] He began driving trucks for a company for about five months. At that point, he was offered the opportunity to obtain his own truck on a lease-to-own basis. He was then able to work as an owner/operator truck driver. After about a year he moved to

2024 BCSC 2380 (CanLII)

another company, VesaCold. He saw an opportunity to expand his business at this new company. Specifically, he stated that they were looking for someone who could effectively run the transportation part of their business. They dealt mainly in cold storage but indicated if someone could get a fleet of 40 trucks, they would give their entire trucking business to that person. The plaintiff testified that it was his goal to be that person.

[89] He claimed that he then went on with the plan to buy more trucks as quickly as he could. He would get contacts of newly arrived immigrants from Iran and would train them to drive and, as he did so, try and earn more money in order to buy more trucks. He felt he was not only improving his business but providing an important service by giving opportunities for new drivers to get work and to be trained by him. He found, given that they were all from Iran and spoke Farsi, there was an ease of communication, which assisted with his business.

[90] He explained the highest cost for his business was the truck maintenance, but that he was able to do a lot of that work himself which minimized his expenses. He said he purchased tools and was able to do the maintenance based on his experience from Iran. He describes that he was extremely busy because not only was he running the business and looking to expand it, he was also responsible for training drivers, recruiting new drivers, and doing the maintenance on the trucks.

[91] He claims he worked about 20 hours per day. He maintained that his goal was to reach owning a fleet of about 40 trucks so that he could get the permanent contract from the company. He also explained that given his father's experience with having been saddled with long-term contracts for the lease of the trucks, his view was to try and have shorter-term leases that he felt was more beneficial. However, those were more expensive, and he had to cut costs, and he did so by doing many aspects of the business himself. In addition to all the duties associated with managing the business, doing the repairs, and training drivers, he also did his own driving and that was when he trained newer drivers.

2024 BCSC 2380 (CanLII)

B. Injuries

[92] The plaintiff claims that he suffered the following injuries from the accident: headaches, neck pain, right shoulder pain, radiating sensations to his hands and fingers, back pain, pain in the right leg and toes, short lived nausea and dizziness, aggravation of pre-existing depression, sleep difficulties, and sensitivity to noise.

[93] The defendant accepts that the accident caused the plaintiff to suffer chronic pain to his neck and upper back, and sensory disturbance symptoms of radiating pain into his right arm. However, the defendant submits those sensations are not the result of neurological injury, and while irritating, the sensations are temporary.

[94] The defendant disputes whether the accident is sufficiently causally related to the aggravation of his depression.

1. The Plaintiff's Testimony

[95] The plaintiff recalls that during the collision his head hit the head rest and that he immediately felt pain in his head and dizziness at the back of his head where it meets the neck. He said for the first several days, he had pain, nausea, and dizziness. The pain in his neck and headaches still exist today. The pain radiates to his right shoulder and down to his right hand, and he sometimes feels pins and needles in his fingers, or other times it feels numb. He takes painkillers to manage that pain, and it does help, but he then wakes up in the morning with the pain being quite pronounced.

[96] The plaintiff testified that other than normal headaches one or twice a year, he did not suffer from headaches for the two year before the accident. Since the accident, he has headaches once or twice a week.

[97] He also claims that he continues to suffer from low back pain on a daily basis, that he classified as severe. He also said he has chronic upper back pain. He also claims to suffer from radiating pain in his right leg down to his right foot and toes, which was non-existent before the accident. He did say the leg pain is improving, but he still has numbness in his toes.

2024 BCSC 2380 (CanLII)

[98] The plaintiff submits that the accident caused him to suffer severe depression because of all the issues relating to it and the problems that it brought to him. He claims that the pain and the consequential stress made him unable to perform his job properly and eventually, he lost his company. Specifically, he says that because of the pain that he was dealing with, he was not able to be a truck driver nor able to manage the company in the same way as he did before. He was also limited in what mechanical work and training of the drivers he could do.

[99] He admits to having depression before the accident, which he related to being caused by the persecution that he and his family faced for their faith. However, he stated that depression was mild. He testified that even with the high pressures of his job by managing and training drivers and everything else, the depression was manageable with medication. However, he claims that after the accident, the physical pain he was experiencing and other problems made him unable to carry on his work and that put him under financial pressure which aggravated his depression.

