Court of King's Bench of Alberta

Citation: Armbruster v Nutting, 2024 ABKB 36

Date:
Docket: 1801 12097
Registry: Calgary

Between:

Jonathan Derk Carl Armbruster, JA Consulting Ltd and His Majesty the King In The Right of Alberta

Plaintiffs

- and -

Brittany Elise Nutting, John Doe and ABC Corporation

Defendants

Reasons for Judgment
of the
Honourable Justice E.C. Wilson

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[1] On September 30, 2016, the plaintiff Jonathan Armbruster was driving west on Parkdale Boulevard (also called Memorial Drive) approaching 29 Street N.W. in Calgary. The traffic control light turned yellow. Mr. Armbruster applied his brakes. He either came to a stop or was coming to a stop when he was suddenly and unexpectedly hit from behind by a following vehicle driven by the defendant, Brittany Nutting.

[2] The defendant wasn't paying proper attention and only noted the plaintiff slowing down when it was too late. She tried to avoid a collision by turning to her right, but the left front portion of her vehicle struck the right rear portion of the plaintiff's vehicle.

[3] Both vehicles were written off as the high cost to repair exceeded the value of the vehicles, both of which were old and had high mileage.

[4] Photos taken of the vehicles at the scene by the plaintiff reveal minor superficial damage to the defendant's vehicle but bumper breakage, some body creasing and bending of the right rear panel area was suffered by the plaintiff's vehicle.

[5] The defendant properly admits liability for the collision.

[6] The plaintiff says that he was injured in this collision. Since the collision and up to the present day – some 7 years later – he says that he continues to suffer significantly from those injuries, primarily pain, but also including other medical and emotional, cognitive and psychological injuries. These difficulties include, depending upon which expert's diagnosis is being considered, mild traumatic brain injury – otherwise called concussion; post traumatic headache with cervicogenic and migrainous features; descending neuromuscular jaw pain (T.M.J.); somatic symptom disorder with or without predominant pain; diffuse chronic pain syndrome; cervical myofascial syndrome; adjustment disorder with anxiety, moderate; and PTSD.

[7] The plaintiff claims that the pain and suffering caused by the collision has been so debilitating that it has prevented him from properly performing his work; indeed it has led to two (2) medical leaves from his employment – the second of which commenced June 1, 2023 and is still in place. This essentially forms the basis for his claims for past and future loss of income.

[8] The defence says that whatever injuries the plaintiff sustained in the collision should have fully resolved no later than 6 – 12 months after the collision. The defendant says that the plaintiff has significantly exaggerated the extent of his ongoing pain and its effect upon his life and work. The defendant says further that the plaintiff does not suffer from the various medical and psychological maladies that have been diagnosed but that, if he does, they are the result of the plaintiff failing to follow proper medical advice and thus are not attributable to the collision. The defendant also argues that the defendant has failed to mitigate his losses by failing or refusing to follow various recommended treatment programs.

[9] It appears to be common ground that the plaintiff was injured, to some degree, in the collision. Indeed the police collision report notes he was injured although no specifics were listed. Both the officer and a paramedic dealt with the plaintiff. Clearly nothing of concern regarding the plaintiff's injuries or condition must have been noted, for he was allowed to drive himself home in his damaged vehicle. He did not drive himself to the Foothills Hospital which was just a few blocks north of the accident scene.

[10] But two days later, on October 2, 2016, he did attend Foothills Hospital Emergency. The physician's notes includes the following report from the plaintiff – "Potential LOC (Loss of Consciousness) at scene – less than one minute" and that he was walking about at the scene and reported no neck or back pain. He developed a headache the following day but not on admission. He had finger tingling when he awoke on October 2 and had pain concentrated in his lower back and neck. An X-ray of his spine revealed no injury. He was diagnosed with a whiplash post motor vehicle collision and prescribed Tylenol and Advil for pain as well as physiotherapy. His discharge notes include the entry: "Potential – 30 sec LOC".

[11] If the plaintiff filled the drug prescriptions, no claim for same has been submitted as part of the special damages claim in Exhibit 1 Tab 66. However claims for physiotherapy treatments commencing October 17, 2016, have been filed.

[12] In her "Concluding Report" for the October 17, 2016 attendance, Ashley Chapman, physiotherapist reported that the plaintiff was then complaining of ongoing headaches, fatigue and difficulty in remembering and in sleeping.

[13] This was somewhat mirrored in the plaintiff's family doctor's note printed December 8, 2016, which stated, that in his three visits since November 10, 2016, the plaintiff reported that his symptoms were unchanged and included intermittent headaches, sleep disturbances, poor concentration and memory changes. The next note of his family doctor, Dr. Bikow, printed February 16, 2017, updated the plaintiff's status:

> Symptoms that he reports include headaches, insomnia, and difficulties with short-term memory and concentration. He reports initial trial of physical and mental rest without any improvement in his symptoms. He also continues with his physiotherapist, which provided some initial improvement, but has now plateaud. He has tried massage therapy and acupuncture without improvement. He is using Advil PRN for headaches with good effect. He reports his symptoms have been affecting his occupational functioning as well as his recreational involvement in playing hockey. He is awaiting further assessment from a specialist in concussion and post-concussive syndrome management for opinion on any other management options as his persistent concussive symptoms. I will continue to monitor his symptoms while awaiting consultation.

[14] Dr. Bikow was able to refer the plaintiff to Dr. Thomas Vant at the Accident Rehabilitation Centre starting on May 11, 2017. The plaintiff claimed he was "still experiencing poor memory and poor concentration, in addition to headaches with stress." Tenderness and soreness was revealed upon palpation. A bone scan of the spine revealed no damage and a CT scan of the head was normal. Dr. Vant reported that a psychological evaluation revealed the plaintiff was suffering from depression and anger with associated sleep disturbance.

[15] A further referral was made to Dr. Christine McGovern of the Brain Injury Clinic at the Foothills Hospital. She saw the plaintiff on February 1, 2018. From her reporting letter of the same date to Dr. Vant, the following is stated:

> He relates his ongoing difficulties are having a terrible memory and having to look at his phone constantly in order to check for his reminders. He experiences a daily headache, which he feels at the back of his head and along the occipital area. He describes it as an ache and a pressure and a throb and a stabbing sensation. He takes Advil to help deal with the discomfort. He has ongoing neck pain and attends physiotherapy approximately every 4 days. He is having difficulty with disrupted sleep. He has light and sound sensitivity, which contribute to headaches. He wakes up with numb hands every morning. He notes at times he experiences dizzy spells and he is not sure if this correlates with when his headache is more severe or not. He has more difficulty reading when his attention is reduced. He tends to avoid driving now when possible, as he is scared of getting hit again. He wears sunglasses outside.

> Jonathan has managed to continue working full-time, but notes he is not as effective at his job and since he is in sales, he needs to recall clients' names and recall their most recent conversations. He has been utilizing his phone to a considerable degree to try and help him compensate. He does go to a sauna at noon in order to try and help him relax and take a break and recharge himself the afternoon. He feels his best period of function in the day is midmorning. He has given up skiing and hockey in an effort to improve his day-to-day skills. He is somewhat mournful that he used to own and run a sports consultation business as well, and he had to give that up. He feels he is generally not as quick as he used to be.

[16] Dr. Bikow notes on July 4, 2018, that the plaintiff was frustrated by his ongoing cognitive difficulties, especially short term memory.

