IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baltadjian v. Schaeffer,*
2021 BCSC 752

Date: 20210423
Docket: M153986
Registry: Vancouver

Between:

Vazguen Baltadjian

Plaintiff

And

Susan Schaeffer, Gottfried Schaeffer, Irvin Contois and Josiah Smith

Defendants

And

Docket: M113013
Registry: Vancouver

Between:

Vazguen Baltadjian

Plaintiff

And

Andre Paul Lacoursiere, Joan Ann Neville, Raelene Reutlinger, Rhoena Refa Reutlinger, Michael Wilbert Poitras, Financialinx Corporation/ Coporation Credilinx and Jason Carl Spies

Defendants

And

Docket: M208820
Registry: Vancouver

Between:

Josiah Paul Smith

Plaintiff

And

Gottfried Paul Schaeffer, Susan Mary Schaeffer, Irvin J. Contois, Vazguen Baltadjian, David Richard Jonash and Joshua James Whissell

Defendants

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for Vazguen Baltadjian:	S.E. Gibson J. Stanley
Counsel for Susan Schaeffer, Gottfried Schaeffer, Josiah Smith, Andre Paul Lacoursiere, Joan Ann Neville, Raelene Reutlinger, Rhoena Refa Reutlinger, Michael Wilbert Poitras, Financialinx Corporation/ Coporation Credilinx and Jason Carl Spies:	L.C. Boulton M. Zacharias, Articled Student
Counsel for Irvin Contois:	S. Walsh
Counsel for Josiah Smith:	M.T.K. Berry
Counsel for Gottfried Schaeffer and Susan Schaeffer:	C. Tham
Place and Date of Trial:	Vancouver, B.C. September 21-25, September 28-29, October 1-2, October 5-7, 2021
Place and Date of Judgment:	Vancouver, B.C. April 23, 2021

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Introduction

[1] The plaintiff, Vazguen Baltadjian, was involved in five motor vehicle accidents (the "MVAs") between August 21, 2009 and June 22, 2014 and commenced these proceedings for damages in relation to injuries allegedly suffered by him in those accidents. The plaintiff subsequently discontinued the proceedings in relation to the third and fourth accidents which occurred on December 12, 2009 ("MVA#3") and April 10, 2010 ("MVA#4"). Liability is now admitted for the remaining three accidents. The first two accidents occurred on August 21, 2009 ("MVA#1"), and November 14, 2009 ("MVA#2") and are the subject of Vancouver Registry action M113013. The final accident occurred on June 22, 2014 ("MVA#5") and is the subject of Vancouver Registry action M153986.

[2] MVA#5 is also the subject of Vancouver Registry action M208820 (originally commenced in Victoria as VI M161919), wherein Josiah Smith is the plaintiff, and which was ordered to be heard at the same time as actions M113013 and M153986 in relation to liability only. Liability for MVA#5 was originally contested but during the course of the trial it was agreed that liability for MVA#5 was to be apportioned 75% to the Schaefer defendants and 25% to Josiah Smith.

[3] The plaintiff, a lawyer who was near the beginning of his career at the time of MVA#1, claims that the injuries he suffered in the accidents have had a catastrophic effect on his life in general and have completely disabled him from working. He claims damages for MVA#1, MVA#2 and MVA#5 in the amount of approximately $2.8 million, as follows:

Head	Amount
General Damages	$180,000
Past Wage Loss	$400,000
Loss of Earning Capacity	$1,850,000
Future Care	$378,151
Special Damages	$48,436
In Trust Claim	$20,000
Total	**$2,876,587**

[4] The defendants contest the credibility of the plaintiff, his evidence, and every element of the damages claimed. They say the plaintiff had unrealistic career aspirations and that, when it became apparent he would not be able to meet those aspirations, he attributed his failure to the MVAs. The defendants say that the plaintiff suffered no injuries in MVA#1 and MVA#2. The defendants concede that MVA#5 was more serious and could have resulted in minor soft tissue injuries but not injuries that would have the catastrophic effects the plaintiff claims.

[5] For the reasons set out below, I am satisfied that the plaintiff has suffered personal injuries in MVAs #1, #2 and #5, for which the defendants are liable. However, the plaintiff has exaggerated his injuries, particularly his headaches and psychological injuries, and is not disabled as a consequence of any such injuries.

Credibility and Reliability

[6] Before turning to the facts and issues in this matter I address the credibility and reliability of the plaintiff and his spouse, Vivian Baltadjian. The defendants very forcefully submit that the plaintiff is neither credible nor reliable, that his evidence should be rejected virtually in its entirety and that the reports of the experts who relied on what the plaintiff told them should be disregarded.

[7] The defendants refer me to the oft-cited comments of Chief Justice McEachern in *Price v. Kostryba*, [1982] B.C.J. No. 1518 (B.C.S.C.) where he stated that “the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.”

[8] The plaintiff submits that medical science, technology and judicial authority have advanced since the *Price* decision. In particular, medical science and the Supreme Court of Canada have recognized the subjective nature of chronic pain: *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, at para. 1. I agree with the plaintiff that *Price* must be considered in light of developments in medical science and, obviously, in the law. There have been many authorities since *Price* that address how to assess the credibility of a plaintiff where there is little

objective evidence of the plaintiff's self-reported symptoms. I noted some of these authorities in *Afework v. Correa*, 2019 BCSC 1672, at para. 10. These authorities establish that in such cases a plaintiff's evidence must be carefully scrutinized. However, as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

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

[10] I do not accept all of the submissions of the defendants insofar as they relate to the credibility and reliability of the plaintiff's evidence. For example, I do not accept that the plaintiff deliberately lied to or attempted to mislead various medical practitioners in regards to his having suffered a concussion or traumatic brain injury. There is sufficient confusion in the clinical notes and records and differences of opinion as to the existence of a traumatic brain injury to justify the plaintiff's belief he suffered such an injury.

[11] However, there are nevertheless serious concerns as to the reliability and credibility of the plaintiff. The plaintiff's testimony was often extremely vague or inconsistent and contradictory. Similarly, from reviewing the expert reports and the various clinical notes and records, it is apparent the information the plaintiff conveyed to medical practitioners was similarly inconsistent and contradictory. In the plaintiff's written submissions it is conceded that he has been a careless historian. However, the inconsistencies, contradictions and lack of specificity go beyond simply being a poor historian. I am of the view that the plaintiff has exaggerated, sometimes to a gross extent, the nature and effects of his injuries and disabilities and has done so not only before me but also to his various medical doctors and others. Moreover, there were numerous instances where the plaintiff admitted to either telling outright lies or giving otherwise misleading information.

[12] Some of the specific factors that raise concerns about the plaintiff's credibility and reliability include:

a) His evidence was at times patently untrue. For example, when he said he earned no net income in British Columbia during the years 2009-2011;

b) He admitted to telling medical doctors and others that he had a Masters degree in tax when, in fact, he had no such degree. He had a diploma in tax law from HEC Montreal. He similarly prepared a resume saying he had a Masters degree in tax. I do not necessarily accept that he was deliberately lying in making such statements but he was, at a minimum, being careless and misleading and attempting to portray himself as having

been more accomplished and successful before the accidents than he was;

c) In various interviews with medical experts he gave false or misleading information including, for example:

   i. He advised various doctors that he was a tax lawyer or a specialist in tax law, which was at best misleading, and which was again intended to portray himself as having been more accomplished and successful before the accidents than he was. Saying he was a tax lawyer or specialist implies a degree of knowledge and experience in tax law. In fact, he had virtually no experience as a tax lawyer.

   ii. He told Drs. Anton and Anderson that he was suffering from constant, "24/7", severe headaches when, in fact, he admitted the headaches were intermittent with good days and bad days.

   iii. He told Dr. McKenzie he went to the emergency room after MVA#1, which was not true.

   iv. He told Dr. Robinson that he did extremely well in law school, had a photographic memory and described himself as "a Superman", all of which were exaggerations.

   v. He falsely advised Mr. Nordin that at the time of MVA#1 he was not working and that he did not commence working until February 2012.

d) He engaged in the practice of law in British Columbia prior to being authorized to do so and although advised by the Law Society of British Columbia ("LSBC") that he could not do so;

e) He provided the LSBC with false or misleading information on several occasions. Specifically:

i. He told the LSBC he had vertebral arterial syndrome when he had never been so diagnosed.

ii. He admitted he told the LSBC he earned no income in the years 2009 to 20011, which was false.

iii. He admitted he lied to the LSBC when he told them he did not go outside between MVA#1 and MVA#2.

[13] The above are but a few examples of the many problems with the plaintiff's evidence. Accordingly, I do not find him credible or reliable. However, I reject the defendant's submission that his evidence should be rejected in its entirety. Rather, his evidence is to be approached with caution and evaluated together with all of the other evidence.

[14] The defendants also submit that Ms. Baltadjian is not a reliable and credible witness. I agree that her evidence must similarly be approached with caution. She obviously has a significant interest in the outcome of these proceedings. She gave evidence about things that she could not have known. For example, she purported to describe a dramatic change in the personality of the plaintiff when she had not known him long enough to be able to give such evidence. I also find that she likewise had a tendency to exaggerate the nature and effects of the plaintiff's injuries and his alleged disabilities.

Evidence

[15] I will first address the evidence given at trial by the various lay witnesses. I will then consider the evidence of the expert witnesses before providing a summary of my findings of fact.

[16] The lay witnesses were, in addition to the plaintiff, Ms. Baltadjian, Rick McNary, a client, Charif Tawfik, a friend and previous law partner, Jean Denis Archambault, a law professor of the plaintiff, and Surinder Makkar, a business associate of the plaintiff.

Plaintiff's Education and Early Work History

[17] The plaintiff was born on April 8, 1978 and was 42 years of age at the time of the trial. He lived and grew up in Montreal where he attended high school and CEGEP. In 1997 he commenced the study of law at the University of Ottawa. He completed the Civil Law program at the University of Ottawa in 2000 and the Common Law program in 2001. According to his law school transcripts, his cumulative grade point average for the Civil Law program was 6.5, a B average, and his cumulative grade point average for the Common Law program was 5.7, a C+ average. However, he did exceptionally well in tax and administrative law, achieving marks of 100%. The Professor of those courses, Professor Archambault, testified that this was unique in his experience.

[18] Professor Archambault wrote a reference letter for the plaintiff dated September 24, 2001. In that letter he stated that the plaintiff's achievement in earning 100% in his two courses was exceptional and something he had never before seen in his 25 year career. He also stated that the plaintiff's "entire academic record is of similar calibre – remarkable".

[19] I do not find that the plaintiff's academic performance overall at the University of Ottawa was in any way remarkable. He did exceptionally well in two courses but overall his academic performance was average, as indicated by his cumulative grade point averages.

[20] While enrolled in his final year of law school the plaintiff sent out over 30 applications for a position at a law firm. He testified that in response to those applications he got a dozen interviews and one job offer. He further testified, however, that the offer he received was later withdrawn when the law firm learned that he had failed his bar exam on the first try.

[21] In 2002 the plaintiff enrolled in a tax Law program at HEC Montreal with the intention of obtaining a Masters of Law degree. He attended courses in the fall semester of 2002 and in the winter and summer semesters of 2003. By the end of the summer 2003 semester he decided to not pursue a Masters degree and

graduated with a Diploma instead. His cumulative grade point average at HEC Montreal was 2.98, a B average.

[22] While attending HEC Montreal, the plaintiff obtained summer employment at Ivaco Inc. where he worked as an assistant to in-house counsel. He earned approximately $16,000 in 2002.

[23] After leaving HEC Montreal, the plaintiff obtained employment with Canada Revenue Agency (“CRA”) and Canadian Border Services Agency as a Customs Inspector. This job lasted only about one year. He earned approximately $6,000 with CRA in 2003 and $10,000 in 2004. He testified that he quit the job once he found articles.

[24] The plaintiff commenced his articles in April 2004 with Planitek International Inc. (“Planitek”). He obtained the articles through an acquaintance at the CRA. He completed his articles in October 2004. On the first day of giving his evidence, when asked in-chief whether he was paid for his articles at Planitek he replied that he believed he was paid but did not remember. On the second day of giving his evidence he was asked what income he earned from his articles. This time he testified that he believed he took his articles on an unpaid basis because he was desperate.

[25] I find as a fact that the articles were unpaid. The plaintiff has produced all of his income tax returns and T4 slips for the period from 2003 through 2019. If he had been paid by Planitek there would have been a T4 slip indicating so.

[26] The plaintiff was called to the Quebec Bar on November 16, 2004.

[27] The plaintiff explained that the delay in his admission to the Quebec Bar was because he failed three of six examinations. He had to retake the three failed examinations. He passed two of the three on the second attempt. The third failed exam he had to rewrite a second time before he passed.

[28] The plaintiff suggested it was not unusual for candidates to fail the Quebec bar exams. He testified that only 20% of students pass the bar exams on their first attempt. He said that he understood this from a bulletin board posting. Mr. Tawfik also testified to the pass rate of the bar exams. His evidence was that he believed no more than 30% passed the exams on the first try. This evidence was based on an article he had read at some point that he could not specifically recall.

[29] I do not accept the plaintiff's evidence or Mr. Tawfik's evidence that only 20% to 30% of candidates passed the Quebec bar exams on their first attempt. Neither of them had first hand knowledge of this statistic. Professor Archambault, who taught at the Quebec Bar Admission Program for three years and was a director of the program, testified that the failure rate once went as high as 50%. He did not know what the pass rate was around the time the plaintiff took the exams but he did testify that the pass rate increased significantly from 1990 to 2000. Further, the plaintiff's articling position was revoked when he failed to pass the bar exam, which suggests that failing the bar exam was unusual.

[30] The plaintiff opened a law practice with Mr. Tawfik in 2005 following his call to the Bar of Quebec. Their practice was not successful and was closed in 2006, although the plaintiff continued to work on some files into 2007. Mr. Tawfik testified that in total the firm had about 15 to 20 clients over two years. Neither the plaintiff nor Mr. Tawfik earned income from this law practice.

[31] During the period from 2005 to 2006, in addition to his law practice, the plaintiff worked part time as a security guard and also worked for AXA, an insurance company. His job at AXA involved answering questions from policy holders. In 2005 he earned $5,200 as a security guard and approximately $6,600 from AXA. In 2006 he earned approximately $26,400 from AXA.

[32] In 2007 the plaintiff entered upon a new venture with two friends involving the concrete business. He took several courses with the Construction Association of Quebec to further this work and a company was incorporated. He testified that he had a 40% interest in the company. He also testified that the company made money.

[33] I do not accept the plaintiff's evidence that this concrete business venture made money nor do I accept any implication that the business was even remotely successful. The lack of success of the business venture is indicated by the plaintiff's income in 2007 and 2008. His total income in 2007 was only $303 and in 2008 he had no income whatsoever. If the business had been successful, the plaintiff would have received some income from it.

[34] The plaintiff sought to explain the lack of success of the concrete business venture by testifying that one of the partners in the venture forged signatures and absconded with the money, which he says was between $20,000 and $30,000. I do not accept this explanation for the failure of the business. First, assuming a partner did abscond with $30,000, the plaintiff's share of those funds would have been at most $12,000, which is an insignificant amount for two years in business. Second, the plaintiff also testified that the partner absconded with the funds after he had already determined to move to British Columbia to work with Mr. Makkar. In other words, the timing suggests the plaintiff realized the concrete business was a failure before the partner absconded with the funds.

[35] As I have indicated, in 2007 and 2008 the plaintiff earned virtually no income. He supported himself during those years by moving in with, and living off of, his mother. As will be seen, the plaintiff's mother providing financial assistance to the plaintiff is a recurring theme.

Plaintiff's Move to British Columbia

[36] In approximately October of 2008, the plaintiff was introduced to Mr. Makkar, an accountant in Surrey, by a mutual friend. Mr. Makkar was looking for a lawyer to assist with his clients' tax issues. The two conversed over the telephone and the plaintiff did a small amount of consulting work for Mr. Makkar in early 2009. In February 2009, the plaintiff traveled to British Columbia to meet Mr. Makkar and to discuss relocating to British Columbia.

[37] In June 2009, the plaintiff moved to British Columbia.

[38] There is a bit of conflict between the evidence of the plaintiff and that of Mr. Makkar as to what their plan was. The plaintiff's evidence was to the effect that he would begin a law practice in British Columbia and Mr. Makkar would refer clients with tax issues to him. He said they discussed a partnership several times. Mr. Makkar's evidence was that the plaintiff would establish a law practice and he, Mr. Makkar, would become a salaried employee and paralegal in the plaintiff's practice, although he was somehow also to get a referral fee and a percentage of the billings.

[39] After moving to British Columbia, the plaintiff applied to the LSBC for a transfer licence on June 17, 2009. His application was approved on June 18, 2009, but required that he pass transfer exams within 12 months. The plaintiff's plan was to write the transfer exams within two or three months.

[40] The plaintiff's evidence at his examination for discovery, which he accepted as true at the trial, was that he obtained the Professional Legal Training Course ("PLTC") materials, the written materials to be studied and mastered before writing the transfer exams, at the time of his acceptance, which was June 18, 2009. He further testified that once he got the materials he focused on studying for 10 to 12 hours per day and did no work for clients. However, this evidence is clearly not true. At his examination for discovery he testified that at the time of MVA#1 he was only about 1/6th of the way through the PLTC materials and, on the day of MVA#1, he was on his way to meet with Mr. Makkar at his office. Additionally, on the day of MVA#2 he was with Mr. McNary, a client that had been referred to him by Mr. Makkar, and on their way to view a project.

[41] Therefore, I find that the plaintiff was not studying the PLTC materials 10 to 12 hours per day prior to MVA#1 and did not suspend client work while he was studying for his transfer exams. Rather, from June 18, 2009 until the time of MVA#1 and continuing until at least the time of MVA#2 he was simultaneously performing consulting work and studying for his transfer exams.

[42] Moreover, given that he was juggling both study and work and that he was only 1/6th of the way through the PLTC materials at the time of MVA#1, I find that the plaintiff's plan to write the transfer exams within two or three months of his arrival in British Columbia was completely unrealistic.

[43] I also note that the fact the plaintiff was doing consulting work before being called to the British Columbia Bar is problematic. His evidence at his examination for discovery, which he adopted in cross-examination, was that prior to moving to British Columbia he had made inquiries of the LSBC and understood that he could provide tax advice, a matter of federal law, without being licenced to practice law in British Columbia. However, upon his arrival in British Columbia, he learned that he was not permitted to do so. Notwithstanding this advice, it is clear on the evidence that he was providing tax advice in British Columbia and that he was doing so for a fee. He earned income in 2009 of $6,000, most of which was earned after he moved to British Columbia.

[44] I further note that at his examination for discovery held on March 2, 2012, the plaintiff gave evidence that he had not earned any income since moving to British Columbia. When this was put to him in cross-examination he admitted that he had earned income but the income was zero after deducting expenses. Both his answer at discovery and his answer at trial are untrue. He did earn net business income in 2009, 2010 and 2011, albeit not a lot.