[100] He admitted that before the accident his doctor had him tested for sleep apnea, which came back negative. He says since the accident he has difficulty with sleep, sometimes screaming or having nightmares. The plaintiff also claims that he never had any issue with sensitivity to noise or a lot of people before the accident, but that now he is so sensitive that, for instance, he cannot handle a child crying or loud music.

2. Expert Evidence

[101] Dr. Faraday was qualified an expert in the fields of musculoskeletal injuries and occupational medicine. Dr. Faraday prepared a report dated January 30, 2022, based on his assessment of the plaintiff in December 2021.

[102] Dr. Faraday's conclusions relating to the plaintiff are as follows:

> Based on my history and assessment of [the plaintiff] and the specific facts listed, it is my opinion that he sustained injuries in the August 27, 2017 motor vehicle accident which included:
>
> 1. Musculoligamentous injuries to the neck, with on-going pain symptoms.

2024 BCSC 2380 (CanLII)

> 2. Musculoligamentous injuries to the upper back, with on-going pain symptoms.
>
> 3. Sensory disturbance symptoms of radiating pain into his right arm, with ongoing symptoms.
>
> 4. Aggravation of pre-existing depressive symptoms, with on-going symptoms.
>
> [The plaintiff] does not have any significant pre-existing medical conditions that contribute to his current presentation.

[103] Dr. Faraday opined that he was unable to relate the plaintiff's low back pain to the accident.

[104] He stated that the plaintiff's clinical history was consistent with the development of increased depressive symptoms association with the effects of the accident, including pain. However, he also stated he "did not conduct an in-depth psychiatric evaluation" of the plaintiff.

[105] Dr. Okorie (the psychiatrist called by the defence) assessed the plaintiff on December 22, 2023, and prepared a report on December 28, 2023. He focussed on the possibility that the plaintiff has undiagnosed and untreated sleep apnea. He noted the clinical records that recounted his doctor had referred him for a home oximetry tests regarding possible snoring and sleep apnea, although the test apparently came back negative. However, in Dr. Okorie's opinion the home oximetry test is inadequate.

[106] In Dr. Okorie's opinion, the accident did not cause the plaintiff's depression or sleep apnea, but the chronic pain caused by the accident did aggravate the plaintiff's pre-existing major depressive disorder. He also noted the plaintiff had been taking an antidepressant since before the accident and had received "inadequate investigation and treatment of his possible sleep apnea which drives his depression and lack of motivation have stalled improvements" in his depression. In Dr. Okorie's view, the appropriate diagnosis and treatment of the plaintiff's possible sleep apnea are "critically important interventions to improve his mood, motivation, energy, and emotional regulation". However, he agreed in cross-examination that before the accident, even with his depression the plaintiff was functional.

2024 BCSC 2380 (CanLII)

3. Analysis of the Evidence about Injuries

[107] There was no dispute that the evidence supports the conclusion that the plaintiff suffers from chronic pain in his neck and upper back which was caused by the accident. He also has sensory disturbance symptoms of radiating pain to his right arm.

[108] Despite the plaintiff's complaints of low back pain, his own expert did not agree that was related to the accident, so I do not find that injury is compensable.

[109] With regard to the aggravation of his depression, the defendant submits the court should prefer Dr. Okorie's evidence over Dr. Faraday because he is a psychiatrist, and he did a full psychiatrist assessment. Dr. Faraday was qualified as a family physician with expertise in soft tissue injuries, chronic pain and occupational medicine.

[110] Dr. Faraday did not agree that as a family physician, he would defer to a psychiatrist for the plaintiff's psychological status, as it was a straight-forward case, but he agreed he would defer to psychiatric doctors for complex cases.

[111] The plaintiff alleged that there was an inconsistency within Dr. Okorie's report and during his testimony relating to the possibility of improvement for the plaintiff's depression. He submits that differences undermine the report.

[112] Dr. Okorie opined that the plaintiff's "depression and possible sleep apnea and related impairments in energy, sleep and motivation" existed before the accident. He went on to say since the possible sleep apnea was inadequately treated, the plaintiff would have "continued to suffer from the disorder and related impairments" absent the accident. He recommended the plaintiff be referred to a sleep physician to have the sleep apnea diagnosed and treated. He then stated that "should [the plaintiff] still have significant depressive and anxiety symptoms after adequate treatment of his sleep apnea", medication and cognitive behaviour therapy would be helpful.

2024 BCSC 2380 (CanLII)

[113] The plaintiff suggests there is an incongruity in Dr. Okorie saying the plaintiff would have had impairments regardless of the accident because of the untreated sleep apnea, while also saying, that symptoms may continue even after successful treatment for the sleep apnea.