[17] The next day he saw Dr. Vant who reported:

> When last seen July 5, 2018 he continued to have difficulty with memory as well as daily headaches. He was particularly concerned with his memory as he has been forgetting colleagues and clients he has known for years. He also complains of occipital pain and neck discomfort. He wakes up with bilateral hand numbness every morning. He also notes some fatigue and change in mood. He has been seen by a psychologist for this. He has not filled the prescriptions given due to concerns of side effects. He did see Dr. McGovern in the Brain Injury clinic February 2018, she referred him to the CAR (Community Accessible Rehabilitation) program and he will be following up with her in the fall. He had been getting IMS elsewhere with regards to his neck pain as well massage therapy, and has found it ineffective. Based on the ineffectiveness of therapy I have advised him to follow up at ARC with regards to IMS and have prescribed topical gel rather than oral medication.

[18] On August 28, 2018, the plaintiff was seen again by Dr. McGovern. In her letter of August 30, 2018 to Dr. Bikow, Dr. McGovern noted that nothing had really changed for the plaintiff since her last session back in February. The plaintiff continued reporting memory difficulties, and specifically in remembering client's names. She added the following:

> He notes if he has a massage it helps his neck for approximately 3 days. He did trial acupuncture for his neck, but did not really find it helped. He has seen a psychologist twice, but I do not believe he is receiving ongoing care there. He has been given a number of prescriptions to assist with his headache control, but he is not interested in medications or injections and so has not pursued that as yet. He tells me he was reviewed by an optometrist who told him to stop wearing contacts and that he needs to wear his glasses.
>
> At present, he is receiving massages once per week. He had received some physiotherapy early on, which he had not found helpful. He does use mouthguard at night and apparently has been grinding his teeth. He does find that his jaw and neck area are extremely tight and after a massage he will sleep better for approximately 3 days.

> He finds he still has general poor tolerance for activities and interactions, whether he has a headache or not. He does have a headache most days of the month now and has been taking analgesics probably more than half of the days of the month, although not daily. We did have a discussion about potential analgesics rebound headaches, and to try and keep his analgesic intake to less than half the days of the month. He notes he had a major flare of his headache after driving to BC at one point, but he does not think that it was the driving or his neck that exacerbated his headaches.
>
> He remains tender to palpation along the paracervical regions, but only to a mild degree over the occiput. He is quite tender over the mastoid insertion of the sternocleidomastoid.
>
> We reviewed a chin-pivot stretch to target the base of the occiput, which he has not been targeting. I gave him a list of nutraceuticals, including magnesium 250 mg twice per day, riboflavin 400 mg once a day, and coenzyme Q10 and 200-250 mg once a day as potential options to treat his headache. He says he is willing to take the nutraceuticals.
>
> He tells me that he has an EMG booked for his numb hands on September 17.

[19] On August 29, 2018 the plaintiff returned to see Dr. Bikow. Her note of that consult includes the following information:

> Seen by Dr. McGovern yesterday and advised to see me for ECG
>
> pt requesting workup of his symptoms
>
> Started taking history of symptoms and pt became mildly agitated and didn't want to answer questions and just wanted a work-up
>
> discussed the importance of taking a history for determining an appropriate work-up and DDx
>
> pt became a bit more cooperative but had very little eye contact during the assessment
>
> at the end of the visit he apologized and said he was very stressed
>
> asked about whether he's tried counselling for support and he said he has friends he can talk to and doesn't want counselling

[20] From a few months prior to the collision, the plaintiff operated his own one-man company contracted as a business development officer to Viking Projects Ltd.

[21] On September 17, 2018 Viking terminated the contract – see Exhibit 1 Tab 42. The plaintiff testified to the circumstances:

> Q What about 2018, did you lose any income because of the motor vehicle accident in 2018?
>
> A Correct. I was fired from Viking Projects in September 17th and due to lack of performance.
>
> Q And is that related to the motor vehicle accident, or something else?

A Correct.

Q How is it related to the motor vehicle accident?

A During my time with Viking I -- I struggled with headaches, I struggle with memory loss, I can remember numerous times having meetings, whether it's the Pembina (phonetic) tower, where I'd have a meeting booked in my phone, I had met the person before, and I'd go to meet the person at the Starbucks and I wouldn't recognize them, and they're looking at me, and -- and I wouldn't know their name. Pretty hard to develop business. I can remember having panic attacks, having breakfast at Cucina's (phonetic), which is ground level on -- on 8th Ave., where I'm meeting with someone that's in charge of hundreds of millions of contracts and -- and I'm shaking when I go to take a drink from my coffee. These have all been very traumatic in my life.

Transcript November 6, 2023, page 55 line 26 to page 56 line 3

[22] The historical record is interrupted at this point in order to make some observations, reflective of the submissions of the defendant.

[23] Absent the plaintiff's claims of pain and suffering and, more importantly, the claimed disabling effects of his pain arising from the collision, there is no objective, clinical evidence of any bodily injury suffered in that collision which might explain that pain. No X-rays, no MRI's, etc.

[24] The disabling effects which were so significant as to result in being fired for an alleged lack of performance at his job comes only from the plaintiff. The termination letter gives no reason or "cause" for the termination.

[25] And of singular note, no one from Viking was called by the plaintiff as a witness. Nor was any customer of the plaintiff called who could provide some type of corroboration of his claims. Given the defendant's position throughout that the plaintiff has exaggerated his claims of injury as well as his claims of significant resulting disability, it is an issue which will be further addressed later in these reasons.

[26] I return to the historical narrative.

[27] Within a few months of being terminated by Viking, the plaintiff obtained new employment at a better salary with Mark's Hauling Ltd.

[28] The plaintiff testified that shortly after starting his new job at Mark's Hauling, he went on a "medical leave" due to his pain and suffering:

Q I don't think we -- we've talked about it, but when was your first medical leave?

A After meeting with my family doctor a number of times, she strongly encouraged me to take a medical leave, I believe it started in December of 2018, or possibly January - - early January of 2019, and was on medical leave for four months.

Transcript November 6, 2023, page 57 line 16 – 19

Q And how long was your medical leave?

A I believe I was on medical leave for four months.

Q And what physicians or treatment providers did you speak with, if any, before taking that first medical leave?

A I communicated with my family doctor, Dr. Jennifer Bikow, she was my family doctor at the time, and she was the one that recommend me take a medical leave from Mark's Hauling.

Q Anyone else or just Dr. Bikow?

A Primarily Dr. Bikow.

Transcript November 6, 2023, page 58 line 1 – 12

Q So when did you -- when did you go back to work then?

A I believe it was the latter part of April, 2019 that I tried to rebrand myself, extremely embarrassing to have phone calls from your clients and it's Jon, we hear you're on medical leave, what's the problem? Jon, you're on medical leave. And coming back from medical leave to have to be asked numerous times of what's wrong with me and why I was on medical leave, it took a very long time to get my brand back as a business developer.

Transcript November 6, 2023, page 58 line 21 – 27

[29] The plaintiff had been referred by his law firm to neuropsychologist, Dr. Gregor Jason who saw the plaintiff February 13 – 15, 2019. Echoing, in part, what he told the court above, the plaintiff told Dr. Jason that he took a "medical leave" on February 1, 2019 because he felt that he wasn't doing the work he should have been doing for Viking and he wanted to get healthy again (Exhibit 1, Tab 54B, page 4). The plaintiff repeated a similar story to the psychiatrist Dr. Spivak on March 4, 2020 (Exhibit 1, Tab 58B, page 5). On January 29, 2020 he told his neurologist Dr. Robinson that "from January to April 2019 he took a leave of absence at the recommendation of his family doctor" (Exhibit 1, Tab 56B, page 9).

[30] The Plaintiff's testimonial version of this "medical leave" at the encouragement primarily of Dr. Bikow is, however, at dramatic odds with the records filed by agreement of counsel.