Plaintiff's Pre-Accident Health

[45] The plaintiff testified that prior to MVA#1 he weighed approximately 180 pounds, had no medical issues, did not suffer from anxiety or depression and was very active doing things such as: the Grouse Grind in 50 minutes; playing floor, ice and roller hockey; and going to the gym six to seven days per week.

[46] The plaintiff also testified that his only prior injuries or accidents were a head injury from a football tackle in 1994, from which he fully recovered, and a motor vehicle accident in 2004. In the 2004 accident, the plaintiff was a passenger in a vehicle being driven by Mr. Tawfik. The plaintiff testified that the injuries suffered in

that accident consisted of headaches, a stiff neck, irritability, nausea and dizziness but stated that these symptoms lasted only a few weeks. He also testified to having a left knee problem before 2009.

[47] There is no evidence before me indicating that the plaintiff's testimony of his pre-accident health is incorrect or incomplete and there is evidence corroborating the plaintiff's testimony. In particular, Mr. Tawfik, who was the driver of the vehicle involved in the 2004 accident, testified that the plaintiff complained of headaches for two months following the accident but then was fine. He also testified that the plaintiff had been a sportsman and good at hockey. The plaintiff's spouse, Ms. Baltadjian, also purported to confirm the plaintiff's pre-accident health but, as will be seen, she scarcely knew the plaintiff and the corroborative value of her evidence is therefore minimal. She was however able to confirm the plaintiff's passion for roller hockey as she testified to watching the plaintiff play roller hockey for two hours.

[48] I am satisfied, and find as a fact, that the plaintiff was in good health in August of 2009 before MVA#1 and was reasonably physically fit and active.

MVA#1

[49] MVA#1 occurred on August 21, 2009 near the intersection of 152nd Street and 98th Avenue, Surrey. The plaintiff's evidence is that he was travelling northbound on 152nd street in the curb lane when he noticed a bus ahead picking up passengers. He switched into the left lane and was then rear-ended by another vehicle. He estimated that he was going about 50 km/h. He felt his seatbelt restrain him and his head move back and forth. He testified to having a stiff neck and a headache at the scene of the accident.

[50] The vehicles involved pulled over to the side of the road and the drivers exchanged information. The damage to the plaintiff's vehicle was minor consisting of cosmetic damage to the bumper. This damage was never repaired. The other vehicle had a dent in the bumper which the driver simply pushed back out.

[51] After MVA#1 the plaintiff continued to Mr. Makkar's office. He testified that at Mr. Makkar's office he started to get a stiff back. He says that he cut the meeting short and left.

[52] Mr. Makkar confirmed the evidence of the plaintiff. He testified that when the plaintiff arrived at his office he did not look well. He further testified that the plaintiff was rubbing his neck and complained of pain. He confirmed that the meeting was cut short.

[53] The plaintiff testified that as the day progressed his condition got worse. The next day he went to the hospital. He says that in addition to headaches, neck pain, back pain, dizziness and nausea he was disoriented. The hospital records disclose complaints of headaches, neck and back pain and dizziness. At the hospital they took an x-ray and told him he had soft tissue damage.

[54] Ten days later he attended at a walk-in clinic where he saw a Dr. Jones and complained of a sore neck and back, headaches, and nausea. He was told by Dr. Jones to stay active and was not prescribed any medications.

[55] The plaintiff testified that in late September 2009 his symptoms were improving. However, he then described having continuing symptoms of headaches, dizziness, nausea, back pain, neck pain and stiffness, difficulty sleeping, difficulty studying and an inability to sit for more than 20 minutes. His description of his symptoms was wholly inconsistent with his statement that his symptoms had improved.

[56] By this time the plaintiff had become a patient of Dr. Ramani. Dr. Ramani's records for September 28, 2009, disclose that the plaintiff was, in fact, doing much better. Dr. Ramani recorded that there was an improvement in dizziness, stiffness and nausea but there was still neck and upper back pain. Dr. Ramani prescribed muscle relaxants and pain killers.

[57] The plaintiff again saw Dr. Ramani on October 21, 2009. Dr. Ramani's notes for that visit do not state whether the plaintiff's condition had improved or

deteriorated. The notes do record that the plaintiff reported he was suffering from pain, insomnia, dizziness and poor concentration and memory. The notes also record the plaintiff reported going three days without sleep but the plaintiff had no recollection of telling Dr. Ramani this.

[58] The plaintiff testified that by mid-November, the time of MVA#2, he was feeling slightly better in that his headaches were not as intense but that emotionally he was not doing well. His evidence of a slight improvement is mostly consistent with the clinical notes of Dr. Ramani.

[59] Importantly, the plaintiff testified that after MVA#1 and before MVA#2 he was having trouble studying the PLTC materials. He says that he could not sit still or concentrate and could not read and retain information. He also stated that he was not able to stay active because of nausea and dizziness. He tried to go to the gym three or four times but became disoriented and could not finish his workouts. He says that he spent a lot of time in his bed. He says that there were several occasions where he had to crawl from the bed to the bathroom because of excessive dizziness and balance issues. He says that he only left his home “maybe five times” to go to the doctor, for food or to go to the sauna at his gym.

[60] Ms. Baltadjian, testified to the condition of the plaintiff following MVA#1. At the time, she resided in Montreal but spoke with the plaintiff regularly by phone and Skype. She testified that after MVA#1 the plaintiff was not himself. She said he complained of headaches, a stiff neck and a sore back. She said that over time the calls with the plaintiff became less frequent and he became cold and distance. She said he seemed like a different person. She testified that her communications with the plaintiff between October 11, 2009 and MVA#2 were “alarming” and that she came to Vancouver to offer him support. She said that his demeanour had changed from what it was before MVA#1. He was more aggressive. He was not shaving or showering and his apartment was a mess. She said he spent most of his time in bed. She also testified that he had difficulty studying and was not able to be intimate.

[61] I do not consider that the evidence of Ms. Baltadjian is reliable insofar as it purports to show that there was a dramatic change in the personality or demeanour of the plaintiff following MVA#1. Being the spouse of the plaintiff, she has an interest in the outcome of these proceedings and I find that she has exaggerated the plaintiff's symptoms. More importantly, I do not consider that she knew the plaintiff well enough to draw all of the conclusions she purports to draw, namely that there was a fundamental change in his demeanour and his mental and emotional state. The plaintiff and Ms. Baltadjian first met in May of 2009, the month before the plaintiff departed for British Columbia. They went out a few times for coffee and once for Ms. Baltadjian to watch the plaintiff play roller hockey. In view of the limited number of interactions between the two, Ms. Baltadjian did not know the plaintiff well enough to testify to a change in his personality or demeanour. Moreover, her descriptions are not consistent with Dr. Ramani's notes. Nevertheless, I do accept her evidence as corroborative that the plaintiff was suffering from headaches, a stiff neck, sore back and sleep issues.

MVA#2

[62] MVA#2 occurred on November 14, 2009. The plaintiff was driving east on 12th Avenue in Vancouver near Kingsway. The plaintiff switched from the left lane to the right and was proceeding down the road when another vehicle also switched lanes. The other vehicle hit the driver's side quarter panel of the plaintiff's vehicle. The plaintiff's vehicle bounced off the curb. At the time the plaintiff was proceeding at between 20 and 30 km/h. The plaintiff described the force of the collision as a "good wack". The plaintiff testified that his car was written off after the accident but also stated that this was because it was not worth much.

[63] Mr. McNary, a realtor and client of Mr. Makkar, was in the plaintiff's vehicle at the time of MVA#2. He testified that the two of them were going to view a real estate project. He confirmed the details of the accident including that the force of impact was "pretty good". He also testified to suffering a shoulder injury in the accident.

[64] The plaintiff testified that his symptoms worsened after MVA#2. Specifically, he testified that the headaches and nausea got much worse for a good three weeks. He also stated that the neck and back pain "started, came on" suggesting that the neck and back pain had somewhat resolved by MVA#2 and then recurred. His ability to study remained affected. He testified that he would get headaches when he tried to study and could not retain information. He said he could study no more than two hours per week. He also continued to suffer from sleep problems getting only five hours of broken sleep. His symptoms made him feel incapacitated and depressed. He testified that he was unable to keep his home clean.

[65] Mr. McNary purported to testify that the plaintiff was noticeably different after MVA#2, however, I do not accept his evidence in this regard. He testified that he was only introduced to the plaintiff in the spring of 2009 and was unsure how many times they had met. He variously stated that they met two, five, six or seven times. Additionally, he never saw the plaintiff after MVA#2. There was simply no basis for his evidence that the plaintiff was noticeably different after MVA#2.

[66] Following MVA#2 the plaintiff saw Dr. Ramani in late November and early December 2009 complaining of headaches, neck and back pain, dizziness and nausea. Dr. Ramani referred the plaintiff to Dr. Gurwant Singh, a Neurologist, for a consultation.

MVA#3

[67] MVA#3 occurred on December 12, 2009. The plaintiff was in the left lane on 152nd street in Surrey waiting for a traffic light. A vehicle in the right lane attempted to switch lanes and hit the passenger side quarter panel of his car. The plaintiff testified that his symptoms after MVA#3 were not appreciably different than before this accident but he conceded he may have told various medical doctors that his symptoms were aggravated by MVA#3. I accept the plaintiff's evidence that his symptoms were not appreciably aggravated by MVA#3 but note that his advising his doctors otherwise is an example of the plaintiff being careless as a historian, if not untruthful.

[68] The plaintiff returned to Montreal for a Christmas visit at the end of 2009 and again in February 2010. While in Montreal he was able to ice skate for about 30 minutes. He stated that he was able to do this because it was cold in Montreal. While in Montreal in February 2010 the plaintiff attended at Sacré Coeur Hospital because of headaches and vomiting. An MRI was done at the hospital which showed no abnormalities.

[69] The plaintiff and Ms. Baltadjian broke off their relationship while the plaintiff was in Montreal for Christmas. Ms. Baltadjian testified that she ended the relationship because he was always in a foul mood and aggressive. However, when he returned to Montreal in February they resumed their relationship.

[70] The plaintiff saw Dr. Singh, to whom he had been referred by Dr. Ramani, some time after returning from Montreal. Dr. Singh reported on the results of the consultation by letter to Dr. Ramani dated January 19, 2010. In that letter Dr. Singh stated that the plaintiff reported an improvement in his symptoms of headaches, nausea and dizziness after MVA#1 but that after MVA#2 the headaches re-occurred and lasted for three weeks. The plaintiff further told Dr. Singh that his symptoms improved such that around Christmas he spent the entire time skating and did well. However, the headaches returned after the plaintiff helped a friend move. Dr. Singh reported that the plaintiff's only continuing symptom at the time of the visit was headaches and that the plaintiff complained of feeling depressed and having no energy or motivation. Dr. Singh also provided a diagnosis and treatment plan but, as he was not qualified as an expert witness, his opinions are not admissible.

[71] Upon returning to Surrey in February 2010 the plaintiff spent his time doing consulting work rather than studying for his transfer exams. He found the consulting work easier than studying because it simply involved talking. His clients were mostly referrals from Mr. Makkar. In 2010 he earned income of $7,550 from his consulting work.

[72] On March 5, 2010, the plaintiff again saw Dr. Ramani. Dr. Ramani's notes for this visit indicate that the plaintiff continued to suffer from insomnia, headaches and nausea.

MVA#4

[73] MVA#4 occurred on April 10, 2010. The plaintiff was driving eastbound on 108 Avenue in Surrey in the left lane. He switched to the right lane and was side swiped by another vehicle. In his evidence in chief he testified that he was already feeling terrible by the time of this accident and that he did not believe any of his injuries were aggravated in MVA#4. However, he admitted that this accident was his fault and admitted that he may have advised medical experts that his injuries were aggravated by this accident. This is another example of the plaintiff being careless, if not untruthful, in what he told medical personnel.

[74] In April of 2010 the plaintiff wrote to the LSBC advising them of his involvement in three motor vehicle accidents and that he had suffered a concussion as a result. He requested that his application for transfer be cancelled and that the fees paid be refunded to him. The LSBC responded on April 14, 2010 advising him that the fees paid could not be refunded but they did extend the time within which he must pass the transfer exams to February 28, 2011.

[75] I note that the plaintiff told the LSBC he had suffered a concussion because he was told by Dr. Ramani and by Dr. Singh that he had suffered a concussion or that he had concussion symptoms. What Dr. Ramani and Dr. Singh told the plaintiff is relevant and admissible in relation to the plaintiff's state of mind and his belief that he suffered a concussion, but is not evidence that he did suffer a concussion. The latter would require properly admissible expert testimony from Dr. Ramani or Dr. Singh, which is not before me.

[76] In June of 2010, Ms. Baltadjian moved to Vancouver to join the plaintiff. She testified that the plaintiff complained of not having energy and that he did not study, work or go to the gym.

[77] The plaintiff attended appointments with Dr. Ramani on October 27 and November 10, 2010. Dr. Ramani's notes for the October 27, 2010 visit indicate that the plaintiff was having a headache about once very six weeks and was irritable as a result. His notes for the November 10, 2010 visit indicate the plaintiff was having recurring severe headaches and was experiencing poor recall, difficulty concentrating, and frustration. There is an obvious inconsistency in the notes for these two visits, which were only two weeks apart, as to both the severity and frequency of the plaintiff's headaches.

[78] The plaintiff wrote his transfer exams on January 24 and February 4, 2011. He failed one of the exams and had to retake it. He was advised by letter dated March 2, 2011 that he had completed the requirements for call and admission to the British Columbia Bar and that he must take membership within six months. He was subsequently called to the Bar on April 1, 2011. He initially paid the required fees to engage in the part-time practice of law. However, on July 1, 2011, the plaintiff applied to for non-practicing membership status and a refund of the fees paid. That application was processed and a refund was paid on July 12, 2011.

[79] On March 6, 2011 the plaintiff attended hospital due to experiencing headaches, dizziness, nausea and vomiting.

[80] The plaintiff's last visit with Dr. Ramani was on April 6, 2011. Dr. Ramani's notes for this visit indicate that the headaches had improved but that concentration and focus were still difficult and aggression was still a problem. The notes also indicate that the plaintiff had signs of depression but had declined medications.

[81] The plaintiff switched his family doctor from Dr. Ramani to Dr. Baasch. Dr. Baasch's clinical notes and his expert reports, which I will address later, indicate the first visit was on March 28, 2011 at which time the plaintiff complained of headaches, nausea, difficulty studying, back and neck pain and irritability.

[82] The second visit with Dr. Baasch was on April 19, 2011. At this visit the plaintiff reported significant improvements in his symptoms and stated his headaches had subsided.

[83] In April 2011, the plaintiff and Ms. Baltadjian took a short holiday to Whistler where they attempted downhill skiing. The plaintiff testified that it did not go well. He told Ms. Baltadjian to continue without him and went to the restaurant. Ms. Baltadjian confirmed that the plaintiff had a difficult time skiing and quit after a short while. I make no inferences from this skiing adventure other than that the plaintiff was feeling well enough to try such an adventure. This was the plaintiff's first attempt at skiing and it is not surprising that it did not go well.

[84] In May 2011 the plaintiff saw Dr. SuttonBrown for a consult. Dr. SuttonBrown noted that the plaintiff's headache had largely resolved, that he was sleeping much better and that his mood had also improved significantly. Dr. SuttonBrown's examination of the plaintiff was normal.

[85] In June 2011 the plaintiff attempted to play roller hockey at the urging of Ms. Baltadjian. She testified that he was only able to play for about 15 minutes. She contrasted this with the time she had seen him play roller hockey in Montreal when he was fast and skillful and played for two hours.

[86] On June 13, 2011, the notice of civil claim was filed in Vancouver Registry action M113013 relating to MVAs #1 through #4.

[87] In November 2011 the plaintiff began physiotherapy treatments at Abbotsford Sports Clinic.

[88] Also, in November 2011, Dr. Baasch provided his first expert report, which is addressed in more detail below. However, as of November 2011, he noted significant improvement in the plaintiff's symptoms and his prognosis was "excellent".

[89] On February 13, 2012, the plaintiff again saw Dr. Baasch. At this meeting he advised Dr. Baasch of a flare-up in his symptoms in late October and early November 2011 when he recommenced exercising. The plaintiff's only complaint was of headaches, which were not as severe as they had been. Dr. Baasch also recorded that the plaintiff's headaches were worse in the early morning and improved as the day wore on.

[90] The plaintiff testified that he started to feel better in 2012. He re-instated his LSBC membership on a part-time basis and, on February 17, 2012, entered into a consulting agreement with a new client, TR Wilderness Lodge Corp. ("TRW"), a company owned by Gundhart Fleischer. The plaintiff was introduced to Mr. Fleischer by Mr. Makkar.

[91] Pursuant to the terms of the TRW agreement, the plaintiff was to devote 10 hours per month to providing consulting services to TRW and was to be paid $500 per hour for such services. The term of the agreement was for one year.

[92] The plaintiff testified that the services he performed for TRW involved consulting on property acquisition and development and assisting with managing a hotel. He was not specific on the exact services he provided.

[93] The plaintiff testified that the TRW agreement was limited to 10 hours per month because that was all that he believed he could do. I do not accept this evidence. As of the time the TRW agreement was entered into, the plaintiff's condition had been constantly improving since March 2011. No specific treatments had been recommended by Dr. SuttonBrown or by Dr. Baasch, the two doctors most recently seen by the plaintiff. The medical evidence does not support that the plaintiff was able to work only 10 hours per month.

[94] Further, there is no basis for the plaintiff's belief that he was capable of working only 10 hours per month. The plaintiff's tax records show that he earned $5,250 in the first half of 2011 and earned nothing after July 2011. Given the substantial improvement in his condition and the fact that he had not worked for at

least six months, there was no basis for his belief that he could work only 10 hours per month. In my view, it is far more likely that the 10 hours per month limit in the contract had to do with circumstances other than the plaintiff's medical conditions.

[95] I have taken into account that the preamble to the TRW agreement could be considered to be somewhat corroborative of the plaintiff's evidence in that it states: "the Consultant has been recently injured and still suffers from symptoms". However, considering that this action had already been commenced by the time the TRW agreement was entered into and that the plaintiff was advancing a claim for loss of income, I do not consider that statement to be corroborative of the plaintiff's evidence.

[96] I also do not accept any implication from the plaintiff's evidence that it was in February of 2012 that his condition improved sufficiently to allow him to seek reinstatement with the law society and to return to work. This was essentially the evidence he gave at his examination for discovery on March 2, 2012, approximately two weeks after the TRW agreement was entered into, and which he adopted at trial. At his discovery, he testified that most of his symptoms had gone away and that his recovery had been exponential in the last week or two. But, the clinical notes and records indicate his recovery was not exponential in the week or two before the TRW agreement. Rather, those records show, and I find as a fact, that the plaintiff had a steady improvement since at least April 2011.

