IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Niessen v. Emcon Services Inc.,*

2018 BCSC 1410

Date: 20180821
Docket: M157500
Registry: Vancouver

Between:

Neil Niessen

Plaintiff

And

Emcon Services Inc. and
Scott South

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

Counsel for the Plaintiff:	J.M. Cameron P.J. Bosco
Counsel for the Defendants:	B.A. McLaughlin L. Samuel
Place and Dates of Trial:	Vancouver, B.C. February 26-28, March 1, 2, 5, 6 and 9, 2018
Place and Date of Judgment:	Vancouver, B.C. August 21, 2018

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OVERVIEW

[1] The plaintiff claims damages for injuries suffered in a motor vehicle collision that occurred on October 20, 2013 on Highway 97 just south of Quesnel, B.C.

[2] The plaintiff had been on a hunting trip and was returning home on the undivided highway. The defendant Scott South's GMC pick-up truck crossed over the highway's center line and collided with a trailer being towed by the plaintiff and traveling in the opposite direction. Mr. South's vehicle was owned at the time by Salmon Arm Crushing Ltd., which has since been amalgamated into the defendant Emcon Services Inc.

[3] Liability is admitted. The only issues for determination involve the appropriate quantum of damages to be awarded.

BACKGROUND FACTS

[4] I find the following facts.

Biographical Information

[5] The plaintiff is now 52 years of age. He was 47 at the time of the collision. He was born and raised in Vancouver. He was the oldest of six children and is a Mennonite. The plaintiff had a long-term relationship of five years but is now single. He has no children.

[6] The plaintiff found his calling at a later age than many. He performed poorly in high school largely due to a lack of interest and dropped out partway through grade 11. His father, an immigrant who came to Canada with almost no assets, worked hard as a jewellery repairman and built up substantial real estate holdings which included a number of homes in Vancouver. The plaintiff worked with his father after high school doing renovations, repairs on his father's houses, and collecting rent until he was 25 years of age. At that time, the plaintiff's father passed away.

[7] The plaintiff's father had passed onto the plaintiff some skills developed from renovating houses, an entrepreneurial spirit, and an aptitude for hands-on learning.

[8] The father's passing seems to have been a transformative moment for the plaintiff. He referred to it as a wake-up call. Thereafter, he took on management of a family farm in Washington State, eventually installing and maintaining six acres of raspberries. After trying that vocation for a couple of years, and reaching an impasse with his mother over financing of the farm, at the age of 27 the plaintiff made contact with one of his father's old friends who gave him work as a driver for Hillcrest Plumbing and Heating ("Hillcrest").

[9] The plaintiff impressed his bosses during his eight-month stint as a driver. He aspired to move up in the company but knew he needed experience. Hence, the plaintiff worked his way into running the parts counter at the business. This allowed him to study parts, become known in the industry, and gain additional experience. Much of his knowledge was gained through self-study on his own time in evenings and on weekends. The plaintiff developed a reputation as a knowledgeable fellow in the local plumbing industry and became a valued salesman for Hillcrest.

[10] In his sales position, the plaintiff noticed how well the plumbers seemed to be doing financially and soon decided he wanted to take the next step and become a plumber too. He became a plumbing apprentice, completed the necessary studies at BCIT and practical experience at Hillcrest for two years as well as with other employers.

[11] The plaintiff reports and I accept that he excelled in his four-year plumbing apprenticeship. He testified and I accept that he graduated "at the top of the class" and earned his Tradesman Qualification designation as well as his Gas Fitting B designation for heating. Customers responded well to him. He received positive comments about his work and no complaints.

[12] The plaintiff spent the first two years of his apprenticeship at Hillcrest but decided to work with other companies for his last two years to get more experience. After Hillcrest, the plaintiff

spent several years working at two or three other plumbing companies in the Lower Mainland before opening his own business, Niessen Plumbing and Heating.

[13] While the plaintiff had concentrated on plumbing in the early part of his career, he soon learned that he could make more money and work in more favourable working environments by servicing heating units. The plaintiff had a natural curiosity as to how things work which made him ideal for these trades.

[14] He augmented his skills as a heating technician by “hitting the books”, to use his expression, acquiring product manuals, volunteering to assist on heating service calls, and learning lessons from old-timers in the business. He reported that it took him five to seven years before he was comfortable doing his own heating calls.

[15] The plaintiff started Niessen Plumbing and Heating in 1996. Over time, he began to focus more on heating, with an 80-20 split between heating and plumbing. The plaintiff worked hard, and his business grew steadily. He developed expertise in basement boilers because the work required added skills. He received an endorsement from a well-respected boiler-maker which assisted his reputation because most plumbers lacked the skill to service such boilers. He found initially that he actually made more money working as an employee, but his business allowed him to write off certain expenses which were partially personal expenses as well.

[16] Niessen Plumbing and Heating grew, and five years into operating his own business, the plaintiff was making gross revenues of $100,000 to $150,000. His business experienced a downturn in the aftermath of the economic downturn in 2008. However, after that time, in the years immediately preceding the accident in 2013, the plaintiff grossed revenues substantially exceeding $100,000.

[17] In 2003/2004, the plaintiff acquired a rental house in Vancouver through savings he had accumulated in his plumbing and heating business. The home was in derelict condition when he acquired it for $315,000. When his heating business was slow in the summer months, the plaintiff renovated it himself over the course of 10 years. Eventually, he added another rental suite, and still later a coach house, for a total of three rental suites in the home. He refinanced

the home over the years to fund the renovations. At the time of trial, the plaintiff testified the mortgage was $550,000, the assessed value of the property was $1.25 million, and the property was selling for $1.5 million in accordance with a recent market valuation.

[18] The plaintiff turned 45 years of age in 2010. By that time, his plumbing business was taking in gross revenue of $100,000 to $150,000 per year; and his rental property brought in another $5000 per month additional income.

[19] Niessen Plumbing and Heating's peak year for income was 2013, the year of the accident, in which his gross income was approximately $163,000. That year the plaintiff landed a large account with Van Dyke properties, a holding company with 11 apartment buildings. The plaintiff lost the account in July or August prior to his accident for unexplained reasons, though he testified he thought he could have gotten the account back.

[20] After his accident, the plaintiff found it difficult to keep up with the demands of the rentals. In May of 2016, he hired a property management company.

[21] The plaintiff described himself as more social prior to the accident. During this time, he engaged in occasional outdoor activities including camping, fishing, hunting and traveling. Hunting was an annual trip, while camping and fishing with friends were more frequent endeavours.

Pre-Accident Health Status

[22] I accept that prior to the collision, the plaintiff had no significant or enduring health problems of a significant physical or psychological nature.

[23] The plaintiff described himself as having an "imperfect pair of lungs" but testified that he was healthy overall. He did not have a family general practitioner and had not seen a doctor in many years.

[24] The plaintiff did report that he sometimes drank to excess prior to the accident. However, it is apparent based upon the evidence of people who knew him or worked with him that this did not interfere with the plaintiff's behaviour, mood, and work-related abilities.

[25] The plaintiff had occasional back pain after work prior to the accident. He described it as "nothing major", and I have no evidence that it interfered with his work or enjoyment of life.

[26] The plaintiff reported to Dr. Miller, a psychiatrist, and to the Court that he sometimes had lower moods in the winter season, particularly in periods of lower daylight in December and January, and that this condition worsened after the accident. However, he had not previously been treated for this condition, or any kind of depression, and had not previously seen a doctor for the condition or received a prescription for anti-depressant medication.

[27] There was a suggestion of dyslexia prior to the accident, but Dr. Miller discounted its significance and Mr. Abrahamson saw no indication of it impacting the plaintiff's functioning during the course they took together. Clearly it did not interfere with the plaintiff's ability to pass his BCIT courses for his plumbing apprenticeship.

[28] Similarly, other traumatic experiences the plaintiff had before his 2013 car accident (a car accident at age 16, another in his early 20s, seeing a dead body on two occasions, and a physical fight) do not appear to have resulted in any lasting difficulties which impacted the plaintiff's functioning. The accident at age 16 reportedly involved the plaintiff being thrown from a vehicle and ensuing neck and back injuries. However, there is no evidence that he was diagnosed with any head or brain injuries, and no indication that any such injuries were ongoing at the time of the 2013 accident.

[29] As for the tinnitus or ear-ringing that plagued the plaintiff after the accident, the plaintiff reported experiencing it one time prior to the accident when taking a course in which he discharged a shotgun numerous times. He reported that his ears rang for two or three days, but the condition dissipated after that and did not return. Dr. Prout, a neurologist, reported that the previous noise-induced hearing loss made the plaintiff more susceptible to developing tinnitus. I am satisfied that this condition was merely transitory, immediately associated with the firearms

course, and that it indicated at most that the plaintiff had a vulnerability to developing the condition again in the future.

[30] Prior to the accident, the plaintiff would get the occasional headache from time to time, but he was not prone to them. He had no cognitive problems and in fact seemed to function at a high level in his trade.

[31] Overall, I accept that prior to the accident, the plaintiff was reasonably healthy and without significant health issues. The pre-accident conditions he did have were not so significant that they adversely impacted his earning capacity or his enjoyment of life.

The October 20, 2013 Car Accident

[32] The plaintiff's accident occurred on Sunday, October 20, 2013, at approximately 4:00 p.m. as he travelled on Highway 97 south of Quesnel. He had gone hunting over the weekend with two friends, shot a moose, and was in the process of returning. The plaintiff was driving his Ford pick-up truck and towing a twenty foot "toy hauler" enclosed trailer as he proceeded at approximately 100 km/hr southbound on the undivided highway. His two friends were in a vehicle ahead of him. The defendants do not dispute that the plaintiff was properly belted in the driver's seat.

[33] In the oncoming lane, a truck owned by Salmon Arm Crushing (now Emcon Services Inc.) and operated by the defendant Scott South, crossed over into the plaintiff's lane coming straight at the plaintiff. The plaintiff saw the defendants' vehicle coming directly for him at high speed. He moved his truck over but not enough to avoid a collision.

[34] While the defendants' truck missed the plaintiff's vehicle, the defendants' truck impacted the plaintiff's trailer. The plaintiff described the impact as "the hardest blow you've ever come across" with a "shock that was unreal". Indeed, I accept that the collision (occurring at an effective closing velocity on the order of 200 km/hr) was an extremely forceful one.

[35] The photos taken of the plaintiff's vehicle immediately after the accident show that the defendants' truck impacted the driver's side of the plaintiff's trailer including the rear tire and axel which was damaged in the collision. The trailer remained attached to the plaintiff's truck after the collision. Hence, the evidence indicates that much of the force of the impact would have been transferred to the plaintiff's truck and indirectly to the plaintiff himself.

[36] The plaintiff does not recall if his head hit anything during the impact but speculates it may have. He recalls having looked in the mirror, and thought the front part of his head was close to the window, but he is unclear on the precise nature of any trauma to his head resulting from the collision. Regardless, I accept that the force of the collision with the plaintiff's trailer would have resulted in substantial force being applied to the plaintiff's body, including his head and neck, even if the application of the force was indirect and without intrusion of the defendants' vehicle into the plaintiff's truck itself.

[37] The plaintiff's trailer was destroyed in the collision. The contents of the trailer were spread over the road. The plaintiff exited, helped a woman and her child who had apparently been following the plaintiff in their own vehicle. Their car had gone into a ditch at the side of the road. The plaintiff looked a distance further down the road and saw what he discovered to be the defendants' vehicle. He soon located the defendant, Mr. South, wandering aimlessly in a nearby field. Mr. South made a comment about working too many hours and falling asleep.

[38] Police, fire, and ambulance attended the scene. While Mr. South was taken to the hospital, the plaintiff was not. He reported being stunned but not bleeding or feeling pain while at the scene.

[39] As noted, liability is not in issue.