[31] The first mention in Dr. Bikow's records to this topic of a "medical leave" is her note of May 22, 2019 which reads:

pt reports losing his job as a business contractor in sept 2018 due to weak performance

tried going back to work Nov-Jan, but stopped in February as did not feel his performance was adequate due to cognitive symptoms

he remains off work at this time

he is requesting letter for medical leave from work

[32] On June 3, 2019 Dr. Bikow had a phone consult with Dr. Jason. Among the topics discussed was the plaintiff's request for work leave. Dr. Bikow notes that she would consider a 3 month leave, subject to reassessment.

[33] But, according to the plaintiff's testimony, his "medical leave" had begun and ended and he was back to work by June.

[34] No letter supporting any such medical leave could be located in the exhibits filed. The plaintiff did not call Dr. Bikow or anyone from Mark's Hauling who might have shed light on this "medical leave" claim. It seems clear that the Plaintiff was off work from Mark's Hauling in 2019 but the reason for this and its duration are unknown based on this record. I note as well that there is no reference in the admitted facts to any medical leave at this time – only to the medical leave that commenced June 1, 2023.

[35] Dr. Bikow's May 22, 2019 note makes it clear that the decision to stop working was solely that of the plaintiff. There is no record of a recommended "medical leave," or supportive medical opinion for his decision.

[36] The plaintiff has significantly misrepresented the situation under oath. He has also done so, although not under oath, when meeting with his experts, as they have reported. And those reports are specifically relied upon by Mr. Theresa Reichert, the plaintiff's economist (Exhibit 1, Tab 59D, schedule 4).

[37] All these assertions are simply falsehoods. This isn't a case of a failure of memory or simple misstatement. This is a case of false testimony and assertions designed to help advance his claim.

[38] This medical leave claim is significant to the plaintiff's case, as it is supportive of his claim that the ongoing debility from his pain and suffering was so significant that he could not satisfactorily perform his job and, thus, that he had to go on a medically approved leave; as well as supportive of his claims for lost income.

[39] This claim might also be considered in the context of the January 24, 2019 assessment performed upon the plaintiff by his physiatrist expert Dr. Tony Giantomaso. To him, the plaintiff reported that at work "sometimes cognitively he seems out of it and has difficulties remembering names and details, which has negatively affected his work. He notes pain with prolonged sitting, standing and prolonged traveling secondary to work." (Exhibit 1, Tab 53B, page 5)

[40] However, there is no reference by Dr. Giantomaso in his report of that assessment to any planned leave – medical or otherwise – for the plaintiff. Yet, according to the plaintiff, he was about to commence a medical leave of absence, due to his above noted workplace deficiencies. Apparently he must have forgot to share this pertinent information with Dr. Giantomaso, or deliberately omitted doing so.

[41] But some further comment upon the plaintiff's various explanations upon this 2019 leave from work is required.

[42] For example, on November 19, 2019 he told his psychologist Dr. Rachel Jose an entirely different story. To her he said he took time off in February 2019 because his mood was low (Exhibit 1 Tab 21 page 14).

[43] And in her psychiatric medical assessment conducted February 27, 2021, Dr. Joann Mundin reported yet another, more startling story, while she was going through his physical health history. Under the heading "Cardiac" she recorded the following:

> Mr. Armbruster advised me that I would see in his records that his heart was giving him some problems. He described having a 'real scare' with chest pain and

this led to the advice that he take 3 months from work. The medical records from 2019 observed that Mr. Armbruster's chest pain was deemed non-cardiac and most likely musculoskeletal in nature.

[44] The plaintiff's "recollection", made there for the first time, is not only contrary to his records but also falsely claims it led to his "medical leave" from work.

[45] If all his varying and ever changing explanations do not demonstrate a pattern of deceit, then they must surely lead to no other conclusion than that he is neither credible nor reliable, when recounting the past. Either way, the court will not make findings based on his testimony absent confirmatory or corroborative evidence.

[46] But let us proceed.

[47] Subsequent to starting to work for Mark's Hauling Ltd and up to the present, the plaintiff continued to report ongoing pain and headaches, if not daily, then approximately every second day. As I understand the plaintiff's situation, this chronic pain and headaches makes sleep intermittent, thus leading to fatigue. Concentration and memory are often nonexistent or patchy, at best, due to this pain and fatigue. This is repeated and repeated in a vicious circle. He detailed his present condition which he says has shown no real improvement over the 7 years since the collision:

> Q And -- and, Sir, moving forward to -- to now, what symptoms do you still experience from the motor vehicle accident?
>
> A Today I feel very hopeless. Tired. Almost daily headaches are a strain on my mental health. Mental health is -- is hard to describe at times, but not being able to sleep at night, struggling with memory, and feeling very alone are things that I'm struggling with today.
>
> Q And are you having -- still having any physical symptoms? Any pain?
>
> A Correct.
>
> Q What pain are you having?
>
> A My neck still causes headaches --
>
> THE COURT: Sorry, your neck what?
>
> A My neck causes headaches, migraine headaches that prevent me from standing up, where I need to just lay down where it's dark and sleep. My back, lower back, brings spasms. Just two weeks ago, getting out of my Jeep, my back literally locked up to where I -- I could not stand up straight for a number of minutes. Extremely embarrassing when you're trying to fill your Jeep with gas. Extremely painful and very alarming. I also struggle with pain in my hands when I wake up, having a hard time to actually fully extend my -- both hands, I have pain in my elbows --
>
> THE COURT: Sorry, what is your problem with your hands when you wake up?
>
> A My hands literally are numb when I wake up and it takes time for feeling to be in both hands.
>
> THE COURT: How long?

A It depends.

Transcript November 6, 2023 Page 37 line 30 – Page 38 line 20

Q Okay. Any other pain or symptoms you're having now that you attribute to the motor vehicle accident?

A As addressed on my mental health, very hard to describe and share what I feel each day, but the side of very low motivation and just a lack of -- of -- of motivation, feeling very low, struggling with concentration, I really do not like driving. If I was allowed, I would fly everywhere, I wouldn't even drive a vehicle, that's how much I dislike driving since the vehicle accident.

Transcript November 6, 2023 Page 39 line1 – 7

the new Jon Armbruster, the one that I'm trying to accept that has almost daily pain and -- and struggles with memory loss, and -- and struggling to know what I can do moving forward, and I'm not sure of that now, you know, the stress leave, the medical leave.

Transcript November 6, 2023 Page 39 line 15 – 18

Q Yeah. So were -- were -- were your injuries affecting your ability to work in 2021 and 2022?

A Yes.

Q How?

A My headaches continued, my memory frustrated me, having to end days early, having to end meetings, you know, I can remember one evening taking a client just to a Junior 'A' game in Grande Prairie, just a simple Junior 'A' game and having to tell him after the first period that I had to go home, my head was hurting. Pretty embarrassing, but it was just the pain that I was experiencing, and -- and this happened numerous times, and this is something that my president knew that I was struggling with headaches, and I think if he wasn't a kind president, he probably would have let me go a long time ago.

Transcript November 6, 2023 Page 69 lines11 – 23

[48] As was noted above, the plaintiff went on a medical leave on June 1, 2023 supported by Dr. Singh, who was then operating Dr. Bikow's practice as she was on maternity leave and Dr. Newton, a neuropsychologist – see paragraph 47 of the Agreed Statement of Facts.

[49] Returning to the plaintiff's testimony:

Q Okay. So since you went on this second medical stress leave, what have you been actually doing?

A I've been sleeping a lot and trying to spend time just understanding my thoughts. I've been trying to simplify my life, something that Dr. Newton and Dr. Unsworth have encouraged me to do is try to set my priorities at the start of the day and simplify my life.

Q Are you able to do any recreational activities?

A Very light. And when I'm challenged and do something that exerts me where my heart rate climbs, I get a headache.

Q Are you -- are you able to do any exercise?

A I've done light exercise, but I've had so many headaches over these past seven years. So many headaches.

Q Have you -- are you taking any medication, either for your headaches or other conditions?

