

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
Section 148.2(1) of the Revised Regulations to the Insurance (Vehicle) Act
(includes amendments up to the BC Reg. 126/2014)**

AND

Arbitration Act, RSBC 1996, c. 66

BETWEEN:

SN

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRATION AWARD

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Mark Tweedy, C. Med.

Dates of Hearing

July 6-10, and 13-14, 2020

Place of Hearing

Vancouver, BC

Date of Submissions

July 15, 2020

Date of Award

August 12, 2020

INTRODUCTION

1. This is a claim for compensation for injuries sustained by the claimant, pursuant to underinsured motorist coverage afforded by the ***Insurance (Vehicle) Regulation***.
2. The motor vehicle accident which gives rise to this proceeding occurred on June 22, 2011. The claimant, Mr. N, was a passenger in a Subaru being driven by Ms. N, who was then his fiancé, and is now his wife. They had been attending Mr. N's convocation at the British Columbia Institute of Technology ("BCIT"). The Subaru was run into from the rear by a vehicle being driven by a Mr. G, who was insured by the respondent.
3. Liability was admitted in the tort proceeding underlying this claim. The claimant agreed with the respondent to settle that action for the available insurance limits, and proceed with this claim.

THE CLAIMANT'S BACKGROUND, EDUCATION, AND WORK HISTORY

4. Mr. N is 43 years old. He was 34 at the time of the accident. He was born in Edmonton, AB, but moved to Vancouver, BC at a young age. Prior to the accident, he enjoyed a close relationship with his mother and two sisters. Mr. N's evidence regarding his close family relationship was confirmed by his sisters, Ms. S, and Ms. R and his wife, all of whom gave evidence.
5. Mr. N and Ms. N married the day after this accident. They have a daughter who is now almost two years old.
6. Mr. N graduated from high school in New Westminster in 1993. For approximately two years after graduation, he worked in a variety of jobs in two restaurants. He then worked for three years as a security guard. After that job, he completed an eight month course to become a residential care aide. He never worked in that occupation. He then took a job with the Community Living Society, where he worked caring for a young man with cerebral palsy.
7. In the fall of 2003, he commenced his studies at BCIT toward a Diploma of Technology in Financial Management. That same year, he met his future wife. They commenced a relationship in 2005. Ms. N graduated from BCIT with the same diploma that year.
8. Mr. N took time off from BCIT in approximately 2005 to 2006 to buy and renovate a home in Abbotsford, BC. He also worked full time in this time period for International Tracing Services as a "skip tracer", although the amount he earned is not in evidence. He continued to work as a skip tracer until he and Ms. N took a three month vacation in Europe in 2007. He earned approximately \$16,000 working for the skip tracing firm in 2007 prior to his departure on his vacation.

9. Upon his return from Europe, Mr. N applied for a job with the RCMP. While engaged in fitness testing in furtherance of that application, he encountered some physical difficulties. He saw his doctor, who ordered blood work. He was told he was diabetic. He experienced a number of physical and mental maladies as a result. He says he failed two courses at BCIT in 2009 as a result of his issues related to his diabetes and its treatment. I will say more about Mr. N's diabetes later in this award. In 2011 he completed the two courses he had failed, and completed his diploma requirements.

10. Mr. N's BCIT transcript reveals two instances where he stopped his course of study without notice. These resulted in assigned grades of "V", for "vanished".

11. Mr. N completed two courses with the Canadian Securities Institute ("CSI"). In 2009, he passed the Canadian Securities Course with a final mark of 63%. In 2011, he passed the Professional Financial Planning Course, with final mark of 70%.

12. Mr. N did not work at all from 2008 through 2011.

13. Mr. N's evidence was that his plans upon graduation were to become a financial planner if he did not obtain a job with CSIS. Mr. N had submitted an application to CSIS in June 2011. This was after being encouraged to do so by a CSIS supervisor that Mr. N had met at a border crossing.

14. Both Mr. N and his wife confirmed that he was waiting for a response to his CSIS application before applying for jobs as a financial planner, and in particular, a job with Freedom 55. He said that he had done well on a school project where a Freedom 55 presentation had been created as part of an internship. His evidence was that he was told he could have a job with Freedom 55 upon completion of his diploma, but he never followed up with that, nor applied for such a position. He had not in fact applied for any financial planner positions despite receiving emails "every week" advertising that such positions were available.

15. Mr. N considered that he had the necessary skill set to work as a financial planner. He viewed his career goals as "completely attainable". This view is one shared by Ms. S, who completed the same course of studies at BCIT as Mr. N, and works herself in that field.

16. Mr. N graduated from BCIT with a GPA of 60. He has never worked in the financial management field.

17. Mr. N had "not put much thought" into retirement plans. His evidence was that as his wife was seven years younger than him, he thought he might retire later.

THE CLAIMANT'S PRE-ACCIDENT HEALTH AND ACTIVITIES

18. Apart from the issues arising from his treatment for diabetes, Mr. N enjoyed excellent health prior to the accident. He enjoyed an active life, and took part in many

social engagements with his family and friends. He frequently assisted his mother with tasks such as power washing, and cleaning gutters. He exercised, lifted weights, ran, and cycled regularly. He was able to bench press his weight of 180 pounds. He travelled frequently, often with his sisters and mother.

19. Mr. N's pre-accident health and activity level was confirmed by the evidence of Ms. N, Ms. S, and Ms. R.

20. Mr. N's evidence was that as between him and his wife, he did the bulk of domestic chores such as cooking, cleaning and grocery shopping. He said this was because he was more efficient and organised.

21. Mr. N said that he travelled extensively prior to the accident, typically one to two weeks per year. Some of these vacations were with his mother and sisters. He described these vacations as typically very busy, with activities from morning until night.

22. Mr. N denied that he had any issues with sleep, pain, emotions or cognition at the time of the accident.

23. Mr. N was first diagnosed with diabetes in 2007. In 2008, on the advice of an endocrinologist, he commenced taking a number of medications to treat that illness. He experienced a number of physical and mental maladies as a result. He says that they caused him to fail two courses at BCIT in 2009. He ultimately saw a naturopath, who recommended that he ask his doctor for further tests. These tests revealed that he had been wrongly diagnosed and prescribed. He commenced taking insulin in August 2010, and his health gradually improved.

24. The effects of Mr. N's diabetes on his schooling and general health were confirmed by Ms. N. His evidence regarding the improvement in his health once he commenced taking insulin was also confirmed by her, and Ms. R.

THE ACCIDENT

25. The accident occurred near Canada Way and Edmonds at approximately 1:00PM on June 22, 2011. The Subaru in which Mr. N was a passenger was stopped at a red light, heading south bound on Canada Way. Other cars were also stopped. Mr. N's evidence was that he heard a loud crash when a Ford Explorer ran into the Subaru from the rear. He said his head bounced off the head rest. The Subaru jerked forward. He said he saw an immediate "flash".

26. Ms. N confirmed that the accident occurred quite suddenly. She said that on impact her sunglasses flew off her face, and that the sunroof cover opened. She sustained soft tissue injuries in the accident, but they recovered without incident, over time.

27. The force of the impact described by Mr. N and Ms. N is disputed by the other driver, Mr. C. He said that the vehicles "bumped into each other".