[97] I find that the plaintiff was capable of working, at least on a part time basis, from the time he passed his transfer exams and was called to the bar on April 1, 2011. I further find that his decision to apply to the law society for non-practicing status was motivated not by any medical inability to work but because he simply had no clients to work for. This is corroborated by the fact that on the same day the TRW agreement was signed, February 17, 2012, the plaintiff applied to the law society to return to practicing member status.

[98] On March 2, 2012 the plaintiff again saw Dr. Baasch. This time he reported that his headaches were definitely improving and that he had started working and doing some sporting activities.

[99] The plaintiff was also examined for discovery in March 2012. At his examination he testified to an overall exponential improvement in his symptoms, that his headaches occurred only “once in a while” and that he still had “some lack of sleep”.

[100] In late March 2012, the plaintiff purchased a condominium for $335,000 with a $2,000 deposit. It is not completely clear on the evidence exactly how the purchase was financed. There is some suggestion that the plaintiff’s mother may have assisted with the purchase and Ms. Baltadjian testified that they had a combined income of over $100,000 per year and felt they could afford it. Regardless, in my view nothing turns on how they financed the purchase of the condominium.

[101] In May 2012 the plaintiff saw Dr. McKenzie. The plaintiff testified that by this time he was concerned about personality changes, namely an increase in aggression. He also still complained of neck pain and headaches and was still getting only five hours of broken sleep per night.

[102] Dr. McKenzie prepared an expert report dated May 16, 2012. Although I will address his report in more detail below, I note here that Dr. McKenzie was of the opinion that any myofascial pain issues had resolved and that the plaintiff’s main problems were headaches and emotional issues, neither of which was within his area of expertise.

[103] On May 28, 2012, the plaintiff again visited Dr. Baasch whose notes record that the plaintiff’s main problem was headaches when exercising. The notes also state that the plaintiff complained of personality changes, beyond irritability, when he has headaches.

[104] I note that the plaintiff testified he had both neck pain and headaches on a daily basis in May of 2012. His evidence that he still had neck pain is not consistent

with Dr. McKenzie's report or Dr. Baasch's records. This is yet another example of the unreliability of the plaintiff's evidence.

[105] On July 7, 2012, the plaintiff and Ms. Baltadjian married in Montreal and went on a Mediterranean cruise for a honeymoon. The plaintiff testified that he was unable to enjoy the shore excursions that were offered on the cruise as he would get symptoms when he started walking. Ms. Baltadjian confirmed that the plaintiff was not able to do most of the shore excursions.

[106] The plaintiff continued receiving physiotherapy in 2012. He also commenced chiropractic treatments, which continued until 2015, and naturopathic treatments.

[107] In 2012 the plaintiff earned a gross business income of $47,500 and a net business income of $35,150. All of the income earned was from TRW.

[108] The plaintiff testified that he also returned to playing roller hockey in 2012, although his evidence of the frequency was contradictory. He stated that he played once per week but also said he played four or five times in total.

[109] On November 2, 2012, the plaintiff attended for an interview and assessment with Dr. Robinson, one of the plaintiff's expert witnesses. I will address Dr. Robinson's reports in more detail below but note here that Dr. Robinson reported the plaintiff telling him the headaches had gradually improved, were a lot better, and were less frequent and intense, although they did occur at least every two weeks.

[110] The plaintiff testified that by the end of 2012 he was <u>still</u> having daily headaches, neck pain and emotional issues. Again, I find that this evidence is inconsistent with the plaintiff's testimony of earlier improvements to his condition, his evidence at his examination for discovery and with what he told Dr. Robinson in November of 2012.

[111] In 2013 the plaintiff continued to do consulting work for TRW. He earned a gross business income of $55,000 and a net income of $36,683. He testified that his

gross income was only $55,000 as he and Ms. Baltadjian spent one month in the Philippines looking after Ms. Baltadjian's mother.

[112] Ms. Baltadjian gave birth to a child, Venice, in 2013. She testified that the plaintiff became aggressive, irritated and frustrated when Venice cried and that he was not much help with the new baby.

[113] The plaintiff and Ms. Baltadjian also purchased a house in April of 2013 for $712,500. The down payment of $40,000 was borrowed from the plaintiff's mother. They did not sell their condominium when they bought the new house but rented it out.

[114] The plaintiff attended to see Dr. Baasch on June 25, July 5, July 19, August 8, August 22, September 27 and November 15, 2013. His only complaints during the various visits were of headaches. In his second report dated November 11, 2013, Dr. Baasch stated that the plaintiff reported his headaches had become worse around the middle of 2013.

[115] The plaintiff received Botox injections for the headaches but the injections apparently provided no relief. The plaintiff also attended for naturopathic, chiropractic, and osteopathic treatments, spinal decompression, and massage therapy.

[116] In the fall of 2013 the plaintiff was referred to a psychiatrist, Dr. Neelakant. The plaintiff testified that the referral was because he was feeling anxious, stressed and depressed, was having suicidal thoughts and was being overly aggressive with his spouse. Dr. Neelakant prescribed Epival.

[117] Ms. Baltadjian began attending the plaintiff's medical appointments with him. She testified that this was because she wanted to understand what was going on with him and she was concerned that he was not providing full information to the medical doctors because he forgot a lot. She also testified that his mood improved after he began seeing Dr. Neelakant but that he was still tired and fatigued.

[118] The plaintiff continued to play some pick-up roller hockey in 2013. He says he was able to manage by taking lots of breaks.

[119] The plaintiff testified that by early 2014 he felt he was improving. His mood was better, his headaches were less frequent and he was less dizzy. Ms. Baltadjian also confirmed an improvement in his condition in early 2014 but was not specific as to how he improved. She did note that he was still having headaches.

[120] It is worthwhile to contrast the evidence of the plaintiff and Ms. Baltadjian with the clinical notes of Dr. Baasch. The plaintiff saw Dr. Baasch on January 28, February 28, April 7, May 22 and June 19, 2014. Dr. Baasch's clinical notes for those dates record absolutely no improvement in the plaintiff's headaches. The note for the visit on April 7, 2014 records that the plaintiff had difficulty with headaches while visiting Montreal, which the plaintiff attributed to a sinus condition, but further states that the plaintiff was back to baseline with ongoing headaches. The testimony of the plaintiff and Ms. Baltadjian that his condition improved in 2014 is not supported by these notes.

MVA#5

[121] MVA#5 occurred on June 22, 2014 in Prince George. The plaintiff was with Mr. Fleischer and Mr. Fleischer's grandson. They were visiting properties in Dawson Creek and checking on a hotel. The plaintiff was driving a Hummer towards Dawson Creek from Prince George. He was proceeding at 80 to 90 km/h along highway 97. There were vehicles in front of and behind him. As they were crossing a bridge at the Salmon River the vehicle in front of him slammed on its brakes unexpectedly and he did the same. Unfortunately, the vehicle behind him did not stop quickly enough and slammed into his vehicle propelling it forward into the vehicle in front of him.

[122] The liability for MVA#5 was initially disputed but it is now admitted that the defendant, Mr. Schaeffer is 75% at fault and the defendant, Mr. Smith is 25% at fault. Mr. Schaeffer was driving the vehicle at the front of the chain of cars. He slowed down or even stopped while crossing the bridge. The defendant Mr. Smith was the driver of the vehicle behind the plaintiff.

[123] MVA#5 was by far the most severe accident in which the plaintiff was involved. There was substantial damage to the rear of the Hummer the plaintiff was driving and to several of the other vehicles involved in the pile-up. Emergency vehicles were called to the scene.

[124] Both Mr. Fleischer and his grandson suffered some injuries. Mr. Fleischer was bleeding and having trouble breathing. He was administered oxygen at the scene by the emergency responders. Mr. Fleischer's grandson was experiencing neck issues.

[125] The plaintiff testified that immediately after the accident he felt his neck stiffening and a horrible headache starting.

[126] All three of the plaintiff, Mr. Fleischer and the grandson were taken to hospital. The plaintiff was not admitted. He stayed overnight in a hotel and flew back to Vancouver the next day.

[127] The Prince George hospital records for the plaintiff note only that he suffered a minor neck strain.

[128] The plaintiff testified that after MVA#5 his emotional health deteriorated badly. He says he felt guilty he could not support his family. He could not interact with his daughter. He was not motivated and was frustrated. He also complained his libido was worse.

[129] The plaintiff did not receive any new treatments or medications following MVA#5.

[130] Ms. Baltadjian testified that after MVA#5 the plaintiff regressed back to where he was in 2009. She said he was having terrible headaches and neck and back pain and was more aggressive

[131] The plaintiff attended to see Dr. Baasch on July 4, 2014, almost two weeks after MVA#5. Dr. Baasch's clinical note for that day records that the plaintiff complained all of his symptoms were worse. The complaints were: his headaches

were worse and constant; he had dizziness; both jaws hurt; his entire back hurt; and he was irritable and angry. On examination he had discomfort with any movement of the neck and generalized tenderness on palpitation of the spine.

[132] At a subsequent visit with Dr. Baasch on September 26, 2014, Dr. Baasch noted that the plaintiff was struggling and that MVA#5 really set him back.

Post MVAs

[133] At the end of 2014 the plaintiff's relationship with TRW and Mr. Fleischer ended. The plaintiff testified that he and Mr. Fleischer argued frequently and that he was struggling with his work. The termination letter dated December 11, 2014 referenced the reasons for the termination as follows:

> You are being terminated for your intolerable conduct which has persisted without improvement and of which you have been given verbal notice and have acknowledged. There has been no improvement and the situation is now intolerable. The conduct in question includes, but is not limited to, aggressive outbursts, difficulty focusing and concentrating on the task at hand or subject before you, memory lapses and unreasonable delays in completing tasks.

[134] I note that the termination letter could be seen as indicating that the plaintiff was terminated because of the injuries he suffered in the accidents. However, the letter seems to suggest that the "intolerable conduct" had been ongoing for a period of time. It is not obvious when that conduct began or that it is related in some way to MVA#5. Also, given that the plaintiff was generally only working 10 hours per month, I find it difficult to understand how there could have been delays in completing tasks. On balance, I am not satisfied that the termination of the TRW contract had anything to do with the injuries suffered by the plaintiff in any of the MVAs.

[135] Ms. Baltadjian testified that the plaintiff was "devastated" by the termination of the TRW contract. She further testified that this put a strain on their finances. She also noted that their second child was born on December 5, 2014, but did not comment on how this affected the plaintiff.

[136] The plaintiff's gross business income in 2014 was $57,500 and his net income was $32,393. Most of this income was earned consulting for TRW but he did some work for other clients. The fact that he was working for clients other than TRW indicates he was capable of working more than 10 hours per month, if he had other work available.

[137] In 2015, the plaintiff testified he was having daily headaches and was unable to think. He began seeing an occupational therapist, Wendy Singh, to assist him with day to day living and a psychologist, Dr. Chuck Jung. The plaintiff testified that he went to see Dr. Jung as he was having issues both with driving and with being a passenger in a vehicle. He said that Dr. Jung helped him get over his fear of driving but that his fear of being a passenger remained. The plaintiff also testified to having suicidal thoughts in 2015 which he discussed with Dr. Jung.

[138] The plaintiff also attended for various treatments in 2015. These included a pain clinic, kinesiology, physiotherapy, vision therapy (for blurry vision and difficulty focusing), massage therapy, and chiropractic treatments in 2015.

[139] By the end of 2015 the plaintiff testified he was feeling better. He was more comfortable with driving. The occupational therapy helped him with doing things at home. The kinesiology allowed him to be more active with less pain. The vision therapy improved his dizziness.

[140] However, the plaintiff also testified that he had his highest weight gain in 2015. He said he achieved a weight of 254 pounds which he attributed to stress eating and which made him more depressed and lethargic.

[141] The plaintiff worked very little in 2015. His gross business income that year was $6,160 which was from clients referred to him by Mr. Makkar. He testified that he was unable to work after February of 2015.

[142] I do not accept the plaintiff's evidence that he was unable to work subsequent to February of 2015. The plaintiff's condition did not markedly deteriorate in 2015

from what it had been in the latter half of 2014 when he was able to work. The only difference was that he had no clients in 2015.

[143] At the end of 2015 the plaintiff and his family moved, first to Montreal and then to Ontario to be closer to Ms. Baltadjian's family. They sold their Surrey home and condominium in January 2016 and purchased a new home in Niagara Falls for $680,000 with a $7,000 deposit. The plaintiff was asked how they could afford to pay for the new home if he was not working. He testified that Ms. Baltadjian was to work and that they would rent out a basement suite in the new house for additional income. However, once they purchased the house they discovered that the basement needed finishing and Ms. Baltadjian's job offer was withdrawn. The plaintiff testified that these events put pressure on their relationship and made him feel like he was not providing for the family.

[144] The plaintiff further testified that they hired a contractor to renovate the home but this contractor hired workers who were unprofessional and who either did not show up at the appointed time or, when they did show up, did not have the proper tools. He testified that this caused additional stress for him and that he was tired and having headaches.

[145] In 2016 there was an incident where the plaintiff had suicidal thoughts and went to the hospital to seek help. The plaintiff testified that this incident occurred after a fight between him and Ms. Baltadjian. He said he was feeling pressure because of the new home and the fact that he was not working. As a consequence of his attendance at the hospital for suicidal thoughts, his driver's licence was suspended.

[146] The plaintiff testified that in 2016 he had a poor mood, poor concentration, insomnia and fatigue. Ms. Baltadjian testified that the plaintiff's mental state was "spiralling out of control". She said he was very depressed and was in constant pain with his headaches. She testified that he was not able to care for himself or for the children. She testified that she had to remind the plaintiff to brush his teeth and shower and to do basic activities.

[147] Mr. Tawfik, the plaintiff's law partner from Montreal, met with the plaintiff in August 2016. Mr. Tawfik testified that he was shocked when he saw the plaintiff but was not particularly specific as to what shocked him except the plaintiff had gained weight. He said that all they talked about was the plaintiff's condition. He said that the plaintiff could not laugh for long because it hurt. He also testified that he and the plaintiff went for a drive and the plaintiff had an icepack on his head. The plaintiff also asked him to drive fast because the lights were hurting him.

[148] The plaintiff was treated by two physicians in 2016. One was Dr. Santher who he saw for suicidal ideation. The other was Dr. Keenakovich who he saw in relation to marijuana use. The plaintiff had been using marijuana since at least 2012. He testified that it helped with pain, headaches and nausea and had a calming affect. However, by 2016 his use of marijuana was increasing. The plaintiff did not follow up with Dr. Keenakovich because he felt he was being treated like an addict. The plaintiff continued his use of marijuana until 2019 when he finally realized that he needed to do something to address it. He started reducing his use and finally quit marijuana use in 2020.

[149] In 2016 the plaintiff earned no income but in that year the family qualified for Ontario disability benefits. This required that Ms. Baltadjian be declared as the plaintiff's caregiver which then allowed her to quit her job to look after the plaintiff and the children. The plaintiff testified that he was no longer able to look after the children as he would yell at them all the time.

[150] In 2017 the plaintiff tried to return to work. He obtained a job driving taxi and worked for a few weeks but made a lot of mistakes and concluded he was unable to continue. He then took a job as an Uber driver where he worked from March to October 2017. He found working for Uber was easier than working for a taxi company as Uber found the clients, collected the fares, maintained logs of all trips and had a GPS system. He earned approximately $2,000 driving for Uber. He left his employment with Uber as he felt anxious and overwhelmed by the responsibilities and having to communicate with passengers.

[151] An incident occurred in 2017 at a birthday party for the plaintiff's daughter at which approximately 20 members of Ms. Baltadjian's family were present. Specifically, the plaintiff yelled at a child who was hitting his daughter. The plaintiff and Ms. Baltadjian testified that as a result of this incident they were ostracized by Ms. Baltadjian's family. I do not accept this evidence. It is unlikely that an adult raising his voice to a child who is hitting another child would have such a result.

[152] The plaintiff attended Dr. Wassif for treatment from approximately June 2016 to August 12, 2020. Dr. Wassif's clinical records were in evidence before me and from these records it is apparent that the plaintiff's complaints to Dr. Wassif were mostly of headaches, difficulties with concentration, and depression, although there are references of neck and back pain. (I make no mention of Dr. Wassif's diagnoses or opinions as he was not qualified as an expert.)

[153] On November 10, 2017, the plaintiff was seen by Dr. G. Hassey on referral from Dr. Wassif. It is noteworthy that Dr. Hassey's report to Dr. Wassif records that the plaintiff advised he had not felt sad or depressed in recent months and that his sleep was good.

[154] On December 15, 2017, the plaintiff was seen by Dr. Seyone on referral from Dr. Wassif. Dr. Seyone recorded that the plaintiff complained of horrible sleep and that his mood was anxious and depressed. It is to be noted that the plaintiff's complaints to Dr. Seyone differed markedly from those he gave to Dr. Hassey only one month earlier.

[155] In 2017, the plaintiff earned $5,000 in gross business income and $22 in net income.

[156] In 2018 the plaintiff testified that he continued to have headaches, although he had good days and bad days. He was not more specific about the frequency or severity of the headaches, which is regrettable because in 2018 he told several medical practitioners that he was having severe headaches "24/7".

[157] Ms. Baltadjian testified that the plaintiff was struggling in 2018 and was mentally slow and fragile but he had started working out three times per week. She further testified that he did a minimal amount of work around the house.

[158] Dr. Seyone's reports to Dr. Wassif indicate that on February 2, 2018, the plaintiff's mood was more stable and he seemed to be happier. On April 20, 2018, Dr. Seyone reported the plaintiff had made remarkable improvement over the last few months, that he was better able to function and take part in family activities and look after the children and that his outbursts with his wife had diminished significantly.

[159] The treatments received by the plaintiff in 2018 included group pain therapy sessions, managing emotions therapy, kinesiology and massage therapy.

[160] In 2019, Ms. Baltadjian testified that the plaintiff still had headaches but had learned to manage them by avoiding activities that triggered them. She also testified that he lost about thirty pounds.

[161] In August of 2019 the plaintiff had a syncopal episode when he fainted and fell down stairs.

[162] In February of 2020, the plaintiff had another syncopal episode. A consultation report dated February 26, 2020 relating to this episode was sent to Dr. Wassif. It is noteworthy that this report records that the episode occurred while the plaintiff was at the gym doing exercises on a bike and had been on the bike for 45 minutes before the onset of the episode.

[163] The plaintiff testified that it was subsequently determined that there was a problem with his heart and that he had a pacemaker implanted.

[164] On April 6, 2020, Dr. Seyone reported that the plaintiff "has done well for the last two to three years with significant stability leading to better family functioning".

Current Symptoms and Functioning

[165] The plaintiff testified that his current symptoms are headaches, stiff neck, dizziness, fatigue and blurry vision. He said that his headaches are improving because he controls the amount of responsibility he takes on. He was not specific as to the frequency or severity of his headaches. Ms. Baltadjian also testified that the plaintiff still has headaches. She also stated that he gets overwhelmed with little things.