Aftermath of the Collision and Initial Course of Treatment

[40] Paramedics checked over the plaintiff at the scene. He reported being stunned but otherwise feeling alright and without immediate physical pain. The plaintiff was able to attend to

his belongings in the trailer, arrange with the help of the RCMP for a local meat shop to deal with his moose, and rent a truck to drive back to Vancouver.

[41] He stayed overnight at a motel with his two friends. However, he did not sleep at all. He eventually gave up trying to sleep, and at 8:00 a.m. the next morning called ICBC and reported the accident when the call line opened. The evening following the collision, the plaintiff was still stunned and began to experience ringing in his ears.

[42] Within days, he went to a walk-in clinic in Vancouver still feeling “stunned”. He reported headaches, lower back pain, and ringing in the ears. He was prescribed a sleep aid and a muscle relaxant. He did not immediately return to his gas fitter course at BCIT, electing instead to attend online from home.

[43] On October 29, 2013, the plaintiff saw his general practitioner, Dr. Gurdeep Parhar. The plaintiff complained of constant pain on the left side of his neck and occasional lower back pain. He reported using Tylenol and a muscle relaxant to alleviate pain. He also complained of frequent headaches, blurred vision, a depressed mood, sadness, decreased or excessive sleep and difficulty falling asleep, anxiety about driving, difficulty concentrating and short-term memory problems, and ringing in his ears (tinnitus).

[44] The plaintiff took a week off work and school after the collision. He reported having difficulty sitting and studying, as well as difficulty with problem-solving abilities. He also indicated that his self-image and self-esteem had been negatively affected, and that he had become less social, preferring instead to just stay at home rather than participate in activities with friends.

[45] Upon examination, Dr. Parhar observed that the plaintiff had tenderness to palpation on the right, left, and midline regions of his cervical spine. This was consistent with damage to the underlying tissue. The plaintiff had reduced range of motion in his neck. The range of motion in his lumbar spine was normal in forward and side motion but decreased in extension with associated pain and tightness.

[46] Dr. Parhar recommended treatment with ice, heat, rest, exercises, massage therapy, and physiotherapy. He prescribed Tramacet and advised the plaintiff to stay off work for six weeks. Dr. Parhar testified that Tramacet is a “fairly strong” opiate analgesic and he would not have prescribed it unless he thought the pain was moderate to severe. He noted that despite maintaining a busy clinical practice dealing with workplace injuries he has only prescribed it once in the last year.

[47] On November 17, 2013, the plaintiff saw Dr. Parhar for a second visit. The plaintiff explained he was feeling worse, and in fact “terrible”. His most severe symptoms included headaches, ringing in the ears, intermittent blurred vision, and mood swings. He reported experiencing “angry spells”. He was also experiencing fatigue, decreased energy, depressed mood, sadness, decreased appetite, and difficulty falling asleep, remaining asleep, or sleeping too much. He continued to suffer anxiety over driving, nervousness around vehicles, and recurring visions of the motor vehicle accident.

[48] The plaintiff also had difficulty with concentration, both short and long-term memory, and reported that his performance in his gas fitter course had been significantly and adversely affected due to these problems. The plaintiff said his ears had been constantly ringing for four weeks.

[49] At work, the plaintiff started to make mistakes and lose clients.

[50] Dr. Parhar testified that these symptoms represented significant and profound dysfunction in the plaintiff’s life. At this visit, he recalled clearly observing the plaintiff to be in obvious distress.

[51] Upon examination at the second visit, Dr. Parhar observed tenderness to palpation in the right, left and midline regions of the cervical spine, thoracic spine, and lumbar spine. He noted that the plaintiff continued to suffer from some decreased range of motion in his spine. He prescribed similar treatment, including Tramacet, and again advised the plaintiff to remain off work for six weeks.

[52] On December 15, 2013, the plaintiff again saw Dr. Parhar at a third visit. The plaintiff's condition had levelled off since his November 17th visit but had not improved.

[53] The plaintiff reported his neck pain feeling better. He said he suffered from constant frontal headaches, blurred vision, fatigue, and decreased energy.

[54] He was also experiencing depressed mood, sadness, mood swings, decreased appetite, decreased concentration, decreased energy, and decreased sleep with sleep problems continuing. He felt frustrated. He reported problems with concentration and intermediate, short, and long-term memory.

[55] The plaintiff reported to Dr. Parhar that he was continuing to work despite his symptoms and that his symptoms had been aggravated at work.

[56] The plaintiff indicated his injuries had affected his personal life; for example, walking his dogs or doing household chores and yard work. He also reported having gained 20 pounds since the motor vehicle accident. He continued to indicate his self-image and self-esteem were negatively affected. He had become reclusive.

[57] Dr. Parhar again noted tenderness to palpation on certain areas of the cervical spine. Range of motion of the cervical spine was normal.

[58] Dr. Parhar prescribed ice, heat, rest and exercise. Again, he advised the plaintiff to stay off work for six weeks.

Post-Accident Income-Earning Abilities, Presentation, and Behaviour

[59] The plaintiff gave evidence as to the changes in his mood, personality, and behaviour as a result of the accident. Although I generally accept his evidence, I would set this evidence aside for the moment, as I regard it as potentially self-serving and prefer to first examine the observations of other witnesses.

[60] Several witnesses provided observations of the plaintiff prior to and after the accident.

[61] Mr. James McGlynn, a man with 50 years of experience in the plumbing and heating business before his retirement in October of 2017, testified. He started his own business, Across Town Plumbing, approximately 25 years ago. Mr. McGlynn testified in a knowledgeable, straight-forward manner with no hesitation. I have no reason to doubt his evidence and I accept his testimony in its entirety.

[62] Mr. McGlynn testified that he met the plaintiff 10 years ago and that his pre-accident performance was “great”. He hired him regularly to do work including wiring up boilers, and described the plaintiff’s work as “top”, “first class”, and “close to perfect” compared to other contractors. The plaintiff was knowledgeable and “an excellent heating guy”.

[63] He described the plaintiff before his accident as upbeat and outgoing, and without any physical ailments. In particular, the plaintiff was very knowledgeable in the heating aspect of the business.

[64] After the accident, he found the plaintiff to be forgetful and less confident. He said these changes gradually got worse and worse. The plaintiff also put on weight. His mood changed, and he became depressed. The plaintiff talked about ringing in his ears, something he did not do before the accident. After the accident, the plaintiff would sometimes make mistakes when he worked for Mr. McGlynn. Mr. McGlynn found this surprising.

[65] Mr. Robert Wilson similarly testified that he was also an experienced plumbing and heating specialist who also recently retired after working in the industry for 50 years. He had his own plumbing, heating, and fireplace business from 1985 through 1992, when he sold it to his partner, but continued to work in the industry after that.

[66] Mr. Wilson came to know the plaintiff in approximately 1993 or 1994. He described the plaintiff as “the one to go to” if you had a problem. In the 2000s, he did different jobs with the plaintiff, which were mostly boiler installations a couple of times a year.

[67] Eventually, the two became good friends and worked together on and off until approximately one year ago.

[68] Mr. Wilson described the plaintiff's pre-accident personality as very nice, outgoing, and positive. He said that before his accident, the plaintiff was a workaholic and very knowledgeable. The plaintiff would go "above and beyond" for his customers. "I'd hire him in a minute," he said.

[69] Mr. Wilson "never had a problem" with the plaintiff's mental functioning prior to the accident. He saw the plaintiff run a "whole storefront" on at least one occasion, which I gather was a reference to his time at Hillcrest. He said the plaintiff had to be knowledgeable to do that. Before the accident, he was also aware of the plaintiff's desire and plans to acquire and run his own plumbing or heating company.

[70] After the accident in October of 2013, Mr. Wilson said the plaintiff lost confidence, and his memory became "really bad". He said the plaintiff became a "totally, totally different person". He complained of ear-ringing on a daily basis.

[71] Mr. Wilson gave some examples of different jobs the plaintiff performed after his car accident in which the plaintiff made mistakes. This surprised Mr. Wilson because such things would not have occurred before the accident.

[72] He also described the plaintiff's post-accident personality as very depressed and lacking self-confidence, unlike his pre-accident behaviour. He said after the accident, the plaintiff might be able to work, but could never run a business as could the plaintiff before his accident.

[73] Mr. Wilson said that someone with the plaintiff's pre-accident qualifications and abilities in plumbing would be sought after for hiring purposes, and could earn approximately $40 per hour. A gas fitter with an "A" ticket could earn even more, perhaps substantially more. Mr. Wilson said that the plaintiff was "one of the best plumbers" he knew. As far as heating, he was

“one of the best”. However, after the accident, the plaintiff went from bad to worse, would frequently get depressed, and often remained at home for days.

[74] John Abrahamsen is a plumber and heating technician with 32 years’ experience in the industry. He met the plaintiff in 1995 at a wholesaler and ended up working with the plaintiff at Hillcrest. In fact, it was the plaintiff who helped Mr. Abrahamsen secure employment there. The plaintiff soon moved on to work for another company, but they continued to see and talk to each other outside of work. Mr. Abrahamsen later took the Class A gas fitter course at BCIT with the plaintiff in 2013-2014.

[75] Mr. Abrahamsen described the physical aspects of the job as being demanding. Heating and plumbing servicing requires one to often work in awkward situations, materials are often heavy or old, and one has to pay attention because working with electricity and gas can be dangerous.

[76] Mr. Abrahamsen described the pre-accident plaintiff as an “excellent worker” and a “hard worker”. He had a good grasp of the trade, knew a lot of stuff for a guy his age, and was knowledgeable in all aspects of the heating and plumbing trades. He said the plaintiff was a “go-to guy” for him, and for others. When Mr. Abrahamsen came across heating or plumbing problems he couldn’t figure out, typically the plaintiff would have the answer. He described the quality of the plaintiff’s work as “top drawer” and “second to none”. He did not observe any problems with the plaintiff’s health prior to the accident.

[77] Mr. Abrahamsen described the plaintiff’s pre-accident personality as approachable, helpful, attentive and caring. He went on fishing and camping trips with the plaintiff prior to the accident, but not afterward.

[78] After his accident, Mr. Abrahamsen testified that the plaintiff complained of headaches and ringing in his ears. He seemed to be overwhelmed by the symptoms. He found the plaintiff forgetful, prone to getting flustered, and often depressed. He also started to gain weight, appear older, and look more haggard.

[79] When Mr. Abrahamsen visited the plaintiff's home after the accident, he noticed that his boats or trailers in the yard were out in the elements and not properly canopied. He observed the plaintiff after the accident put no effort into the upkeep of his belongings. He found this to be out of the norm for the plaintiff.

[80] Mr. Abrahamsen said the plaintiff used to be a guy with an orbit of people around him associated with the trade. After his accident, the plaintiff was not like that any more.

[81] Dr. Donald Meen is a retired clinical psychologist who knew the plaintiff personally. Approximately 22 years ago, Dr. Meen purchased a house with a water heating system which stopped functioning properly in 2003. He retained the plaintiff to install a new system, and also had the plaintiff maintain the system annually or biannually over the years. He came to know the plaintiff as a customer.

[82] Dr. Meen found the plaintiff before the accident to be very energetic and knowledgeable. Dr. Meen described the plaintiff as loquacious, sometimes to the extreme. The plaintiff loved talking about heating systems and what he was doing. Overall, he said he was an "up-beat, enthusiastic fellow". Despite installing a complex heating system, the plaintiff appeared to know what he was doing and his work was of a high quality. In his discussions with the plaintiff, Dr. Meen found him keen to grow his business and interested in systems.

[83] Dr. Meen observed "quite a change" in the plaintiff after the accident. The plaintiff was no longer as energetic or effervescent. Instead, he found the plaintiff to be depressed and distressed. The plaintiff reported being in a great deal of pain and suffering from tinnitus. The plaintiff also complained of memory problems. On one occasion after the accident, the plaintiff completely forgot an appointment. He had never done that before.