28. Mr. N and his wife, and the other driver, got out of their cars. Mr. N said that Mr. C said he did not wish to involve ICBC, and that his repair facility would repair the Subaru. Mr. N said that he did not wish to do that, and he expressed the view that this had been a serious collision.

29. Both Mr. N and Ms. N gave evidence that they were surprised at the attitude of the other driver. Both said that he urged them to resolve the damage to the car outside of ICBC.

30. Both Mr. N and Ms. N were shown photographs of the Subaru following the accident. Both denied that a dent visible in a photograph had been there prior to the collision.

THE CLAIMANT'S INJURIES

31. According to the Notice of Civil Claim filed in this matter, Mr. N says he sustained the following injuries in the motor vehicle accident:

- (a) injury to the head;
- (b) injury to the neck;
- (c) injury to the back;
- (d) injury to the upper buttock;
- (e) injury and contusion to the left knee;
- (f) injury to the left shoulder and arm;
- (g) tingling in the right foot;
- (h) TMJ injury;
- (i) ringing in the right ear;
- (j) headaches;
- (k) dizziness and confusion;
- (l) chronic pain; and,
- (m) psychological problems.

32. Mr. N's ongoing complaints are principally chronic pain, and issues related to chronic pain.

HISTORY OF THE CLAIMANT'S SYMPTOMOLOGY, AND CURRENT CONDITION

33. Mr. N experienced pain immediately following the accident. This increased into the evening. He also experienced headache and nausea. He felt dizzy and confused. He slept at most five hours that night.

34. Mr. N's wedding was the day after the accident. It was a small family affair. Mr. N said that he experienced fatigue and nausea throughout. The same day, he and his wife were driven to the airport. They took a flight to Florida, to carry through with their honeymoon plans. Mr. N said that the flight was very difficult, as he was both in immense pain, and very fatigued.

35. Following their arrival in Florida, Mr. N and Ms. N embarked upon a cruise. Mr. N said that for most of the duration of the cruise he was in their room sleeping or resting. He said he tried to attend an onboard show, but was not able to do so. He said he was not intimate with his wife on the cruise.

36. Following the cruise, Mr. N and his wife visited Universal Studios, and Disneyland. He said that every day was "shot" because of his condition.

37. Ms. N described the honeymoon as "just a waste". This was due to the fact that both her and Mr. N were suffering from injuries sustained in the accident.

38. For the first few weeks and months following the accident, Mr. N experienced headaches, vertigo, nausea, ringing in his ears and in his right ear in particular, bright flashes in his left eye, pain in his neck, back, shoulders, chest, left knee, and buttocks, and tightness in his jaw and neck.

39. Overall, in the weeks and months following the accident, Mr. N said he felt "poorly", and was experiencing lots of pain. He also felt emotionally upset, as he was scared about his physical condition.

40. In 2012, one year after the accident, Mr. N was still experiencing headaches multiple times per week, and light flashes. He said that the ringing in his ears was "constant". He also described constant pain in his neck, upper back, low back, and hips. He was not sleeping well. He described his emotional state as one of low mood, anger, and frustration at his lack of improvement.

41. By 2016, Mr. N's headaches were less frequent but still occurred depending on the level of activity he engaged in. He still had ringing in the ears, but it was now at a reduced volume. He still had pain in his neck, upper, low and mid back. His left knee was still bothersome. He had some impairment in the use of his right hand. He was still seeing a psychologist, and other issues regarding his marriage had surfaced.

42. In 2016, Mr. N and his wife moved in with his mother and sister. This living arrangement carried on for about two years. Mr. N's evidence was that it "did not go well".

This evidence was confirmed by his wife and his sisters. The problems detailed by him surrounded his inability to assist in the way he wanted to, but was unable to. He and his wife decided to move out before their child was born in 2018.

43. Mr. N's counsel accurately described the evidence as to the claimant's current condition as follows:

He has headaches, but they are not constant. He has jaw tightness and clicking. He still has ringing in his ears. He has pain in the front of his neck, especially under the jaw. He always has pain in the back of the neck. Sitting or being upright increases his pain and can cause dizziness or the onset of a headache. He has pain in the upper back where it connects to his shoulders. His right shoulder is now okay, but with activity his shoulder blades get tight. He has a tool he uses on the front of his shoulders to release pressure. His mid-back gets really tight. His lower back and hips are tight. His left knee does not bother him too much.

44. Mr. N said that he is able to play with his daughter if he is laying on the floor. He rests and takes breaks repeatedly and regularly through the day, in order that he can carry out basic daily tasks. He said his activities outside the home are limited to buying groceries, and walking with his wife and daughter. This evidence was confirmed by Ms. N.

45. Mr. N travelled, with his wife, to Greece and Romania in 2012, the far east in April 2013, Florida in October 2013, Vietnam in December 2013, Dominican Republic in 2015, Atlanta, Georgia and Florida in 2015, Dominican Republic in 2016, and Atlanta in 2016. His evidence was that travel was very difficult, and required significant recovery time.

46. Mr. N said his relationship with Ms. N is better than it had been. His wife has returned to work from maternity leave, but is working out of the home due to Covid. He has fear surrounding his ability to care for his daughter when his wife returns to working out of the home. Both Mr. and Ms. N said that separation had been discussed since the accident.

47. Mr. N said he does not talk to friends. He said he sees his sisters and mother perhaps once a month. Ms. S's evidence was that her contact with Mr. N was now limited principally to special occasions. Due to his pain issues, he finds it necessary to limit his interactions with them to one hour, but does not want to discuss why.

48. Mr. N said that on a good day, he can play with his daughter, prepare dinner, a snack, do the dishes, brush his teeth and floss without his hand cramping, and put his clothes on without sitting on the floor. On a bad day, he cannot move because of fatigue and pain. A bad day is brought on by doing too much, or when he misses a treatment with Dr. Allen Lam. I will say more about the treatment being provided by Dr. Lam later in his award.

49. Mr. N said that he had a lack of patience, and that he was quick to be critical. Ms. N confirmed this evidence.

HISTORY OF THE CLAIMANT'S MEDICAL TREATMENTS FOLLOWING THE ACCIDENT

50. Mr. N's medical treatments up to the date of the hearing were summarised by his counsel in the following table.

Type of Treatment	Number of Treatments	Duration
Interurban Chiropractic	133	July 26, 2011 to June 15, 2020
So Cal Chiropractic	9	June 4, 2018 to June 15, 2018
Massage Therapy	66	July 13, 2011 to December 10, 2019
Physiotherapy	72	July 11, 2011 to January 14, 2015
Kinesiology	2	November 4, 2013 to February 5, 2014
Acupuncture	88	April 27, 2012 to January 14, 2019
Dr. Dejong-psychology	47	August 26, 2014 to April 25, 2019
Osteopath	16	November 18, 2017 to March 10, 2020
CHANGEpain Clinic	114	October 2, 2014 to August 7, 2019
Dr. Lam-trigger point injections	9	August 15, 2019 to December 4, 2019 **continued with Dr. Lam weekly until Covid-19 closure in March 2020. Started again in May 2020.
City of Burnaby and New Westminster Parks & Recreation-exercise	112	October 5, 2011 to March 13, 2013

51. As well, I note the following evidence.

52. Mr. N took part in an active rehabilitation program from end of 2013 until 2014. This was funded by the respondent, but support for it was discontinued. The reasons for that were not before me, but it appears that Mr. N derived some benefit from the program.