[166] The plaintiff testified that his current activities included going to the gym five times per week before the Covid-19 pandemic but since the pandemic he has been limited to walking regularly. Ms. Baltadjian confirmed the plaintiff went to the gym five times per week before the pandemic and that he lost another 30 pounds. She testified that the plaintiff is now close to the weight he was in 2009. Going to the gym and walking are his main activities.

[167] Concerning the plaintiff's overall level of functioning, it was his evidence that he is unable to look after his children and that he requires Ms. Baltadjian's help to look after himself so that he does not become overwhelmed. Remarkably, the plaintiff suggested that he could not use an ATM card without Ms. Baltadjian's help. It was also suggested that the plaintiff could not brush his teeth without his spouse reminding him to do so. Ms. Baltadjian gave similar evidence. She testified that the plaintiff can do little things here and there such as watching the children for 30 minutes. She said that he does very little of the housework. She said that that when he does things like mowing the lawn or snow blowing he gets headaches and is more fatigued. She testified that the plaintiff is dependent on her and requires her to look after him. She further testified that the plaintiff's mother recently sold her home and had moved in with them. She suggested this was because she could not leave the plaintiff on his own and needed the assistance of the plaintiff's mother.

[168] I completely reject the evidence of the plaintiff and Ms. Baltadjian that he is unable to look after himself or his children. As will be seen, I find that the plaintiff's actual physical and psychological injuries are much less severe than he has

indicated and, given the nature of his actual injuries, the suggestion that he cannot do basic tasks border on the ridiculous and are simply unbelievable.

[169] I acknowledge that Ms. Baltadjian has been declared the plaintiff's caregiver but this was so the couple could qualify for a social assistance program offered by the Province of Ontario. I do not accept that the plaintiff requires a caregiver.

[170] In respect of the plaintiff's ability to return to work, the plaintiff testified that he was too anxious to return to work and that he gets too overwhelmed. As will be seen, I do not accept that there is any medical reason that the plaintiff cannot return to work in some capacity. He has simply determined that he is not able to work, has convinced the appropriate authorities in Ontario that he is completely disabled and has withdrawn himself from the workforce.

[171] I note that the plaintiff was extensively cross-examined on his sources of income and finances and it was suggested to the plaintiff that he had other sources of income that were not disclosed. The plaintiff's response to these questions was that he juggled credit, took out a second mortgage and borrowed money from his mother at different times. I accept the plaintiff's evidence of this.

[172] I also note that there was evidence that the defendants put the plaintiff under surveillance at various times and took video. The plaintiff was questioned about this surveillance video during his examination in chief. He testified to various scenes in the video. One was of him taking out the garbage and recycling. Another was of him holding his daughter who was 15 pounds at the time. A third scene was of him bending over. A fourth scene was of him waiting for the bus with his children. Ms. Baltadjian also testified during cross-examination that one of the scenes in the video was of the plaintiff going with their contractor to pick up materials. The actual video surveillance footage was not shown to me or entered as an exhibit. I decline to make any inferences from the fact of the surveillance or from the descriptions of what was in the video footage.

Experts

[173] The plaintiff introduced into evidence the expert reports of five medical doctors to provide their expert opinion evidence on the nature, cause and extent of the plaintiff's injuries. The medical experts of the plaintiff and their specialities were: Dr. Erik Baasch, Family Medicine; Dr. G.M. McKenzie, Orthopaedic Surgeon; Dr. Gordon Robinson, Neurology; Dr. Stephen Anderson, Psychiatry; and Dr. H.A. Anton, Physical Medicine and Rehabilitation. Of these experts, only Dr. Baasch testified at the trial.

[174] The plaintiff additionally introduced the following expert reports: Derek Nordin, a Vocational Consultant; April Belbeck, an Occupational Therapist who provided a cost of future care report; and Darren Benning, an economist who provided a report on the plaintiff's income loss.

[175] The defendants introduced into evidence the expert reports of: Dr. W. Gittens, Neurosurgeon; Dr. Eytan David, Otolaryngologist; and Dr. R. O'Shaughnessy, Psychiatrist. Only Dr. Gittens and Dr. O'Shaughnessy testified at the trial.

[176] As will be seen, there is a substantial difference of opinion as between the two Psychiatrists, Dr. Anderson and Dr. O'Shaughnessy. Accordingly, I will address their reports in a separate section.

Dr. E. Baasch

[177] Dr. Baasch is an expert in family medicine with a specialty in treating chronic pain. He treated the plaintiff from March 28, 2011 to November 24, 2015. During this period he saw the plaintiff approximately 35 to 40 times. He prepared two reports; one dated November 15, 2011 and a second dated November 15, 2013.

[178] During the first visit with Dr. Baasch, the plaintiff advised that he had been involved in two motor vehicle accidents. Dr. Baasch was told that in the first accident the plaintiff suffered a concussion, headaches, and back and neck pain. Dr. Baasch was told that after the second accident the headaches became much worse and that

the symptoms were nausea, vomiting, irritability, aggressiveness, loss of memory and difficulty studying and concentrating.

[179] Dr. Baasch notes that on April 19, 2011 the plaintiff advised of significant improvements in his symptoms and that his headaches had subsided.

[180] In his first report, Dr. Baasch diagnosed the plaintiff as having “a head injury with a likely component of a whiplash injury to the spine”. He opined that “it seems reasonable” the complaints of headaches, nausea and vomiting were causally related to the two MVAs. He opined that the prognosis was excellent and provided no specific treatment recommendations.

[181] Dr. Baasch also opined in his first report that it was likely the plaintiff’s symptoms significantly affected his ability to study. He was otherwise not able to give further details of the exact degree of any disability.

[182] In his second report, Dr. Baasch repeated his original diagnosis of concussion and whiplash. However, his prognosis changed significantly to one of “very guarded”.

[183] I do not accept Dr. Baasch’s opinions as they are premised on his finding that the plaintiff suffered a head injury or concussion. As will be seen, the majority of the medical experts disagree with this opinion.

Dr. G.M. McKenzie

[184] Dr. McKenzie, an orthopedic surgeon, saw the plaintiff on May 16, 2012 and provided a report on the same day. In his report he states that the plaintiff’s main complaints were a perceived change in personality and headaches. Neck pain is the only other complaint mentioned and it was “not the major issue”.

[185] Dr. McKenzie described the plaintiff’s situation in 2012 as having headaches three to four times per week, that last up to a day, and that cause blurred vision, nausea, aggressiveness, and decreased concentration and memory. The plaintiff perceived the headaches were decreasing in frequency and intensity. Issues with

anxiety and depression were noted, however, the plaintiff said the depression was much improved. He described the plaintiff's sleep as somewhat better but once or twice per week the plaintiff had poor sleep. The neck stiffness occurred about once per week and could last up to one day.

[186] The only treatment noted by Dr. McKenzie was cannabis, three times per week.

[187] Dr. McKenzie stated that he was not able to opine on causation or prognosis in relation to headaches, anxiety or depression as these were not within his area of expertise. He merely recommended that the plaintiff be seen by a neurologist, neuropsychologist or neuropsychiatrist.

[188] Dr. McKenzie opined that the plaintiff had suffered myofascial pain in the first accident that was aggravated by the second accident and had essentially resolved. On clinical assessment the plaintiff had no spinal issues.

[189] I consider that Dr. McKenzie's report is of very limited value other than as evidence that the plaintiff suffered myofascial pain in the first accident that was aggravated by the second accident and that had mostly resolved by May 2012. He clearly, and properly, declined to comment on issues related to headaches, anxiety or depression as being outside his area of expertise.

Dr. Hubert A. Anton

[190] Dr. Anton is an expert in Physical Medicine and Rehabilitation, otherwise known as a Physiatrist. He examined the plaintiff on May 14, 2015 and March 8, 2018 and prepared two reports; one dated June 15, 2015 and a second dated March 29, 2018.

[191] Dr. Anton noted that the plaintiff reported headaches, neck pain, back and shoulder pain, depression, anxiety, irritability, verbal aggressiveness, problems with focus, concentration and memory, episodic vertigo and ringing in the ears. He also stated that the plaintiff had probably developed deconditioning.

[192] Dr. Anton's diagnosis was that the plaintiff probably sustained soft tissue injuries to the neck and back in each of the MVAs and that his ongoing neck and shoulder girdle pain is probably myofascial. He further opined that the headaches were comprised of tension type headache and cervicogenic headache and probably within the general category of post-traumatic headache. Concerning the cognitive symptoms, it was his opinion that the more probable cause of these was pain, anxiety and depression. Dr. Anton also considered the plaintiff probably had a somatic symptom disorder with predominant pain and a major depressive disorder. However, he deferred to his colleagues in psychiatry regarding any relationship between the depressive disorder and the MVAs.

[193] Dr. Anton thought the plaintiff had probably not suffered a traumatic brain injury but, if he did, it was so mild it likely did not lead to lasting sequelae.

[194] Dr. Anton's prognosis was "guarded".

[195] Concerning the causal relationship between the plaintiff's injuries and the MVAs, Dr. Anton stated that it was not possible to clearly determine the causal relationship between each accident and the symptoms. However, based on the plaintiff's self-report, MVA#5 was the most significant.

[196] Concerning the effects of the injuries, Dr. Anton stated that the plaintiff was not competitively employable but noted that with treatment he might be able to return to competitive employment in the future. He further stated the injuries had affected all aspects of the plaintiff's life including participation in household chores, recreational pursuits, exercise, and social and family activities.

[197] Dr. Anton recommended further treatment including: psychiatric and psychological treatment; cognitive behavioural therapy; active rehabilitation with a kinesiologist; occupational therapy; and attendance at a pain clinic.

[198] In his second report dated March 29, 2018, Dr. Anton noted that the plaintiff continued to experience symptoms of headaches, neck pain, generalized pain, fatigue, changes in his vision, and dizziness. He also continued to experience

depression and anxiety and continued to have cognitive problems. Dr. Anton noted that the depression, anxiety and cognitive issues had mildly improved.

[199] I note that Dr. Anton was told by the plaintiff that he experienced headaches “24/7” and that they varied. However, in his evidence in chief the plaintiff testified that in 2018 he had good days and bad days with headaches and, when asked why he told Dr. Anton he experienced headaches “24/7”, he replied that he guessed he should be more careful. I infer from this evidence that the plaintiff did not have constant or daily severe headaches and that he misled Dr. Anton as to the severity and frequency of his headaches. This is but another example of the plaintiff exaggerating his condition and giving incorrect information.

[200] Dr. Anton’s diagnosis in his second report was essentially unchanged from that in his first report. He considered the plaintiff had myofascial neck pain and that his headaches were probably muscle tension headaches. He attributed the plaintiff’s cognitive issues to pain, fatigue and psychological disruption of cognitive function. Although the depressive symptoms had improved, he was still of the opinion that the plaintiff suffered from somatic symptom disorder with predominant pain.

[201] Dr. Anton opined that it was highly probable the plaintiff would continue to experience chronic pain and associated impairment and disability in future. He was of the view that the plaintiff’s disability was severe enough to preclude a successful return to any type of work or further education.

[202] Concerning further treatment Dr. Anton recommended: assessment by an occupational therapist; sleep evaluation; ongoing psychiatric and psychological counseling; 12 sessions with a kinesiologist and periodic sessions thereafter; 12 sessions of massage therapy or physiotherapy; and assessment for an interdisciplinary chronic pain management program. Dr. Anton did not recommend vocational counseling unless the plaintiff had a significant improvement in his psychological condition.

[203] Dr. Anton also noted that the plaintiff relied heavily on his spouse and noted that she may be at risk of “caregiver burnout”. He suggested this risk could be ameliorated if she was provided with regular assistance with household chores and child care.

[204] I do not accept Dr. Anton’s opinions relating to the existence of a somatic symptom disorder with predominant pain and a major depressive disorder. He is not a psychiatrist or psychologist and acknowledged that he should defer to his colleagues in psychiatry regarding these injuries. I also do not accept Dr. Anton’s prognosis, in particular, his opinion that the plaintiff would be unable to return to work. His prognosis was premised, at least in part, on his diagnosis that the plaintiff had somatic symptom disorder with predominant pain and a major depressive disorder.

Dr. G. Robinson

[205] Dr. Robinson is a Neurologist. He prepared two reports on behalf of the plaintiff; one dated November 20, 2012 and a second dated May 17, 2018. He interviewed and examined the plaintiff on November 2, 2012 and May 15, 2018.

[206] Dr. Robinson’s first report addressed MVAs #1, #2, #3 and #4.

[207] Upon examination on the first visit, Dr. Robinson noted “no apparent deficits in attention, language, or memory”. The examination was essentially normal except the plaintiff complained of pain at extremes of movement and there was tenderness in paracervical upper trapezius and parathoracic musculature.

[208] Dr. Robinson’s opinion was that the plaintiff had sustained soft tissue injury to his neck in MVAs #1 and #2 and suffered headaches as a consequence. He did not believe that there was any damage to the nervous system and specifically stated the plaintiff did not sustain any brain damage. He noted that headaches are a common symptom following soft tissue injury to the neck.

[209] He was of the view that no further treatment was required other than to maintain an active lifestyle with regular exercise. He stated that physical therapy was not curative and that medications were usually of little value. He allowed that Botox injections might be helpful for the plaintiff.

[210] Importantly, Dr. Robinson opined that the plaintiff's issues with anxiety, panic depression and overall emotional distress was a substantial part of the plaintiff's disability. He strongly recommended the plaintiff see a psychiatrist or psychologist and deferred to such professionals in relation to the assessment, causation, management and prognosis of these symptoms.

[211] Dr. Robinsons was of the view that the headaches, neck pain and mood disorder would persist until the plaintiff received effective psychological intervention. Concerning the plaintiff's cognitive symptoms relating to concentration and memory, he was of the opinion that these were reversible.

[212] Dr. Robinson's second report addressed the changes in the plaintiff's conditions and the effects of MVA#5.

[213] I note parenthetically that Dr. Robinson records that the plaintiff advised him that he, the plaintiff, was off work for one month following MVA#5. This was not true and is but another example of the plaintiff giving incorrect information.

[214] The plaintiff's primary compliant to Dr. Robinson was of headaches which occurred "24/7" and were severe. The headaches sometimes resulted in nausea but rarely vomiting. The plaintiff complained of occasionally having mild low back pain. The plaintiff stated his sleep problems had improved but that he would still wake up between 2:00 a.m. and 5:00 a.m. and sometimes have difficulty falling back to sleep.

[215] The plaintiff additionally complained of difficulties thinking and stated he was unable to work or to look after the family finances. The plaintiff described being easily irritated and angry and being depressed and tearful.

[216] Upon examination in 2018, the plaintiff was again essentially normal with the exception of tenderness in the paracervical musculature. Importantly, there were no apparent deficits in attention, language or memory.

[217] Dr. Robinson's opinion remained that the plaintiff had suffered soft tissue injury in all of the accidents that collectively contribute to his ongoing difficulties with post-traumatic headache, insomnia, depression, anxiety and cognitive dysfunction. He specifically diagnosed the plaintiff as having persistent post-traumatic headaches as a result of soft tissue injuries sustained in the accidents. He also opined that the plaintiff did not suffer a mild traumatic brain injury in any of the accidents.

[218] He again stated that psychological distress was a major factor in relation to the headaches and the plaintiff's ability to work and cope within his family environment. He again deferred to a psychiatrist or psychologist.

[219] Dr. Robinson was pessimistic that there would be any substantial improvement in the plaintiff's conditions.

[220] I accept Dr. Robinson's opinion that the plaintiff suffered post-traumatic headaches as a result of soft tissue injuries suffered in the MVAs. However, I do not accept that the headaches were persistent. Dr. Robinson clearly relied only on the plaintiff's self report that the headaches were "24/7" and severe. This was not true. The plaintiff exaggerated the frequency and severity of his headaches to Dr. Robinson as he had with Dr. Anton.

[221] Also, insofar as Dr. Robinson opined on the plaintiff's emotional and psychological injuries, which he expressly acknowledged were major factors, I prefer the evidence of his colleagues in psychiatry, particularly Dr. O'Shaughnessy, to whom he deferred.

Derek Nordin

[222] Mr. Nordin is a certified vocational evaluator. He interviewed the plaintiff and administered a vocational test battery on March 17, 2018. He prepared a report dated June 13, 2018.

[223] Mr. Nordin described the plaintiff's complaints as:

a) Head, neck, shoulder and back pain on a constant 24/7 basis;

b) Difficulties with memory, concentration and multi-tasking;

c) Depression and anxiety;

d) Irritability and inability to control anger; and

e) Difficulty with being a passenger in a vehicle.

[224] Mr. Nordin administered various tests including: the Montreal Cognitive Assessment test ("MOCA"); the Beck Depression Inventory ("BDI-2"); and, the Beck Anxiety Inventory ("BAI"). The plaintiff's MOCA score was 17 out of 30 which Mr. Nordin stated was well below normal and is indicative of cognitive dysfunction. The plaintiff's BDI-2 score indicated his self-reported feelings of depression were in the severe range and his BAI score indicated his self-reported feelings of anxiety were also in the severe range.

[225] Mr. Nordin opined that the plaintiff's scores on the BDI-2 and BAI questionnaires indicated that he may benefit from further consultation with a mental health professional and additionally, opined that, in his experience, mood issues can, and often do, negatively impact competitive employability.

[226] I note that Mr. Nordin is not a medical doctor and was presented as an expert in vocational assessment. I do not consider that he has the requisite expertise to opine on any recommended treatment or on the meaning of the plaintiff's scores on the MOCA, BDI-2 and BAI questionnaires.

[227] Mr. Nordin also administered a Patient Competency Rating Form which is a self-report of the level of difficulty of various tasks. In this self-report the plaintiff indicated he found it very difficult to: take care of finances; stay involved in work activities when bored or tired; remember what he had for dinner last night; remember important things he must do; adjust to unexpected changes; handle arguments with people he knows well; control his crying; schedule daily activities; keep his emotions from affecting his ability to go about the days activities; and control his laughter. He also indicated that he had some difficulty with: taking care of personal hygiene; keeping appointments on time; remembering names of people he sees often; remembering his daily schedule; getting help when he is confused; understanding new instructions; and keeping from being depressed.

[228] Mr. Nordin opined that the items endorsed by the plaintiff on the Patient Competency Rating Form "could negatively impact on any employment environment".

[229] Mr. Nordin reviewed the plaintiff's educational and employment history and his income tax records. He noted that the plaintiff's income history was not reflective of what one would expect of a lawyer:

> … my review of his earnings from 2004 (the year he was called to the Bar in Quebec) to 2009 the year of the first subject accident does not reflect income commensurate with what might be expected from an individual working as a lawyer.
>
> …
>
> Given the earnings information available to me, Mr. Baltadjian's employment history as a lawyer prior to the first subject accident does not show income commensurate with the average earnings cited above As such, even absent the subject accidents it remained to be seen as to whether he could have commanded such an income as he developed his career. However the available information suggests Mr Baltadjian did not have physical nor psychological barriers that would have prevented him from doing so.