A I don't want to, but I am still taking Advil and I still have some medication left over that I do take that Dr. Vant prescribed to me.

Q And, sir, what are your future career plans?

A I just think these last seven years I've lost a lot and I don't know what my future career plans are.

THE COURT: You don't know what?

A I don't know what my future career plans are. I don't know what I can do.

Q MR. ALLCHURCH: Are you considering -- or have you considered retirement? Or at what age you'll retire?

A I haven't considered either.

Transcript November 6, 2023, page 78 line 37 – page 79 line 26

[50] But while the plaintiff repeatedly told the court and all the expert witnesses, over the years, that his post collision medical condition prevented him from being a productive and engaged business development officer, his social media postings revealed an individual who was not physically, mentally, or emotionally unable to participate in activities at all and was, in fact, excited, engaged and enthusiastic when working with other people.

[51] According to his C.V. and testimony, part of his duties with both Viking and Mark's Hauling, involved organizing community events for worthwhile causes. Corporate sponsors were brought on and, in return, would receive public recognition for their support of such endeavours.

[52] For example, in June, 2018 and in August, 2018 the plaintiff was involved in organizing, and obtaining volunteers and sponsors for two separate golf tournaments – the first in Swift Current, Saskatchewan for kids with learning disabilities. The second was in Cochrane, Alberta and was named the "First Annual Armbruster Invitational" with the goal of raising money for mental health.

[53] The plaintiff had never helped organize golf tournaments before. The plaintiff's efforts bore great results it appears. After he changed jobs to Mark's Hauling the plaintiff helped organize the Second Annual Armbruster Golf Tournament in August, 2019 performing the same activities as before. Photos of the plaintiff with other participants in the tournament were exhibited in Court.

[54] It was interesting to note the plaintiff's success when encountering – post collision – these new organizational challenges.

[55] The plaintiff tried to portray himself as only a fringe player in the organizing but led no evidence of who might have done more. And it is worth noting that two of the three tournaments were named after him – not someone else or some other entity.

[56] This led to the plaintiff being cross-examined on a number of his YouTube posts entitled "Coaches Corner".

[57] These were a series of videos involving various numbers of participants and all of whom commented upon various aspects of coaching hockey players based on their own experiences and learnings.

[58] The first video was in May 6, 2020 followed by one on May 20, 2020, June 3, 2020; June 17, 2020; July 15, 2020, July 29, 2020; April 7, 2021 and May 12, 2021.

[59] All were played in court, absent some portions which were fast forwarded. Clearly, in all of them, the plaintiff was the host. He led the discussions from beginning to end. Each video lasted 1 – 1.5 hours. He admitted that he helped organize all of them. Six to ten individuals participated in each video.

[60] Some observations about some of the videos are warranted.

[61] For instance, I saw no signs of discomfort or grimaces of pain. He was focused on the camera, his speech is clear, he is focussed in his commentary and clearly passionate about the topic. In the June 3, 2020 video he said he was planning for another video session which demonstrates organizational planning.

[62] In the June 17, 2020 video he recognizes a participant who he says he hadn't seen for 18 years and whose hockey teams repeatedly knocked the plaintiff's teams out of hockey playoffs so many years before.

[63] Again the video shows the plaintiff engaged and with no sign of discomfort. He is organized and easily moderated the discussion.

[64] In the next video – July 15, 2020 – the plaintiff again came across as very enthused. There was no sign of memory problem. There was no loss of pace or place when he spoke. He smiled a lot and joked with his colleagues.

[65] At one point he said that it was about a month since the last video – which was true. He had a good recall of games and series played years earlier with one of the participants.

[66] In the May 12, 2021 video, one of the plaintiff's guests was former NHL Edmonton Oiler, Dave Hunter. Without any real prompting, the plaintiff then testified before me as to the circumstances and discussion that led Hunter to be a guest – again, displaying good memory of the details leading up to that event.

[67] In the April 7, 2021 video he told his viewers that it was October, but then quickly and accurately corrected himself to say it was April.

[68] Interestingly, in his testimony, the plaintiff volunteered this as a good example of his defective memory when he said "October" when it clearly was "April". He testified he felt embarrassed about this misstatement, at the time.

[69] It was a sad, somewhat pathetic attempt to self-corroborate. His testimony completely ignored the fact that, in the video, he had immediately corrected himself. It was clearly a

misstatement, I find. This was not a reflection of any embarrassing memory defect flowing from the collision. His portrayal of what happened was a deliberate misrepresentation of the truth in an effort to bolster his case.

[70] The plaintiff in those videos displayed not one of the numerous, serial complaints about pain discomfort and the various types of suffering detailed in his numerous attendances upon all of the expert witnesses called in this case and repeated before me.

[71] Clearly the plaintiff organized all these videos and issued the invitations.

[72] In none of them nor in his testimony is there a hint that any meetings had to be delayed in starting or had to be rescheduled because the plaintiff was finding it difficult to proceed.

[73] No participant in any of the videos made any mention of the plaintiff being ill or unable to work.

[74] In many of the videos – some of which lasted 1.5 hours – the plaintiff did not display any discomfort. He never got up to stretch. He never took a break.

[75] When counsel asked him why, in some of the videos, he was so upbeat, he could provide no explanation.

[76] When repeatedly asked why he never displayed any signs of pain or discomfort in any of the videos as he had told the court and all the experts, all he could say was "It must have been a good day".

[77] To be kind, that would appear to he an understatement because it overlooks the fact that in organizing future Coach's Corner videos he must have apparently known, ahead of time, that he would be having a good day on a precise date in the future. Even though the videos are of only a small portion of 8 days over an entire year, they cannot be simply dismissed as some random "good days".

[78] In further cross-examination the plaintiff confirmed his involvement in helping organize various indigenous hockey skill camps and coaching seminars from 2020 through 2022 as part of his job with Mark's Hauling, although many were repeatedly postponed during COVID. No difficulties in executing his on-ice and off-ice activities were alleged.

[79] Counsel also played two videos that the plaintiff had taken and posted of himself which apparently reflected certain personal, political and economic views he had, which appear to the Court to be in the vein of some social commentary podcast that he wanted to share with anyone who might be interested enough to watch. His remarks were focussed. He was never at a loss for words nor was he repetitive. In none of the videos did he show the least bit of discomfort.

[80] The last video of note was posted on May 30, 2020 by the plaintiff. It is a video taken of a motor vehicle radio playing a Kenney Chesney song on a Sirius radio channel. The video was clearly taken by a cellphone operated by the driver of the vehicle and clearly while the vehicle was in motion.

[81] The plaintiff admitted that he posted the video. He admitted that he then typed in some of the lyrics of that song and added them to the posting.

[82] The following cross examination then occurred:

Q Right. Did you shoot that video while you were driving?

A I don't remember that day. I don't remember who shot that video.

Q Is that the dash of the vehicle that you owned around 2020?

A I can't remember.

Q Is that a, the dash of a vehicle that you drove?

A I can't remember.

Transcript November 7, 2023 Page 61 line 35 – Page 62 line 1

[83] I am satisfied that the plaintiff was untruthful when he claimed this lack of memory regarding who shot the video. His claimed lack of memory about any familiarity with his vehicle's dashboard is not believable. Most importantly, nowhere does he actually deny shooting the video. I find that he did shoot the video.

[84] This clear case of "distracted driving" was put to the plaintiff in an obvious attempt to put a lie to his claim made to some of the expert witnesses as well as to the court that he had been so traumatized by the accident that he now disliked driving, found it dangerous, feared he would get into another accident and now suffered PTSD.