53. Mr. N was referred to the CHANGEpain clinic by his then general practitioner, Dr. Wodynski. After a five to six month wait, Mr. N commenced trigger point pain injection treatment in 2015. At first the injections were every three weeks, then every two weeks, and then weekly. He described the treatment as "very painful". He continues to see Dr. Lam regularly for these same treatments, but outside the CHANGEpain clinic.

54. Mr. N saw a psychologist, Dr. Michael Dejong, "on and off" from 2014 to 2019 regarding issues related to his fear of driving, his relationship with his wife, and pain management. ICBC funded this until 2019, and then ceased doing so. Ms. N confirmed

relationship issues, and said that they existed up to the present day. She said that the last two years (since the birth of their daughter) had in particular been difficult.

55. Mr. N underwent an intensive two week chiropractic program in California in 2018. He said it had a long term beneficial effect in that it granted him an increased range of motion in his neck.

56. Mr. N continued to see Dr. Wallace in relation to his diabetes. In a consultation report dated March 3, 2014, Dr. Wallace noted, *inter alia*, as follows:

S returned for review. He is feeling great.

...

REVIEW-EXAMINATION: S is doing very well, much improved after physio for soft ts pain. He is now sleeping well and feeling healthy.

57. There are a number of other references in the medical records that point to some gradual improvements in Mr. N's physical condition up to 2014.

THE CLAIMANT'S CURRENT MEDICAL TREATMENTS

58. Prior to Covid, Mr. N underwent regular chiropractic, osteopathy and massage treatment. Chiropractic treatments were every three to four weeks, and are now about every two weeks. He said that they decrease stiffness, and that he "feels lighter". Osteopathic and massage treatments were about every three to four weeks. They assist with alleviating stiffness, and with mobility.

59. Mr. N also continues to see Dr. Lam weekly, who gave evidence as to the ongoing treatment he provides. Dr. Lam needlepoint injects about 30 places in his back and neck. Both Mr. N and Ms. N said that he required 24 hours of rest after receiving these injections.

60. Mr. N regularly stretches at home. He also uses a soft roller, exercise ball, a "jack knobbler" on his shoulder, and an electronic device that sends waves through him. He said that all of these things assist him in pain management.

61. Dr. Lau had recommended Ketamine therapy to manage Mr. N's pain. He has not done that because he says it is ongoing, and very expensive. He said he would like to try it.

THE CLAIMANT'S POST-ACCIDENT EMPLOYMENT HISTORY

62. Mr. N commenced part time work in June 2015 with a company called P. This work came about as a result of an auditing contract his wife had with that company. His job was to analyse financial documents, and fix potential problems prior to audit. He was

initially to work on Mondays and Wednesdays. This changed to Mondays and Thursdays, as he was “wiped out”, and thought an extra day of rest would help. He continued this work until November 2015. He said he had lots of pain, and had developed a frozen shoulder.

63. Mr. N returned to work at P in 2016, and again in 2017, doing the same job. His evidence was that his pain and fatigue symptoms were worse than they were during his 2015 employment. He gave evidence that he also had cognitive difficulties doing that work.

64. Mr. N was employed by T for 44 hours in May to July 2018. The work involved the review and organisation of financial documents. He said that the work completely “wiped me out”, and left him unable to do any household tasks.

65. Mr. N was also employed in a similar capacity, again on a part time basis, by T in January, July and August 2019. Mr. N experienced the same difficulties as he had in 2018.

66. Ms. N said that it was clear that Mr. N had physical difficulties working at P and T. She in fact said that she felt badly for the adverse effects the work had on him, as she had been the one to ask him to do those jobs.

THE CLAIMANT’S EXPERT EVIDENCE

(a) Dr. Brenda Lau

67. Dr. Lau is a medical doctor, with a specialty in anesthesiology, and a sub specialty in pain management. Dr. Lau assisted in the creation of the sub specialty of pain management in Canada.

68. Although Dr. Lau was a founder of CHANGEpain Clinic, and works out of those offices, Mr. N was never Dr. Lau’s patient. Dr. Lau saw Mr. N twice, and provided two reports, one dated October 26, 2016, and another dated August 7, 2019.

69. In her first report, Dr. Lau opined as follows:

20. Question 1: Whether Mr. N suffered any injuries as a result of the above noted accident.

a. Based on the physical assessment, review of the documents provided, and the lack of pain symptoms, cognitive function problems, or stamina problems prior to the subject MVA on June 22, 2011, it is my opinion that Mr. N’s current functional limitations are due to the injuries caused by the subject MVA.

...

27. Question 8a: Your opinion as to the likelihood, in percentage terms if appropriate, of any future disabilities or future degenerative changes.

...

c. Widespread Pain

i. Mr. N had a number of associated symptoms common to chronic myofascial pain, but also common to widespread pain syndromes, such as fibromyalgia. These symptoms included diffuse body pain that had been present for at least three months, and symptoms of fatigue, sleep disturbance, cognitive changes, mood disorder, and other somatic symptoms like functional bowel [sic] and headaches.

ii. He met both the classical criteria for fibromyalgia and the newer criteria of widespread pain...Trialing a layered care approach will gauge his response to treatment and provide evidence of the mechanisms causing his widespread pain.

d. Many areas of his pain have not yet been treated and still require a layered care approach for diagnostic and therapeutic purposes.

70. In her second report, Dr. Lau considered the treatment, changes and condition that had taken place over the three years since she had last seen Mr. N. She opined:

Question 1: Whether Mr. N suffered any injuries because of the above accident.

It is still my opinion that his current problems involving pain, cognitive function and reduced stamina are due to the injuries incurred from the subject motor vehicle accident on June 22, 2011.

Question 2: Your diagnosis of Mr. N's injuries.

Update on Issues Identified Resulting from the Subject MVA from my report dated December 5, 2016:

- a. New onset and persistent nonspecific neck pain due to multiple factors: refractory contracted muscles due to ligament laxity and facet joint involvement.
- b. New onset and persistent nonspecific upper back pain and neck pain due to whiplash associated disorder due to refractory contracted muscles.

- c. New onset and persistent low back due to ongoing contracted muscles and ligament laxity affecting the low back and sacroiliac joint.
- d. New onset and persistent cervicogenic headaches are improved with less frequency but easily aggravated with positional changes.
- e. New onset and persistent widespread body pain associated with hyperalgesia to pressure and pin prick. He demonstrates strong signs of central sensitization. Chronic fatigue syndrome is a key working diagnoses.
- f. Severe fatigue resulting from multiple factors including ligament laxity of the spine, chronic pain, and sleep disturbance. His diabetes is much better controlled whereas before the fluctuating blood sugars may be contributing to this problem.
- g. Concussion symptoms now improved. Treatments at CHANGEpain Clinic have been helped the tinnitus and altered vision.
- h. New onset left knee pain is improved with no clicking and has not recurred.

Question 3: A description of symptoms experienced by Mr. N and any interference with normal activities, as well as your views on continuation of the symptoms.

Mr. N continues to suffer from headaches, pain in the neck, upper back and shoulder muscles, chest, lower back, hip joint, legs, and bilateral feet. Please see the facts and assumptions sections on the update on these symptoms.