[84] While prior to the accident, the plaintiff was seen by Dr. Meen as a gregarious, talkative, and up-beat guy very interested in the technical aspects of the work, these qualities evaporated after the accident. He lost excitement, presented as downcast and withdrawn. He found these changes "quite significant".

[85] To this list of observers, I add the evidence of the plaintiff's accountant, Reudiger Seyen. Mr. Seyen was asked one question about the differences he saw in the plaintiff before and after the accident, and replied that he was "not as active" afterward. He did not elaborate; nor was he asked to. I would give Mr. Seyen's evidence on this point only marginal weight.

[86] The plaintiff gave evidence about his injuries resulting from the October 20, 2013 accident, as well as the changes in his personality and behaviour. This evidence was largely consistent with that of the other witnesses. The plaintiff did not appear to be exaggerating his symptoms. In fact, the plaintiff was honest to a fault and readily admitted facts such as his increased alcohol consumption and experimentation with non-prescription drugs that could potentially hurt his case.

[87] As much of the plaintiff's symptomology is covered in the review of other lay and expert witnesses, I will not repeat it here. Generally, in the first few months after the accident the plaintiff reported difficulties with headaches, tinnitus, mood, weight gain, his social life, his self-image, mood, and depression.

[88] In the early part of 2014, he continued to struggle with his BCIT gas fitter course because of headaches and cognition difficulties. His tinnitus and depression continued. He reported trying two anti-depressant medications, and possibly a third, though he had the same bad reaction to all of them.

[89] Although he continued to work, he was no longer able to be proactive because of his symptoms and his ability to work suffered. His depression and "bad feelings" increased, and he became more socially withdrawn. He reported seeing Dr. Nunez with respect to his tinnitus, but Dr. Nunez was not able to give the plaintiff any suggestions for meaningful treatment.

[90] By 2015, the plaintiff indicated he found Dr. Parhar too busy to provide effective treatment. He started seeing another general practitioner, Dr. Steinson. The plaintiff testified that he asked Dr. Steinson for some type of opiate painkiller but was told that it was a "hassle to prescribe", and was offered medical marihuana which he declined.

[91] By 2016, the plaintiff reported that his company revenues were down. He did not continue to take the proactive steps in his business that he took before the collision (though he did not continue to advertise and sometimes entertain clients). He found his work more challenging due to problems with his short-term memory and forgetfulness, and explained that he had to double check everything. He testified that before the collision people found him to be a useful resource, but after the collision he did not have the same sharpness and thought process as he previously had. He found the frequency of others in the industry reaching out to him markedly decreased.

[92] The plaintiff testified that his headaches and tinnitus remained steady though there were windows in July and August when his headaches would improve. The plaintiff indicated that if his stress goes up, his headaches can worsen.

[93] By 2017, the plaintiff testified that he was still working but that his company was making a modest income. At this time, the plaintiff had no real social life and had lost most of his friends. By the winter of 2017, his headaches had increased, his tinnitus was steady, and he had back pain from gaining weight since the collision. The plaintiff testified that his low mood and depression remained, but he was dealing with it as best as he could.

[94] Much of the plaintiff's evidence as to his injuries and symptoms, and their impact upon him, went unchallenged; and as noted, his evidence was in any event largely consistent with the reports from other witnesses.

Gas Fitter Course

[95] Gas and heating repair in British Columbia is a regulated trade where gas fitters require appropriate certification to do certain heating work. The plaintiff, already a 20 year plumber and gas fitter by the time of the accident, had attained a Class "B" gas fitter license as part of his initial tradesman qualification.

[96] Prior to the accident, the plaintiff planned to acquire his Class "A" gas fitter designation. This higher certificate of qualification would have meant that he could service any commercial or

residential gas system, including boiler systems in large buildings. Class A technicians are highly valued in the heating industry because of their advanced skills, and the fact that they can work on the heating systems in commercial buildings, which is more lucrative work.

[97] Mr. McGlynn, with whom the plaintiff worked sometimes, often had to contract Class A work out to other contractors. The plaintiff thought the designation would lead to more revenue for him and make him even more valued in the industry. The other plumbing and heating technicians who testified confirmed this.

[98] The course of study leading to a Class A licence involved a difficult six month course at BCIT, a two-part classroom exam at the end of the course, and finally a government exam. Parts of the course could be completed online.

[99] For the plaintiff's hunting trip around the time of the accident, the plaintiff was missing a week of his course. However, he received permission from his instructor and knew he could make up his coursework.

[100] The plaintiff took the class with Mr. Abrahamsen. It began in September 2013 before the plaintiff's accident on October 20, 2013, and extended through March 2014.

[101] Mr. Abrahamsen often sat beside the plaintiff in the course. He testified and I accept that the plaintiff was doing well with the course before the accident. Mr. Abrahamsen stated, "he was managing the material for sure". Asked about whether the plaintiff needed extra attention in the course before the accident, Mr. Abrahamsen stated "absolutely not".

[102] However, after his car accident, the plaintiff struggled in the course. The plaintiff had to continually ask the teacher for help. He often couldn't remember details and would get flustered. Mr. Abrahamsen found this surprising because before the accident the plaintiff did not need extra help and was definitely managing the material. As to the time away for the hunting trip, Mr. Abrahamsen said this was manageable. However, after the accident the plaintiff did not return

right away. When he did, he struggled and reported incessant ringing in his head and headaches.

[103] The plaintiff earned a 68% exam on the classroom exam. He needed a 70% mark to pass. The plaintiff retook the exam but again failed to pass. Hence, the plaintiff did not go on to complete the course, or the government exam which followed, and did not earn his Class A ticket.

[104] Mr. Abrahamsen did pass the course. He testified that his wages went from $28 to $37 per hour as an employee. He feels he is more respected with his Class A designation and gets substantially better work.

[105] I accept that the plaintiff performed well in his course up to the time of his accident. Although he had dropped out of high school, he had matured in life, had developed experience in the industry and an aptitude for learning the more demanding aspects of the higher heating technician qualification. In addition, Mr. Abrahamsen testified that prior to the accident, the plaintiff was doing well in the course.

[106] After the accident, and while still in the course, the plaintiff reported to Dr. Parhar he was having difficulty because of his symptoms. As a result of the accident, the plaintiff experienced symptoms including blurred vision, headaches, ear ringing, decreased ability to concentrate, fatigue, decreased energy, and memory problems. I accept that these side-effects were suffered as a result of the plaintiff's motor vehicle accident and that they substantially and negatively impacted his ability to do the coursework, study, and pass his exams.

[107] The plaintiff failed the advanced gas fitter course by the slimmest of margins, a mere 2%. But for his accident, he had the drive, ability, time, and determination to successfully complete the course. I find as a fact, that had the accident not occurred, the plaintiff would have passed the course and gone on to earn his Class A gas fitter certification.

[108] Acquiring his Class A gas fitter license would have allowed the plaintiff to do any commercial heating work and would have made him even more sought-after.

[109] This would have led him to better and more lucrative work and opportunities in the heating industry, including, likely, more sizeable commercial contracts and a higher income.

The Negotiation to Buy Across Town Plumbing

[110] Before the accident, Mr. McGlynn and the plaintiff had discussed the sale of Mr. McGlynn's business, Across Town Plumbing, to the plaintiff. Mr. McGlynn thought so highly of the plaintiff that he would have preferred to sell the business to the plaintiff over his own son.

[111] The business had seven to eight employees. Mr. McGlynn was approaching retirement and the demanding physical nature of the business was taking a toll on him.

[112] Mr. McGlynn had multiple discussions with the plaintiff prior to the accident about the plaintiff buying the business. He said the plaintiff became more and more interested. He wanted to sell the business because he wanted it to continue to thrive, and he knew the plaintiff as honest, fair, and genuine, and someone who had his own repeat customers. His intention to sell the business, and the plaintiff's intention to buy it, was fixed but there was no end-date on the plan because Mr. McGlynn was not sure when he would be retiring. He had no hesitations about the plaintiff's ability to take over the business.

[113] The purchase price was to be roughly between $200,000 and 300,000. A sale in this range was preferable for Mr. McGlynn than the option of having his son take over because the sale to the plaintiff would have facilitated his retirement.

[114] The plaintiff testified similarly about his discussions to buy Across Town Plumbing. He said that after the accident and up until 2016, he and Mr. McGlynn had been in a "holding pattern". After the plaintiff was injured, Mr. McGlynn delayed things and told him he remained hopeful that he would get better and then they could proceed with the transaction. However, Mr. McGlynn was coming up on age 68, and it was time to finalize a deal.

[115] The plaintiff finally had to tell Mr. McGlynn that he couldn't proceed with the deal. It was a huge disappointment for both of them, and the two had a bit of a falling out after this. The plaintiff testified and I accept that but for the collision, he would have gone ahead with the purchase "in a heartbeat".

[116] The plaintiff testified he had sufficient savings to afford a purchase in this range. I note that it has been established that the plaintiff had accumulated substantial equity in his rental property. While the defendants strongly challenged whether the plaintiff could have afforded to purchase the business, I accept that the plaintiff was in a financial position to buy it.

[117] The plaintiff also discussed with others his intention to buy Mr. McGlynn's business. Prior to the accident, Mr. Abrahamsen knew the plaintiff was looking at purchasing Across Town Plumbing. Mr. Wilson, a fellow plumbing and heating technician, indicated that prior to his accident the plaintiff talked about career plans to acquire and run a plumbing and heating company.

[118] These statements of present intention, which were made in innocuous circumstances not under circumstances of suspicion, fall under a traditional exception to the hearsay rule and serve to demonstrate the plaintiff's statements about his plan to purchase the business: *R. v. Lowe*, 2009 BCCA 338 at para. 74; *R. v. Starr*, 2000 SCC 40 at paras. 168-174.

[119] Mr. McGlynn testified that after the accident, he lost confidence in the plaintiff's ability to run his business.

[120] Six months to a year after the accident, it became clear to Mr. McGlynn that the plaintiff was undergoing noticeable changes in his work-related behaviour and personality. These changes significantly eroded the plaintiff's ability to do his plumbing and heating work. The plaintiff became less confident and became forgetful. He started making mistakes. He also started switching his phone off, which was highly detrimental to his ability to attract customers. In addition, after the accident the plaintiff became depressed. He started talking about a sound

in his ear, something he had not mentioned before the accident. Overall, his ability to complete work became markedly worse.

[121] Mr. McGlynn described gross wages for an employee in the heating and plumbing business as perhaps $50-$60/per hour and $100,000 per year. If someone ran their own business, they would usually make more money.

[122] In his own business, Mr. McGlynn's business generated over $1 million dollars a year in gross revenue. He "took home" $100,000 or more a year doing commercial and some residential work. He could have easily taken home $150,000 to $200,000 per year, but he and his wife decided to leave some of the money in the business. He described his business as very financially viable.

[123] The estimate of a higher income for an owner of a plumbing and heating business is consistent with the evidence of Mr. Wilson, who estimated that he could gross as much as $50,000 per month and net up to $30,000 per month in salary. Mr. Wilson also indicated that a Class A gas fitter ticket would positively impact the amount of money one could earn.

[124] Mr. McGlynn showed a clear preference to selling the business to the plaintiff for a lump sum because he was confident in the plaintiff's skills, and this would have allowed him a nest egg with which to enter retirement. However, by October of 2017, it was clear that to Mr. McGlynn that the plaintiff simply could not follow through with the plan. Mr. McGlynn's son ended up taking over the business without paying any consideration to Mr. McGlynn.

[125] On the whole of the evidence, I find a real and substantial possibility that the plaintiff would have purchased Mr. McGlynn's business had the accident not occurred. In fact, I view it as likely occurrence but for the plaintiff's accident. Mr. McGlynn's testimony demonstrated that he was clearly counting on the plaintiff purchasing his business to fund his retirement and would not have done so unless he thought the plaintiff was serious and capable of taking on the challenge. While he was sympathetic to the plaintiff's having been injured to a certain extent, he struggled with significant regret that the plan never came to fruition.