[230] I accept Mr. Nordin's opinion that the plaintiff "did not have physical nor psychological barriers" that would have prevented him from earning the average income of a lawyer but do not accept the inference he appears to draw that there was nothing preventing the plaintiff from earning the income of an average lawyer.

This is a point which I will address in more detail when addressing the plaintiff's income loss.

[231] Mr. Nordin ultimately concluded, in agreement with Drs. Anton and Anderson, that the plaintiff was not competitively employable in his current condition. He did not consider that the plaintiff would be able to successfully return to the workforce, absent a significant improvement in his condition.

[232] I do not accept most of Mr. Nordin's opinions or findings for various reasons. First, he based his opinion, in part, on the plaintiff having head, neck shoulder and back pain twenty-four hours per day and seven days per week. This is not accurate. Second, Mr. Nordin exceeded his area of expertise in administering and interpreting the various questionnaires. Finally, he relied heavily on the reports of Drs. Anton and Anderson but, as I have indicated and will address further below, their opinions concerning the plaintiff's psychological injuries are not accepted.

April Belbeck

[233] April Belbeck is an occupational therapist. She prepared two expert reports dated October 25, 2017 and August 2, 2018, relating to the costs of the plaintiff's future care. I will address her reports below in the section entitled Costs of Future Care.

Dr. W. Gittens

[234] Dr. Gittens is a neurosurgeon retained by the defendants to conduct an independent medical examination of the plaintiff and to provide an expert report on the nature, cause and extent of the plaintiff's injuries, the prognosis, and recommendations for further treatment. Dr. Gittens examined the plaintiff on December 8, 2014 and April 23, 2018 and prepared two reports dated December 8, 2014 and May 2, 2018.

[235] The plaintiff's symptoms, as recorded by Dr. Gittens in the first interview, were: headaches; neck, back, shoulder and jaw pain; difficulty with thinking,

concentration and memory; lethargy; dizziness and nausea; anxiety and aggression; erratic sleep; ringing in the ears; and tingling in the fingers.

[236] Dr. Gittens' examination of the plaintiff revealed the cranial nerve was normal as was the peripheral neurological examination, but the plaintiff had a positive Tinel's sign bilaterally. He was able to tandem walk and to heel and toe walk, but with some difficulty. He tended to sway when Romberg's test was done. He had a good range of motion of his neck with some pain. There was no lumbar spinal tenderness. Straight leg raising produced hamstring tightness on the right side. He had a limitation of forward flexion of the lumbar spine region.

[237] Dr. Gittens opined that as a consequence of MVA#1 the plaintiff suffered soft tissue injuries which resulted in neck and back pain and headaches. He was of the view that, although the plaintiff's symptoms mimicked post concussive syndrome, the plaintiff did not suffer a concussion in the accident. He was further of the opinion that the plaintiff's injuries were aggravated by MVA#2 and MVA #5 and that no injuries resulted from MVAs #3 and #4. He diagnosed the plaintiff with myofascial pain, muscle contraction and possibly a vascular component to the headaches. He additionally diagnosed the plaintiff as having carpal tunnel syndrome, which was unrelated to the MVAs.

[238] Dr. Gittens was unable to explain the plaintiff's cognitive symptoms and declined to comment on psychological symptoms or PTSD as being outside his area of expertise.

[239] Dr. Gittens stated that there were no pre-accident problems or conditions that made the plaintiff more susceptible to injury and that there were no post-accident events that were relevant. He noted the possibility that there might be pre-existing psychological factors that could impact the post-accident symptomology but declined to comment further as this was outside his area of expertise.

[240] In regard to future treatment, Dr. Gittens recommended neuropsychological testing, and assessment by a psychiatrist or psychologist. He saw no need for

surgical intervention or for ongoing chiropractic, physiotherapy or massage therapy treatments.

[241] Dr. Gittens was unable to identify any clear neurological reasons for the plaintiff not working.

[242] Dr. Gittens limited his prognosis to the plaintiff's physical symptoms. It was his opinion that the plaintiff's physical symptoms would improve and he did not anticipate any significant disability with respect to the spinal column. Importantly, in regards to a prognosis for the plaintiff's non-physical symptoms, he suggested a referral to a psychologist or psychiatrist.

[243] Dr. Gittens' second report dated May 2, 2018, details the plaintiff's complaints as being substantially the same as recorded in the first report. His diagnosis and conclusions in the second report are also substantially the same as in the first report. He opined: that the plaintiff did not suffer from a traumatic brain injury; that there is no significant focal neurological deficit; and, that there is no significant impairment of function in the spine. Interestingly, in his second report he states that he is unable to determine the cause of the headaches and dizziness, whereas in his first report he stated the headaches were related to pain and possibly had a vascular component.

[244] Dr. Gittens concluded his second report by stating that there was nothing discovered during his neurological and spinal examination that would prevent the plaintiff from being more active generally or from working. He suspected that the plaintiff's main issues were non-neurological and, more specifically, that mental-health or other psychological issues may be important. He again suggested that a psychologist or psychiatrist should address these issues.

[245] Dr. Gittens testified at the trial and was cross-examined by the plaintiff. During the course of his cross-examination he admitted or conceded:

a) The plaintiff's symptoms of headaches, sleep problems, depressed mood, irritability, anxiety, loss of memory are classic post concussive syndrome

symptoms, can occur without a concussion and can affect daily life and the ability to work;

b) 10% to 15% of patients with post concussive syndrome symptoms have long term problems and the plaintiff falls within this category;

c) The post concussive syndrome symptoms experienced by the plaintiff could be attributable to headaches or other psycho-social factors;

d) The headaches suffered by the plaintiff are post-traumatic headaches attributable to trauma to the neck as suffered in MVA#1 and aggravated by MVA#2 and MVA#5; and

e) Post-traumatic headaches can be profoundly disabling and the plaintiff's history suggests that they were for him.

[246] I accept the evidence of Dr. Gittens that the plaintiff suffered from myofascial pain and post-traumatic headaches and that based on his examination, there was nothing preventing the plaintiff from working. He also quite properly identified that mental or psychological factors might be at play and declined to comment on such issues.

Dr. Eytan David

[247] Dr. David is an otolaryngologist retained by the defendants to provide an opinion on the causal connection between the MVAs and the plaintiff's complaints relating to hearing and balance issues. He conducted independent medical examinations of the plaintiff on October 31, 2014 and April 23, 2018 and prepared two reports dated April 16, 2015 and June 23, 2018. His reports were commissioned in contemplation that the plaintiff would be introducing reports of Dr. Longride into evidence. Those reports were, however, not put in evidence by the plaintiff.

[248] Dr. David's opinion was that the plaintiff's complaints of tinnitus were within normal parameters and his complaints of sound sensitivity did not have an objective correlate in outer, inner or middle ear testing dysfunction. He also found that the

plaintiff had normal clinical and objective balance examination. He concluded that there was insufficient evidence of post-traumatic inner ear hearing or balance injury due to the MVAs.

[249] Dr. David did, however, note that sound sensitivity was seen in patients with the plaintiff's neurologic and psychiatric diagnoses and that his description of subjective imbalance can reasonably be explained by his other comorbidities, polypharmacy, common medication side effect profiles, and cannabis use.

Psychiatry Experts

[250] The plaintiff and defendants both introduced reports prepared by psychiatrists addressing the plaintiff's alleged psychological injuries. The plaintiff's expert was Dr. Anderson. The defendants' expert was Dr. O'Shaughnessy. As will be seen, these experts had very different opinions.

Dr. S.D. Anderson

[251] Dr. Anderson conducted independent psychiatric assessments of the plaintiff on February 12, 2015 and March 9, 2018 and provided two reports dated February 19, 2015 and March 12, 2018. He also prepared a third report dated June 20, 2020, in which he addressed new medical documentation since his second report. The defendants did not require Dr. Anderson to attend at the trial for cross-examination. Therefore, I do not have the benefit of his *viva voce* testimony.

[252] In his first report, Dr. Anderson stated that the plaintiff's most significant ongoing symptoms were: chronic headache pain, neck pain, upper back pain, dizziness, vertigo, tinnitus, light sensitivity, noise sensitivity and chronic fatigue. Additionally, he suffered from cognitive impairment including in relation to attention, concentration, memory, visual spatial functioning, and executive functioning. Finally, he developed severe anxiety associated with pain and developed personality changes including apathy, irritability and emotional lability.

[253] Dr. Anderson's assessment of the plaintiff indicated that he scored poorly on the MOCA cognitive screening test with a score of 18 out of 30. The presence of

significant anxiety and depression were also indicated by scores of 21 out of 21 on GAD-7, a questionnaire relating to anxiety, and 25 out of 29 on PHQ-9, a questionnaire relating to depression.

[254] Dr. Anderson opined that the plaintiff's physical, cognitive and emotional difficulties began with MVA#1 and were exacerbated by MVAs #2 and #3. He noted that the symptoms had been improving somewhat up to MVA #5 but then returned back to "square one". He specifically stated that the plaintiff "would not likely have developed his present constellation of physical, cognitive and emotional difficulties if he had not been injured in the MVA's".

[255] Dr. Anderson's diagnosis was that the plaintiff had developed a moderate to severe major depressive disorder over time since the MVAs. His depressive symptoms included low self-esteem, hopelessness and suicidal thinking. He also diagnosed the plaintiff as having a severe persistent somatic symptom disorder with predominant pain.

[256] He stated that the plaintiff did not develop a post traumatic stress disorder and thought it unlikely that he had suffered a traumatic brain injury in any of the MVAs.

[257] Dr. Anderson noted that the plaintiff has had a marked decrease in his overall quality of life as a result of his symptoms and opined that he is not likely competitively employable due to the nature and extent of his ongoing physical, cognitive and emotional difficulties.

[258] Dr. Anderson made a number of recommendations for further treatment including: psychotherapy; cognitive behavioural therapy; psychotropic medication; marital therapy; occupational therapy; kinesiology; and vestibular therapy. He also recommended the plaintiff continue to be followed by a pain specialist and recommended a referral to a multidisciplinary pain clinic.

[259] Dr. Anderson's prognosis was "guarded".

[260] In his second report dated March 12, 2018, Dr. Anderson noted some improvements in the plaintiff's symptoms. Specifically, he noted that the plaintiff's mood and self-esteem had improved, there was no recent suicidal thinking, there was generalized reduction in anxiety, and episodes of dizziness, vertigo, tinnitus, noise sensitivity, and light sensitivity were reduced in frequency and severity. However, he continued to have headache pain, neck pain, jaw pain, shoulder pain, upper back pain, insomnia, reduced energy, fatigue and driving fears. He also continued to have cognitive symptoms and personality changes. Dr. Anderson again opined that the plaintiff's "constellation of physical, cognitive and emotional difficulties are likely due to the five MVAs in question".

[261] Dr. Anderson noted in his report that the plaintiff "requires supervision and guidance in order to complete basic activities of daily living such as eating and completing personal hygiene tasks". He also opined again that the plaintiff was not likely competitively employable due to his ongoing physical, cognitive and emotional difficulties. However, he allowed that part time work with a sympathetic employer might be possible in the future provided that it was low stress and did not exacerbate the physical symptoms and was not cognitively demanding.

[262] He revised his diagnosis somewhat in the second report. He opined the plaintiff continued to have a severe persistent somatic symptom disorder with predominant pain. However, the plaintiff no longer suffered from a major depressive disorder but rather had an adjustment disorder with mixed anxiety and depressed mood. He noted that the plaintiff was likely to develop a recurrence of a major depressive disorder if he discontinued his antidepressant medication, if his physical symptoms worsened as he aged or if exposed to new psychosocial stressors.

[263] Dr. Anderson again opined that the plaintiff did not suffer from PTSD. He also opined that it was unlikely that the plaintiff had a bipolar disorder, although he did not completely rule out such a diagnosis.

[264] Concerning ongoing treatment, Dr. Anderson stated that the plaintiff will likely require long term treatment with psychotropic medications as well as supportive

therapy. In particular, he recommended ongoing psychotherapy, psychotropic medication, psychiatric follow-up, treatment at a comprehensive multidisciplinary pain clinic, a supervised exercise program, rehabilitation guidance from an occupational therapist, and a vocational assessment.

[265] Dr. Anderson's opinion was that the plaintiff had likely plateaued in terms of his psychiatric recovery and that his psychiatric prognosis was poor.

> Mr. Baltadjian has likely largely plateaued in terms of his psychiatric recovery. He no longer has MDD. It is unlikely however that Mr. Baltadjian will be able to fully return to his premorbid level of emotional functioning despite further treatment and the passage of time. Mr. Baltadjian will likely remain emotionally vulnerable. He will likely continue to have anxiety symptoms, depressive symptoms, and personality changes on a long term basis despite further treatment.

[266] Dr. Anderson's third report dated June 20, 2020, references a number of new documents that he reviewed subsequent to his second report. He merely states that his previously expressed opinions remain unchanged.

Dr. R. O'Shaughnessy

[267] Dr. O'Shaughnessy is a psychiatrist retained by the defendants. More specifically, he is a forensic psychiatrist. He conducted psychiatric assessments of the plaintiff on June 11, 2015 and April 25, 2018 and provided four reports dated August 6, 2015, December 12, 2016, April 30 2018, and August 11, 2018. He also testified at trial and was cross-examined by the plaintiff.

[268] In his first report dated August 6, 2015, Dr. O'Shaughnessy described the plaintiff as a very poor historian and stated that there were "serious difficulties" with the plaintiff's self-report and history. As a consequence, he provided only what he called tentative opinions. These opinions included:

a) The plaintiff had not suffered a concussion;

b) The plaintiff did not meet the criteria for major depressive disorder, i.e. sustained depression over time;

c) The plaintiff's sleep problems had improved;

d) It is possible that the plaintiff had a period of depression meeting the criteria for adjustment disorder with depressed mood during the period from 2009-2011;

e) He did not think the plaintiff ever had psychiatric symptoms severe enough to impair his concentration;

f) During the examination, there was nothing to suggest any clear signs or symptoms of a clinical depression by self-report;

g) There was nothing indicating a post-traumatic stress disorder or any other anxiety disorder; and

h) There was nothing from a psychiatric perspective limiting the plaintiff's ability to work.

[269] Dr. O'Shaughnessy noted that Dr. Neelakant, a psychiatrist, thought the plaintiff had a bipolar disorder. However, on reviewing Dr. Neelakant's records, he did not think the plaintiff ever met the criteria for a bipolar disorder. He further stated that because of the plaintiff's poor self-report and history, it was unclear whether the plaintiff had bipolar disorder.

[270] Dr. O'Shaughnessy also expressed concern that some of the lifestyle choices of the plaintiff might be contributing significantly to his anxiety and stress. In this regard he referred to the plaintiff's decision to move to British Columbia without a strong plan, the plaintiff's lack of knowledge as to the requirements to practice law in British Columbia and the plaintiff's decision to buy a house when he had no money.

[271] With respect to the plaintiff's complaints of chronic headaches, neck and back pain, dizziness and nausea, Dr. O'Shaughnessy deferred to his colleagues in physical medicine.

[272] Dr. O'Shaughnessy's second report dated December 12, 2016, was provided after he was provided with additional documentation. In this second report he affirmed the opinions expressed in his first report. He specifically addressed a psychological evaluation of the plaintiff prepared by Dr. Jung dated April 20, 2015, in which Dr. Jung suggested the plaintiff showed signs of major depressive disorder. Dr. O'Shaughnessy disagreed with that conclusion and stated that the plaintiff had intermittent periods of depression as opposed to a sustained depressed mood. He noted that uncertainty regarding the plaintiff's ability to get a licence to practice law and concern over how he would support his family would cause intermittent emotional periods of emotional distress but not a significant mental disorder.

[273] Dr. O'Shaughnessy's third report dated April 30, 2018, essentially affirmed the opinions expressed in his earlier reports. This report was prepared after a review of yet more documents and after a second assessment of the plaintiff. He notes that on this second assessment the plaintiff was somewhat improved and that he had no clear signs of depression or anxiety. He attributed this improvement to the medication (sertraline) the plaintiff had been prescribed. He opined that the plaintiff was not impaired from a psychiatric perspective. He acknowledged the presence of mild cognitive symptoms, which he accepted could be caused by headaches.

[274] Dr. O'Shaughnessy bluntly recommended that the plaintiff should get back to work and to an active lifestyle with regular exercise.

> At the time of my examination, his symptoms of anxiety and depression were in relatively good remission on medications. He is certainly not impaired from a psychiatric perspective. He continues to complain of cognitive symptoms which are difficult to understand although one can certainly see mild cognitive symptoms in the context of headaches. By his account, his other symptoms have improved substantially; i.e. he is now sleeping well and no longer exhibits any clear signs of depression or anxiety. By the same token, he is not doing any physical activity, he has limited himself from any social network- of any type, and spends virtually all his time in passive activities with his family. I noted that he had previously been in kinesiology treatments and the occupational therapist described improvement, which he now states did not occur and he states there has been no improvement. Putting it simply, this man needs to get back to an active lifestyle with regular exercise, increase in social interests and activities, and a return to work. I do not see that there is any plan afoot to facilitate these and this would be encouraged.

[275] In this third report, Dr. O'Shaughnessy noted that the plaintiff's decision to move to Ontario had resulted in financial stressors and ongoing anxiety. He mentioned in particular the decision to buy a house in Ontario with the intent of renting a suite which turned out to not be possible. He also mentioned the "shunning" of the plaintiff by his spouse's family as being an additional stressor.

[276] Dr. O'Shaughnessy's final report dated August 11, 2018 was provided after a review of yet more documents including the reports of Dr. Anderson and Dr. Anton. In this report he provides critiques of the reports of Drs. Anderson and Anton, which I will address below in the discussion of my findings relating to the plaintiff's psychological injuries.

[277] Dr. O'Shaughnessy was extensively cross-examined. The relevant evidence from his cross-examination was:

a) He acknowledged the plaintiff had reported symptoms of headaches, dizziness, sleep problems, mood problems and memory problems after MVA#1, that these symptoms can be caused by pain and can affect enjoyment of life;

b) He acknowledged neck injuries can cause headaches which can interfere with daily activity;

c) He acknowledged that several of the doctors the plaintiff had seen had diagnosed a concussion or post concussive syndrome;

d) He acknowledged that the plaintiff's reports of headaches were consistent, that there was no indication of headaches before MVA#1, that headaches are a subset of chronic pain and that headaches can affect concentration and memory and induce fatigue;

e) He acknowledged chronic pain as well as headaches could trigger anxiety and depression and lead to a mood disorder;

f) He confirmed that in 2015 he thought the plaintiff might have an adjustment disorder but by 2018 that had resolved and he had no psychiatric condition;

g) He stated that other stressors in the plaintiff's life were putting him at risk of developing psychiatric conditions in the future;

h) He declined to say whether the plaintiff was malingering, saying that was for the court to decide, but did state that the plaintiff was exaggerating his psychological and cognitive issues;

i) He confirmed that his approach to assessments was to be skeptical but denied that was a lack of neutrality;

j) He acknowledged that the plaintiff's condition may have improved between the date the plaintiff saw Dr. Anderson and the date of his own assessment due to various treatments the plaintiff had undergone and medications he took in the interim; and

k) He acknowledged that he conducted no tests such as MOCA, GAD-7 and PHQ-9 but stated that was because the tests were screening tools for use when managing patients and are not appropriate for use when doing a forensic diagnosis.