[114] I agree this evidence is somewhat incongruous, but I am not persuaded it undermines his report.

[115] What I do find tempers some of Dr. Okorie's conclusions is that despite his experience and interest in sleep apnea, he was not qualified as an expert in that area. More importantly, the only test done on the plaintiff (on his own doctor's recommendation) came back negative.

[116] Dr. Okorie certainly had some basis to suspect the plaintiff's condition is complicated by sleep apnea, but I find his opinion went too far to suggest that absent the accident the plaintiff might still have suffered from the depression and related impairments because of that. He also admitted that the plaintiff suffered from depression before the accident, but was functional.

[117] The defendant points out Dr. Okorie's assessment was more current, and Dr. Faraday agreed that Dr. Okorie was in a better position to know the plaintiff's current mental health status.

[118] I find that the plaintiff's depression has become worse since the accident. Both Dr. Faraday and Dr. Okorie correlated that aggravation to the chronic pain resulting form the accident.

[119] Despite Dr. Okorie's view that untreated sleep apnea is complicating the plaintiff's depression, I am unable to conclude that results in tempering in any way Dr. Faraday's opinion.

4. Non-Pecuniary Damages

[120] The parties agreed on the guiding legal principles. It is well settled that the amount awarded should put the plaintiff in the same position he would have been

2024 BCSC 2380 (CanLII)

but for the defendant's negligence. In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal articulated a non-exhaustive list of common factors to be considered (para. 46) when awarding non-pecuniary damages, which includes: the plaintiff's age; the nature of the injury; severity and duration of the pain; the degree of disability; emotional suffering; any loss or impairment to life, family, marital or social relationships or physical and mental abilities; and loss of lifestyle.

[121] While similar cases are helpful to provide a range of damages awarded, but each case must be decided on the facts before the court.

[122] The plaintiff relied on the following cases in which non-pecuniary damages in the range of $190,000 to $200,00 were awarded: *Thiessen v. Kepfer*, 2023 BCSC 1593; *Shongu v. Jing,* 2016 BCSC 901; *Fletcher v. Biu*, 2020 BCSC 1304; *Antignani v. Heaney*, 2022 BCSC 228; *Valand v. Campbell*, 2021 BCSC 439.

[123] The defendant relies on two cases: *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, where Court of appeal found appropriate range was $50,000 to $60,000. The court in *Burnett v. Granneman*, 2023 BCSC 1425, relied on that range and awarded $55,000.

[124] The cases relied upon by the plaintiff are distinguishable because each involved a plaintiff who not only had more serious psychological injuries, but for whom, the injuries had a more devastating impact on their life overall. I also note, in most there was not as wide a gap between the plaintiff and defendant on the appropriate range based on the plaintiff's condition.

[125] I acknowledge the plaintiff is relying on his position that his injuries are directly related to the loss of his business, and a severe impact on his earning capacity. However, as I discuss below (and therefore reference and incorporate here), I have not found there to be a causal relationship established between the loss of the plaintiff's business and the accident. This makes the relevance of the cases cited by the plaintiff to be significantly diminished.

2024 BCSC 2380 (CanLII)

[126] On the other hand, the two cases relied on by the defendant did not involve people who had an aggravation of psychological injuries, and therefore I find the range is inappropriately low.

[127] In my view, both *Antignani* and *Fletcher* have similarities in the nature of the physical injuries. However, they differ significantly in that in the former the accident caused post-traumatic stress disorder, and in the latter the plaintiff suffered from cognitive limitations.

[128] Doing the best that I can in light of the gulf between the positions of the parties, and the cases they presented, I find the appropriate amount to award the plaintiff for his injuries is $100,000.

C. Loss of Earning Capacity

[129] The plaintiff seeks compensation for loss of earning capacity as a truck driver, but also loss of business and business opportunity relating to Rooh Transportation company.