[126] The purchase of the business would have allowed the plaintiff to earn a higher take-home income. Together with his Class A gas fitter qualification, which I also have found the plaintiff would have attained, and the plaintiff's pre-accident hard-working proclivity, I am satisfied that the plaintiff's income would have increased markedly but for his motor vehicle accident.

EXPERT OPINIONS

[127] The Court received evidence from two experts who treated the plaintiff: Dr. Parhar and Dr. Thinda. In addition, several experts assessed the plaintiff for the purposes of trial and gave evidence as to their diagnosis and prognosis of the plaintiff's injuries, and potential treatment options. Dr. Steinson, another GP who treated the plaintiff in 2015-2016, did not testify at trial.

Dr. Parhar, General Practitioner and Occupational Medicine Specialist

[128] The plaintiff continued to see Dr. Parhar in 2014, 2015, and in 2017. I would add at this point that Dr. Parhar is a physician with 25 years of practice and has very substantial experience in occupational medicine. He was a careful, thoughtful witness, and I readily accept his evidence.

[129] At a January 19, 2014 follow-up appointment (three months after the accident), Dr. Parhar found that the plaintiff's condition had worsened. His lower back pain had flared up, and his most sever symptoms were headaches and ear ringing. The plaintiff reported having "bad thoughts", meaning that he had thoughts of hurting himself or someone else.

[130] Dr. Parhar supported the plaintiff continuing to work full time, though only as much as he could. Dr. Parhar became worried about suicide.

[131] On a February 16, 2014 visit, the plaintiff had a similar but slightly worsened presentation with continuing headaches and ear-ringing. In terms of work, Dr. Parhar noted that the plaintiff became more reactive and passive – going to calls when called by a customer but not actively seeking out work or trying to widen his customer base.

[132] At a March 2014 appointment, Dr. Parhar described the plaintiff as being in severe distress. He referred the plaintiff to a psychologist, Dr. Thinda.

[133] Dr. Parhar continued to see the plaintiff periodically throughout 2014 and on two occasions in 2015, not at all in 2016, and once most recently in October of 2017. The plaintiff's memory, thinking, and hearing problems continued. Dr. Parhar reported that the plaintiff remained in distress, and his plumbing and heating business suffered as well as his ability to manage his rental property.

[134] In February 2015, Dr. Parhar referred the plaintiff to Dr. Nunez (an ear, nose and throat specialist at a Vancouver tinnitus clinic) as the plaintiff's ear ringing remained "quite profound". Dr. Parhar said that there is not much that can be done by way of treatment for the condition; hence, for him to make the referral meant that the plaintiff's symptoms were quite bad. He made the referral to see if there was something else by way of a treatment option that he was missing.

[135] I do not have a report from Dr. Nunez; however, Dr. Parhar reported being advised of Dr. Nunez's 2016 diagnoses of noise-induced hearing loss and post-traumatic tinnitus. Dr. Nunez did not prescribe any course of treatment. He was reportedly of the view that the plaintiff's tinnitus condition was not amenable to treatment.

[136] At the plaintiff's June 2, 2015 visit, Dr. Parhar found that the plaintiff had gained 50 pounds since the accident.

[137] Dr. Parhar had also referred the plaintiff to Dr. Horton, a neurologist, for possible treatment of the plaintiff's headaches. Dr. Horton did not testify before me; however, Dr. Parhar testified that Dr. Horton prescribed amitriptyline for headache prevention and that Dr. Horton gave the plaintiff information about non-pharmacological management strategies for headaches.

[138] After the June 2, 2015 visit, the plaintiff did not follow-up with Dr. Parhar until October 2017. At that point, Dr. Parhar found that the plaintiff was presenting similarly to his previous condition. He was complaining of back pain but no longer complaining of neck pain. Upon

examination, Dr. Parhar found the plaintiff's range of motion of the lumbar spine to be normal in all directions.

[139] At this 2017 appointment, Dr. Parhar also found that the plaintiff's headaches were continuing with constant frontal headaches. He indicated having blurred vision and decreased energy, depressed mood, sadness, mood swings, increased appetite, decreased concentration, and both decreased sleep and sleeping too much. He was nervous to drive a car and still had nightmares and recurring visions of motor vehicle collisions. The plaintiff also complained of ringing in his ears and problems with concentration as well as immediate and short-term memory.

[140] The plaintiff reported that he had taken medications as prescribed and had attended chiropractic treatments. He was still self-employed as a plumber but had lost motivation for work. The plaintiff had also lost friends and become anti-social. His self-image and sexual function had been negatively impacted.

[141] Dr. Parhar made the following diagnoses that in his view best described the conditions resulting from the motor vehicle collision on October 20, 2013:

1. Musculoligamentous injuries of the cervical spine;
2. Musculoligamentous injuries of the lumbar spine;
3. Muscle tension headaches and vascular (migraine) headaches;
4. Post traumatic tinnitus (ringing in the ear sensation);
5. Depressed mood;
6. Anxiety;
7. Post-Traumatic Stress Disorder (PTSD) symptoms; and
8. Sleep disturbance.

[142] In terms of prognosis, Dr. Parhar concluded that

· the musculoligamentous injuries of the cervical spine had improved and should be less problematic in the future;
· the musculoligamentous injuries of the lumbar spine and the muscle tension headaches are more likely than not permanent;

· the plaintiff's depressed mood, anxiety, and PTSD symptoms had become chronic and would likely continue for the foreseeable future. He indicated antidepressant/anti-anxiety medication or counseling were possible treatments that could lead to improvement; and
· the plaintiff has had consultations and extensive investigation of his post-traumatic tinnitus and that the condition was more likely than not permanent.

[143] Dr. Parhar was of the opinion that the plaintiff's injuries left him vulnerable and susceptible to future trauma in the same anatomical areas as well as future psychological trauma. His personal life, family life, and social life had been detrimentally affected directly as a result of the injuries sustained in the motor vehicle collision.

[144] In cross-examination, in relation to the suggestion that various medications that could be tried on the plaintiff, Dr. Parhar indicated that one had to remember that each of them had fairly significant side effects, and that the plaintiff already had problems with diarrhea as a side effect. He indicated he would be cautious in prescribing additional medications.

[145] Dr. Parhar disagreed with the suggestion that it was premature to conclude that no progress could be made with respect to the plaintiff's psychological ailments. For psychological issues, if they were not improved after 18 months, a person may not get better. In the plaintiff's case, it was four years later and he had now "plateaued". Dr. Parhar was open to the idea that additional medication and counseling could help, but only in the sense of keeping the plaintiff at his current level. He did not think the plaintiff would be suddenly cured. He also thought that one of the issues with anti-depressants was that patients often do not want to be on them or stay on them due to side-effects.

[146] In response to the suggestion that the plaintiff should be referred to a psychiatrist, Dr. Parhar testified that the majority of depression, anxiety, and PTSD is treated by general practitioners.

[147] Aside from the issue of lower-back pain, which some of the other experts indicated had resolved by the time of trial, I accept Dr. Parhar's diagnoses. Given his experience with work-related injuries, I would ascribe significant weight to Dr. Parhar's opinions as to the plaintiff's prognosis.

[148] After the plaintiff saw Dr. Parhar, he saw Dr. Steinson (another GP) for a second opinion sometime in 2015. He continued thereafter to periodically see Dr. Steinson and saw Dr. Parhar for the final visit on October 28, 2017.

Dr. Thinda, Psychologist

[149] Dr. Sundeep Thinda is a clinical psychologist with experience in rehabilitation work who practices cognitive behavioural therapy. He treated the plaintiff beginning on March 22, 2014. After that, the plaintiff received cognitive behavioural therapy from Dr. Thinda in several sessions in April through July of 2014.

[150] Dr. Thinda discussed the plaintiff's headaches and cognitive symptoms with him, as well as his depressed mood and neck muscle pain, blurry vision, tinnitus, difficulty focusing and memory issues. The issues they dealt with were primarily cognition, low interest, and lack of motivation.

[151] During his sessions the plaintiff volunteered that his alcohol consumption had increased to a few times per week and that he was occasionally binge drinking. Dr. Thinda advised the plaintiff that alcohol use was poor stress management, and in later sessions noted that the plaintiff appeared to have taken his advice.

[152] Dr. Thinda noted that the treatment options for cognitive symptoms were few, though mood and anxiety issues were much more prone to treatment. He reminded the plaintiff that treatment sessions were about symptom management, not eradication.

[153] Dr. Thinda testified that he did not receive a history from the plaintiff that indicated any pre-existing depression or relevant familial issues that contributed to his psychological condition. There were no prior hospitalizations due to depressive mood, no suicidal problems in the past, and no previous mental health treatment.

[154] Dr. Thinda testified that it crossed his mind that the plaintiff's headaches were anxiety-related, but there was no clinical concern over anxiety. He was more concerned with the plaintiff's depression.

[155] Dr. Thinda expressed surprise that the person he met and counselled could ever have been an upbeat, outgoing or bubbly person.

[156] In October of 2017, the plaintiff saw Dr. Thinda again. They discussed the plaintiff's work and his continuing inability to manage his company. At that point, Dr. Thinda indicated the plaintiff's progress was "status quo" and not much had changed. He did not think the plaintiff's depression in winter months was seasonal affective disorder. Dr. Thinda testified that three and half years after the accident, the plaintiff's mood disorder was likely chronic. Dr. Thinda explained the limits of therapy and the fact that there was no magic fix for his problems.

Dr. Prout, Neurologist

[157] Dr. Alister Prout, an experienced neurologist called by the plaintiff, conducted an examination of the plaintiff on September 12, 2017 and a document review. Dr. Prout was well-qualified, thorough and cautious in his opinions. He deferred to other specialists where appropriate. I accept his evidence.

[158] Dr. Prout wrote that prior to the accident, it did not appear that the plaintiff suffered from any mental health difficulties other than perhaps low mood during the winter months. He noted that the plaintiff's pre-accident history indicated a generally low attendance at medical appointments.

[159] During examination, he noted the plaintiff exhibited slightly flattened affect and signs of withdrawal consistent with being depressed. He rated the plaintiff at a score of 27/30 on the Montreal Cognitive Assessment ("MoCA") scale, a screening test for cognitive dysfunction, losing two points for short-term recall and one for verbal fluency. He noted some mild tenderness in the plaintiff's temporomandibular joints (TMJ), which hinge the jaw to the skull,

something common in whiplash injuries and that can contribute to headaches and tinnitus. But generally, the plaintiff was physically normal.

[160] Dr. Prout further noted that the plaintiff developed early symptoms of neck pain, headaches, ringing in the ears, sleep disturbance, fatigue, blurred vision, cognitive symptoms, and symptoms of an emotional nature. He opined that the plaintiff's symptoms developed post-accident as a result of injuries sustained in the accident and the emotional sequelae of the accident.

[161] Dr. Prout additionally opined that in association with musculoligamentous injuries to the neck and, to a minimal degree the lower back regions, the plaintiff developed post-traumatic headaches and post-traumatic tinnitus. The continuing headaches were a tension type and were attributable to the effects of the accident. They were likely confounded by ongoing psychological and emotional difficulties, sleep difficulties, and varied stressors including difficulty sustaining his work activities. In his testimony, Dr. Prout said that while the musculoligamentous injuries appear to have resolved, the plaintiff continued to experience post-traumatic tension-type headaches which were now chronic.

[162] The tinnitus was likely superimposed on pre-existent mild sensorineural type hearing loss related to prior noise exposure. He stated the plaintiff's symptoms had limited his drive, motivation, general health, and work abilities.

[163] Dr. Prout thought it unlikely that the plaintiff suffered a traumatic brain injury (TBI) in the accident, and that it was unlikely that the plaintiff had struck his head during the collision. The plaintiff however did develop significant sleep and psychological problems post-accident including persistent symptoms of depression and possibly post-traumatic stress disorder.