Findings

[278] Due to the credibility issues that I have identified, the complex nature of the plaintiff's alleged injuries, and the alleged extent of the injuries, the findings of fact in this matter are exceedingly difficult. Nevertheless, the following paragraphs set out my findings.

Pre-Accident Condition

[279] I find that prior to August of 2009 the plaintiff was fit and healthy and had no medical issues of relevance. In particular, there is no evidence that he suffered from

depression, anxiety or cognitive issues of any sort before the accident. He weighed approximately 180 pounds and was active in sports, particularly all types of hockey.

The Injuries Suffered

[280] MVA#1 was a minor rear-end collision. Nevertheless, I accept the plaintiff's evidence that he had a sore neck and back and headaches following the accident. His evidence is confirmed by Mr. Makkar and further corroborated by the plaintiff's attendance at the hospital the following day, by his attendance before Dr. Jones 10 days later and by his attendance with Dr. Ramani in September 2009.

[281] The plaintiff's evidence as to the progression and nature of his symptoms between MVA#1 and MVA#2 is confusing and somewhat contradictory. I accept that he had a sore neck and back and headaches and that he had sleep problems and bouts of nausea and dizziness as a consequence. However, the worst of the symptoms had resolved after about five weeks. As recorded by Dr. Ramani, he was much improved by September 28, 2009. Dr. Ramani's clinical notes of October 21, 2009 suggest, and I find as a fact, that he had some continuing pain, insomnia, dizziness and headaches and that these symptoms affected his ability to concentrate.

[282] I accept that the plaintiff's symptoms would have affected his ability to study the PLTC materials but not to the extent suggested by the plaintiff. I do not accept that he was required to spend most of his time in bed. I do not accept that he suffered any personality changes or changes to his mental or emotional state during the period between MVA#1 and MVA#2, other than increased irritability, anxiety and frustration.

[283] MVA#2, which occurred on November 14, 2009, was also a minor collision, although perhaps slightly more serious than MVA#1. I accept the plaintiff's evidence that this accident aggravated the injuries from MVA#1. The plaintiff's evidence is corroborated again by Dr. Ramani's records which disclose that, on November 20, 2009, the plaintiff complained of neck pain and a recurrence of the dizziness and nausea. I find, however, that many of the symptoms resolved after about three

weeks. By Christmas of 2009, approximately six weeks after MVA#2, the plaintiff was much better, although he still had headaches.

[284] Throughout 2010 and the first quarter of 2011 the plaintiff was suffering from recurring, but not constant, pain, headaches, nausea and dizziness which adversely affected his ability to focus and concentrate and caused him to be more irritable and perhaps more verbally aggressive. At times, the plaintiff would suffer a severe regression such as in February of 2010 and March 2011 when the recurrence of symptoms were so severe that the plaintiff attended briefly at a hospital. At other times, however, the symptoms were minor such that he was able to attempt downhill skiing.

[285] By April 2011 the plaintiff's symptoms had much improved and this improvement continued throughout the balance of 2011 and 2012. During this time frame the plaintiff experienced occasional pain, occasional headaches, sleep problems and associated irritability that manifested in verbal aggression. I find that the plaintiff was capable of working during this period, although I accept that he was perhaps not as efficient and that there would have been occasions where he was unable to work due to a particularly severe headache or a flare-up in his symptoms. However, I also find that the plaintiff did not have the clients to work full time.

[286] The plaintiff's condition in 2013 remained relatively unchanged from what it was in 2012. Throughout 2013 he did his contracted 10 hours per month of consulting work with TRW and he played pick-up hockey from time to time. He also took a month long holiday to the Philippines. I do not accept that the plaintiff suffered from daily pain or daily debilitating headaches in 2013. I accept only that he had occasional headaches that could at times be temporarily debilitating.

[287] The plaintiff's condition in 2014, up to the time of MVA#5, remained unchanged from what it was in 2013. I reject the evidence of the plaintiff and Ms. Baltadjian that there was an improvement in his condition in early 2014. Any such improvement is not supported by the clinical records of Dr. Baasch.

[288] I accept that following MVA#5 the plaintiff felt his neck stiffen and a headache coming on. I accept that MVA#5 further aggravated the plaintiff's symptoms. I further accept that since MVA#5 the plaintiff has continued to suffer from occasional headaches and intermittent pain, but headaches have been the primary problem.

[289] The evidence, is not clear as to the frequency or severity of the plaintiff's headaches since MVA#5. The plaintiff appears to have told many professionals that the headaches are severe and constant, occurring 24 hours per day and seven days per week. However, he essentially admitted this was not true when he testified that, at least in 2018, he had good days and bad days. He acknowledged that he should have been more careful when he told Dr. Anton the headaches were "24/7". The plaintiff's tendency to exaggerate his symptoms and to give contradictory information increases the difficulty of finding the necessary facts. Nevertheless, I am satisfied that he has suffered intermittent pain and headaches since MVA#5 and continues to suffer occasional headaches and intermittent pain. However, neither are debilitating, except temporarily.

[290] I further accept that the headaches can be accompanied by dizziness, fatigue and irritability and that the irritability has manifested in verbal aggression. However, I find that the incidents of verbal aggression have markedly decreased since at least 2018 and are now infrequent.

[291] The plaintiff and Ms. Baltadjian also testified to the existence of cognitive, emotional and psychological symptoms following MVA#5. I address the expert evidence before making findings on these symptoms.

Expert Opinions Relating to Non-Psychological Injuries

[292] The experts who have examined the plaintiff have overwhelming found that the plaintiff suffered soft tissue injuries in MVA#1, #2 and #5 which have given rise to myofascial neck and back pain and headaches. This was the opinion of Drs. McKenzie, Robinson, Anton and Gittens. I accept their evidence.

[293] The experts who have examined the plaintiff have also overwhelming opined that the plaintiff did not suffer a traumatic brain injury in the accidents. This was the opinion of Drs. Robinson, Anton, Anderson, Gittens and O'Shaughnessy. I accept their evidence.

[294] I note that Dr. Baasch diagnosed the plaintiff as having a head injury and that other treating doctors had diagnosed a concussion, however, I prefer the opinions of Drs. Robinson, Anton, Anderson, Gittens and O'Shaughnessy who are specialists in their respective fields.

[295] I further find that the plaintiff does not have post traumatic stress disorder. This was the opinion of Drs. Anderson and O'Shaughnessy.

Expert Opinions Relating to Psychological Injuries

[296] Concerning the plaintiff's emotional and psychological symptoms, I decline to rely upon any of the opinions expressed by Drs. Baasch, McKenzie, Robinson Anton, Gittens or David in relation to these symptoms. The majority of these doctors recognized that these symptoms were outside their area of expertise and expressly deferred to their colleagues in psychiatry. It is therefore to the experts in psychiatry that I now turn.

[297] The two Psychiatrists that have opined on the plaintiff's psychological injuries are Drs. Anderson and O'Shaughnessy. They agree that the plaintiff does not suffer from a traumatic brain injury and further agree that the plaintiff does not have post traumatic stress syndrome. However, they disagree on other aspects of the plaintiff's condition.

[298] As I have indicated, Dr. Anderson initially diagnosed the plaintiff as having a severe major depressive disorder and a severe persistent somatic symptom disorder with predominant pain. In his second report, he noted that the plaintiff's condition had improved and modified his diagnosis. In the second report he diagnosed the plaintiff as having an adjustment disorder with mixed anxiety and depressed mood

and a severe persistent somatic symptom disorder with predominant pain. This remained his opinion in his third report dated June 20, 2020.

[299] In contrast, Dr. O'Shaughnessy initially opined on a tentative basis that the plaintiff possibly had an adjustment disorder with depressed mood from 2009 to 2011 but, as of the date of his examination, there were no clear signs of clinical depression. In his second and third reports dated December 12, 2016 and April 30, 2018 respectively, Dr. O'Shaughnessy affirmed the opinions expressed in his first report. He specifically rejected a diagnosis made by Dr. Jung in April 2015 that the plaintiff had a major depressive disorder and he noted an improvement in the plaintiff's condition in 2018.

[300] Dr. O'Shaughnessy's final report includes a critique of the reports of both Dr. Anderson and Dr. Anton. He is critical of them for excessively relying on what the plaintiff told them and for not doing proper forensic investigations. He specifically noted that the plaintiff had told many practitioners he had suffered a concussion whereas he had not. He was also critical that they appeared to accept that the plaintiff was a practicing lawyer before the accidents and that there was a major change in the plaintiff's functioning after the accidents. It was his view that this was questionable. He was also critical that they did not acknowledge or address the inconsistencies in the plaintiff's presentation over time and did not address other relevant factors and stressors such as the plaintiff's financial status, lifestyle and living situation.

[301] With respect to Dr. Anton's reports, Dr. O'Shaughnessy noted that the plaintiff's MOCA score in the test conducted by Dr. Anton was 22 out of 30, which Dr. Anton attributed to pain, anxiety and depression. However, it was Dr. O'Shaughnessy's opinion that one would never see such a low score based solely on pain, anxiety and depression. He was additionally critical of Dr. Anton's apparent acceptance that the plaintiff attempted to commit suicide in 2016 whereas it was Dr. O'Shaughnessy's opinion that there was suicide ideation but never a suicide attempt.

[302] Dr. O'Shaughnessy's particular criticisms of Dr. Anderson's reports were:

a) that Dr. Anderson relied on a MOCA cognitive screening test where the plaintiff scored 18 out of 30, which is consistent with individuals who have advanced Alzheimer's disease and totally inconsistent with the plaintiff's injuries;

b) that Dr. Anderson relied on self-report instruments of anxiety and depression, notably the GAD-7 and PHQ-9 questionnaires, and the plaintiff's scores indicated high levels of anxiety and severe levels of depression; and

c) that Dr. Anderson relied on a Personality Assessment Inventory conducted by Finlay Counselling but the validity indicators on this assessment were abnormal with a high negative impression management meaning the plaintiff was exaggerating his complaints.

[303] I prefer the opinion evidence of Dr. O'Shaughnessy over that of Dr. Anderson. In my view, Dr. O'Shaughnessy conducted a more thorough assessment and investigation of the plaintiff's circumstances than did Dr. Anderson. He did a more thorough review of the background medical documentation than did Dr. Anderson. He also expressly requested additional documentation to better understand the plaintiff's history and circumstances. In contrast, Dr. Anderson appears to have excessively relied on prior opinions and findings of other medical professionals and appears to have accepted uncritically what he was told by the plaintiff and Ms. Baltadjian.

[304] In reaching my conclusion that I prefer Dr. O'Shaughnessy's opinion over that of Dr. Anderson, I have taken into account that Dr. Anderson interviewed Ms. Baltadjian whereas Dr. O'Shaughnessy did not. However, in my view, that does not elevate the reliability of Dr. Anderson's reports. He merely conducted a telephone interview of Ms. Baltadjian, which appears to have been relatively brief.

Moreover, I note that Ms. Baltadjian advised Dr. Anderson that the plaintiff's personality changed after MVA#1, which I have found did not occur.

[305] I also prefer the opinion of Dr. O'Shaughnessy over that of Dr. Anderson because I find that his criticisms of Dr. Anderson's reports are well founded.

[306] Dr. Anderson did rely on and accept the plaintiff's MOCA score in rendering his opinion. In his first report he wrote:

> Since the accidents occurred Mr Baltadjian has had significant cognitive impairment. Mr Baltadjian scored very poorly on routine cognitive screening during the recent assessment MOCA 18 out of 30. A patient with a score that low would not be able to function in a cognitively demanding job such as the legal profession.

[307] In his second report dated March 12, 2018, Dr. Anderson also referenced a MOCA test that he administered in which the plaintiff scored 20 out of 30.

[308] Dr. O'Shaughnessy's evidence, in his report and at the trial, was that a MOCA score of below 20 indicates that a person is severely cognitively impaired. He testified that scores between 18 and 20 are in the Alzheimers range. This evidence was not challenged in cross-examination.

[309] The plaintiff testified in court over several days. He did not display symptoms of severe cognitive impairment and certainly not anything even approaching Alzheimers symptoms. Moreover, his description of his cognitive difficulties were, in essence, of difficulties concentrating and associated memory problems. He did not describe what I would consider severe cognitive difficulties or Alzheimers type symptoms.

[310] I agree with Dr. O'Shaughnessy that the plaintiff's exceedingly low MOCA scores should have been further investigated or questioned by Dr. Anderson. In my view, Dr. Anderson's casual reliance on those scores undermines his opinions.

[311] The second criticism Dr. O'Shaughnessy makes of Dr. Anderson's reports is that he relied on the GAD-7 and PHQ-9 questionnaires which are self-reporting

tools. This criticism is a sub-set of Dr. O'Shaughnessy's overarching criticism that Dr. Anderson relied excessively on what the plaintiff told him and did not conduct a proper forensic investigation. Dr. O'Shaughnessy notes that the plaintiff has generally been inconsistent in the reporting of his symptoms and says that this inconsistency was not addressed by Dr. Anderson. In particular, he notes that the plaintiff reported significantly different symptoms to him in June 2015 than he did to Dr. Anderson in February of the same year.

[312] I agree with Dr. O'Shaughnessy that Dr. Anderson appears to have excessively relied upon the plaintiff's self reports and has not applied a critical eye to what he was told by the plaintiff. In his first report, Dr. Anderson diagnosed a major depressive disorder primarily based on the plaintiff's score on the PHQ-9 questionnaire. However, the diagnostic criteria under DSM-V for a major depressive disorder was entered into evidence and it is not at all apparent to me how the plaintiff could be said to meet those criteria or how Dr. Anderson determined the plaintiff met those criteria.

[313] Dr. O'Shaughnessy was also critical of Dr. Anderson for relying on a PAI conducted by Mr. Finlay, a clinical counsellor. In his first report, under the section facts and assumptions, Dr. Anderson notes that Mr. Finlay documented significant depressive symptoms, anger management difficulties and cognitive difficulties. Dr. Anderson later stated that the PAI "was consistent with a patient who had significant emotional difficulties". Dr. Anderson said nothing about the PAI test being invalid or otherwise suspect. To the contrary, he appears to have accepted the results of the PAI. However, it was the evidence of Dr. O'Shaughnessy, both in his reports and in his *viva voce* evidence at trial, that the PAI conducted by Mr. Finlay had built in validity indicators which indicated the plaintiff was grossly exaggerating his symptoms and invalidated the results. Dr. O'Shaughnessy was not cross-examined on his interpretation of the PAI and his conclusion that it was invalid.

[314] I accept Dr. O'Shaughnessy's evidence that the PAI administered by Mr. Finlay was invalid. This is something that ought to have been recognized by

Dr. Anderson and discussed in his reports. The fact that he did not undermines his opinions.

[315] In addition to the specific criticisms made by Dr. O'Shaughnessy, I would add that Dr. Anderson's opinions are undermined by the additional fact that he attributed the plaintiff's emotional and psychological symptoms to all of the MVAs. Based on the evidence I have heard and received, the plaintiff's most severe emotional and psychological symptoms arose after MVA#5. Up to that time he had periodic bouts of depression but his main issues were headaches and, to a lesser extent, neck and back pain.

[316] Accordingly, I prefer the opinions of Dr. O'Shaughnessy over those of Dr. Anderson. I also prefer the opinions of Dr. O'Shaughnessy over those of Dr. Anton, and all of the other experts, in relation to the plaintiff's cognitive, emotional and psychological injuries. It follows that I find the plaintiff suffers from intermittent periods of depression and mild cognitive symptoms but does not have a major depressive disorder or a somatic symptom disorder.

Conclusion on Plaintiff's Current Condition

[317] In summary, I find that the plaintiff's current injuries and symptoms are:

a) Intermittent neck and back pain;

b) Intermittent headaches that are sometimes debilitating;

c) Periods of irritability associated with headaches that infrequently manifest in verbal aggressiveness;

d) Periods of dizziness, fatigue and blurry vision associated with headaches;

e) Mild cognitive symptoms such as lack of concentration and focus and related memory problems, all associated with headaches;

f) Periodic bouts of non-clinical depression; and

g) Minor anxiety when a passenger in a vehicle.

[318] I find that the plaintiff did not suffer any type of brain injury, does not have post-traumatic stress disorder, does not have a major depressive disorder, and does not have a somatic symptom disorder.

[319] I find that the plaintiff has not had a change in personality. I accept only that the plaintiff is, at times, more irritable due to the presence of headaches and that this has manifested in the plaintiff being more verbally aggressive. Although I further find that the frequency of aggressive outbursts have been far fewer in recent years and are now infrequent.

Effects of the Injuries

[320] I make the following findings concerning the effects of the injuries that I have determined the plaintiff has or had:

a) I accept that the injuries affected the plaintiff's ability to study the PLTC materials. However, the plaintiff's timeline of two or three months from his arrival in British Columbia to pass the transfer exams was unrealistic. A more realistic timeline was 10 months which would have meant he would write the exams in or about April of 2010. Moreover, the injuries and symptoms suffered in MVAs #1 and #2 had mostly resolved by Christmas of 2009, although the headaches continued on an intermittent basis. At most, in my opinion, MVAs #1 and #2 delayed the plaintiff's writing of the exams and his admission to the bar by a few months;

b) I do not accept that the plaintiff was or is completely disabled from working as a lawyer, or in other occupations, by reason of the injuries suffered. However, I do accept that the plaintiff's injuries have imposed some limitations and restrictions on his ability to work as a lawyer. Specifically, because of his injuries he would be required to take time off from work when experiencing particularly severe headaches. Additionally, due to his

concentration, focus and memory issues, he would have required, and will in the future require, more time to complete tasks;

c) I specifically do not accept that the TRW agreement was limited to 10 hours per month because of the plaintiff's injuries and an inability to work more than 10 hours per month;

d) I do not accept that the plaintiff was capable of working only 10 hours per month from 2012 through 2014. During this period he did work more than 10 hours per month when he had other work available;

e) I do not accept that the plaintiff was unable to work after MVA#5. For five months immediately after MVA#5 the plaintiff continued to work the contracted 10 hours per month for TRW. He did not cease working until the contract was terminated by TRW;

f) I do not accept that the termination of the TRW contract had any relationship to the injuries suffered by the plaintiff in any of the MVAs;

g) I also do not accept that the plaintiff has been completely incapable of working since December 2014. He worked in 2015 when he had clients to work for. He has not worked since early 2015 because he initially had no clients to work for. He then moved to Ontario where he gave up the practice of law and completely withdrew from the workforce, except for two brief periods when he attempted driving a taxi and driving for Uber;

h) I accept that the injuries the plaintiff has suffered have impacted his marital relationship but not other family relationships. Specifically, I accept that there were periods where the plaintiff was verbally aggressive with Ms. Baltadjian and that this strained their relationship. However, their relationship has survived and the incidents of verbal aggressiveness have improved. I do not accept that the severing of the relationship with Ms. Baltadjian's family had anything to do with the injuries suffered in the

accidents. A single incident of raising one's voice to a child who was hitting another child seems unlikely to have had such a result;

i) I also accept that the injuries have impacted the plaintiff's sporting and recreational activities, although no longer to a serious degree. Prior to the accidents the plaintiff weighed approximately 180 pounds, had no medical issues, and was very active doing things such as: the Grouse Grind in 50 minutes; playing floor, ice and roller hockey; and going to the gym six to seven days per week. Subsequent to the accidents he had periods where he did very little exercise and his weight increased to 254 pounds. However, as of 2020 the plaintiff weighed approximately the same as he did before the accident, plays at least some hockey and goes to the gym five or six times per week. He does not hike but he does regularly go for walks. In other words, his activities now are similar to what they were before the accident but not as intense.

j) I do not accept that the plaintiff's ability to do housework or chores continue to be affected by the injuries he has suffered. He has essentially no limitation in range of movement and is physically fit. His intermittent headaches should not interfere with housework and chores except sporadically; and

k) Finally, and perhaps most importantly, I do not accept that the plaintiff is unable to look after the children or to care for himself. I also do not accept that the plaintiff requires a caregiver. The suggestion that the plaintiff cannot perform basic tasks without Ms. Baltadjian's help is not consistent with the nature of his injuries as I have found them to be. His main injury is occasional headaches with periodic bouts of non-clinical depression. Such injuries do not render persons incapable of caring for themselves and did not do so to the plaintiff. The plaintiff's evidence and the evidence of Ms. Baltadjian relating to the plaintiff's abilities was preposterous and wholly unbelievable. I acknowledge that Ms. Baltadjian has been declared

the plaintiff's caregiver but this was so the couple could qualify for a social assistance program offered by the Province of Ontario. It does not mean, and is not evidence that, the plaintiff is in any way disabled or unable to look after himself.