[85] I am satisfied that he has misrepresented this particular psychological effect of the collision. I do not believe that anyone in such a condition as he claims, would willingly take any risk in recording this video while driving, as it would obviously risk the very result that he claimed he so deeply feared with respect, I also reject any diagnosis of PTSD arising from this low speed fender bender.

[86] Let us return to the plaintiff's testimony that the effects of the collision resulted in an impaired ability to properly perform his job functions with Viking and Mark's Hauling.

[87] To support his case on this impaired performance the plaintiff called two colleagues from the oil patch with whom he had worked since approximately 2010.

[88] William Kubica testified that, since 2018, the plaintiff was one of his main points of contact at Mark's Hauling up to recent times. Indeed Mr. Kubica talked about working with the plaintiff since May, 2023 which is when the plaintiff said he was off an medical leave because he couldn't do his job satisfactorily.

[89] In any event, Mr. Kubica testified to the following changes he had noted in the plaintiff since the collision:

A Probably his inability to maybe remember certain things, his inability to make it to work every day.

Transcript November 7 page 107 lines 17 – 18

[90] When these occasions occurred or how often they occurred was not explored.

[91] The only particular example of unusual behaviour that he observed occurred in June, 2017 in a Calgary casino when the plaintiff failed to interact with Mr. Kubica. To the court, the described event seemed to simply be a situation where the plaintiff was so focused or distracted by something else that Mr. Kubica's presence wasn't even sensed.

[92] Scott Vyze, who is a marketing officer, described his relationship with the plaintiff as being mostly friends. From 2016 to present he said they didn't work directly with each other but

they did spend time helping each other with business development networking and attending business events.

[93] He remembered bumping into the plaintiff about a year after the accident. They hadn't seen each other for quite a while. The plaintiff didn't recognize him although they chatted. Weeks later the plaintiff said he remembered their meeting but that he just couldn't identify him.

[94] Post collision, Mr. Vyze said the plaintiff was different – crazy headaches, neck and back pain and seemed absent-minded at times. Mr. Vyze offered the following comparison of the plaintiff pre-accident to post accident:

> You know, before the collision, yeah, Jon was pretty normal. I mean he's pretty normal now, other than the headaches and the memory loss and some of the stuff he's struggling with, but yeah, he was a normal guy, super sharp, hard working, good at his job, enjoyed it.
>
> Q What about after, what about after the collision?
>
> A Yeah, I think, you know, I think after the collision I think Jon still enjoys it. He's still a really hard worker. He's still good at it. The difference is, is that, you know, he's, suffers these darn headaches, will pull him out of things and he'll have to, you know, he'll have to take off. And he tells me that he's got to turn the lights off and close his eyes and try to go sleep. You know, I've seen him have to get up at dinners and not come back and, you know, that type of thing. So it's definitely changed for him since the collision in that way, you know. I still think he's fairly good at his job, but you know, he has to try a lot harder I think because of some of these physical pains and whatnot that he's, that he's working through right now.
>
> *Transcript November 7, 2023 page 119 lines 27 – 41*

[95] This was the only evidence called by the plaintiff to support his claim that the pain and suffering was so debilitating that he could not properly perform his job. Much of what these two men had to say was simply what the plaintiff told them.

[96] With respect, I find their testimony somewhat unpersuasive. I do not find it really begins to support the case being pressed upon me by the plaintiff.

[97] Employers or staff members from either Viking or Mark's Hauling would surely have been better situated and better able to attest to the plaintiff's daily, weekly and monthly performance over the 7 years post accident. Actual clients of the plaintiff who had seen the plaintiff's performance in meetings and in securing or helping to execute contracts with Mark's Hauling would surely be able to provide evidence capable of supporting the plaintiff's broad claims of disability when doing his job.

[98] Either groups of witnesses would have been best placed to support or corroborate the plaintiff's claims, if they could. No explanation why none of them were called was advanced; no reason arises in the evidence.

[99] As stated earlier in these reasons, the plaintiff claims that his pain and suffering arising from the September, 2016 collision was so significant that it resulted in lost employment and a lowered income. The court will now examine this particular claim.

[100] The plaintiff's counsel relies on the October 2, 2023 report of economist Theresa Reichert, at Exhibit 1 Tab 59D schedule 4, to establish his client's yearly consolidated revenue.

[101] In the years before and after the September, 2016 collision that income was:

2013 – $146, 827

2014 – $144, 996

2015 – $149, 512

2016 – $75, 101

2017 – $206, 288

2018 – $145, 891

2019 – $70, 188

2020 – $129, 900

2021 – $194, 945

2022 – $328, 749

Jan – May, 2023 – $78,000

[102] Note will be had to the significant dip in the plaintiff's 2016 income from 2013 – 2015. But when asked if he lost income that year due to the collision, his rather convoluted answer suggests he did not (see 54/23 – 55/19). The court notes that there were yet 3 more months post collision to generate more income in 2016. But there was no explanation offered to explain why he earned in 2016 only 50% of what he had earned in 2015.

[103] Maybe someone at Viking could have helped explain such a significant income drop in 2016, but they weren't called. I do not find he lost any income in 2016 due to the collision.

[104] In 2017 – the year following the collision, the plaintiff's income skyrocketed – two and a half times over 2016! Not surprisingly, the plaintiff testified he lost no income in 2017 due to the collision (55/21 – 24).

[105] More importantly, his employer was obviously satisfied with the plaintiff's work, because at some unknown date in 2017, his monthly salary of $11,000 was raised to $12,000 (see monthly invoices September 29, 2017 to August 31, 2018, Exhibit 1 Tab 41B).

[106] On September 17, 2018, he was fired by Viking for reasons that the plaintiff says were actually related to a lowered ability to do his job as a result of this collision. Clearly Viking's termination letter suggests nothing of the kind. As noted earlier no one was called from Viking to help assist in finding the truth.

[107] But as it relates to any loss of income in 2018 attributable, even in part, to the collision, Viking fully paid the plaintiff for September and October, 2018 (see Exhibit 1 Tab 42).

[108] According to Ms. Reichert's report, the plaintiff commenced working for Mark's Hauling on November 5, 2018 (see Exhibit 1 Tab 59D, scheduled 4). This is somewhat consistent with the plaintiff's testimony regarding his start date (56/20 – 22; 57/21 – 23).

[109] The plaintiff testified that the hiring was on a handshake at $9,000 per month with no bonuses (57/31 – 37). His counsel believes the monthly salary was $8,500. No one was called from Mark's Hauling to accurately establish the income.

[110] Thus the total decrease in income for November and December, 2018 amounted to either $6,000 or $7,000.

[111] Yet the plaintiff's 2018 income dropped a little over $50,000 from his 2017 income.

[112] Outside of some vague and unsubstantiated claims about not being able to earn bonuses, no other explanation for this income drop was provided. And, again, note that no one from Mark's was called who might have shed light on the issue.

[113] Once again, I am unable, on this record, to find the plaintiff lost income in 2018 as a result of the collision.

[114] That takes us to 2019. In this year the plaintiff's income fell to less than half of his 2018 income.

[115] The plaintiff testified that he didn't work due to a "medical leave". As I have previously found, this was false evidence. There was no "medical leave".

[116] The plaintiff told me and others that he just couldn't do the work expected of him. He had to take a break to try to fix the situation.

[117] Before, during or after he stopped working full time (it's not clear in the transcript) he said he wasn't working "full days" (59/17 – 18).

[118] While the court is prepared to accept that the plaintiff made the decision, based on how he was feeling, to stop working, the court's acceptance is further qualified because no one from Mark's Hauling was called. We do not know when this working stoppage occurred, nor what was the reason given, nor how the plaintiff's work and work ethic was assessed by his emloyer.

[119] And the court, on this record and with regard to some of the defendant expert's evidence, has some concerns with the true extent of the actual injury sustained in the collision, in addition to the court's concerns with the testimonial integrity of the plaintiff regarding his claims of debilitating ability to do his job.