These have caused functional limitations in stamina, physical conditioning, emotional resiliency and coping that has impaired all his activities of daily living including his work. Since I first reviewed him in October 2016, he has not had any new injuries that would account for his current reduced functional state.

He has complied with numerous physical, medical and psychological therapies. He has continued with trigger point injections which have transient benefit. These also do not address the underlying root cause of his pain and limited upright position which I suspect is due to undertreated ligamentous laxity. Untreated ligament laxity

causes compensatory myofascial contraction which results in fatigue and inability to stay upright for sustained periods of time.

The symptoms of chronic fatigue syndrome are one of the syndromes involving central sensitization. He has several factors including concussion, severe psychological symptoms of phobia, anxiety and undertreated chronic pain. This widespread severe nature of his pain significantly impairs his function. It adds to his phobia in doing activity. It contributes to reduced stamina in sitting and upright positions leading to further fatigue. He avoids physical activities as they increase pain. All of this also contributes to his overall depressed mood. His overall function compares to his pre-MVA level of function is less than 20%.

71. Dr. Lau recommended that Mr. N undergo treatment with Ketamine. She opined, in her first report, that “pain sensitivity and reduction [from the use of Ketamine] can last up to years, if not resolved it [sic] altogether”, although she also said that most patients require the treatment every three to four months.

72. Dr. Lau was cross-examined as to whether or not Mr. N had sustained a mild traumatic brain injury (“MTBI”). She seemed to agree that the MTBI symptoms had not been met, because Mr. N had not experienced an altered state of consciousness at the scene of the accident. However, she did say that typical MTBI symptoms such as headaches and tinnitus can evolve over time.

73. She agreed with respondent’s counsel’s suggestion that concussions are very difficult to diagnose, and that the diagnosis is one of exclusion.

(b) Dr. Iris Sharir

74. Dr. Sharir is a clinical psychologist. She prepared a report regarding Mr. N dated December 19, 2017.

75. Dr. Sharir opined that Mr. N had Somatic Symptom Disorder, as defined in the DSM-5. She said:

Based on my initial assessment with Mr. N, questionnaire data, and my review of the available documents, I am of the opinion that Mr. N currently meets DSM-5 criteria for a Somatic Symptom Disorder, with predominant pain, persistent, an Adjustment Disorder with depressed mood, and a Specific Phobia, Situational (driving).

With respect to case formulation, it appears that, prior to the motor vehicle accident of June 22, 2011, Mr. N was functioning well, including being in a committed relationship and completing a post-secondary school program. He had an active social and recreational lifestyle and he enjoyed various activities, including

running, hockey, tennis, and golf. He had no prior significant mental health issues. He had never seen a counsellor. He briefly took psychiatric medication in 2009.

Mr. N was involved in a motor vehicle accident on June 22, 2011. The accident was sudden and unexpected. He immediately developed a number of concerning symptoms, including tingling and numbness in his face and difficulties with his vision. He felt scared. He quickly developed pain in various areas. Mr. N had little time to recover from his injuries as his wedding was the following day and then he left on his honeymoon. While he was on his honeymoon, he continued to have significant symptoms of pain, fatigue, and dizziness. Once he returned home, he began to attend physical treatments. Over time, he attended massage therapy, physiotherapy, active rehabilitation, acupuncture, and osteopathy. A few years ago, he began to have treatment at a pain clinic, CHANGEpain. He continues to attend this clinic. He also continues to see an osteopath, acupuncturist, and chiropractor. In 2015, and again in 2016, Mr. N tried to work part-time. However, he was not able to maintain employment due to his pain, physical difficulties, and cognitive problems. He spent his time attending various appointments. He was not able to engage in his usual recreational activities. He felt frustrated and upset that his plans for his life were disrupted. He became isolated from friends and family. He developed an Adjustment Disorder with depressed mood. This is consistent with the nature of his physical and psychological injuries and the negative impact of his pain and fatigue on his work, home, and recreational lifestyle. Mr. N started psychological counselling in October 2014 to treat his depressed mood, but his symptoms continued. At the time of my assessment, on October 18, 2017, Mr. N experienced periods of low mood. He was frequently irritable. He felt tired and he had little energy. His motivation was often low. He met the DSM-5 criteria for an Adjustment Disorder with depressed mood.

Following his motor vehicle accident, Mr. N developed increased anxiety in vehicles, as a driver and as a passenger. He experienced muscle tension and physiological arousal (e.g., increased heart rate and breathing rate) while in vehicles. He monitored the traffic. He avoided being a passenger and driving in certain situations (e.g., at night). He has confronted other drivers about their driving behaviour on several occasions. This is consistent with the nature of his motor vehicle accident of June 22, 2011, in which he developed a Specific Phobia following exposure to a frightening incident. Mr. N continued to meet the DSM-5 criteria for a Specific Phobia at the time of my assessment with him, on October 18, 2017.

Subsequent to his accident, Mr. N spends much of his time attending appointments and resting in an attempt to manage his pain and physical injuries. He has significantly altered his lifestyle in order to manage his somatic symptoms. He has significant limitations on his daily activities due to his pain. He is limited in his ability to participate in normative social activities (e.g., going for dinner with his wife). In her report in December 2016, Dr. Lau noted that Mr. N requires

continued psychological treatment, specifically with psychologists who specialize in pain. She also noted the need for psychiatric care. Mr. N's symptoms are consistent with the DSM-5 criteria of a Somatic Symptom Disorder, in which there are somatic symptoms (i.e., pain and fatigue) that result in significant disruption to daily life and in which excessive amounts of time and energy are spent on trying to manage the physical health symptoms.

...

I am in the view that if not for the accident of June 22, 2011, Mr. N would not have developed his Somatic Symptom Disorder, Adjustment Disorder with depressed mood, and Specific Phobia.”

...

Given the duration of his psychological symptoms, Mr. N's prognosis for returning to his pre-accident psychological state is poor. However, until he receives additional psychological treatment, specifically addressing his psychological difficulties, the likelihood of further recovery from his current psychological conditions remains unclear. Once he has received further psychological treatment, as outlined above, and his response to treatment has been evaluated, I will be in a better position to comment on the prognosis of his psychological conditions. Mr. N's physical injuries, chronic pain, and his inability to work contribute to his ongoing stress and depressive symptoms. As long as he continues to experience these problems, his psychological symptoms may be less receptive to treatment and he may be vulnerable to further deterioration.

76. Dr. Sharir was cross examined as to whether Mr. N met the criteria set out in the DSM-5 for Somatic Symptom Disorder. It was also suggested to her that she had misapplied the criteria. She maintained that Mr. N did meet the criteria, and that she had accurately applied them.

77. Dr. Sharir agreed with respondent's counsel's suggestion that Mr. N needed to develop better psychological strategies, and that he required specific treatment for Somatic Symptom Disorder. She also agreed that Mr. N had not reached maximum medical improvement.

(c) Paul Pakulak

78. Mr. Pakulak is an occupational therapist. He conducted a functional capacity evaluation of the claimant, and prepared a report dated November 23, 2017.