[130] In *Gark v. Lauzon*, 2023 BCSC 1930, I reviewed the legal principles applicable to loss of earning capacity:

> [157] The standard of proof for both past and future loss of earning capacity is not the balance of probabilities, but a real and substantial possibility: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Schenker v. Scott*, 2014 BCCA 203 at para. 82; and *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
>
> [158] In *Rowe v. Bobell Express Ltd*., 2005 BCCA 141 at paras. 25–31, the court set out the principles applicable to determining the appropriate amount to award a plaintiff for past loss of earning capacity. The principles from those cases can be distilled as follows:
>
> > a) The loss of earning capacity is a lost asset, and the appropriate valuation is to determine what the plaintiff would have earned if the injuries had not occurred.
> >
> > b) The claim is the loss of learning capacity, meaning the loss of the value of the work the plaintiff would have performed but was unable to because of the injury, not just “loss of income”.
> >
> > c) The damages are meant to represent the value of the plaintiff’s earnings that she would have received over time had the tort not been committed, not merely a loss incurred entirely at the time of the tort.

2024 BCSC 2380 (CanLII)

d) The loss may be measured in different ways including reference to actual earnings the plaintiff would have received.

[159] With regard to assessment of future loss of earning capacity, the legal principles were recently re-affirmed by the Court of Appeal's trilogy of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. From those cases, I distill the following principles:

a) The burden to establish entitlement to future wage loss is not a balance of probabilities. Instead, the plaintiff must show a real and substantial possibility of loss that amounts to something more than speculation.

b) The award for future loss of earning capacity is an assessment, not a mathematical calculation.

c) The assessment involves a comparison of the plaintiff's likely future if the accident had not happened, with what the plaintiff's likely future will be after the accident.

d) The first step of the assessment requires the court to determine whether the evidence discloses a potential future event that could lead to a loss of capacity. One example is the possibility that accident-related injuries will worsen.

e) If the first step is satisfied, the second step asks where there is a real and substantial possibility that the future event will cause a pecuniary loss.

f) A number of factors are examined to determine if the second step is met, including:

i. the plaintiff's intention to keep working and what they intend to do;

ii. the plaintiff's inability to devote the same energy or hours to the pre-accident occupation;

iii. the plaintiff's work history;

iv. the plaintiff's medical conditions; and

v. the plaintiff's intentions concerning future lifestyle, and risks inherent in those plans.

g) If the second step is met, the third step is to determine the value of that potential future loss, which requires assessing the relative likelihood of the possibility occurring. The third step can be accomplished by employing either the "earnings" approach, or the "capital asset approach".

h) The earnings approach is more useful when the loss is easily measured. While that determination is not a mathematical exercise, the court should be guided by mathematical anchors.

i) The capital asset approach should be used where the loss is not measurable in a pecuniary way. In that case, the court asks whether the plaintiff:

2024 BCSC 2380 (CanLII)

> i. has been rendered less capable overall from earning income from all type of employment;
>
> ii. is less marketable or attractive as an employee to potential employers;
>
> iii. has lost the ability to take advantage of all job opportunities which might have been open to her had she not been injured; and
>
> iv. is less valuable to themselves as a person capable of earning income in a competitive market.

[131] Neither party suggested the approach cited above would be inappropriate.

1. Loss of Business

[132] The plaintiff produced a large volume of documents for his business in 2015, 2016 and 2017, but I agree with the defendant that what was presented was unorganized and incomplete. Moreover, I find his testimony about the documents, when confronted with some samples, was confusing, somewhat inconsistent and difficult to follow.

[133] The plaintiff's tax records were entered into evidence. His gross business income reported on those forms was:

a) for 2015 - $186,414.58

b) for 2016 - $482,074.20

c) for 2017 - $358,986.66

d) for 2018 - $250,964.59

e) for 2019 - Nil

[134] For 2020 his income was reported to be $8,000, derived from COVID-19 government benefits.

[135] The plaintiff claims that he was only legally required to keep most documents for his business for about six months and he routinely shredded them after that time.

2024 BCSC 2380 (CanLII)

He claims that if he had kept everything, there would have been at least 10 times more documents.

[136] His counsel adduced some documents and referred to them as a “sample” of the plaintiff’s business documents. The types of document included electronic payment remittance advices, VersaCold pay statements, itineraries, holdback amounts, unit number sheets with lists of trips, lists of fuel consumption, *etc*. The plaintiff explained that every 15 days he received one statement from VersaCold for truck that listed the trips taken, mileage, rates, fuel and payment made.

[137] He described his role in his business as managing the day-to-day operations of his company, training drivers, taking order and assigning routes and schedules to drivers. He also performed maintenance on the trucks. He said he managed his business while he was on the road through his phone. He claims his business was expanding and by 2020, he expected to have 40 trucks.

[138] He submits that he was forced to close his business in 2018 because of the pain he experienced caused by the accident. He testified that he was expecting to earn about $600,000 in 2017, but could not because of the accident.