[164] Dr. Prout testified that the plaintiff's tinnitus was likely associated with his head injuries but was of "peripheral origin" and not due to a brain injury. Further, the plaintiff's tinnitus was now entrenched, and he would be "very surprised" if treating the headaches removed the

tinnitus. He testified that the plaintiff's previous noise-induced hearing loss made him more susceptible to developing tinnitus.

[165] Dr. Prout indicated the plaintiff had persistent symptoms of depression and possibly post-traumatic stress disorder, though he deferred to experts in psychology and psychiatry on these symptoms. He characterized the plaintiff as being limited to a moderate to severe degree with respect to his ability to perform his normal employment tasks as a result of the accident.

[166] Dr. Prout opined that there was room for significant improvement in the plaintiff's headache management if his ongoing emotional, psychological, and sleep difficulties were adequately treated. He suggested medications to prevent tension-type headaches and improve mood and sleep, a retrial of tricyclic antidepressants, or a retrial of specific antidepressant medications should be considered and managed by a treating psychiatrist. He noted the plaintiff's phobia over needles meant injection therapies would likely not be beneficial. Overall, Dr. Prout opined that the plaintiff's prognosis was "guarded" with respect to a full recovery.

Dr. Chawla, Physiatrist

[167] Dr. Kshitij Chawla, a physiatrist with a sub-speciality in chronic pain, also testified for the plaintiff. He conducted a document review and assessed the plaintiff on November 14, 2017.

[168] Dr. Chawla noted from the records that the plaintiff had taken various medications including amitriptyline (an anti-depressant), Tramacet (pain medication), cyclobenzaprine (a muscle relaxant), citalopram (another anti-depressant), indomethacin (an anti-inflammatory medication), Tylenol, and methocarbamol OTC (a muscle relaxant).

[169] Dr. Chawla's physical examination of the plaintiff revealed mostly normal results. He scored the plaintiff at a 27 out of 27 on the PHQ 9 depression screening test, which was in the severe category and suggestive of ongoing depression. The plaintiff's score on the MoCA test indicated he had some cognitive impairment.

[170] Dr. Chawla made the following diagnoses:

1. Chronic post-concussion syndrome;

2. Persistent post-traumatic headache;

3. Post-traumatic tinnitus;

4. Persistent cognitive difficulties; and

5. Mood disorder

[171] In coming to the diagnosis of post-concussion syndrome, Dr. Chawla took note of persisting symptoms such as headaches, tinnitus, cognitive difficulties, mood and sleep disturbance. Dr. Chawla used an Ontario guideline to make the diagnosis, which may explain why other doctors who used other criteria did not. Dr. Chawla thought the plaintiff's symptoms were most likely caused by the motor vehicle accident.

[172] Due to the chronic nature of the symptoms persisting for four years, Dr. Chawla opined that it was unlikely that they would resolve and concluded the plaintiff will have ongoing symptoms. With symptomatic management and rehabilitation, he may be able to control the symptoms better and return to a quality of life closer to what he had before the accident.

[173] Dr. Chawla was careful to say that he could not retrospectively diagnose the plaintiff as having suffered an acute concussion at the time of the accident or the period that followed. He was saying the plaintiff had lingering symptoms which well-qualified him for a diagnosis of post-concussive syndrome.

[174] Dr. Chawla also opined that the plaintiff's persistent, traumatic headaches were most likely caused by the accident. He noted that headaches were the most common symptom following concussion. He thought it unlikely the headaches would resolve. With symptomatic medical management and lifestyle modification, the plaintiff may be able to better control his headache symptoms and return to a better quality of life.

[175] Similarly, Dr. Chawla thought the plaintiff's tinnitus was likely the result of his injuries sustained during the accident. He deferred further questions on causation and prognosis to an ENT specialist.

[176] Finally, Dr. Chawla opined that the plaintiff's persistent cognitive difficulties and mood disorder were also caused by the accident. He thought the cognitive difficulties were unlikely to

improve though the plaintiff may be able to make progress respecting specific tasks. For mood disorder, the prognosis could improve to fair with adequate medication and therapy; however, Dr. Chawla deferred to the opinion of a psychiatrist on this point.

[177] Overall, the plaintiff's main concerns were persistent headaches and tinnitus, but Dr. Chawla did not think they had a cause-and-effect relationship with each other.

[178] In terms of treatment, Dr. Chawla recommended referral of the plaintiff to a specialist, which could include a chronic pain specialist, physiatrist, or neurologist with experience in treating post-concussion headaches. He listed a number of additional medications which could be tried. He also suggested non-pharmacological treatments such as stress reduction, relaxation techniques, biofeedback and cognitive behavioural therapy that could be explored. He also recommended the plaintiff be seen and assessed by a psychiatrist and a psychologist, and opined that he could benefit from ongoing anti-depressant pharmacologic treatment or further cognitive behavioural therapy. He further recommended a neuropsychological assessment to clarify appropriate treatment options.

[179] Like the other expert physicians who testified before me, Dr. Chawla was careful, thorough, and cautious in his opinions. With the exception of his diagnosis of post-concussion syndrome, which is a point of contention among the experts, I accept Dr. Chawla's evidence. While I choose not to rely on the label in the form of the diagnosis of post-concussion syndrome, I accept Dr. Chawla's evidence that the plaintiff's problematic symptoms including his headaches, tinnitus, cognitive difficulties, and mood disorders were chronic, unlikely to completely resolve, and resulted from the accident.

Dr. Miller, Psychiatrist

[180] The plaintiff additionally called Dr. Robert Miller, a forensic psychiatrist with considerable experience in post-traumatic stress disorder. He interviewed the plaintiff on November 22, 2017 in preparation for his report. As with the other physicians, I generally accept the conclusions of Dr. Miller.

[181] Dr. Miller noted that the plaintiff had been the subject of several pre-accident traumatic experiences including two car accidents, witnessing the charred body of a tenant, seeing the body of a man who passed away in a car accident, and engaging in a physical fight with another man.

[182] The plaintiff told Dr. Miller that he suffered low mood in the winter season, and that these feelings were worse after the accident than before. Dr. Miller did not view these feelings as rising to the level of seasonal affective disorder.

[183] Dr. Miller diagnosed the plaintiff with a major depressive disorder and generalized anxiety disorder. He thought the evidence also suggested a reasonable case for somatic symptom disorder with predominant pain. He indicated it was possible that the plaintiff sustained a mild concussion in his motor vehicle accident, but was unable to say that it was probable.

[184] Dr. Miller opined that the plaintiff's pre-existing problems with depression appear to have been aggravated by the persistence of pain after the accident. He deferred to physical medicine specialists as to the etiology of the plaintiff's pain symptoms, but stated that if those experts believed the plaintiff's pain was caused by the accident, then the accident had indirectly caused exacerbation of the plaintiff's mood symptoms.

[185] Dr. Miller thought the plaintiff's lingering pain and emotional problems could be due to brain damage, but were more likely due to depression, anxiety, and pain which can impair concentration and lead to problems even without a brain injury. In his view, the accident directly contributed toward the plaintiff's experience of anxiety following the accident.

[186] Dr. Miller viewed the plaintiff's prognosis as guarded. He opined that his mood symptoms are probably affected from his pain symptoms. He thought the plaintiff's prognosis "might" be improved if he were to participate in treatment with antidepressant medications and a course of between 12 and 20 sessions of cognitive behavioural therapy. In cross-examination, Dr Miller indicated he was unable to discern from the medical records how persistent the plaintiff's

physicians were in insisting he continue to take additional anti-depressants after the plaintiff indicated he was initially unable to take it.

[187] Dr. Miller noted that the plaintiff's mood symptoms likely impaired his endurance and motivation to perform household duties.

[188] As to work, Dr. Miller concluded that while the plaintiff is capable of work and does go to work, it is likely that his mood and anxiety symptoms impaired his motivation, endurance and focus at work.

[189] Dr. Miller also thought the plaintiff will continue to have fluctuating problems with depression, probably worse in the winter months.

[190] As to treatment, Dr. Miller suggested that the plaintiff's mood and pain symptoms "may" be assisted by treatment with anti-depressant medications. His review of collateral information led him to conclude that the plaintiff had not yet been prescribed a course of anti-depressant medication of sufficient dosage and duration that was likely to be effective. He testified, however, that anti-depressant medication is not a panacea. For people with chronic pain, he cannot say anti-depressant medication or psychotherapy will probably make a difference, but they are worth trying.

Dr. Anton, Physiatrist

[191] The last expert called by the plaintiff was another physiatrist, Dr. Hugh Anton. Dr. Anton assessed the plaintiff on September 26, 2017. He took a medical history, conducted a physical exam, and reviewed the medical records provided.

[192] The history taken by Dr. Anton was similar to that taken by the other physicians. Of note, the plaintiff was quite tearful when he presented himself to Dr. Anton. The plaintiff described having now reached the point where he had "given up". The plaintiff reported that his biggest problems were headaches and ear-ringing.

[193] Dr. Anton concluded that the plaintiff suffered soft tissue injuries to his neck, shoulder girdle, and back as a result of his motor vehicle accident.

[194] Dr. Anton noted that mild TBI, or concussion, was a possible explanation of the plaintiff's cognitive symptoms. However, a mild TBI diagnosis is most reliably made based on information from trained clinical observers at the scene and that information was not available in the plaintiff's case. Such an injury could be caused by forceful acceleration or deceleration and did not necessarily require the plaintiff hitting his head against the window.

[195] Dr. Anton noted the plaintiff's self-report of a very brief period of loss of consciousness or amnesia after the accident. He stated that if that self-report is accurate then the plaintiff "probably" sustained a TBI at the very mild end of the spectrum.

[196] Dr. Anton testified that if the plaintiff did not have headaches before the accident, and suffered clear headaches after the accident, a diagnosis of post-traumatic headaches would be appropriate.

[197] Dr. Anton scored the plaintiff as a 27/27 on the PHQ 9 test, which is in keeping with severe depressive disorder. Dr. Anton diagnosed the plaintiff with depression based on self-reported symptoms and his scoring on the screening tests.

[198] Dr. Anton also indicated the plaintiff endorsed symptoms of anxiety and post-traumatic stress, though he would likely not meet the criteria for a PTSD diagnosis which requires certain clear indications. He did, however, have symptoms of PTSD.

[199] Dr. Anton opined that the plaintiff's anxiety and depression are probably contributing significantly to his cognitive symptoms and exacerbating his headaches and tinnitus.

[200] Overall, Dr. Anton testified he was comfortable making a diagnosis of major depressive disorder, and that the depression was probably secondary to the accident. The accident was at least likely a major contributing factor. He thought the plaintiff's depressed mood would cause reduced interest and motivation to participate in activities going forward.

[201] As for prognosis, Dr. Anton thought the prognosis for improvement depended to the greatest degree on whether the plaintiff's psychological condition, especially his major depressive disorder, improves.

[202] As for treatment, like the other experts, Dr. Anton recommended a combination of medication prescribed by a psychiatrist and further cognitive behavioural therapy.

Dr. Dost, Neurologist

[203] Dr. Rehan Dost is a neurologist who testified for the defendants. He was the only defence witness. His report is relatively brief.

[204] Dr. Dost conducted a clinical exam of the plaintiff on August 14, 2017. In addition to taking the plaintiff's history, he reviewed file information about the plaintiff including a consultation report of Dr. Nunez, a consultation report of Dr. Horton, and clinical records and notes from October 29, 2013 and June 2, 2015 from a walk-in clinic.

[205] Dr. Dost concluded that there was no evidence the plaintiff sustained a mild TBI in the motor vehicle accident based on the lack of one of four observed symptoms: loss of consciousness, amnesia, disorientation or a confusional state. He indicated the plaintiff did not meet the requisite clinical criteria of the CDC World Health Organization. He further testified that a diagnosis of TBI was to some extent dependent upon the observations of third parties around the time of the injury, and he had no evidence of such information on the day of the accident. He stated that the CDC guidelines prevented him from making such a diagnosis retrospectively.