[120] The plaintiff has not satisfied the court on credible and reliable evidence that any income reduction in 2019 was due to the collision.

[121] In 2020 the plaintiff's income almost doubled from 2019 to $129,900.

[122] This is remarkable given the plaintiff's evidence that his monthly salary was cut in half due to the effect of COVID on business.

[123] The only invoices filed are for 4 months – April 30, 2020 to July 31, 2020, each in the amount of $4,250 (see Exhibit 1 Tab 43D). That totals $17,000.

[124] After deducting this from the $129,900 income for 2020, there is a balance of $112,900 which – assuming there were no other ½ pay months – works out to a salary of $14,000 for each of the other 8 months.

[125] This would exceed his monthly income for every year to date but for 2017.

[126] Other possible interpretations of these 2020 numbers could only arise if someone from Mark's Hauling had been called. I can find no "income loss" in 2020 that could be attributed to the 2016 collision.

[127] Moving to 2021, the plaintiff's income increased to $194,945.

[128] He attributed this to an offer he received from a company called Pipeworx on November 5, 2020, to leave Mark's Hauling and which would offer a yearly salary of $250,000 plus a sliding scale of bonuses that could result in a doubling of that salary for doing the same type of work. He testified that he turned the offer down and explained why:

> A I didn't want the fear of failure again, of what I felt in 2019 when I had to go on medical leave with Mark's Hauling and even though it looked very, very attractive, I turned it down.
>
> *Transcript 70/34 – 36*

[129] But he testified that he did use this offer to negotiate a better deal with Mark's Hauling who did not want to lose him as a valued employee (Transcript November 6, 2023 – 67/20-26).

[130] So Mark's Hauling apparently was so happy with the plaintiff's work – even if the plaintiff thought otherwise – to decide to increase his compensation with bonuses and the plaintiff was happy to sign on, with apparently no fear of failure like he feared if he took the same job at Pipeworx. His logic is not immediately apparent.

[131] Unfortunately no 2021 invoices have been filed. We don't know what part of his income is attributable to salary, what to bonuses and when precisely the new salary regime commenced at Mark's Hauling. No one was called from Mark's Hauling to assist the court.

[132] I'm satisfied that there is no persuasive evidence that the plaintiff lost any income in 2021 due to the collision.

[133] I turn briefly to 2022. The plaintiff's income was the highest ever recorded - $328,749.

[134] I know nothing of what was done to obtain his bonuses. Again, no one from Mark's Hauling was called to assist the court.

[135] All that one can safely conclude is that the plaintiff was apparently able to do the job expected of him by his employer.

[136] He testified that he only did so by fighting the pain and the debilitating effects of his pain. And at great personal sacrifice to his own personal, emotional and psychological condition.

[137] But no one besides the plaintiff tells me or tells the experts that this is what he was going through.

[138] No coworker, no client, no office colleagues at Mark's Hauling was called. No reason was advanced for not calling them. Meanwhile his income had sky rocketed, again, which might suggest that whatever he was encountering was actually no type of impediment at all.

[139] Thus I find there is no basis to suggest there was an income loss in 2022 – let alone a loss attributable to the collision in 2016.

[140] We arrive finally at 2023. His invoices, as noted by Ms. Reichert were for January through May, 2023 billing at $15,600 per month totalling $78,000. He then went on a medical leave.

[141] Again, because no one from Mark's Hauling was called, I don't know whether these monthly billings were only salary or salary plus bonus.

[142] I'll presume they're only salary.

[143] So why take this first medical leave, starting June 1, 2023, 7½ years after the collision?

[144] The plaintiff had explained how he was suffering during 2021 – 2022 (see para 47 above). Yet he continued working full time and did not go on medical leave.

[145] He was never asked about pain or suffering or any inability or challenges in doing his job in 2023, which might help explain to the court why he needed to go on medical leave 7½ years after the collision.

[146] During final argument, his counsel offered the suggestion, flowing from the diagnosis of several experts that the plaintiff, who is a highly driven person, suffers from somatic symptom disorder. Such persons who may suffer from such a disorder will push through their pain, deal with their stress and other difficulties but eventually must succumb and essentially crash (see November 23, 2023 transcript page 21).

[147] The court has no difficulty with this proposition.

[148] However there is no evidence of such a dramatic change in the plaintiff, nor of any particular time frame when this occurred – and which would have had to occur, if it had occurred at all, only several months before this trial started.

[149] In the absence of any such evidence, I do not accept this "crash" theory as applicable here.

[150] Counsel points to two witnesses to explain why the plaintiff went on a medical leave – Dr. Newton and Dr. Singh.

[151] Dr. Virginia Newton – a neuropsychologist – saw the plaintiff 11 times – in person or virtually – from October, 2021 to June 6, 2023.

[152] With reference to the 3 letters she authored (Exhibit 1 Tab 25), Dr. Newton wrote in 2021 about the stress of the plaintiff's job and his reported neurobehavior symptoms "including frequent headache, poor short-term memory, cognitive fatigue and mood decline".

[153] She had provided him with some pacing strategies to help reduce his stress but feared recovery would likely be gradual and likely require extended counselling.

[154] Seven months later, in June, 2022, Dr. Newton reported that the plaintiff's condition had not improved; indeed the plaintiff reported that he was so distracted by his pain that he was unable to fully implement her recommended strategies.

[155] In her last report, March 23, 2023, she discussed all of her recommendations and the plaintiff's response:

> Mr. Armbruster has now completed 10 counselling sessions; the majority of these have been 30-minute virtual sessions at his request. We have discussed pacing strategies, behavioural activation and goal setting, changing maladaptive thought patterns, setting healthy psychological boundaries, and anger management. Mr. Armbruster has also been given self-directed resources for developing adaptive behavioural strategies. However, his attempts to practice psychological coping

> skills often seem to get derailed by persistent headaches, the severity of which he describes as "disabling."
>
> At our session earlier today, we discussed the likely contribution of Mr. Armbruster's very stressful and demanding work environment and he expressed an interest in taking a medical leave of absence to focus on improving his mental health. I would be willing to support this as it would provide him an opportunity to remove himself from the stress of work for an extended period and, hopefully, encourage him to consider alternative options for employment.

[156] Dr. Newton's evidence left the impression that since nothing she and others had recommended was apparently working, the only alternative was to reduce the work stress by reducing hours or taking time off as this should reduce his neurobehavioral symptoms. As she testified – "who knows what might happen?"

[157] But note will also be had to the fact that the notion of taking a medical leave came from the plaintiff. All Dr. Newton wrote was that she was willing to support this.

[158] Dr. Singh is a family doctor who looked after Dr. Bikow's practice when she went on maternity leave.

[159] Dr. Singh's note of a phone consult, April 12, 2023, with the plaintiff (Exhibit 1 tab 34) makes for interesting reading.

[160] After referencing Dr. Newton's March 23, 2023 letter, the plaintiff is reported to say the following:

> Wondering if I received letter from Dr. Newton psych, reviewed and she recommends leave of absence from work
>
> Would also like a letter stating I would support his leave as well
>
> He has not mustered the courage up to go on leave yet, feels there will be significant stigma with him leaving due to medical condition
>
> Feels like he will be a better to leave work in August or later when things slow down

[161] Once again it is the plaintiff looking for medical support for his wish to go on a "medical leave".

[162] And almost 1½ months before he did go on this leave, he was indicating contentment to wait 4 or more months to do so while he worked up the "courage" to go on leave.

[163] But according to the plaintiff, customers and colleagues alike were regularly observing his failures and shortcomings while attempting to do his job. If the situation was as bad as he says it was, surely all he would be doing is confirming what would be self-evident to everyone.