[139] However, other evidence was adduced in cross-examination that is relevant. The plaintiff testified that his business relationship with VersaCold was negatively impacted by criminal allegations made against one of his truck drivers. He agreed he did not at first take the allegations seriously.

[140] I also agree that his work history after the accident was unclear. He said heonly worked three months as a truck driver in 2019 and denied he was paid for that despite a T4A issued in his name for just over $30,000. He also agreed that he told his family doctor in October 2021 and February 2022 that he had been working as a truck driver on trips between Toronto to Vancouver.

2024 BCSC 2380 (CanLII)

2. Expert Evidence

[141] The plaintiff relied on expert report prepared by Christiane Clark and dated December 18, 2023. She was qualified as an expert economist and labour economist.

[142] She was asked to provide past and future income loss for the plaintiff based on the assumption that he worked as a truck driver having an average income based on the statistical average income for truck drivers in British Columbia, up to ages 65 and 70.

[143] Ms. Clark provided table representing estimates of past and future earnings based on statistical date for British Columbia males potentially working full time, full year as transport truck driver. This is meant to provide baseline data for the plaintiff's "without accident" earnings.

[144] She also provided a table of income multipliers, based on the constant sum of $1,000 per year form the date of trial up to the plaintiff's becoming 70 years old. She has adjusted those figures for survival, but did not incorporate statistic allowance for other positive or negative labour market contingencies, conceding it may be necessary to do so.

[145] The plaintiff relies on the tables in Ms. Clark's report to assert a claim for past loss of earnings of $369,660 subject to deductions for contingencies. The plaintiff acknowledges he may have residual capacity to earn income, but that it is limited because of the injuries suffered, as well as his personal circumstances, being someone with high school diploma from Iran, and at trial was 44 years old. He suggests the deduction for contingency ought to be minimal, but in his closing submissions, he did not quantify that.

[146] The plaintiff also relies on Ms. Clark's report for the loss of future earning capacity to be $1,464,316.00, again subject to minimal deductions for his residual earning capacity.

2024 BCSC 2380 (CanLII)

[147] The defence relied on two expert reports. The first, dated July 17, 2023, was prepared by Ron Tidball, who was qualified to give opinion evidence on accounting business valuation and income loss measurement. Mr. Tidball is a chartered professional accountant and chartered business valuator.

[148] He was asked to write a report assessing the financial condition of the plaintiff's trucking business in the immediate pre-injury period, and any other relevant comments within his expertise related to past loss of income as a result of the accident.

[149] Among his opinion were the following:

a) The plaintiff's business was not successful in the two years before the accident. He found the combined net income for 2015 and 2016 was a loss of $1,484.

b) He noted that in 2017 the business sustained a loss of $30,693, and there was a decline in revenue in 2017, although he could not identify if that decline occurred before the accident in 2017.

c) While he agreed it might be that the 2017 business loss could be attributable to the plaintiff's injuries, in that he had to hire more drivers to make up for his decreased capacity. However, Mr. Tidball noted that the subcontract expense as a percentage of revenue for 2017 was 34 percent, the same as it had been in 2016, meaning it was possible the 2017 loss was not attributable to a need for hiring extra drivers.

d) The plaintiff's business income in 2018 was greater than in any of the four prior years, which belied the logic that the plaintiff "had to sell" the business because of his injuries. He also noted the business was performing better in 2018 than in 2015 and 2016 (when it sustained a loss).

2024 BCSC 2380 (CanLII)

e) The CRA had no record of the plaintiff's business revenue and expenses for 2018.

f) The CRA has no record of his income in 2019, but he was issued a T4A from Acme Transport Ltd. for $30,483

[150] Mr. Tidball agreed he was unaware that according to the plaintiff, the jump in income in 2018 was because he sold many of his trucks in anticipation of shutting down the business.

[151] The defendant also relied on a report prepared by Thomas Steigervald dated February 9, 2024, which was a responsive report to Ms. Clark's report. He was qualified as an economist.

[152] His main criticism of Ms. Clarke's report was a failure to apply negative contingencies, without explanation. However, he takes no issue with the methodology and calculations she used, only the basis for assumptions applied, or not applied.

[153] As noted by the plaintiff, despite these differences, the actual figures used by both experts in their multiplier tables did not differ significantly. I acknowledge, however, that small differences in a multiplier could still have a significant impact on an overall award.