[206] Dr. Dost opined that the nature of the plaintiff's headaches would satisfy clinical criteria from the IHS (International Headache Society) for chronic headaches. Dr. Dost attributed the plaintiff's chronic headaches to whiplash, perpetuated by psychological factors.

[207] Dr. Dost further opined that the plaintiff's headaches have not been optimally treated because (1) the plaintiff has psychological issues with depressed mood and a lack of motivation that mandate further evaluation by a psychiatrist, and (2) further medications could be tried. With regard to the latter point, Dr. Dost recommended tricyclic medications to improve the

plaintiff's mood, motivation, and sleep regulation. Specifically, he suggested Nortriptyline; and if that did not work, Topamax, which is a different class of medication. If this was still ineffective, he suggested Botox treatment in three month intervals. Dr. Dost indicated he could not prognosticate the potential response for the plaintiff to these treatments.

[208] Dr. Dost also wrote that determining impairment or disability from a subjective report of headaches is extremely difficult and depends ultimately on the credibility of the individual.

[209] As to the ringing in the plaintiff's ears, Dr. Dost deferred to comment by an ENT specialist. He thought the plaintiff's ear-ringing was not neurological as the vast majority of the time such a condition is an inner ear problem. He agreed that tinnitus was a chronic side effect that can accompany whiplash disorder.

[210] In cross-examination, Dr. Dost agreed that the plaintiff's headaches, tinnitus, and cognitive problems post-dated the collision. He also conceded that the plaintiff had a relatively consistent post-accident presentation.

[211] I would put some weight on Dr. Dost's opinions, especially where they align with Dr. Prout, the plaintiff's neurologist. However, it appears to me that Dr. Dost spent very little time with the plaintiff and may not have had access to a full clinical history; for instance, Dr. Dost appeared unaware that the plaintiff had difficulty sleeping the night of the accident. For the most part, however, Dr. Dost's opinions fell in line with the consensus from the other experts, and I accept his evidence.

SUMMARY OF INJURIES

[212] I am satisfied on the basis of all of the evidence that the plaintiff's headaches, tinnitus, cognitive difficulties, sleep disruption, anxiety, and depression were caused by the motor vehicle accident on October 20, 2013. As a result of the accident, the plaintiff also sustained various musculoligamentous injuries to the neck and lower back which, though they persisted for an

extended period of time, have now largely resolved. However, the tinnitus, headaches, depression, anxiety, sleep disruption, and cognitive problems are ongoing and chronic.

[213] The plaintiff's symptoms diminished his ability to operate at the same high level in the plumbing and heating business, caused him to fail his advanced gas fitter course, and led to drastic changes in his personality and behaviour. I accept that his injuries have generally reduced the plaintiff's enjoyment of life including his social, recreational, and employment pursuits.

[214] The multiplicity of the plaintiff's chronic injuries creates difficulties for treatment going forward. For instance, Dr. Prout indicated that he would be very surprised if treating the headaches removed the tinnitus. There is some possibility for treatment of the plaintiff's depression symptoms through medication or further cognitive behavioural therapy, but I accept the consensus of medical opinion that the plaintiff's symptoms are now well-established, and while further treatment is possible it cannot be said that such treatment will probably be effective.

[215] The descriptions of third parties and the plaintiff's physicians accord with the plaintiff's own account of the pre- and post-accident changes in his personality and behaviour. The nature of the changes in the plaintiff's personality and behaviour are such that they have adversely impacted his work-related abilities, as well as his earning capacity in future years.

DEFENDANTS' ARGUMENTS

Failure to Mitigate

[216] Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate, but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd, [2001] S.C.C.A. No. 467.

[217] The test for mitigation of damages was described in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 in which Low J.A. writing for the Court stated as follows:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[218] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Garson J.A. for the Court further discussed the nature of the test as follows:

[56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu*: "there is some likelihood that he or she would have received substantial benefit from it ...". [Emphasis in original]

[219] In terms of a failure to take further recommended medication, the defendants argue that they should not be held responsible for the plaintiff's "stubborn" refusal to take antidepressant medication after being advised to do so. The medical records indicate that the plaintiff outright refused Dr. Steinson's recommendation in June of 2015 that he take any more antidepressants. They also point to the plaintiff's use of non-prescription drugs and alcohol to self-medicate.

[220] On this point, I note that the plaintiff generally followed the treatment recommendations of his physicians. He did try two or perhaps three anti-depressant medications but refused to take further medication when he found that they upset his stomach. This appears to be a reasonable response in the absence of better medical assurances that additional medications would not affect the plaintiff similarly.

[221] Additionally, I find as a fact that there is little to no solid indication that other anti-depressant medications would have successfully led to a recovery. I accept the characterization by Dr. Parhar that the plaintiff's symptoms have now plateaued, and that they are unlikely ever to be completely cured with further counseling or medication. Similarly, Dr. Miller testified that anti-depressant medication is not a panacea. It could be beneficial, and is

worth trying, but he could not say it would make a difference. The defence neurologist, Dr. Dost, could not say any better and refused to prognosticate the potential of further medication. I note as well that the plaintiff's depression is just one of a number of chronic psychological conditions arising from the accident, and that improvement of his depression may do nothing for his tinnitus, cognitive difficulties, and chronic headaches which also impair his ability to work and enjoy life.

[222] Some of the suggestions for further treatment through anti-depressant medication came from physicians preparing forensic assessments whose recommendations do not have been brought to the plaintiff's attention. As to those recommendations from the plaintiff's treating physicians, there is some question as to how hard the plaintiff's physicians had in the past pressed him to take further anti-depressant medication and whether the plaintiff would be open to other treatments in the future if treatment options were properly explained to him. In the past, he accepted most medications prescribed to him, readily accepted referrals to specialists, agreed to see a clinical psychologist, and sought out treatment on his own such as his purchase of an expensive hearing aid. This is not a plaintiff who generally forgoes potential treatment options.

[223] Dr. Miller suggested that the plaintiff had not been prescribed a course of anti-depressant medication of sufficient dosage and duration that was likely to be effective for depression. Dr. Prout opined that the ongoing use of medications to prevent tension type headaches and improve mood and sleep would be indicated, and a retrial of tricyclic antidepressants or a retrial of specific antidepressant medications should be considered and managed by a treating psychiatrist. Both opinions were that more treatments could be tried, within an overall guarded prognosis for fully recovery. Dr. Dost, who also suggested trying additional medication but indicated he could not prognosticate a potential response, was no more positive in his assessment.

[224] The question is whether the plaintiff was unreasonable in refusing further anti-depressant medication. The standard is not one of perfection from the injured person. Having regard to all the circumstances, I find that it was reasonable for the plaintiff to refuse further

anti-depressants. I further find that the defendants have not met the onus of proof required for the plaintiff to be found to have contributed to his own damages.

[225] Having regard to all the evidence, I cannot find on a balance of probabilities that if the plaintiff had taken more anti-depressants, depression or other symptoms would have necessarily improved to any degree. I would come to the same conclusion with respect to other potential treatments such as Botox therapy and cognitive behavioural therapy: similarly, see *Slater v. Gorden*, 2017 BCSC 2265 at paras. 219–222.

[226] The plaintiff testified that he illegally purchased two dozen OxyContin and/or Percocet tablets to attempt to cope with his symptoms, though he used only about 16 in the just over four years prior to trial. He used them when he was at the height of his depression to take his “sad eye” away and to avoid thoughts of suicide. He has not been diagnosed with a substance abuse disorder. His treatment providers have advised him against the practice and it appears that he has largely heeded their warnings.

[227] The plaintiff’s use of non-prescription drugs was a concern but did not alter his course of treatment. I would come to the same conclusion with respect to the plaintiff’s occasionally excessive alcohol consumption. I am satisfied that his increased alcohol intake and occasional use of the non-prescription drugs was reflective of his desire to alleviate his symptoms and demonstrates the extraordinary lengths the plaintiff was willing to go to attempt to alleviate his symptoms. In all the circumstances, I am not satisfied that occasional use of these narcotics or alcohol amounted to a failure to mitigate.

[228] I will further address the possibility of future effective treatment as a negative contingency below.

Adverse Inference from Failure to Call Physicians

[229] In some cases, the trier of fact may draw an inference adverse to a litigant if, without sufficient explanation, that litigant fails to call a witness who might be expected to give

supporting evidence: *Buksh v. Miles*, 2008 BCCA 318 at paras. 31–35; *Zawadzki v. Calimoso*, 2011 BCSC 45 at para. 149;*Thomasson v. Moeller*, 2016 BCCA 14 at paras. 34-35.

[230] The defendants argued that I should draw an adverse inference from the plaintiff's failure to call Dr. Desmond Nunez, an otolaryngologist, as a witness. The plaintiff was referred by Dr. Parhar to a tinnitus clinic run by Dr. Nunez at Vancouver General Hospital in February of 2015. Dr. Parhar reported that Dr. Nunez concluded that the plaintiff had suffered noise-induced hearing loss and post-traumatic tinnitus, that the condition was not genetic, and that there was no treatment for the condition.

[231] While the defendants were critical of the plaintiff's failure to call Dr. Nunez, I would not draw an adverse inference in this regard. While the reported opinion of Dr. Nunez cannot be relied upon for its truth, Dr. Nunez's opinion overlapped with and was shared by the other experts at trial. As well, his report was fully disclosed before trial.

[232] The defendants point out that the plaintiff advised only just prior to trial that he would not be calling Dr. Nunez, but I am unconvinced by this argument in part because there is no property in a witness. It was open to the defence to take steps to secure Dr. Nunez's attendance, in the eventuality the plaintiff ultimately exercised its discretion not to call him, if it thought his evidence would be of importance to the defence case. Moreover, Dr. Nunez was not involved in ongoing treatment of the plaintiff. Dr. Nunez made no concrete treatment recommendations which could be the subject of legitimate debate over the plaintiff's compliance. In all the circumstances, I cannot infer that Dr. Nunez's opinion would have been detrimental to the plaintiff's case.

[233] Similarly, to the extent the plaintiff could be criticized for not calling Dr. Steinson, one of the plaintiff's general practitioners, I cannot find fault with the plaintiff in this regard. An adverse inference for failing to call Dr. Steinson was not strongly urged upon me, and in any event it is apparent from all the evidence that the plaintiff's condition did not substantially change during the intervening period in 2015 and 2016 when he was under Dr. Steinson's care. This is confirmed by Dr. Parhar's October 2017 observation of the plaintiff. I cannot find that by not

calling Dr. Steinson the plaintiff was avoiding evidence which was potentially negative to his case.

[234] The plaintiff reported Dr. Steinson's treatment recommendations as being similar to Dr. Parhar's. I accept the plaintiff's explanations that he wanted a second opinion, and that Dr. Parhar's practice was becoming busy and it was harder to get appointments with him. Dr. Steinson's records were provided to the defendants. In all the circumstances, I would decline to draw any adverse inference from the failure to call Dr. Steinson as a witness.

[235] In my view, the failure to call these medical witnesses has been adequately explained. Moreover, the ability to call these witnesses was available to both parties. Having regard to all the circumstances, I would exercise my discretion not to draw an adverse inference from the failure to call Dr. Nunez and Dr. Steinson.

Crumbling Skull Doctrine

[236] The defendants submit that the plaintiff's occasional seasonal depression prior to the accident should be characterized as one which warrants the application of the crumbling skull doctrine. That doctrine was defined by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 34–35 as follows:

(5) The Thin Skull and "Crumbling Skull" Doctrines

[34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. **The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.** The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, Damages for Personal Injuries and Death (9th ed. 1993), at pp. 39-40. Likewise, **if there is a measurable risk that the pre-existing condition would**

have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke, supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Underline in original; bold added]
See also *McKelvie v. Ng*, 2001 BCCA 384; *Heska v. Little*, 2000 BCCA 255; and *Gordon v. Ahn*, 2017 BCCA 221 where this doctrine was considered by the Court.