[164] Both doctors have supported what the plaintiff wanted. And again, it returns to the same reason – the plaintiff's uncorroborated claim that all his neurobehavior problems arising from the collision are so severe that they have left him unable to properly do his job in the past nor, apparently, in the future.

[165] It is interesting to observe that the plaintiff has – elsewhere – attempted to manipulate doctors and records in an apparent attempt to bolster his case.

[166] A note from Dr. Bikov dated January 9, 2019 makes the point:

> Pt came to front desk today asking to have two documents that he had to be faxed to his legal representative. one picture was of the CLS req for the ECG that had been ordered and the other was a picture of himself with the ECG leads on his chest that he reports that he took of himself while having the ECG done. he said his representative wants documentation that he went for an ECG. I asked whether it would be better to send a copy of his actual ECG report, but patient was adamant that his representative required an actual picture of him with ECG leads on. I inquired why he could not send these copies himself and he informed that his representative said it had to be faxed through his doctor's office. My assistant had Jonathan sign a written consent for this information to be faxed to his representative. I included a cover letter indicating that the patient requested these be sent but unclear of why these would be required.

[167] I do not believe that plaintiff's counsel put him up to manipulate a doctor's notes. I'm satisfied this was the plaintiff's idea, apparently born out of desperation; believing his case needed more medical evidentiary support.

[168] I also note that as late as February 3, 2022, a note from Dr. Bikov has the plaintiff expressing some real concerns that his medical team wasn't doing enough to support him in his lawsuit, including poor record keeping. Only after Dr. Bikov offered to help him find another doctor did he cease his complaints.

[169] The plaintiff's claim for loss of past and future income due to debility is somewhat tempered by his counsel's submission that the plaintiff is not contending that he can't work. His position is that he can work, but only at a job with less stress.

[170] But nothing was offered by way of example. Nor what be the requisite degree of less stress? Nor whether it might be a job that would interest the plaintiff. Nor whether it would pay satisfactorily.

[171] But there is another difficulty for the plaintiff. The defendant asks the court to draw an adverse inference against the plaintiff for failing to call witnesses that could have spoken to the plaintiff's allegations of poor work performance. These witnesses included those from his present and past employers. I would also include witness who were past or present customers with whom he was contracting.

[172] None were called and no reason for not calling them was suggested.

[173] The failure to call such witnesses who would be expected to be able to speak to the plaintiff's alleged poor work performance is particularly surprising here, as the plaintiff knew that the defendant was challenging his claims of poor work performance flowing from the collision.

[174] In ***Singh v Reddy***, 2019 BCCA 79, the court wrote this at paragraph 9:

> Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her.

[175] To be clear, adverse inferences can be drawn when the issue includes claims for pain and suffering – see ***Mohini v Jude***, 1991 CarswellBC 1297 paras 17 – 20.

[176] I note that, in his reply argument, the plaintiff said nothing in response to the defendant's submission that the court should draw an adverse inference.

[177] Having regard to my earlier comments regarding the plaintiff's credibility and reliability, I am satisfied that it is appropriate to exercise my discretion in this case and to draw an adverse inference against the plaintiff for failing to call this evidence and when no explanation for that failure is offered.

[178] I note that, otherwise, the plaintiff failed to prove any loss of income as a result of the collision. In the result, the court will make no award on the claims for past or future loss of income nor for any loss of earning capacity.

General Damages

[179] I turn now to the issue of general damages.

[180] The defendants agree that an award for general damages is appropriate. They would set it at $45,000, whereas the plaintiff seeks $125,000.

[181] Both sides have called expert witnesses and the plaintiff has even filed expert reports, without calling the authors, as part of the agreed statement of facts.

[182] As a general statement, and as outlined at paragraph 6 of these reasons, even the plaintiff's experts do not agree with each other's diagnosis regarding the plaintiff's condition and why it is so.

[183] Each counsel challenged the opinions of the experts called by the other side, but none were really compromised, let alone did they recant their opinions. It falls upon the court to try to resolve the conflicting evidence.

[184] In the main, I will do this by trying to determine where the weight of the opinion evidence lies.

[185] First, I'm satisfied that this was a low impact collision – not much more than a glorified "fender bender". The fact both vehicles were written off is not a compelling feature, given the cost to repair these older, high mileage vehicles. And as will be recalled, the plaintiff after examination at the scene, was cleared to drive himself home in his damaged vehicle.

[186] Second, I accept that in this collision the plaintiff suffered a whiplash and a minor concession and has suffered long term neck pain, back pain, headaches, discomfort and some impairment of bodily movement, all of which has waxed and waned over the following years.

[187] However, as I previously indicated, the plaintiff has not satisfied me that he suffered such pain and suffering that led to a debility that affected his ability to perform the job he was doing when he went on his medical leave on June 1, 2023, nor when he went on his own leave in 2019.

[188] And as earlier stated regarding the plaintiff's credibility and reliability, I am not prepared to accept the plaintiff's assertions concerning the true extent and true duration of any pain and suffering when it is not supported or corroborated by other independent evidence.

[189] There is some limited evidence from his two friends that touches on the impact of his pain upon his leisure activities, thus going to his complaints about his quality of life being affected, but it is limited and somewhat contrary to what the plaintiff said. For example, Mr. Kubica testified that he thought the plaintiff's golf game had improved post collision!

[190] Nevertheless I do find that all of the plaintiff's injuries should have resolved no later than12 months after the collision – thus doubling the 6 month time line offered by some witnesses who were asked the question.

[191] Plaintiff's counsel argues that their expert witnesses provided independent confirmation of the plaintiff's complaints.

[192] Those witnesses had said that in his complaints and during his testing, they suspected no feigning, no malingering, and that, if they had, they would have stopped their work. I believe that they would have.

[193] But that doesn't mean that my task is resolved by their opinion.

[194] The problem for the plaintiff is that, at this trial, I have had the opportunity to see all of the conflicting evidence and I have not found myself holding even a benign opinion about his testimonial integrity.

[195] His experts believed him without question.

[196] I don't believe what he says unless his evidence is corroborated.

[197] They have based their various opinions relying, in the main, upon his self-reporting which they have presumed was the truth.

[198] I have found the plaintiff to not be credible or reliable. It necessarily follows that the various opinions or diagnoses of his experts that he relies upon in this trial are, in fact, unreliable from the judicial perspective.

[199] Both sides have provided Alberta case authorities to support their position on general damages. Most are easily distinguishable.

[200] The plaintiff submits that the most compelling comparison case is ***Pedherney v Jensen***, 2008 ABQB 345, due to the findings by Rooke, J. (as he then was) that the collision resulted in a Somatic Symptom Disorder (S.S.D.) and a T.M.J. injury along with 5 years of pain.

[201] However I am not satisfied that S.S.D. has been proven here as it relies, in part upon the credibility and/or reliability of the plaintiff's description of his major distress or excessive worries and feelings caused by his pain.

[202] The T.M.J. complaint arose in the spring of 2023. Dr. Stanleigh opined it was traceable to the collision – 6½ years earlier – because the plaintiff told him nothing had happened in the interim to have caused it.

[203] The few, sporadic dental records covering that time period provide insufficient support for the plaintiff's assertion, for the court to accept this collision caused this injury.

[204] Lastly Rooke, J's award took into account an adjustment for failing to mitigate, although no amount or percentage was specified (see paragraph 354).

[205] Of the defendant's authorities the court finds ***Petz v Duguay***, 2017 ABQB 90 to be the most compelling comparator – but not by relying upon counsel's PowerPoint to give the pertinent facts of injury which was taken from the recital of the plaintiff's evidence.