3. Evidence from BCLC

[154] The defendant's position is that the plaintiff was facing substantial financial pressure, but not because of the effects of the accident but because of his gambling habit. He submits the plaintiff lost his business because of his gambling habit.

[155] The defendant adduced records from the British Columbia Lottery Corporation ("BCLC") relating to a loyalty card issued in the plaintiff's name. A witness from BCLC testified to explain the limitations of the records produced. Significantly, in a letter to counsel accompanying some records, the BCLC wrote that the documentation "may not accurately represent the true amount of bets, win or

2024 BCSC 2380 (CanLII)

loss, distinguishing who used the card, and possible adjustments and errors in data entry".

[156] While the plaintiff admitted he did gamble, he denied the documents produced from BCLC can be attributed to his gambling, since anyone can use the card. He specifically noted that at times other people lived with him at his house and could easily have used the card to enjoy the perks that came with it.

[157] The defendant submits the plaintiff's refusal to accept the information in those documents representing his own gambling was not believable.

[158] If the court accepts the documents can be attributed to the plaintiff, the following information discerned form those documents would be relevant:

a) Possible gambling loss of $2,300 on April 29, 2017;

b) Possible gambling loss of $4,200 on May 2, 2017;

c) Indications that bets placed in amounts as high as $124,400 in the last two weeks of July, and possibly over $100,000 bets placed in August 2017.

d) The card is used to place bets consistently in September, November and December 2017.

4. Analysis

[159] Overall, the evidence regarding the plaintiff's business was difficult to follow, woefully unorganized and incomplete.

[160] I agree with the defendant that reduced weight must be applied to Ms. Clark's report for the simple reason that by his own account, the plaintiff was not an "average" truck driver. His case was premised on earning income primarily from running his business (that is, from other drivers) possibly supplemented by occasionally being a driver. His evidence about this was unclear.

2024 BCSC 2380 (CanLII)

[161] Mr. Steigervald's criticisms of Ms. Clark's report are sound, but Ms. Clark noted in her report that it might be appropriate to apply more contingencies to the figures in her tables. As noted above, the actual figures did not differ as between the two experts.

[162] The problem is not with the expert evidence but the frailties in the evidentiary foundation put forward by the plaintiff.

[163] In my view, the best evidence comes from Mr. Tidball who examined records produced by the plaintiff, although again, I repeat my comments about the flaws of that evidentiary record.

[164] The defendant submits the plaintiff's truck driving business was already failing before the accident and he would have shut it down regardless of the accident. He also submits there is no evidence adduced to support a conclusion that he would have succeeded in his dream of having 40 trucks by 2020. I agree.

[165] The plaintiff's submission is that compensation for the loss of his business "must be at least $1,000,000, which is simply less than the combined revenue of his business in 2016 ($482,074.20) and expected revenue of the business in 2017 ($600,000)". Other than the plaintiff's high hopes, the proposition that he was going to earn $600,000 in 2017 lacks evidentiary support. More importantly, Ron Tidball analyzed the records produced and did not agree, stating that the business was not in good shape.

[166] I find the plaintiff's evidence to fall short of the standard required to prove a claim that the accident caused his business to fail. This situation bears a striking similarity to what faced the court in *Baughan v. Baughan*, 2023 BCSC 938. That plaintiff was also a long-haul truck driver who missed significant time from work. He too provided a large volume of document to support the claim about his earnings, but was selective or poor record-keeping. I find the Court's comments to apply directly to the evidence before me:

2024 BCSC 2380 (CanLII)

> [21] Mr. Baughan's own evidence about was remarkably devoid of details about which expenses set out on the tax returns were false and which were genuine. In cross-examination, he accepted the misrepresentation was mainly in relation to minor things like claiming personal gas receipts as a business expense. In submissions, plaintiff's counsel seeks to have me accept that the misrepresentations were much greater. For example, on his 2021 tax return, Mr. Baughan claimed a net business income of around $36,000 having worked 6 or 7 months in total. His counsel presented a series of calculations based on what he submits were reasonable expenses, coming to an actual net income of some $93,000. For example, counsel seeks to have me conclude that "management and administration fees" of $15,705.20 claimed by Mr. Baughan in 2021 were false. The problem is that Mr. Baughan provided no testimony on that issue. To the contrary, he said that in 2021 he declared a higher income than in previous years because he was applying for a loan. In cross-examination, he said he "didn't add any extra expenses in 2021".
>
> [22] Mr. Baughan appears to see it as the role of this Court to review a mass of incomplete and disorganized documents to cobble together an estimate of his actual income. I disagree. It is Mr. Baughan who bears the onus of establishing his losses, and any conclusions to be drawn about his actual income from the documents ought to have been put to Mr. Baughan. Notably, Mr. Baughan has not even testified that the receipts or other documents before the court provide a complete picture for any given time period. In my view, little purpose is served in the exercise proposed by plaintiff's counsel of wading through an incomplete collection of receipts.