[237] The crumbling skull doctrine dictates in part that if there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award.

[238] Here, the defendants argue that the plaintiff would likely have been suffering significant depressive symptoms irrespective of whether the accident occurred. They also point to the loss of a major client in the summer of 2013, Van Dyke Properties, which accounted for 50% of the plaintiff's revenues that year. It submits this blow to the plaintiff's business likely aggravated the plaintiff's pre-existing depression.

[239] I would not apply the crumbling skull doctrine here. I find that the facts simply do not rise to the level of warranting the doctrine's application. The highest indication of a pre-existing depression comes from the plaintiff's report to Dr. Miller, the psychiatrist, that prior to the accident the plaintiff experienced fluctuating symptoms of depression, especially in winter months, over what appears to have been a prolonged period. These symptoms appear to be an exception to the plaintiff's overall enthusiastic and engaging personality before the accident that was attested to by the civilian witnesses before me.

[240] The plaintiff testified that before the accident he sometimes suffered from depressed moods in December and January. He never saw a doctor for the condition and never took medication for it. He tried to eat well and be as healthy as he could be. As the plaintiff described it, winters were always busy, but he had to "get going" even if he was "sad". The plaintiff had not been diagnosed with a depressive disorder prior to the accident, none of his friends or

associates in the plumbing industry picked up on it, and to the extent he had symptoms it appears he was able to cope with and overcome them.

[241] The plaintiff's isolated pre-accident occasional depressed mood in winter months did not appear to be worsening. Rather, as described to Dr. Miller, it was a fluctuating condition. Moreover, it was not of a degree that required attention from a physician or medication. I would therefore characterize the plaintiff's pre-accident depressive symptoms as relatively minor.

[242] None of the experts testified that absent the accident, deterioration of the plaintiff's pre-existing bouts of depression was probable, let alone inevitable: see similarly *Gordon v. Ahn* at paras. 32-34. I find that but for the accident, the plaintiff would still have been in a situation where he might occasionally experience bouts of depression in the winter, but could work through those feelings. Indeed, there is no evidence that such a pre-existing condition ever significantly affected the plaintiff's ability to work or obtain work. I cannot find that there were other events happening close in time to the accident that would provide an alternate, and more accurate, explanation of the true cause of the plaintiff's symptoms.

[243] I would thus categorize the present situation as a "thin skull" situation, where the plaintiff's post-accident depression is perhaps more severe owing to his pre-existing condition; rather than a "crumbling skull" situation where the plaintiff would have been suffering significant depressive symptoms irrespective of whether the accident had occurred.

[244] I conclude from all the circumstances that the plaintiff's occasional pre-existing depressive moods in the winter do not establish a measurable risk of detrimental effect upon the plaintiff in the future, regardless of the defendant driver's negligence.

NON-PECUNIARY DAMAGES

[245] The plaintiff seeks an award in the range of $180,000 for non-pecuniary damages. The plaintiff relies upon *Sebaa v. Ricci*, 2015 BCSC 1492; *Pearson v. Savage*, 2017 BCSC 1435; *Chaudhry v. John Doe*, 2017 BCSC 1895; and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81.

[246] The defendants suggest that an award of $100,000 is appropriate. The defendants rely upon *Carroll v. Hunter*, 2014 BCSC 2193; *Bricker v. Danyk*, 2015 BCSC 2404; *Shapiro v. Dailey*, 2010 BCSC 770, varied on other grounds 2012 BCCA 128; and *Maldonado v. Mooney*, 2016 BCSC 558.

[247] In *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd 240 B.C.A.C. 319 (note), the Court described some of the factors to be considered when assessing general damages.

> [45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal, supra*, at 637 is a helpful reminder:
>
> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, Personal Injury Damages in Canada (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [Emphasis added.]
>
> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).

[248] While regard may be had to other cases, ultimately, the Court must make an award of damages for pain and suffering and loss of enjoyment of life that is tailored to the specific circumstances of this plaintiff: *Carroll v. Hunter* at paras. 150–53.

[249] I accept the plaintiff's evidence that he suffered headaches, tinnitus, depression, social withdrawal, sleep disruption, cognitive problems including an inability to concentrate and impaired memory, anxiety, and symptoms consistent with PTSD as a result of his motor vehicle accident. Most if not all of these symptoms are chronic. The plaintiff's neck and back pain persisted for longer than usual, but I accept that those injuries are now resolved. There is no evidence that his headaches, depression, cognition problems, and tinnitus were pre-existing conditions. I find that, apart from the neck and back pain, it is unlikely that the plaintiff will fully recover from any of the above mentioned injuries.

[250] I find that the plaintiff's symptoms had a significant impact on his social, recreational, and employment-related functioning, his emotional well-being, and his enjoyment of life. His symptoms also affected his personality, work ethic, and general attitude toward life.

[251] There has been a fair amount of discussion among the experts and between counsel as to whether the plaintiff qualifies for a diagnosis of mild traumatic brain injury or concussion. There is disagreement about whether he qualifies for such a diagnosis, though he certainly has lingering symptoms of a kind that are sometimes associated with a concussion.

[252] I agree with plaintiff's counsel that while certain diagnoses or labels may assist in the analysis, the focus remains on the plaintiff's symptoms, their endurance, and their overall effect upon the plaintiff's life. As noted in *Bricker* at para. 123:

[123] I would add, however, that in assessing Ms. Bricker's claim for damages, the issue for the court is not so much the label or diagnosis attached to a particular condition, but rather the extent to which the condition has affected a plaintiff in his or her social, recreational and employment pursuits (see *Bagnato v. Viscount*, 1995 CanLII 418, [1995] B.C.J. No. 2752 at paras. 28-29, … (S.C.)).

[253] Having regard to the precedents cited before me, the nature and severity of the plaintiff's symptoms in this case, his age, and the guarded possibilities for improvement, I would assess general damages at $170,000.

LOSS OF INCOME-EARNING CAPACITY

Legal Principles

[254] In *Grewal v. Naumann*, 2017 BCCA 158, Goepel J.A. writing in dissent (with the majority agreeing with his analysis) summarized the proper analysis of diminished earning capacity at paras. 44-50:

[44] With respect, I cannot agree. The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458:

[27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke*(1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*, Cooper-Stephenson, *supra*, at pp. 67--81.

[29] This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and

reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).

[46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

[29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

[47] I note that neither *Reynolds* nor *Ostrikoff* referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as *per incuriam*.

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[50] I would reject the appellants' submission that the trial judge set out the wrong legal principles…

[Emphasis added]

[255] Kent J. described the two approaches to assessing loss of earning capacity as follows in *Hoy v. Williams*, 2014 BCSC 234, at paras. 158-160:

[158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

[159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[160 The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

[256] As well, in *Knapp v. O'Neill*, 2017 YKCA 10, the Yukon Court of Appeal discussed the capital asset approach and the earnings approach to assessing loss of earning capacity:

[17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity... However, in my view, <u>even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors</u>. Adopting the capital asset approach does not justify an undisciplined approach.

[18] It can be helpful under either approach for the judge to consider the *quantum* of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case ...

[19] <u>Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a</u>

plaintiff's pre-accident employment history, training, and capabilities... In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors...

[21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either [*sic*] involves hypotheticals, proceeding in this manner involves moving from something generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity).

[Internal citations omitted; emphasis added]

[257] Finally, I adopt the summary of the legal principles in assessing loss of earning capacity set out by Voith J. in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 para. 133:

[133] The relevant legal principles are well-established:

a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

Loss of Past Income Earning Capacity – Positions of the Parties

[258] The plaintiff claims $245,000 for past loss of earning capacity, to be adjusted depending upon positive and negative contingencies. The plaintiff's claim is based on an estimate of total past loss of capacity of $75,000 per annum up to the date of trial. It seems to me that there is an

error in the math for the plaintiff's total claim, since $75,000 multiplied by 4.33 years from the date of the accident to trial would add up to a claim of $324,759.

[259] The plaintiff's $75,000 per year loss of income figure comprises two components, the first being $50,000 per annum for past loss of capacity flowing from Niessen Plumbing and Heating. This in turn is based on the significant drop of approximately $75,000 to $100,000 in sales (gross revenue) after the collision, and then reduced to reflect the fact that not all gross revenue flows directly or indirectly to the business owner as a result of business operating expenses.

[260] The second component of the plaintiff's past loss of earning capacity is the impact of the collision on the plaintiff's ability to successfully complete the BCIT course he was taking at the time of the collision and to subsequently obtain a gas fitter "A" ticket. The plaintiff puts the value of this loss at $20,000 per annum.

[261] The defendants submit that a fair and reasonable damages award is $300,000 for both past and future loss of earning capacity. The defendants invite me to exclude the 2013 year, and to use the average annual income loss of $15,124 as a measure of the plaintiff's post-accident loss of income if I use an earnings approach. The defence says that if one assumes the plaintiff would have retired at age 68, or 20 years after the accident, this yields to total of $300,000 without any adjustment for positive or negative contingencies.

[262] The defendants further suggest that the principle reason the revenues of Niessen Heating declined after the accident was that at some point in 2013 prior to the accident, the plaintiff lost his largest account, which was responsible for approximately $70,000 in gross revenue. It makes other criticisms of the plaintiff's estimates of the probabilities, such as whether the plaintiff would or could have purchased Across Town Plumbing, whether he could have operated it successfully, the plaintiff's reliance on gross income figures, and the plaintiff's failure to adequately account for business expenses such as paying back a loan to buy the business.

[263] Despite these submissions on available mathematical markers, the defendants submit the proper approach in this case is the capital asset approach. Using that approach, it suggests

the accident did not prevent the plaintiff from working. It concedes that the headaches, tinnitus, and depression reduced the plaintiff's effectiveness as a plumbing and heating contractor. It arrives at the $300,000 figure by multiplying the decline in the plaintiff's reported taxable income by the number of years between the year of the accident and a date on which he could be reasonably expected to retire.

Analysis – Loss of Past Income Earning Capacity

[264] Applying the principles above to the present case, I have no hesitation in finding a real and substantial possibility that the injuries the plaintiff sustained in the collision negatively impacted his capacity to earn income in his business. While it is not necessary to come to the same conclusion on a balance of probabilities, I would be prepared to do so. In fact, the evidence strongly establishes that the deleterious effects of the accident adversely impaired the plaintiff's earning capacity.

[265] I am satisfied that as a result of the plaintiff's accident-related impairments, he lost motivation to conduct his business, became chronically depressed, lost his entrepreneurial spirit including some of his ability to be proactive in generating business, failed his gas fitter course, and was unable to take advantage of the opportunity to take over Mr. McGlynn's business.

[266] With respect to mathematical anchors to assist in the analysis, I would look first to the plaintiff's past business income and profits. The post-accident drop in revenue of the plaintiff's business is one indication of the degree of lost earning capacity. The gross and net business income for the plaintiff's business is as follows:

Year	Gross Business Income	Net business income	Gross Profit
2008	117,368	27,677	68,724
2009	103,577	15,763	61,501
2010	93,741	13,240	59,895

2011	111,215	29,387	82,942
2012	142,875	49,264	99,551
2013	163,062	-9,158	54,181
2014	73,594	1,744	35,699
2015	78,408	8,941	48,220
2016	59,929	5,246	34,538

[267] These figures show an overall increase in gross and net business income as well as gross profit in the years (especially 2010-2012) immediately preceding the collision. It is reasonable to assume that the plaintiff's business was growing during this time.

[268] 2013 was somewhat of an outlier given that the plaintiff gained and lost a key client that year, which loss preceded and cannot in the main be attributed to the accident. It is also an outlier because the plaintiff had higher expenses and purchases (including $26,501 in subcontracts) that year and because he reduced his work hours after the accident on October 20th. His 2013 income is thus truncated and would have been higher but for the accident reducing his work in the final 10 weeks of the year. The plaintiff claims that but for the accident there was a reasonable possibility he could have again secured the major client he lost in 2013. I am not satisfied with the plaintiff's claim that this was necessarily so based only on the fact that they shared the same religion.