Prognosis

[321] The various medical experts have given different opinions on the likely future course of the plaintiff's injuries and symptoms. In summary, these are:

a) Dr. Baasch stated that the prognosis was "very guarded";

b) Dr. McKenzie gave no prognosis as he considered the plaintiff's symptoms had essentially resolved by May 2012 and he declined to comment on the headaches, anxiety or depression which were outside his area of expertise;

c) Dr. Robinson was pessimistic that there would be any substantial improvement in the plaintiff's conditions but he also identified psychological distress as a major factor in the plaintiff's difficulties and deferred to a psychiatrist or psychologist in relation to these;

d) Dr. Anton opined that it was highly probable the plaintiff would continue to experience chronic pain and associated impairment and disability in future. He was of the view that the plaintiff's disability was severe enough to preclude a successful return to any type of work or further education;

e) Dr. Gittens limited his prognosis to the physical injuries and stated that there was nothing preventing the plaintiff from entering the workforce. He recognized, however, that psychological issues might be important;

f) Dr. Anderson's opinion was that the plaintiff had plateaued in terms of his psychological recovery and that his prognosis for future improvement was poor. He also opined that the plaintiff was not likely competitively

employable although allowed that part-time employment might be a possibility in a non-demanding job; and

g) Dr. O'Shaughnessy did not provide a prognosis as such but the overall tenor of his reports and evidence was that there was nothing from a psychological or cognitive perspective preventing the plaintiff from returning to work and getting back to an active lifestyle.

[322] It is difficult to reconcile these various opinions given that some experts are addressing physical injuries, some are addressing psychological injuries and some are addressing both, even though both are not within their area of expertise. Nevertheless, I must make findings in relation to the likely future course of the plaintiff's injuries and symptoms.

[323] I reject the prognosis of Dr. Baasch as his entire opinion was based on the plaintiff having suffered a traumatic brain injury which I have found the plaintiff does not have.

[324] Drs. Robinson and Anton were both pessimistic as to whether the plaintiff would see any improvement in the future but both prognoses are suspect. Dr. Robinson's prognosis was based, at least in part, on the plaintiff having significant psychological injuries which he acknowledged were outside his area of expertise. Dr. Anton's prognosis was premised, at least in part, on his diagnosis of psychological injuries, which I have determined the plaintiff does not have.

[325] Dr. Gittens opinion that there was nothing preventing the plaintiff from returning to work is an imperfect or incomplete prognosis in that it is based solely on the plaintiff's physical injuries while acknowledging that psychological issues were important.

[326] Drs. Anderson and O'Shaughnessy had contradictory opinions as to the very existence of any psychological injuries as well as to the prognosis. However, as I have rejected Dr. Anderson's opinions in relation to the existence of the

psychological injuries, it follows that his opinions as to the prognosis must also be rejected.

[327] Considering all of the expert medical evidence, I conclude and find that the plaintiff is likely to continue to suffer from his various injuries and symptoms, as I have found them, for the foreseeable future. However, I do not find that the plaintiff's injuries and symptoms currently prevent him or will in the future prevent him from working as a lawyer or in some other capacity.

Causation

Legal Principles

[328] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused the injuries. The general test of causation is the "but for" test meaning the plaintiff must establish that "but for" the defendants' negligence the injuries would not have occurred. This is a factual determination. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Clements v. Clements*, 2012 SCC 32, at paras. 8-10; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[329] In circumstances where there are multiple accidents and tortfeasors, it is recognized that the "but-for" test can be unworkable because each defendant can point to the other as being the "but for" cause of the injury. In such circumstances, the plaintiff must show that the defendant materially contributed to the risk of injury: *Clements,* para. 46.

Submissions on Causation

[330] The plaintiff submits that all of his injuries were caused by MVA#1 in the sense that "but for" the accident the plaintiff's injuries would not have arisen, and that the injuries were aggravated by MVAs #2 and #5. The plaintiff says that the injuries are indivisible and that the defendants are jointly and several liable.

[331] The defendants submit that the plaintiff suffered no injuries in MVA#1 and #2, which were exceedingly minor collisions, and that he suffered, at best, only minor soft tissue injuries in MVA#5. They further submit that the plaintiff's injuries are caused by factors unrelated to the MVAs. In particular, they submit that his injuries are caused by his realization that he would not be successful in his chosen career and by other unrelated issues such as financial worries and family stress.

Findings on Causation

[332] The facts relevant to causation have mostly been set out above. In brief summary, these are:

a) The plaintiff had no medical issues before MVA#1;

b) Following MVA#1, the plaintiff suffered from neck and back pain and developed headaches, dizziness, nausea and sleep problems. The worst of these symptoms resolved after about five weeks;

c) The plaintiff suffered a worsening or an aggravation of his symptoms following MVA#2. Again, however, many of the symptoms resolved within about six weeks;

d) Prior to MVA#5, the plaintiff's symptoms had improved such that he was then suffering from occasional pain, occasional headaches, sleep problems and associated irritability that sometimes manifested in verbal aggression. Further, at times his symptoms could be temporarily debilitating; and

e) Immediately following MVA#5, the plaintiff experienced a stiff neck and a headache and in the following days experienced a worsening of his symptoms.

[333] In my opinion, the above facts clearly establish a temporal link between the accidents and the injuries.

[334] Additionally, the opinions of the medical experts support a causal link between the accidents and injuries. The medical experts were virtually unanimous in concluding that the plaintiff's myofascial pain, headaches and associated symptoms were caused by the accidents. The only exception to this unanimity was in relation to the plaintiff's alleged psychological injuries, which I have found the plaintiff does not have.

[335] Accordingly, in my opinion the plaintiff has clearly established that his injuries, with the exception of the psychological injuries which I have found he does not have, were caused by MVA#1 and aggravated by MVA#2 and #5.

Assessment of Damages

[336] The assessment of damages is a step distinct from causation. Once causation is established on a balance of probabilities, the defendant is required to put the plaintiff in the position he would have been in absent the tort. This requires that the court determine both the position that the plaintiff would have been in if the tort had not occurred (the "original position") and the position of the plaintiff after the tort (the "injured position"). The plaintiff's compensable loss is the difference between these two positions: *Athey*, para. 32.

[337] It is in the assessment of damages that the court takes into account the "thin skull" and "crumbling skull" rules, both of which address pre-existing conditions. The "thin skull" rule recognizes that some plaintiffs will suffer more serious injury because of the existence of a pre-existing condition. The "thin skull" rule holds that the defendant must compensate the plaintiff for the unexpectedly more serious injury: *Athey*, para. 34. The "crumbling skull" rule recognizes that some injuries would have occurred in the absence of the tort due to a pre-existing condition. The "crumbling skull" rule holds that the defendant need not compensate a plaintiff for such injury provided there is a measurable risk that the injury would have occurred in the absence of the tort: *Athey*, para. 35.

[338] These various principles were summarized by McLachlin, C.J.C. in *Blackwater v. Plint*, 2005 SCC 58, at paras. 78 - 81:

> 78 It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*…
>
> 79 At the same time, the defendant takes his victim as he finds him — the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> 80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
>
> 81 All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

[339] In *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 36, Smith J.A. for the Court of Appeal observed that unrelated intervening events must be taken into account in the same way as pre-existing conditions.

> [36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* ¶ 31-32).

[340] These are the general principles that I will apply in the assessment of the plaintiff's damages.

General Damages

Legal principles

[341] The factors to be considered when assessing general damages for pain and suffering are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris* (2004), 237 D.L.R. (4th) 193] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

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

Assessment

[343] The plaintiff submits that general damages in the amount of $180,000 should be awarded to him.

[344] The defendants made no submissions on what might be an appropriate award for general damages. The defendants relied entirely on this court finding that the plaintiff had suffered no injuries in the accidents.

[345] The plaintiff refers me to the following cases which the plaintiff submits are similar to the matter before me and establish a range of damages justifying an award of $180,000:

a) *Neufeldt v. Marcellus*, 2020 BCSC 427, which concerned a 40 year old plaintiff who suffered soft tissue injuries to his neck and back, chronic pain and headaches, a concussion, depression and anxiety. As a result of his injuries the plaintiff could no longer work as a police officer or engage in sports and his family relationships became strained. That plaintiff was awarded $200,000 in general damages;

b) *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, where the 42 year old plaintiff, a lawyer, suffered a mild traumatic brain injury in a slip and fall accident that had a dramatic effect on her life. Specifically, the plaintiff had ongoing post-concussive symptoms including physical, cognitive and emotional difficulties and post-traumatic headaches. The plaintiff also developed a chronic pain disorder. The plaintiff also suffered soft tissue injuries in a subsequent motor vehicle accident. The plaintiff's injuries had a profound effect on her life and she was no longer able to pursue her career. She was awarded general damages of $185,000;

c) *Fancello v. Cupskey*, 2019 BCSC 1724, where the 25 year old plaintiff suffered a mild traumatic brain injury and soft tissue injuries in two motor vehicle accidents and developed chronic pain, dizziness, tinnitus, and cognitive difficulties. The plaintiff was diagnosed with somatic symptom disorder with predominant pain and with a major depressive disorder. The plaintiff was unable to partake in recreational activities and was unable to work in any occupation requiring physical exertion. She was awarded $175,000;

d) *Macie v. DeGuzman,* 2019 BCSC 1509, where the 24 year old plaintiff was diagnosed with a mild traumatic brain injury, post-concussion syndrome, major depressive disorder, panic disorder, somatic symptom

disorder, generalized anxiety disorder, and post-traumatic stress disorder. She was awarded $170,000 in general damages;

e) *Niessen v. Emcon Services Inc.*, 2018 BCSC 1410, where the plaintiff was found to have ongoing and chronic, headaches, depression, anxiety, sleep disruption, cognitive problems, tinnitus and PTSD. 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. The plaintiff was awarded $170,000 in general damages;

f) *Ranahan v. Oceguera*, 2019 BCSC 228, where the plaintiff sustained a mild traumatic brain injury, soft tissue injuries to her spine, chronic neck pain, upper back pain, post-concussion syndrome, cognitive problems with memory and focus, imbalance, tiredness, fatigue, tinnitus, eye strain, sleep disturbance and chronic headaches. She also suffered from ongoing mood symptoms including irritability, moodiness and a reduction in patience, and positivity. Her injuries were found to have significantly impacted her recreational and social pursuits, although she was able to participate in some of these activities. She was awarded $160,000 in general damages;

g) *Hauk v. Shatzko*, 2020 BCSC 344, where the plaintiff sustained soft tissue injuries that developed into chronic pain in her neck, back and shoulders, chronic headaches, and problems sleeping. She was diagnosed with somatic symptom disorder, major depressive disorder, and anxiety. As a consequence of the injuries the plaintiff ceased working, was not as social and did not engage in the same pastimes and hobbies. She was awarded $150,000 in general damages; and

h) *Senner v. GE Canada Leasing Services Company*, 2017 BCSC 1939, where the plaintiff had chronic pain, headaches, sleep problems, fatigue, inability to focus, depression and anxiety. His injuries prevented him from pursuing all work, recreational and family activities. He was awarded

> $150,000 in general damages, although the amount was reduced to take into account contributory negligence.

[346] In my opinion, the above cases to which I have been referred by the plaintiff are not comparable to this matter. They would have been comparable if I had accepted the plaintiff's submissions concerning the nature and extent of the injuries suffered in the accidents, but I have not accepted those submissions. In five of the above cases, the plaintiff had suffered a traumatic brain injury. In five of the above cases the plaintiff had a diagnosed psychological injury such as somatic symptom disorder, major depressive disorder or PTSD. In most of the above case the plaintiffs were either unable to work as a result of their injuries or were significantly limited in their ability to work. Additionally, in most of the above cases the injuries were found to have had a significant impact on the plaintiff's social or family life and their recreational activities.

[347] I have found that the plaintiff's injuries and symptoms as a consequence of the motor vehicle accidents consist of: intermittent neck and back pain; intermittent headaches that are sometimes debilitating; periods of irritability associated with headaches that infrequently manifest in verbal aggressiveness; periods of dizziness, fatigue and blurry vision associated with headaches; lack of concentration, focus and related memory problems, all associated with headaches; periodic bouts of anxiety, and depression; and minor anxiety when a passenger in a vehicle. I have specifically found that the plaintiff did not suffer a traumatic brain injury and does not suffer from somatic symptom disorder, major depressive disorder or PTSD.

[348] I have set out above my detailed findings as to the effects these injuries have had on the plaintiff. In summary, the injuries delayed the plaintiff's call to the bar by five months, have imposed some limitations on his ability to work, and have mildly affected the plaintiff's recreational and sporting activities. The injuries have not, however, prevented the plaintiff from working, affected his ability to do housework and household chores, or affected his ability to care for his children or himself.

[349] I have further found that the plaintiff is likely to continue to suffer from his various injuries and symptoms for the foreseeable future.

[350] Regrettably, the defendants have provided me with no cases that they submit are comparable, which has left me with only the cases to which I have been referred by the plaintiff.

[351] Upon comparing the nature of the injuries suffered by the plaintiff in this matter, and the effects of those injuries, with the plaintiffs in the cases referred to me by the plaintiff, I am of the view that the plaintiff's general damages in this matter should be assessed at $80,000.

Loss of Income or Earning Capacity Generally

[352] The principles applicable to an assessment of loss of income claims, both past and future, are summarized by Justice Dardi in *Carrillo v. Deschutter*, 2018 BCSC 2134, as follows:

> [111] An award of damages for loss of earning capacity, whether past or future, is compensation for a pecuniary loss: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175 [*Hardychuk*]. The purpose of such an award is to restore, as best as possible with a monetary award, an injured plaintiff to the position he or she would have been in had the negligence not occurred. The Court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.
>
> [112] The appellate authorities establish that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an "earnings approach" or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [*Perren*]. The earnings approach is more appropriate when the loss is more easily measurable: *Perren*. Under either approach, the plaintiff always must prove that there is a real and substantial possibility of hypothetical events leading to an income loss: *Perren*, at para. 33; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133 [*Pololos*]; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14 [*Rousta*].
>
> [113] The Court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45 [*Falati*], provided an instructive distillation of the principles which inform the assessment of loss of earning:

(i) The standard of proof is not the balance of probabilities. A plaintiff is entitled to compensation for real and substantial possibilities of loss, *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.) [*Milina*].

(iii) The court must assess damages for loss of earning capacity based on the evidence, taking into account all positive and negative contingencies. The task of the court is to assess the losses, not to calculate damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43.

(iv) The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[114] To this list, I would add that evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": Graham v. Rourke (1990), 75 O.R. (2d) 622 at 636 (C.A.).

[115] A claim for "past loss of income" is properly characterized as a component of loss of earning capacity: *Falati*, at para. 39. It is subject to the same legal test as a claim for loss of future earning capacity. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [*Rowe*]; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32.

[116] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered in a damages assessment as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27. Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. She clarified that the same test applies regardless of whether the court is considering hypothetical events in the assessment of past or future loss of earning capacity. She expounded at para. 29:

> [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.

[117] In sum, the assessment of past or future loss of earning capacity requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 178 at para. 49 [*Grewal*]. The test to be applied to hypothetical events, past and future, is whether there is a real and substantial possibility that the events in question would occur or would have occurred absent the defendant's

> negligence: *Rousta* at para. 14. In advancing a claim for the loss of income-earning capacity, whether past or future, the plaintiff must always prove a real and substantial possibility of an income loss, as opposed to a theoretical one. In other words, the award cannot be based on mere speculation; *Grewal* at para. 48; *Rousta* at para. 17. While the onus on the plaintiff is not a heavy one, it must nonetheless be met in order to justify a pecuniary award. *Kim v. Morier*, 2014 BCCA 63 at para. 7.

[353] These are the principles that I apply.

Past Income Loss

[354] The plaintiff submits that because of the injuries suffered in MVA#1 and MVA#2 he had extreme difficulty studying for his transfer exams which delayed his call to the bar and his ability to earn income. He further submits that because of the injuries suffered in those accidents, and the further aggravation of those injuries in MVA#5, he was not able to enter into his business venture with Mr. Makkar and was unable to earn the amount he would have earned but for the accidents. The plaintiff submits that his past loss of income is in the amount $400,000.

[355] The plaintiff filed the expert report of Darren Benning, an economist. In this report Mr. Benning purports to calculate the income that the plaintiff would have earned if he had not been injured. In doing so Mr. Benning uses generalized data from Statistics Canada of the median earnings of individuals with Bachelor's of Law degrees, Bachelors degrees other than for Law and Masters degrees. The median annual incomes for each of these classes increased annually in the years 2011 through 2019. During this period the median annual incomes increased: from $75,000 to $120,000, for persons with a Bachelor's of Law degree.

[356] Mr. Benning calculates that during the period from February 1, 2011 to July 1, 2019 the plaintiff would have earned $575,360, net of income taxes and employment insurance premiums, if he had earned the median income of a person with a Bachelor's degree in Law. The plaintiff correctly submits that this amount must be adjusted to reflect the time between July 1, 2019 and the date of trial that is not accounted for in Mr. Benning's report. With this adjustment, and after deduction of the income the plaintiff actually earned, being $120,876, the plaintiff says the loss of

income is approximately $530,000. The plaintiff then applies a negative contingency of 30% to reflect that he was likely to have less than the median amount in this group. The plaintiff submits that these calculations lead to a loss of income of $403,000, rounded down to $400,000, for the period from February 1, 2011 to the trial.