[167] I come to this conclusion without the necessity to take into account the defendant's position that the business failed because of financial pressures from the plaintiff's gambling habit.

[168] In any event, I do not find the evidence from BCLC is sufficient to establish that the plaintiff spent the amounts indicated on those documents gambling. However, I also find the plaintiff was argumentative and evasive when cross-examined about those records, which may be indicative that he gambled more than he was willing to admit. However, as noted, I need not make a finding about that given my other conclusions.

[169] I find the plaintiff's assertion that he could no longer work in trucking because of his injuries to be suspect. I find it more probable than not that he was earning income as a truck driver in 2019, 2021 and 2022, possibly doing long-haul trips from Toronto to Vancouver. Apparently, he has not filed income tax returns with CRA for 2018 and 2019.

2024 BCSC 2380 (CanLII)

[170] The plaintiff's position was simply to use Ms. Clark's multiplier tables based on statistical evidence to calculate his loss, leaving it to the Court to apply an unquantified but minimal reduction for residual work capacity.

[171] It bears repeating that the onus is on the plaintiff to establish both his entitlement to damages for loss of capacity to earn income both before trial (past income loss), and after trial (future income loss). For the reasons stated above, he has failed to provide coherent evidence about his income. Instead, he adduced a mass of unorganized documents and relies on statistical income for truck drivers in British Columbia. This is inadequate.

[172] The only reliable evidence other than income tax records about the plaintiff's income(not statistical evidence) is Mr. Tidball's opinion. He opined that the plaintiff's business operated at a loss in 2015, 2016 and 2017.

[173] According to the plaintiff, the increase in his business income in 2018 was not due to his working, but the sale of trucks. As noted earlier, I am not satisfied he has persuaded me on a balance of probabilities that he was unable to earn any income. Among other things, there was no evidence form a vocational expert to opine on what other jobs he might pursue, given his claim that he cannot work in trucking. I add that claim is dubious given his truck driving in 2019 and later.

[174] For all those reasons, there is an insufficient evidentiary basis upon which to award any damages for loss of earning capacity, past or future, and I decline to do so.

D. Cost of Future Care

[175] The plaintiff relies on the recommendations contained in Dr. Faraday's report, but adduced no evidence as to the cost of those treatments. He submits there is jurisdiction in the court to base an award on a "ballpark" estimate, relying on *Flores v. Burrows*, 2018 BCSC 334. However, I am in agreement with the following comments from *Verma v. Friesen*, 2024 BCSC 13 regarding the that approach:

2024 BCSC 2380 (CanLII)

> [243] Mr. Verma did not provide the court with any cost estimates for any of Dr. Kroeker's recommendations. He asks me, essentially, to "ballpark" a figure, as has been done in other cases, such as *Flores v. Burrows*, 2018 BCSC 334. I am aware that the court is to "do the best it can" to assess damages so as not to "relieve the wrongdoer of the necessity of paying damages": *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242 at para. 26. I am also aware that there are occasions where courts will "ballpark" a figure. However, in this case, there is simply no evidentiary basis in which I could even attempt to "ballpark" an award. Not only is there no evidence about anticipated costs of the recommendations made by Dr. Kroeker, there is no evidence about whether any of the services recommended by Dr. Kroeker would be available to Mr. Verma, and no evidence that even if such services were available, Mr. Verma would incur the costs, if any.
>
> [244] I am mindful that there was some limited evidence about Mr. Verma's current medications. … However, there is no evidence about the recommended dosage or costs, if any, of this medication. In these circumstances, to "ballpark" a figure for any future costs would require me to make many uncertain assumptions, not grounded in any evidence. This would not be fair or reasonable to either of the parties. On the state of the evidence, I find I am unable to make any award for this claim.
>
> [Emphasis added.]

(See also *Panganiban v. Sovdat*, 2023 BCSC 650 at paras. 238–242.)

[176] I find the underlined portions of the preceding quote apply directly to the facts before me.