79. Mr. Pakulak opined as follows:

Maximum Sustainable Activity Level

In my opinion Mr. N is best suited for activity requiring up to light level strength. He demonstrated the strength sufficient for some functional strength activity in the modified medium range but given his cardiovascular response to this level of functional strength activity he may not be well suited for this level of activity on a regular basis...

Overall Work Capacity

In my opinion, Mr. N demonstrated the physical capacity to be employable at up to a light level on a part time basis with restrictions and limitations as noted above...

It is also my opinion that his overall ability to compete for work in an open job market is significantly reduced due to his ongoing physical limitations. That is, the overall number of jobs that he would be able to compete for given his physical limitations is significantly limited.

With respect to prospective work as a Financial Planner or other similar occupations, the physical demands of that type of work are described in the NOC... and the DOT... Based on the testing results, it is my opinion that he did not demonstrate the capacity to complete this work on a part time basis at a gainful level... As such, he is not competitively employable in this type of work.

80. Mr. Pakulak said in his report that Mr. N demonstrated the capacity to work on a “part time basis”. His evidence was that it was difficult to assess how much part time work Mr. N could do in the real world. He noted, in cross examination, that Mr. N performed two and a half hours of seated activity. It was not established in the evidence how often Mr. N would be able to do that, whether on a weekly basis or otherwise.

(d) Mr. Curtis Peever

81. Mr. Peever is an economist. He prepared two reports. His report dated September 30, 2019 dealt with Mr. N’s past and future wage loss. A second report of the same date provides cost of future care multipliers.

82. Mr. Peever assumed, for the purposes of his opinion regarding the wage loss claims, that Mr. N would have, but for the accident, worked as a financial planner from January 1, 2012 to the date of the hearing, continuing on until retirement at the age of 70. He was instructed to assume “risk only” labour market contingencies. These account for time spent out of the work force by reason of illness, injury, poor economic conditions, or involuntary retirement, or time spent unemployed. These factors would not include “choice factors”, such as travel, school, part time work, or choosing to retire early.

83. Mr. Peever agreed in cross examination that this was not the usual way to perform the analyses he performed. He also agreed that to assume risk only labour market contingencies, one would have to assume that Mr. N was not the average person. Finally,

he agreed that a risk only analysis assumes that Mr. N would never choose to work part time.

84. Mr. Peever calculated a net wage loss to the date of the hearing of \$323,496, a future wage loss to age 65 of \$1,916,100, a future wage loss to age 68 of \$2,136,500, and a future wage loss to age 70 of \$2,253,100.

85. Mr. Peever provided a cost of future care multiplier of \$26,225, per thousand dollars.

THE RESPONDENT'S EXPERT EVIDENCE

(a) Dr. Prema Laban

86. Dr. Laban is a medical doctor with a specialty in psychiatry. She prepared three reports, dated November 25, 2019, January 10, 2020, and March 2, 2020.

(i) November 25, 2019 report

87. The November 25, 2019 report was prepared after Dr. Laban interviewed Mr. N.

88. Dr. Laban opined that Mr. N did not meet the criteria for a mood disorder, that he had "unspecified anxiety disorder that predated the subject accident", and that his then current symptoms did not impact his quality of life. She said that he had mild somatization, and that he currently referred to his symptoms as "discomfort versus pain". She said that somatization is part of Mr. N's personality profile, and that his somatic symptoms "may be predominant as a way of coping with stress". Finally, she stated that his psychiatric morbidity did not impact his ability to function as an internal audit assistant or financial planner.

89. Dr. Laban refers to a personality assessment inventory prepared by Dr. Leslie Morey in August 2014. This is in error. Dr. Morey is actually the creator of the test. The test was in fact administered by Dr. Dejong. She repeated two of the conclusions from the inventory both of which suggested a preoccupation with somatic symptoms. She agreed, however, that she was not licensed to perform the test, and that it was only one part of a diagnosis.

90. Dr. Laban reviewed Dr. Lau's report. She said that she does not dispute Dr. Lau's diagnosis that Mr. N suffers from chronic pain. She says that chronic pain is not a psychiatric disorder. Rather she specifically disagrees that Mr. N suffers from somatic symptom disorder.

91. Dr. Laban said that her interview of Mr. N took 70 minutes. Mr. N said Dr. Laban interviewed him for about 25 minutes. She said during cross examination that it could not have been less than 70 minutes. There was nothing in her file which would provide a contemporary record of the time spent.

92. During his cross examination, Mr. N gave evidence as to what he said were 26 factual errors, or statements attributed to him which he did not make, in Dr. Laban's November 25, 2019 report. These ranged from the inconsequential, such as Dr. Laban stating that Ms. N worked for a pharmaceutical company, to significant, such as stating that Mr. N's limitations at work in 2015 did not including mental challenges. None of these matters were addressed by Dr. Laban when she gave evidence.

(ii) January 10, 2020 report

93. Dr. Laban was provided with further records to review prior to preparing her January 10, 2020 report. She said her opinion remained unchanged from her November 2019 report.

(iii) March 3, 2020 report

94. Dr. Laban's report of March 3, 2020 is a review and critique of Dr. Sharir's report. She disagrees with Dr. Sharir's diagnosis of Somatic Symptom Disorder. She suggests that Mr. N may suffer from "compensation neuroses". She says that the accident "cannot be isolated out" as a trigger for the course that Mr. N's life took after 2011. In particular, she notes that he got married and finished school, which she said would have been "life changing". She references psychological issues arising from what she says was abandonment by Mr. N's father, and "ambivalent, conflictual issues" with his mother and sister. She disagrees that but for the accident Mr. N would not have developed Somatic Symptom Disorder. She also disagrees that Mr. N's prognosis is poor. She believes that an "empathic therapist" would be of assistance.

(b) Mr. Clae Willis

95. Mr. Willis is a vocational evaluator. He provided a vocational assessment of Mr. N, and provided a report dated October 21, 2019.

96. Mr. Willis concluded that Mr. N had only suffered a temporary vocational disability as a result of the accident. He was of the view that Mr. N was competitively employable, but required a graduated return to work program, a period of vocational therapy, and minor accommodations from a prospective employer.

97. This is to be contrasted with the Functional Capacity Evaluation ("FCE") results themselves, which note:

Based on the testing results, it is my opinion that he did demonstrate the capacity to complete this work on a part time basis at a gainful level. Testing results suggest that the demand for prolonged work intensive sitting and prolonged and repetitive positioning of the neck and shoulders for work in front of the body will continue to result in increases in symptoms and reduced capacity and productivity over time. He will require the flexibility to take frequent breaks to

stretch and move about which may further limit his productivity in this type of work. As such, he is not competitively employable in this type of work.

98. Mr. Willis' report stated that:

Mr. N was capable of various sedentary tasks and examination assessment, with hourly 5 minute micro-breaks. He functioned at an average intellectually academic ability. This is an objective demonstration of the ability to engage in sedentary competitive labour, parallel to his pre-incident vocational path.

99. This statement is to be contrasted with Mr. Willis' notes, which indicated that there had been a discussion between he and Mr. N regarding the breaks required, that Mr. N requested a break 40 minutes into the assessment, and that Mr. N laid down for the breaks that he took.

100. Mr. Willis agreed that Mr. N could only proceed with vocational assistance if he achieved resolution or management of his physical health. He also said in cross examination that given the length of time Mr. N had not been working, that it was possible that he might not be able to return to work.