[357] The plaintiff's calculation of his past income loss is based on the following assumptions, either stated or unstated:

a) that absent the accident the plaintiff would have passed the transfer exams and commenced earning income on February 1, 2011;

b) that the plaintiff would have earned 70% of the median income of a person with a Bachelor's of Law degree; and

c) that the plaintiff would have worked full time during the relevant period.

[358] The first assumption, that the plaintiff would have passed the transfer exams by February 1, 2011 is reasonable and I accept it. As I indicated earlier in these reasons, the plaintiff's belief that he could write the transfer exams within two or three months of moving to British Columbia was exceedingly unrealistic.

[359] The second and third assumptions are not reasonable and not supported by the evidence.

[360] The plaintiff's actual earnings history prior to MVA#1 is not reflective of the median income for persons with a Bachelor's of Law degree, even after the application of a 30% reduction. In the years preceding his call to the Quebec Bar, namely, 2002, 2003, 2004, the plaintiff earned $16,000, $6,000, and $10,000, respectively. In 2005 and 2006, following his call to the Quebec Bar, he earned $11,800 (of which $5,500 was as a security guard) and $26,400. In 2007 and 2008 he earned no income. Notably, his average annual income in the four years after being qualified as a lawyer was less than $10,000. In 2009, the year he moved to British Columbia, he earned $6,240. Unfortunately, Mr. Benning's report does not

provide data for the years 2002 through 2010, which would have allowed a direct comparison between the plaintiff's historical actual earnings and the median incomes in those years. Nevertheless, it is apparent that the plaintiff's actual earnings were far below the median income. The 30% negative contingency applied by the plaintiff is far too small considering the plaintiff's historical earnings.

[361] Underlying the plaintiff's loss of income claims is a presumption that, if the accidents had not occurred, the plaintiff would have either established a successful business venture with Mr. Makkar or would have successfully developed a full time practice on his own. Both of these are or were hypothetical events the likelihood of which must be assessed.

[362] Concerning the business venture with Mr. Makkar, the evidence has established that they discussed such a venture; the plaintiff moved to British Columbia to implement the venture; and they did, in fact, commence working together on a limited basis. This evidence establishes a real and substantial possibility that they would have started a venture, but, it does not establish that such a venture would have been successful.

[363] The evidence that such a venture would have been successful consists mostly of Mr. Makkar's testimony that, once it became clear the plaintiff was not able to work, he established a successful tax consultation business with another tax lawyer, one that had worked for the Canada Revenue Agency for 22 years.

[364] However, there are several other factors that suggest there was little likelihood of the venture proceeding and being successful. These are:

a) The plaintiff and Mr. Makkar had no clear or definitive plan in 2009 or at any time thereafter. In fact, they gave conflicting versions regarding what their venture would be. Mr. Makkar seemed to think he would work with the plaintiff in his law firm as a paralegal whereas the plaintiff seemed to think that he would work with Mr. Makkar and Mr. Makkar's clients;

b) The plaintiff had some academic qualifications in tax law but he had minimal actual experience as a tax lawyer. In contrast, the lawyer with whom Mr. Makkar was eventually successful had 22 years of experience with the Canada Revenue Agency;

c) The plaintiff and Mr. Makkar barely knew one another and had had insufficient interactions for either to gauge their compatibility as business associates or each other's respective abilities and qualifications. Throughout the relevant time period, the plaintiff had done only a few small matters for Mr. Makkar. I am aware that Mr. Makkar testified the plaintiff was technically sound and strategically strong but, in my view, he had too few interactions with the plaintiff to come to this conclusion;

d) Mr. Makkar admitted in cross-examination that he was still evaluating the plaintiff in 2011;

e) The plaintiff's past failures with his Montreal law firm and with the concrete business, were not suggestive of future success; and

f) The plaintiff's interactions with the LSBC, in particular the fact that he was practicing law when he knew he was not entitled and that fact that he lied to and misled the LSBC, are not indicative of a prosperous legal career.

[365] At best, in my view, there was a 30% chance that the plaintiff and Mr. Makkar would actually have established their venture and that it would have been successful such that the plaintiff would have earned the median income of a person with a Bachelor of Law degree. This means a negative contingency of approximately 70% should be applied to Mr. Benning's figures.

[366] I am further of the view that the likelihood the plaintiff would have been successful as either a tax lawyer or a general lawyer on his own is even lower. The plaintiff had no contacts in British Columbia other than Mr. Makkar, had minimal experience as a lawyer and had a history of failed businesses.

[367] My findings of fact are further impediments to the plaintiff's past loss of income claim. Although I have accepted that there were times when the plaintiff would have been unable to work because his symptoms were particularly severe, these occasions were intermittent and temporary. I have found that the plaintiff was not completely disabled from working as a lawyer during the relevant time. The fact that he did not work more during the relevant period is not because of his injuries but because he simply did not have the clients to work for.

[368] I note that Mr. Makkar testified that he would have referred clients to the plaintiff, if the plaintiff had been healthy and able to accept referrals. However, Mr. Makkar gave insufficient details of the clients or matters that could have been referred to the plaintiff. He also acknowledged that, at least during the years 2012 through 2014, the plaintiff provided advice to him as needed, which is inconsistent with the plaintiff not being able to accept any work.

[369] Accordingly, in my view, the plaintiff has not established that he has, in fact, lost any income during the period from February 1, 2011 to the date of trial.

Loss of Future Earning Capacity

[370] The principles that apply in assessing loss of future earning capacity were summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at 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.

[371] As is apparent from the foregoing, the plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. Some of the factors to take into account in assessing this possibility are set out in *Miller v. Lawlor*, 2012 BCSC 387, at para. 114:

> [114] In determining whether the plaintiff has established a real and substantial possibility of a loss of future earning capacity, I need to refer to the four factors noted by Finch J. (as he then was) in *Brown*. They include whether:
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> > 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2) The plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3) The plaintiff has lost the ability to take advantage of all job opportunities which otherwise might have been open to him had he not been injured; and
> >
> > 4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[372] I have no doubt that the threshold test is met, namely, the plaintiff has established that there is a real and substantial possibility of a future event leading to an income loss. My findings as to the effects of the injuries clearly establish that the

plaintiff will be subject to limitations and will be less productive as a lawyer or in other occupations. The question is, what should the amount be?

[373] The plaintiff again relies upon the report of Mr. Benning where he calculates the plaintiff's loss of future earnings from July 1, 2019 to his 70th birthday, his presumed age of retirement. Mr. Benning uses the same median earnings of individuals with Bachelor's of Law degrees, Bachelors degrees other than for Law and Masters degrees to calculate the income the plaintiff would have earned. His calculation generates a lump sum present value of the plaintiff's future lost earnings of $3,162,160 based upon the median earnings of a person with a Bachelor's degree in Law.

[374] In submissions, the plaintiff made several adjustments to Mr. Benning's calculations. These were:

a) The plaintiff acknowledged that the end date for the calculations should be the plaintiff's 65th birthday;

b) The plaintiff again acknowledged that a 30% negative contingency should be applied to reflect that the plaintiff would likely be a lower than median earner; and

c) The plaintiff acknowledged that the calculations needed to be adjusted to reflect the fact that the trial was held 15 months after July 1, 2019.

[375] With these adjustments, the plaintiff submits that the lump sum present value of the plaintiff's future lost earnings is $1,871,228. The plaintiff submits that a reasonable assessment of his future loss of earning capacity is $1.85 million.

[376] The plaintiff's calculation of the future lost earnings has presumed that the plaintiff is completely incapable of working as a lawyer or in any other capacity. This is contrary to my findings. The plaintiff is capable of working, albeit at a reduced capacity and less efficiently. Using the plaintiff's calculations, if he worked 50% of a

normal work week, his loss would be reduced to approximately $900,000 and, if he worked 75% of a normal work week, his loss would be approximately $460,000.

[377] Additionally, in my discussion of the claim for past loss of income I set out why a 30% deduction for negative contingencies was not sufficient and why a 70% deduction was more appropriate. Those considerations have equal application to the claim for loss of future earning capacity.

[378] Additionally, there are other negative contingencies that are applicable to the claim for future loss of earning capacity. Specifically:

a) The plaintiff's dealings with the LSBC must be taken into account in assessing his future loss of earning capacity. The plaintiff's interactions with the LSBC have not been promising and raise an issue of whether he would have been able to continue to practice law. More specifically, the plaintiff practiced law upon moving to British Columbia when he knew he was not entitled to do so and he provided the LSBC with false or misleading information on several occasions. Such conduct gives rise to a more than speculative possibility that the plaintiff's law career, should he decide to pursue it, may be interrupted in the future; and

b) The plaintiff has other serious medical issues that give rise to a possibility that even absent the accidents the plaintiff's future earnings might not be as projected. Specifically, the plaintiff recently suffered several syncopal episodes and had a pacemaker implanted.

[379] Considering the fact that the plaintiff is not totally disabled and taking into account all of the negative contingencies, I am of the opinion that an award of $300,000 for loss of future earning capacity is fair and reasonable for all parties.

Costs of Future Care

Legal Principles

[380] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him or her to their pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[381] The test for determining an appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for the costs; and, (2) the costs must be reasonable: *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[382] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be (able to be) rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, and 68-70.

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

prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

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

Assessment

[385] April Belbeck prepared two expert reports dated October 25, 2017 and August 2, 2018 addressing the costs of the plaintiff's future care. Ms. Belbeck did not conduct a functional capacity evaluation of the plaintiff. In preparing her reports and assessing the future care needs of the plaintiff she reviewed various medical reports and documents and conducted interviews of the plaintiff, Ms. Baltadjian and Drs. Anton and Seyone.

[386] Based upon the reports of Ms. Belbeck, the plaintiff claims $378,151 for the costs of future care broken down as follows:

ITEM	AMOUNT
Case Management	$25,000
Medications	$29,947
Psychologist	$105,000
Physiotherapy/Massage	$5,400
Pain Program	$18,841
Rehabilitation Support	$80,256
Kinesiologist	$3,300
Childcare Assistance	$50,513
Home Maintenance	$59,894
TOTAL	$378,151

[387] Before addressing the particular items claimed I wish to make note of a number of general issues with Ms. Belbeck's reports. First, she has referred to and relied upon medical documents and reports that are not in evidence before me. Second, she relies on information that she obtained from Dr. Seyone and that is

clearly in the nature of expert opinion. However, Dr. Seyone did not provide an expert report or otherwise give evidence in this matter. Finally, and more generally, Ms. Belbeck's recommendations are based on an assessment of the plaintiff's injuries and disabilities that are far more bleak and pessimistic than what I have found to be the case. As a result of these various issues, her opinions as to the future care needs of the plaintiff are seriously undermined

Case Management

[388] Ms. Belbeck opines that a case manager is required because the plaintiff is incapable of making the necessary arrangements with treatment and care providers on his own. Given my findings, I do not consider this to be the case. The plaintiff is perfectly capable of making these arrangements and does not require a case manager. Moreover, as will be seen, the plaintiff does not require the amount of care that Mr. Belbeck has allowed for.

Medications

[389] The medications required are based on an interview Ms. Belbeck had with Dr. Seyone, who has not given evidence in this proceeding by way of a report or otherwise, and on the report of Dr. Anderson. I have rejected Dr. Anderson's opinion concerning the existence of a psychological disorder. However, Dr. O'Shaughnessy seemed to acknowledge that the medications the plaintiff was taking were helping with depressive symptoms. Therefore, I allow the claim insofar as it relates to Sertraline and Asenapine.

[390] Also included in medications is medicinal marijuana. However, the plaintiff has ceased such use and, in any event, the plaintiff's use of medicinal marijuana seemed to be causing more problems than it was solving.

Psychological Services

[391] Under this heading Ms. Belbeck has included psychological assessments for the plaintiff, psychological interventions for the plaintiff, marital and family counselling and individual counselling for Ms. Baltadjian. Given the opinions of

Dr. O'Shaughnessy, I do not consider that the plaintiff requires the psychological services Ms. Belbeck has included.

[392] Concerning marital and family counselling and individual counselling for Ms. Baltadjian, it appears that these recommendations were made primarily on the basis of advice received from Dr. Seyone, who has not been recognized an expert. I note that Dr. Anderson also recommended marital counseling, however, I have rejected much of Dr. Anderson's opinion. In my view, the medical evidence properly before me does not establish that this counselling is reasonably necessary.

Physiotherapy/Massage

[393] Under this heading Ms. Belbeck recommends 16 to 20 sessions of physiotherapy and 40 to 60 sessions of massage therapy. She bases these recommendations on information she obtained in interviews with Dr. Seyone and Dr. Anton. However, Dr. Anton only recommended 12 sessions of massage therapy or physiotherapy. Accordingly, I allow 12 sessions at a cost of $80 per session.

Pain Program

[394] Dr. Anton recommended that the plaintiff attend an interdisciplinary chronic pain management program. According to Ms. Belbeck's report, the cost of such a program is $15,100. This amount is allowed.

[395] Ms. Belbeck has additionally recommended a further $3,741 on account of hotel costs, meals and transportation. This amount is reasonable and is also allowed.

Rehabilitation Support

[396] Ms. Belbeck recommends extensive rehabilitation support services. She recommends 192 sessions over the first two years and an additional 20 to 30 sessions in subsequent years for a total amount of between $44,717 and $56,077. She bases her recommendation as to the number and frequency of sessions primarily on information she obtained from Dr. Seyone in an interview. However, the medical evidence that is before me is again the report of Dr. Anton where he

recommended 12 active rehabilitation sessions with a kinesiologist and periodic sessions thereafter. Dr. Anton did not specify how many subsequent periodic sessions would be required

[397] Ms. Belbeck states in her report that the role of a kinesiologist in rehabilitation can also be filled by a rehabilitation support worker and she appears to prefer a rehabilitation support worker.

[398] Based on the medical evidence before me, I allow 12 sessions with either a rehabilitation support worker or a kinesioligist and a further 6 follow-up sessions, for a total of 18 sessions at $70 per hour.

Kinesiologist

[399] The assistance of a kinesiologist is not required as this role is fulfilled by a rehabilitation support worker and I have allowed the costs of such a support worker. I do not allow any additional amount for a kinesiologist.

[400] I also note that Ms. Belbeck bases her recommendation for a kinesiologist on her view that the plaintiff is “doing relatively little exercise”. I have, however, found that he is doing regular exercise.

Childcare Assistance

[401] Ms. Belbeck recommends child care support of 8 to 10 hours per week for 4 years for a total estimated cost of between $26,000 and $39,000. In my view the medical evidence does not justify this cost. First, I have found as a fact that the plaintiff is capable of looking after his children. Second, Ms. Baltadjian no longer works. With two adults at home, I see no need for child care.

Home Maintenance

[402] Ms. Belbeck has recommended housekeeping services, meal preparation services, snow removal services and lawn maintenance services. In my view, none of these are required. The plaintiff is capable of doing all of these things. Moreover,

Ms. Baltadjian no longer works. I fail to see any justification whatsoever for these services.

Award

[403] Accordingly, I have allowed the following amounts for the costs of future care:

a) The costs of Sertraline and Asenapine;

b) 12 sessions of massage therapy at a cost of $80 per session;

c) $18,841 for a pain management program; and

d) 18 sessions with either a rehabilitation support worker or a kinesioligist at a cost of $70 per hour.

[404] I leave it to the parties to calculate a lump sum equivalent of these various items. If the parties are not able to agree on the amount, they have leave to speak to me.

Special Damages

Legal Principles

[405] The principles applicable to an assessment of special damages are summarized by Justice Basran in *Manhas v. Jaswal*, 2020 BCSC 586, at para. 86:

> [86] The principles applicable to the assessment of special damages are as follows:
>
> - Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established.
> - Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite.
> - Subjective factors may also be considered such as whether the plaintiff believes the treatment is medically necessary.
> - $0.50 per kilometer is a reasonable rate to attend treatment.
>
> See: Hancott v. Barnes, 2015 BCSC 1308 at para. 164; Derksen v. Nicholson, 2015 BCSC 1268 at para. 78; Devilliers v. McMurchy, 2013 BCSC 730 at paras. 72 and 75; and Liu v. Thaker, 2012 BCSC 612 at para. 72.

[406] The standard of reasonableness is discussed in *Redl v. Sellin*, 2013 BCSC 581, at para. 55:

> [55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see Juraski v. Beek, 2011 BCSC 982; Milina v. Bartsch (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobb, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in Personal Injury Damages in Canada, (2d ed., 1996) at p. 166:
>
> > Even prior to the Supreme Court's endorsement of the restitution principle [in Andrews v. Grand & Toy Alberta Ltd. and Arnold v. Teno], in the area of special damages the courts had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.
>
> That being said, and while Dr. Frobb's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiffs are not given carte blanche to undertake any and all therapies which they believe will make them feel good.

[407] The plaintiff claims special damages in the amount of $48,436.75. The amounts claimed relate to various treatments the plaintiff received and associated expenses. The defendants did not specifically challenge any of the amounts claimed and they are supported by invoices.

[408] Accordingly, I award the plaintiff special damages of $48,436.75, as claimed.

In-Trust Claim

[409] The plaintiff claims an in-trust award in the amount $20,800 in respect of Ms. Baltadjian's assistance to the plaintiff. He submits that she initially cleaned his apartment, did the cooking and encouraged him during his difficult early days. He submits that she later assumed the role of managing his medical treatments, attended medical appointments with him, and prompted him to perform daily tasks such as showering, and looking after the family finances and children.

Legal Principles

[410] The factors to be considered in relation to an in-trust claim are set out by Justice Smith in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, as follows:

> a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
>
> c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[411] Such claims must be reasonable: *James v. James*, 2018 BCSC 603 at paras. 148-149.

Assessment

[412] I do not consider an in-trust award is appropriate in the circumstances. The in-trust claim is essentially founded on the plaintiff's theory that he is totally disabled and is unable to look after himself or his children. I have found that this not the case. The plaintiff is capable of looking after himself and the children and is capable of doing house and yard work. Ms. Baltadjian was required to do no more than one would normally expect of a spouse.

Conclusions and Orders

[413] In respect of Vancouver Registry action M153986 and Vancouver Registry action M208820, and on consent, Susan and Gottfriend Schaefer are hereby found to be 75% at fault and Josiah Smith is 25% at fault for MVA#5.

[414] The plaintiff is awarded the following damages:

a) General damages in the amount of $80,000;

b) Damages for future loss of earning capacity in the amount of $300,000;

c) Special damages in the amount of $48,436.75; and

d) Damages for costs of future care in accordance with my findings herein.

[415] The parties are at liberty to speak to me if they cannot agree on the present value amount of the award for costs of future care and in respect of costs.

"Giaschi, J"