[177] For the reasons expressed in that case, I find there is inadequate evidentiary foundation to make an award for the cost of future care, and I decline to do so.

E. Failure to Mitigate

[178] The defendant submits it is appropriate to discount the plaintiff's damages by 30 percent because he failed to mitigate his damages by not following recommended treatment after the accident.

1. Evidence about Treatment Recommendations

[179] Dr. Faraday opined that the plaintiff had not had an adequate trial of physiotherapy and active rehabilitation. He recommended 12 sessions of physiotherapy followed by 12 sessions of supervised exercise with a kinesiologist.

2024 BCSC 2380 (CanLII)

He also indicated the plaintiff could consider trigger point injections for his neck and upper back.

[180] In cross-examination, Dr. Faraday acknowledged that earlier treatment with physiotherapy and active rehab is more helpful for a patient, and would have been helpful for the plaintiff. However, he also agreed that seeking treatment late may still produce beneficial results.

[181] The plaintiff acknowledges that there was a gap between the accident and start of the treatments. He also admits he received numerous recommendations for physiotherapy treatment soon after the accident from his doctors.

[182] He testified when it was first recommended that he get physiotherapy, he preferred to attend to his business since his drivers were relying on him. He complains after the second recommendation, ICBC did not approve direct payment for it.

[183] When his business shut down, he travelled to Iran and stayed with his grandfather, who lent him money. He attended at an orthopedic surgeon who prescribed cortisol injections, which he claims he got four or five times.

[184] He again travelled to Iran in 2022 and 2023 and attended various treatments there, including about 30 sessions of physiotherapy, more cortisol injections massages and unorthodox treatments including electric shock to the muscle and leech therapy.

[185] He said he would have liked to get counselling but was informed there was no Farsi-speaking counsellor available where he was living.

2. Legal Principles

[186] The guiding legal principles were not in dispute. The test is well known, and summarized in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the

2024 BCSC 2380 (CanLII)

> plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. …

[187] The defendant also relies on *Mocharski v. Ly*, 2022 BCSC 996, where the court stated that there need not be overt statement in an expert report that any treatment would definitely assist.

[188] With regard to courts have applied the test, the defendant refers to two cases. I agree one of those (*Lee v. Tunuguntla*, 2021 BCSC 223) supports the defendant's position, because notwithstanding the plaintiff pursuing many treatments, a 20% discount was applied because she failed to follow a recommendation for physiotherapy for just over a year after the accident. This was so even though the court concluded that had treatment started earlier, it was unlikely it would have "altered the course of [the plaintiff's] recovery dramatically", but it would have lessened pain and improved function (para. 35). In another extreme, the plaintiff in *Rasmussen v. Blower,* 2014 BCSC 1697, only ever attended one sessions of physiotherapy and one of massage despite both being recommended, which resulted in a 20% reduction in damages.

3. Analysis

[189] I agree the plaintiff's failure to follow the recommendation to attend physiotherapy soon after the accident amounts to a failure to mitigate. However, in my view, 30 percent is not appropriate. The medical evidence was that even when started late, there could be some benefit received from pursuing treatment.

[190] In my view, a 10% discount to the award for non-pecuniary damages is appropriate.

F. Special Damages

[191] The plaintiff testified that he spent approximately $3,000 to $4,000 on treatments in Iran. He also estimated spending about $2,000 for medications in Iran.

2024 BCSC 2380 (CanLII)

[192] The defendant opposes any award on the basis that no receipts for the various treatments or medications was adduced in evidence. With regard to those amounts, the plaintiff simply provided a ballpark figure in total.

[193] I also agree that there was no medical or health professional evidence supporting leech therapy or herbal treatments, so those items are not compensable.

[194] Given the lack of documentary evidence, and the non-specificity of the plaintiff's evidence about the costs, there is an insufficient evidentiary basis to make any award, and I decline to do so.

IV. CONCLUSIONS

[195] For all the reasons in this judgment, I find the defendant is 100% liable for the accident.

[196] The plaintiff is entitled to non-pecuniary damages in the amount of $100,000, reduced by 10 percent for the failure to mitigate.

[197] I decline to award damages for loss of past or future earning capacity (including loss of business), costs of future care or special damages. I find none of those heads of damages were supported by sufficient evidentiary basis to make an award.

[198] If the parties cannot agree on costs, they can schedule a brief appearance before me so long as that request is made no later than 30 days form the date of this judgment.

"Sharma J."

2024 BCSC 2380 (CanLII)