[269] Nevertheless, given the plaintiff's previous business acuity in securing new clients and his demonstrated ability to grow his business, I am satisfied that but for the accident there was a real and substantial possibility the plaintiff could have secured other clients to replace the revenues lost by this major customer and that the plaintiff's income would have approximated his revenue in 2012 which was close to $143,000.

[270] The yearly income table above shows a significant drop of approximately $70-75,000 in gross revenue after the collision and a $40-45,000 drop of net business income off its high in 2012, less so in previous years. Gross profit also dropped significantly.

[271] In addition, as I have noted, I conclude that but for the accident the plaintiff would have successfully completed his BCIT course he was taking at the time of the collision and obtained his gas fitter "A" ticket. This qualification would have allowed the plaintiff to obtain more lucrative work in the heating industry with increased compensation in the gross earnings range of $20,000 per year.

[272] I leave the question of the plaintiff's potential purchase of Across Town Plumbing to the consideration of future loss of earning capacity since that event would likely have occurred sometime in 2017.

[273] Sections 95, 97 and 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, combine to require the past loss to be assessed on a "net income" basis.

[274] Having regard to these figures, the expert evidence, and the other evidence as to the plaintiff's diminished earning capacity, and using relatively conservative mathematical anchors and both gross and net income figures as a guide, I find that a reasonable estimate for the plaintiff's net loss of earning capacity is $45,000 per annum. I would use a figure of $40,000 in the first year after the accident to provide some account for the fact that the plaintiff would not have obtained his gas fitter A ticket until March 2014 even if the accident had not occurred. Extrapolating over 4.33 years from the date of the accident to the date of trial, that estimate ($40,000 plus 3.33 x $45,000) yields a total of $189,850.

[275] I would not make any allowance in relation to the plaintiff's capacity to earn income from his rental property. In my view, it has not been shown that the collision negatively affected the plaintiff's capacity to earn rental income though I do accept that the accident necessitated the plaintiff having to hire a property management company.

[276] Having regard to all the circumstances in the present case, I would assess the plaintiff's past loss of earning capacity at $189,850. I find this award to be fair and reasonable in the circumstances of this case.

Analysis - Loss of Future Income Earning Capacity

[277] In coming to an estimate of what is fair and reasonable to assess the loss of future earning capacity, I would first attempt to use available mathematical anchors under an earnings approach.

[278] I find that the accident occurred at a critical time in the plaintiff's working life. His skills had developed over the years. His business income at Niessen Plumbing and Heating was generally on the rise. He was in the process of obtaining his gas ticket and, after his accident, failed his qualifying exam by the slimmest of margins.

[279] The plaintiff was also engaged in discussions about taking over Mr. McGlynn's business, Across Town Plumbing, a successful heating business in the Lower Mainland with several employees. It was abundantly apparent from Mr. McGlynn's evidence that he was counting on the plaintiff taking over his business and was extremely disappointed when the accident prevented him from doing so. The two had been engaged in discussions about the plaintiff buying the business and the matter was coming to a head with Mr. McGlynn's impending desire to retire. He described the plaintiff as honest and fair, and having his own repeat customers. It is clear he regarded the plaintiff as the best person to take over the business. While the defendants point out the paucity of documentary evidence supporting the plaintiff's alleged impending purchase of Across Town Plumbing, I accept the largely consistent evidence of Mr. McGlynn and the plaintiff that the parties were getting close to an agreement. I find that there was a real and substantial possibility and indeed a likelihood that, but for the accident, the plaintiff would have taken over Across Town Plumbing.

[280] As to the profitability of Across Town Plumbing, Mr. McGlynn testified that he could have made in the range of $150,000-$200,000 per year and that the business was very financially viable. Because he left revenue in the company, he took home just over $100,000 per year. I

accept Mr. Wilson's evidence was that the owner of such a multi-employee plumbing and heating business could make substantially more. Thus, the $100,000 figure is very much a minimum estimate.

[281] The defendants point to the significant purchase price (approximately $250,000) that Mr. McGlynn was demanding, and argues it is unlikely the plaintiff could have afforded it. However, I note that the plaintiff owned a rental property in Vancouver at the time in which he had amassed significant equity on the order of at least $700,000 if one uses the assessed value of the property for tax purposes.

[282] The plaintiff lived at home with his mother, paid no rent, had no dependents, and thus likely had relatively modest living expenses. The plaintiff also claimed he had savings on the order of $200,000 worth of precious metals; however, no evidence was provided of such investment. While I accept that the plaintiff had some savings in this form, I cannot find that he could have financed the full purchase price from the sale of such precious metals.

[283] It is true that the plaintiff had no experience running a small business with several employees, but he had an excellent track record in the industry, an entrepreneurial mindset, and would have been taking over an already established business. The profitability of Across Town Plumbing would have been demonstrable to a bank if the plaintiff had sought financing. I find that the plaintiff was in a position to purchase Mr. McGlynn's business either through refinancing his rental property or through financing the purchase, would likely have purchased the business but for the accident, and would likely have succeeded in operating it successfully.

[284] The plaintiff also had a history of gross earnings of $93,700-$163,000 per year in the years immediately leading up to the accident. As the defendants point out, his net income was much lower and ranged from $13,240 in 2010 to $49,264 in 2012, with the outlier year of 2013 having negative net income of $9,158. If he took over Across Town Plumbing, his net income would have been significantly higher than it had been in previous years due to his work-related expenses remaining within the company.

[285] The plaintiff therefore had excellent earning prospects leading up to the accident. He would likely have completed his gas fitter ticket, would likely have taken over Across Town Plumbing by the time of trial, would have taken on new customers, and would have run his business successfully as he had prior to the accident. In addition, at the time of the accident the plaintiff was entering what were likely to be the most productive years of his life where his heating and plumbing skills and knowledge, customer base, and reputation were at their highest. I find that there is a real and substantial possibility and indeed a likelihood that but for the accident, the plaintiff's income would have grown (and possibly substantially) from his pre-accident income in the years 2008-2012.

[286] The defendants point out that as a sole proprietor, the plaintiff's net income was relatively modest prior to the accident. While that is true, I cannot rely on net income figures alone to anchor the estimate of the plaintiff's loss of future earning capacity. I would reject such a restrictive approach here because some of the plaintiff's business and personal expenses overlapped, the plaintiff's take-over of Across Town Plumbing would likely have significantly increased his take-home income, his Class A gas ticket would likely have augmented his income, and his business income would likely have continued to grow even if he did not take over Across Town Plumbing.

[287] The defendants also point to the loss of a major customer in 2013. As I have already noted, I am satisfied that the plaintiff but for the accident would likely have acquired other customers to approximate replacement of the income stream from the loss of Van Dyke Properties.

[288] The plaintiff has reasonably asked me to assume that the plaintiff's working life would continue until he was 65. This is a reasonable and conservative assumption which would leave approximately 12.66 working years from the date of trial.

[289] I must also remember that while his ability to work has been significantly diminished, the plaintiff has continued to work in the plumbing and heating industry (mostly serving existing customers) and has maintained a modest, though substantially reduced, income. This is not a

situation where the plaintiff has suffered a total loss of income earning potential. Hence, his residual earning capacity must be subtracted from the net present value of his future earnings: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[290] Having regard to these contingencies and others, I am satisfied that the plaintiff's future earning capacity has been substantially reduced as a result of the accident. In arriving at an estimate, I have accounted for the fact that the plaintiff retains some residual earning capacity (as demonstrated by his post-accident income and some advertising and entertaining expenses in his post-accident more limited attempts to secure clients). In the result, I would estimate his minimum future gross loss of earning capacity at a figure of $75,000 per year.

[291] Adjustments should be made to reflect standard contingencies that might have arisen over the plaintiff's working life: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 30. As noted, the plaintiff has asked me to assume that the he would have retired at the age of 65.

[292] Mr. Turnbull, an economist, testified as to various discounts and contingencies for the purpose of calculating the net present value of the plaintiff's future loss of earning capacity including a real discount rate of 1.5% per annum and the plaintiff's probability of survival assuming normal life expectancy.

[293] At $75,000 per annum until retirement at age 65, if a multiplier of 11,278 is employed as recommended in Mr. Turnbull's table, the result is a present value of $846,000. I consider this figure to be an adequate and appropriate award for the plaintiff's loss of future earning capacity.

[294] Even if I were to undertake a capital asset approach, as urged by the defendants, I would come to a similar result on the totality of the evidence. I consider that the plaintiff's ability to earn income, solicit customers, take advantage of job opportunities and run a business, and his value as a person capable of earning income in a competitive labour market, have all been significantly attenuated by his tinnitus, ongoing headaches, cognitive problems, depression and other ongoing effects of the accident. These conditions are chronic and likely to continue well

into the future. They are no less harmful to the plaintiff's earning capacity because they are psychological in nature rather than physical.

[295] Using the factors in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), I would conclude that the plaintiff has suffered a significant loss of his capital asset and would make an award on par with that arrived at under the earnings approach.

Positive and Negative Contingencies

[296] Having regard to future contingencies, it is conceivable that one or more of the plaintiff's symptoms will get better or that his productivity will improve in the future. As noted, there was some speculation that the plaintiff's depression could be treated with anti-depressants, Botox, or additional cognitive behavioural therapy. However, the evidence establishes only that the possibility of treatment of certain symptoms such as depression or headaches remains just that -- a possibility.

[297] The chronic nature of the plaintiff's symptoms is a barrier to successful treatment. Given the multiplicity of the plaintiff's injuries, it appears that successful treatment of one symptom will not get the plaintiff back on his feet and so as to restore his earning capacity to previous levels. Moreover, it is unlikely that his earning capacity could be greatly improved by the use of work-related medical aids or other accommodations. As well, the plaintiff's depression, tinnitus, cognitive problems and headaches would appear to adversely impact his ability to obtain an alternative type of employment.

[298] On the other side, it is also possible that the plaintiff's symptoms and productivity will worsen, thereby further impairing his ability to earn at least a residual income. On the evidence before me, I find that the likelihood of things getting better for the plaintiff is equally offset by the odds of his condition getting worse.

[299] On balance therefore, and weighing real and substantial possibilities of the plaintiff's earning capacity improving or degrading further, I view the positive and negative contingencies

as equally offsetting. Thus, I would not make any adjustment for positive or negative contingencies.

Cost of Future Care

[300] An award of costs for future care is meant to restore, as best possible with a monetary award, the injured person to the position he or she would have been in had the accident not occurred. The award is based on what is reasonably justified on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29‑30; *Aberdeen v. Zanatta*, 2008 BCCA 420.

[301] The plaintiff seeks a modest award for future care of up to $10,000. It is apparent that the plaintiff will incur costs should he pursue recommended treatment options such as further cognitive behavioural therapy, treatment from a psychiatrist, ergonomic devices to allow him to facilitate cognition or improve his functioning, Botox therapy, and medication. Dr. Miller recommended 12-20 further sessions of cognitive behavioural therapy, which I am told cost approximately $200 per hour. On the whole, I would assess the cost of future care at $6000.

Special Damages

[302] The parties are in agreement as to an amount of $11,000 for special damages. I award this amount.

SUMMARY

[303] In summary, on the matter of damages, the plaintiff is entitled to judgment to the following:

ITEM		AWARD
1.	Non-pecuniary damages	$170,000

2.	Loss of past income earning capacity	$189,850
3.	Special damages	$11,000
4.	Loss of future income earning capacity	$846,000
5.	Cost of future care	$6,000
TOTAL		$1,222,850

[304] There will be judgment to the plaintiff for $1,222,850.

[305] The parties may make submissions as to costs if they are unable to agree.

[306] I wish to extend my appreciation to all counsel for their capable assistance on the issues and their well-prepared submissions.

"Brundrett J"