101. Mr. Willis was cross examined as to his professionalism in the manner he dealt with Mr. N. Mr. Willis did not disagree that he made a remark to the effect that "if you [Mr. N] had a father" he would have made him do his schooling "straight through". Mr. Willis also agreed that he referred during the assessment to cars and boats he owned, or had bought and sold. Mr. Willis said that he was attempting to establish rapport with Mr. N.

102. Mr. Willis' evidence was that Mr. N told him he had a daughter to focus on, and had no plans to return to work.

(c) Ms. Kim Thompson

103. Ms. Thompson is a kinesiologist with expertise in, *inter alia*, functional capacity evaluations. She did not see Mr. N. She was provided with a range of materials to review, including Mr. Peever's report, Mr. Willis' report, Dr. Lau's report, and a variety of other reports and records. She provided a critique of Mr. Peever's report in her report of March 5, 2020.

104. Ms. Thompson said in her report:

In my opinion, based on the results of the two reports [of Mr. Pakulak and Mr. Willis], Mr. N does have adequate physical tolerance to perform his Audit [sic] work. Potentially he does have issues with prolonged sitting; however the contrast between his performance between the FCE and Vocational test make it more difficult to conclude the degree and extent of his sitting limitation.

105. Ms. Thompson assumed, however, that the following description in Mr. Willis' report was accurate:

He demonstrated the ability to concentrate, converse and problem solve various tasks from 9:00 a.m. to 1:00 p.m. He was allowed five minute micro-breaks every hour. He had verbal complaints of stiffness but, no direct complaints of pain or signs or readjustment in his seat. He bent over and took his shoes off and on with no issues. He was able to move from the seat to the table without any issues.

106. However, as I have previously noted, this statement is not consistent with Mr. Willis' notes.

107. In cross examination, Ms. Thompson said that given Mr. Pakulak's observations and testing, she would have come to the same conclusions as he did regarding Mr. N's functional capacity. She came to a different conclusion based on the statement of Mr. Willis referred to in paragraph 105 of this award.

108. Regardless, she agreed that Mr. N "has problems", and would not be able to work on a full time basis.

109. Ms. Thompson said that she had not read the report of Dr. Lau. When she was taken to Dr. Lau's report she agreed that there were diagnoses of fatigue sufficient to limit Mr. N's work abilities.

(d) Dr. John Oliver

110. Dr. Oliver is an orthopaedic surgeon. He provided reports dated May 9, 2019, and December 18, 2019.

111. Dr. Oliver opined in his May 9, 2019 report as follows:

2. Diagnosis and prognosis.

Based upon the records and findings in my opinion Mr. N sustained a strain of the soft tissues in the region of the back of the neck and upper back region and a contusion at his left knee as a result of the motor vehicle accident of May 3, 2018.

Based upon a review of the record and the narrative of Mr. N in my opinion he continues to experience symptoms of a chronic nature. I defer to specialists in chronic pain who may opine with respect to his symptoms.

With regard to prognosis based upon the fact that his symptoms have been ongoing for a long period of time I believe that the prognosis is guarded but I defer to the specialist in pain management in this regard.

112. Dr. Oliver also stated that the reason Mr. N was “off work is most likely due to his chronic pain and I defer to the specialists in that field for an answer to this questions [sic]”.

113. Dr. Oliver stated in his cross examination that if the trigger point injections (administered by Dr. Lam) were helpful, it would be reasonable for Mr. N to continue with them. This is contrary to the opinion he expressed in his December 18, 2019 report.

(d) Mr. Mark Szekely

114. Mr. Szekely is an economist, and prepared a report dated March 4, 2020 regarding Mr. N’s past and future earnings.

115. Mr. Szekely’s wage loss calculations, both past and future, considered actuarial and economic multipliers. Economic multipliers take into account the choice factors I referred to when discussing Mr. Peever’s evidence.

116. Mr. Szekely also calculated the losses assuming that Mr. N was a BC male having completed a one to two year college program, and performed a second set of calculations assuming that Mr. N worked as financial planner. Mr. Szekely’s calculations may be summarised as follows:

(a) BC Males with a College Program of 1 to 2 Years

Past loss (January 1, 2012 to April 20, 2020)-\$435,249 (wages and benefits)

Future loss-\$1,300,531 (wages and benefits)

(b) BC Male Other Financial Officers (NOC 11140)

Past loss-\$417,194 (wages and benefits)

Future loss-\$1,866,2357

117. The past loss of earnings figures are gross of necessary deductions for income tax and EI premiums.

(g) Dr. David Strauss

118. Dr. Strauss is a life expectancy expert. He provided a report dated March 4, 2020.

119. Dr. Strauss opined that normal life expectancy for a Canadian male of Mr. N’s age is 81.7 years. Taking into account Type 1 diabetes, Dr. Strauss opined that Mr. N’s life expectancy was 72.8 years.

120. Dr. Strauss was cross examined as to the information he was provided with regarding Mr. N's diabetes. It appears that he was not provided with any information regarding Mr. N's erroneous diagnosis.

THE NATURE AND EXTENT OF THE CLAIMANT'S INJURIES

121. This is the central issue in this case. It is my conclusion that Mr. N suffers from chronic pain, as opined by Dr. Lau, and Somatic Symptom Disorder, as opined by Dr. Sharir. These conditions severely limit his ability to engage in day to day activities, including employment. I am of the view that these conditions were caused by the accident. In reaching these conclusions I have considered the claimant's evidence, and the respondent's challenges to his credibility. I have also considered the evidence of the other lay witnesses, and the expert medical evidence. I will set now set out the reasons for these conclusions in greater detail.

(a) Credibility and reliability

122. Counsel have referred me to several cases, all of similar import, to assist me in determining the credibility and reliability of Mr. N's evidence. A useful summary is found in *Julian v. Joyce*, 2016 BCSC 1417 (CanLII), aff'd 2017 BCCA 2017 (CanLII), as set out below:

[35] In order to assess the evidence, I must consider the credibility and reliability of the witnesses. The factors to be considered when assessing credibility were summarized in *Hardychuk v. Johnstone*, 2012 BCSC 1359 (CanLII) (citing *Bradshaw v. Stenner*, 2010 BCSC 1398 (CanLII)):

[8] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 (CanLII), as follows:

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*, [1952] 2 D.L.R. [354] (B.C.C.A.) [*Faryna*]; *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 (*Faryna* at para. 356).

[9] Where, as here, a Claimant's case relies on subjective symptoms with little or no objective evidence of continuing injury the court must be exceedingly careful in examining the evidence and assessing credibility: *Price v. Kostryba* (1982), 1982 CanIII 36 (BC SC), 70 B.C.L.R. 397. If deliberate falsehood is established it may be difficult to disentangle truth from deceit and some truthful aspects of the Claimant's testimony may lose their force, particularly in the absence of corroboration. That being said, when a Claimant is accused of deliberate deceit more than speculation or innuendo is required. A charge of deliberate deceit under oath is a serious attack on an individual's integrity which should not be lightly treated or lightly made: *Halteren v. Wilhelm*, 2000 BCCA 2 (CanLII); *Edmondson v. Payer*, 2011 BCSC 118 (CanLII); *Vasiliopoulos v. Dosangh*, 2008 BCCA 399 (CanLII).

[10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[11] The presumption of truthfulness will be displaced by convincing evidence of deliberate falsehood. Such evidence may take many forms. There is no hard and fast rule as to how falsehood on a Claimant's part may be demonstrated in a personal injury action. In my view, however, in most such cases fairness will require that a Claimant be given an opportunity to respond directly to an assertion of deliberate untruthfulness before his or her credibility, as distinct from reliability, is successfully impeached: *R. v. Lyttle*, 2004 SCC 5 (CanLII); *Browne v. Dunn*, (1893) CanLII 65 (FOREP), 6R. 67 (U.K.H.L.).

123. The respondent points to what it says are numerous discrepancies with the claimant's evidence regarding the nature and extent of his injuries. These include clinical notes that indicate he was making progress with his recovery, the lack of objective evidence of pain, continued travel after the accident, and surveillance evidence of the

plaintiff running errands, shopping, and driving. I have considered and taken into account all of these matters.

124. Central to the respondent's attack on Mr. N's credibility is that he is claiming that he simply cannot do certain things, when in fact the objective evidence is that he can. At page 38, paragraph 132 of its submissions, the respondent says, for example:

The respondent submits that the claimant does not have chronic pain in the medical/physical realm. It is important to remember that the plaintiff may not use the term severe pain but he is alleging that he is suffering from pain so severe that he can never work, cannot do any of his former activities, cannot help around the home, cannot be a good husband, and cannot be a good father.

125. I do not think Mr. N's evidence quite so black and white, nor is the claimant's case framed quite so narrowly. Mr. N's evidence is that he is capable of doing many things, but that he requires rest, breaks, and planning to do them. It is for this reason that I do not find the surveillance evidence to be compelling, as it does not provide an indication of Mr. N's condition after the activities that were recorded.

126. The evidence of the other lay witnesses, Ms. N, Ms. R, and Ms. S provides unequivocal corroboration of the claimant's evidence regarding his abilities and limitations. I note, in particular, Ms. N's evidence regarding Mr. N's difficulties working part time in 2016, 2017, 2018 and 2019, and the adverse effects that followed those brief periods of employment.

127. Mr. N agreed that he said to Mr. Willis that he had a daughter to focus on, and had no plans to return to work. He said that this was a statement of fact, true at the time because of his limitations.

128. The respondent also took specific issue with Mr. N's evidence that he intended to work as a financial planner, if he did not obtain a job with CSIS. I do not think such a statement can be viewed as any more than aspirational. While I do discuss the likelihood of that actually happening elsewhere in this decision, I do not find Mr. N any less credible because he gave that evidence.

(b) Does the claimant have a chronic pain disorder

129. Dr. Lau was the only witness who gave evidence at the hearing qualified to provide opinion evidence regarding chronic pain disorders.

130. I reviewed Dr. Lau's opinions elsewhere in this decision. I also note that Dr. Lau, in her updated report dated August 7, 2019 stated that she found:

New onset and persistent widespread body pain associated with hyperalgesia to pressure and pin prick. He demonstrates strong signs of central sensitization. Chronic fatigue syndrome is a key working diagnosis.

131. Hyperalgesia and central sensitisation were discussed in Dr. Lau's first report dated October 26, 2016. She there said:

"Hypersensitivity and Hyperalgesia Due to Central Sensitization:

- i. Previous conventional therapies will have limited benefit if the nervous system is sensitized (Arendt-Nielsen 2011).
- ii. Central sensitization can occur abruptly or as part of a cumulative injury process. The phenomenon of central sensitization helps explain how low impact trauma sustains or even amplifies existing pain (Stone 2013). The scientific literature describes the transition from acute to chronic musculoskeletal pain that leads to widespread hyperalgesia (Arendt-Nielsen 2011). The role of immune cells and glia in the development of chronic pain are also implicated (Mifflin 2014)."

132. I accept Dr. Lau's opinions. In my opinion, they are entirely consistent with the claimant's abilities and limitations, as testified to by him, and the other lay witnesses.

(c) Does the claimant have Somatic Symptom Disorder

133. Dr. Sharir, retained by claimants counsel, opined that Mr. N had Somatic Symptom Disorder, Adjustment Disorder with depressed mood, and Specific Phobia.

134. Dr. Sharir was vigorously cross examined on her conclusions with specific reference to the DSM-5 criteria for same. I am of the view that Dr. Sharir correctly understood and applied those criteria when making her diagnosis.

135. Dr. Laban disagreed with Dr. Sharir's diagnosis. She was of the opinion that Mr. N may suffer from compensation neuroses, and that if he worked with an empathic therapist, he would be able to resolve the psychological stressors that cause him to focus on pain.

136. The numerous errors in Dr. Laban's report cause me to question her thoroughness, the care she took in the preparation of her report, and accordingly, the efficacy of her opinions. I prefer Dr. Sharir's evidence to Dr. Laban's evidence, and accept her opinion that Mr. N has Somatic Symptom Disorder caused by the accident.

(d) Are the claimant's current difficulties caused by the accident

137. Compensation for negligent conduct should only be made where there is a substantial connection between the injury and the defendant's conduct. This is known as the "but for" test. See *Hanke v. Resurface Corp.*, 2007 SCC 7.

138. I have no difficulty concluding that the claimant has proven causation. First, he experienced none of the difficulties I have found he now experiences prior to the accident. Second, I accept the evidence of Dr. Lau and Dr. Sharir that the conditions they diagnosed were caused by the accident.

(e) What is the claimant's prognosis

139. I accept the opinions of Dr. Lau and Dr. Sharir that the claimant's prognosis is guarded. However, I do note that both of these medical practitioners make recommendations as to further treatment that may be beneficial. I also note that Mr. N did make some progress up to 2014, and in particular, benefited from an active rehabilitation program before its funding was discontinued.

140. I conclude that the plaintiff's condition may well improve in the future. It is however impossible to say how, when, and to what extent that might occur.

DAMAGES

(a) Non-pecuniary damages

141. I accept that before the accident, Mr. N was independent, outgoing and active. I also accept that his life course has been significantly altered because of ongoing pain and fatigue, and a consequent inability to work.

142. Claimant's counsel said that an appropriate non pecuniary damage award would be in the range of \$175,000 to \$185,000. Respondent's counsel said that if I accepted that the claimant's current condition was caused by the accident, then an appropriate award of non-pecuniary damages would be \$165,000.

143. Taking into account the non-exhaustive list of factors that I am to consider which are set out in *Zen v. Readhead*, 2001 BCSC 190, and the submissions of the parties, I conclude that a fair award of non-pecuniary damages is \$180,000.

(b) Loss of earnings

144. Mr. N claims a past loss of earnings from January 1, 2012, when he says he would have commenced work as a financial planner to the date of the hearing, and a future loss of earnings from the date of the hearing until age 70, again based on him working as a financial planner.

145. As I have previously stated, I view Mr. N's statement that he intended to become a financial planner, and continue on at that career, as much aspirational, as anything else. I also note that there is scant evidence before me of the availability of employment as a financial planner, no evidence of the success rate of persons who embark on such a career, and no admissible evidence that Mr. N would have in fact been hired for such a position.

146. At the time of the accident Mr. N had just finished his schooling, and had not yet established himself in the workplace. He had not, in fact, worked at any job since 2007. His prior work and educational history were inconsistent. He had engaged in a variety of both educational and occupational pursuits. As noted by the respondent, he had never worked in a field in which he had received formal education.

147. The test for whether the claimant should be awarded damages for past and future income losses is the same: whether there is a real and substantial possibility of loss. See, for example, *Morlan v. Barrett*, 2012 BCCA 66, *Reilly v. Lynn*, 2003 BCCA 49, and *Brundidge v. Bolton*, 2018 BCSC 343. Assessing the claimant's damages is not a matter of calculation. Rather, it is a matter of judgement.

148. In *Rosvold v. Dunlop*, 2001 BCCA 1, [2001] B.C.J. No. 4, the Court of Appeal summarized the approach that a trier of fact should take in assessing damages for loss of income earning capacity:

[8] The most basic of those principles is that a Claimant is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a Claimant's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a Claimant's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

[9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leoneti* [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

...

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995) 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a Claimant's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the Claimant if the

accident had not happened with the Claimant's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.); *Parypa v. Wickware supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

149. The evidence does not establish, in my opinion, that there is a real and substantial possibility that the claimant would have worked as a financial planner. Mr. Peever calculates the claimant's loss on the basis that Mr. N would have worked in that occupation continuously from January 1, 2012 to the age of 70. As well, his analysis did not include "choice factors", such as travel, school, part time work, or choosing to retire early.

150. I prefer the approach taken by Mr. Szekely to the calculation of the claimant's losses, because it provides, *inter alia*, calculations based on a BC male having completed a one to two year college program, as opposed to working as financial planner. He also takes into account the choice factors I mentioned. It is my view that this approach is the more realistic one, and more consistent with the claimant's educational and work history prior to the accident.

151. Using this approach, Mr. Szekely calculates the claimant's losses from the date of the hearing to age 70 at \$1,300,531. He calculates the losses from the date of the accident to the date of the hearing at \$435,249, including non-wage benefits. From this must be deducted income actually earned by Mr. N after the accident up to the hearing, which totalled \$22,460. This yields a figure of \$412,789. Using Mr. Peever's analysis, the net amount after deducting taxes and EI premiums, would be approximately \$340,550.

152. I must now assess the claimant's losses taking into account, *inter alia*, the relative likelihood of future events, what is necessary to compensate the claimant for real and substantial losses, and what the plaintiff is capable of earning in his injured state. Above all, I must strive to make an award which is fair and reasonable. See *Brundige v. Bolton, supra*. This is a difficult case to assess. I say that for two reasons. First, because the claimant was not established in the work force and has minimal income upon which to base future projections, and second, because the claimant was about to embark upon a wholly new career path.

153. But for the accident, I do believe that the claimant would have commenced full time in some capacity by on or about January 1, 2012, that is shortly after he was married. I do not think, however, that his employment path would have been quite so linear as Mr. Peever's and Mr. Szekely's models assume. I think it likely, given his past history, that he from time to time would not have been fully employed, whether to continue his education, spend more time with his family, pursue a different career path, or embark upon another venture. I consider that these things would have been more likely for Mr. N than for the average BC male.

154. Mr. Pakulak is of the view that the claimant has some residual work capacity. He could not be precise as to what exactly that is. I believe that this is a more accurate assessment of the claimant's capabilities, than as opined by Mr. Willis in both his reports, where he said that he believed the claimant was competitively employable. Mr. N's residual work capacity must be taken into account by me in assessing his losses.

155. I am also mindful that while the medical evidence I have accepted considers that the claimant's prognosis is guarded, further treatment has been recommended, and Mr. N may see some improvement from those treatments. I believe that this must also be taken into account when I am assessing Mr. N's future income losses.

156. Claimant's counsel says a reasonable assessment of Mr. N's past income loss is \$323,486, which is the net value (after taxes and EI premiums) of Mr. Peever's calculation. Respondent's counsel says a reasonable assessment would be \$100,000.

157. Taking into account all the matters I have discussed, and all of the evidence and argument, I assess the claimant's past income loss at \$200,000.

158. Claimant's counsel says that a reasonable assessment of the claimant's future earning capacity is \$1,850,000. Respondent's counsel says that a reasonable assessment is \$200,000.

159. Taking into account all the matters I have discussed, and all of the evidence and argument, I assess the claimant's future loss of capacity to earn income at \$700,000.

(c) Cost of future care

160. The test for recoverability of future care costs was set out by Madam Justice Garson in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144. Writing for the Court she stated:

I do not consider it necessary, in order for a Claimant to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Aberdeen* at paras. 43, 63.

161. Mr. N claims the following care items:

- Osteopathy-once a month-\$125 each-\$1500 per annum
- massage therapy-once a month-\$113.40 each-\$1360.80 per annum
- chiropractor-once a month-\$55 each-\$660 per annum

162. Mr. N also claims for the following care items, the costs of which are less certain:

- Ketamine treatment-\$2500 per day for 4 to 14 day treatments, for an indeterminate number of times
- psychological counselling-initial 25 sessions, at \$195 per session

163. The respondent takes general issue with recoverability for what it terms “passive therapies”. It relies upon *Brundige v. Bolton, supra*, in support of its position. In *Brundige*, however, there was medical evidence which contraindicated their need. In this case, passive therapies are recommended by Dr. Lau, whose evidence I accept.

164. The cost of future care multiplier provided by Mr. Peevers is \$26,225 per thousand dollars. The respondent did not provide a multiplier taking into account the reduced life expectancy opined by Dr. Strauss.

165. I must assess, and not calculate, future care costs. See *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at paragraph 21.

166. The claimant says that future care costs should be assessed at \$75,000. The respondent did not offer a figure in reply. I am satisfied that the \$75,000 claim is reasonable, and make that award under this head of damage.

(d) Special damages

167. The test for recovery of special damages is whether they were reasonably incurred.

168. Special damages have been presented at \$18,127.60, which is a net amount, after reimbursement for various items by ICBC, PBC and Sunlife.

169. The respondent takes issue with those special damage items related to passive treatments. For the same reasons as discussed regarding future care costs, I do not find that argument persuasive.

170. The respondent also takes issue with \$351.91 paid to Costco (for magnesium, baking soda, and an exercise ball), and the \$1708.59 paid to Vitacost (for herbs, supplements, and pillows) as the sort of “everyday expenditures that are not compensable”. There was evidence before me as to the therapeutic purpose of the magnesium treatments and the exercise ball, but not for the therapeutic purpose of herbs, supplements, and pillows. I therefore reduce the claim by \$1708.59, and award the sum of \$16,419.01 in respect of special damages.

SUMMARY

171. The claimant is entitled to the following damage awards:

- Non-pecuniary damages-\$180,000
- Past income loss-\$200,000
- Future income loss-\$700,000

- Cost of future care-\$75,000
- Special damages-\$16,419.01

Total: \$1,171,419.01

172. If the parties wish to make submissions regarding costs, interest, and deductions, they should arrange a telephone conference with me to determine how best to proceed.

173. I wish to thank counsel for their assistance, and helpful submissions in this matter.

Mark Tweedy

Mark Tweedy, C. Med
Arbitrator