[206] In fact, the Trial Judge rejected the plaintiff's evidence as being incredible (see paragraphs 163 and 164). The Judge rejected S.S.D. and chronic pain syndrome because they were unproven. He found that the plaintiff suffered whiplash, disabling pain for a period of time

but that she ultimately recovered by 2008 (see paragraph's 168 and 173) which was 4 years post accident.

[207] The award in ***Petz*** for general damages was $50,000 which in present value terms amounts to $60,580.

[208] Mr. Armbruster complains that his pain and suffering have not resolved in the 7 plus years post collision. Even after discounting, as unreliable evidence, the plaintiff's complaints of ongoing debilitating pain, there is still a basis to warrant an award higher than what issued in ***Petz*** due to the ongoing complaints of pain and suffering.

[209] Accordingly, I am satisfied that an appropriate award for general damages is $70,000.

Special Damages

[210] The plaintiff claims $51,987 in special damages.

[211] The defendant challenges only one charge as being unwarranted – a milage claim of 1782 kms for 1 visit to a chiropractor.

[212] The plaintiff offered nothing in reply to seek to justify it. It seems to the court to be unwarranted given the wide availability of chiropractors. It is struck from the claim, which results in a reduction of $891, leaving a balance in the claim of $51,898, which I find has been established.

Future Cost of Care

[213] The plaintiff's claim is significant. Even at its lowest number, the plaintiff's claim is for $339,254.

[214] The problem for the plaintiff is that this claim is based upon his experts various diagnoses which I have not accepted because each relies, in the main, upon the plaintiff's self reporting and I have found him neither credible nor reliable.

[215] Further, as the plaintiff has not established that any dental issues were caused in the collision, I am ignoring all of those related cost projections.

[216] What remains are his complaints of ongoing pain, which waxes, wanes and determining a reasonable response to help alleviate those complaints.

[217] Clearly massages give him short term relief as does Advil and, since late 2022, chiropractic adjustments.

[218] Psychological counselling has been an ongoing activity although I note there was but 1 session in all of 2022, then followed by monthly or more sessions during 2023. They appear to be of some assistance in the plaintiff's perception, and qualify as being medically justified and reasonable – ***Milina v Bartsch***, 1985 CarswellBC 13, paragraph 211.

[219] I accept the costs associated with the Life Care Plan tables in the July 28, 2021 report of Sandra Lee (Exhibit 1 Tab 64) at page 42 and following.

[220] In her testimony, she removed some cost items due to her assumptions that those items had already been attended to prior to trial. I'm not sure her assumptions are correct, and those cost items will remain.

[221] I understood the plaintiff's economist put the value of Ms. Lee's recommendations in a range of $20,000 - $30,000. I will accept the higher end and therefore put the cost of future care at $30,000.

[222] I now turn to the question whether the plaintiff unreasonably failed to mitigate his damages.

[223] The parties agree on the applicable law.

[224] In ***Antoniali v Massey***, 2008 BCSC 1085, the following was said at paragraph 29:

> In ***Graham v. Rogers***, 2001 BCCA 432, leave to appeal to S.C.C. refused (2002), 173 B.C.A.C. 21 (note), at para. 35, Rowles J.A. writing for a majority of the Court of Appeal succinctly stated the principle of mitigation of damages in personal injury cases as follows:
>
> > Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

[225] In ***Carreon-Rivera v Zhang***, 2014 BCSC 709 at paragraphs 108 and 109:

> [108] A plaintiff in a personal injury action has a positive duty to mitigate her loss. This duty includes an obligation to undertake reasonably available treatment that would assist in alleviating or curing her injuries: see *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 201.
>
> [109] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of her loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to her by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably. See: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[226] For a more recent authority the defendant pointed to ***Mocharski v Ly***, 2022 BCSC 996 where the following was said at paragraph 98:

> *Pearson v. Savage*, 2020 BCCA 133 summarises the legal consideration of an argument that the plaintiff has failed to mitigate her damages:
>
> > [74] Mitigation limits recovery based on the unreasonable failure of an injured party to take steps to limit the loss: *Graham v. Rogers*, 2001 BCCA 432 at para. 35, leave to appeal ref'd [2001] S.C.C.A. No. 467. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant argues that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on the issue.

> [75] Where a plaintiff has not pursued a course of recommended medical treatment, the defendant must prove that the plaintiff acted unreasonably in eschewing the recommended treatment, and the extent, if any, to which the plaintiff's damages would have been reduced had he or she acted reasonably: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.
>
> [76] The test set out in *Janiak* is objective. If a plaintiff had capacity to make decisions about treatment that ought to have been pursued, and the advice to pursue a particular form of treatment was sound, the question is what would be expected of a reasonable person in the circumstances considering the plaintiff's medical condition at the material time: *Cassells v. Ladolcetta*, 2012 BCCA 27 at para. 26. If, through no fault of her own, the plaintiff did not have the capacity to make the decision, the issue of mitigation does not arise.

[227] The defendant also points to ***Pugsley v Wong et al***, 1999 ABQB 921 paragraph 86 and ***Minhas v Hayden et al***, 2012 ABQB 528.

[228] The plaintiff, in reply argument, reminds the court not to be too quick to criticize a plaintiff's decisions. He points to ***Forsberg v Naidoo***, 2011 ABQB 252, particularly at paragraph 494:

> A plaintiff's choice during mitigation is evaluated with the knowledge of the plaintiff at the time, and must not apply 'hindsight'. In ***Tangye v. Calmonton Inv. Ltd.*** (1988), 51 D.L.R. (4th) 593, 87 A.R. 22, (Alta. C.A.) Côté, J. explained this point:
>
> > ... the law does not exact perfection or hindsight by the [plaintiff]. His test is relatively lax: whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice ...

[229] Plaintiff's counsel relied upon ***Costello v Calgary***, 1997 ABCA 281 at paragraph's 70 and 71:

> 70 ... However, the courts will not allow the defendant, in discharge of that onus, to be overly critical of the plaintiff. Having committed a wrong, the defendant should not quickly be heard to point out his victim's shortcomings in avoiding resulting losses: *Banco de Portugal v. Waterlow & Sons Ltd*, [1932] A.C. 452 at 506 (U.K. H.L.). The benefit of doubt, therefore, generally will be given to the plaintiff.
>
> 71 The duty to mitigate does not invariably require action to be taken immediately upon breach. As the plaintiff need merely act reasonably in the circumstances, considerable delay may be permitted in some cases.

[230] But while there is no disagreement on the applicable legal principles, the plaintiff's only submission to the allegation that he failed to mitigate, was that he didn't know until 2019 that he may have suffered from S.S.D. Thus, how could he be faulted for failing to act when ignorant of his condition?

[231] But, as was pointed out during argument, the absence of a particular diagnosis is irrelevant. The issue, simply, is whether a regime of treatment in response to his complaint(s) was offered.

[232] Clearly, I find that it was.

[233] Second, the defendant argued that the plaintiff did not respond by mitigating his damages. And, on this point, the plaintiff offered no argument nor relied on any evidence nor challenged the defendant's submissions at all in his reply argument.

[234] The evidence, unchallenged and uncontradicted, was that the plaintiff was recommended to do many things to assist his response and rehabilitation and he did nothing or did less than what was recommended. Only after approximately 3 years was there some sporadic attempts at counselling and injections.

[235] In the report of Dr. Mundin, Exhibit 1 Tab 61, she detailed many of the recorded occasions where the plaintiff declined or would not engage in treatment programmes – see pages 12 – 13.

[236] At page 20 of her report, Dr. Mundin recorded question 10 and her answer thereto:

> **Question 10:** Do you believe that the Claimant's lack of proper treatment or lack of taking prescribed medication has severely impacted his employment?
>
> From a psychiatric perspective, the majority of mental health problems including S.S.D. are treatable to the point of recovery. If Mr. Armbruster had a mental health condition caused by the index collision, recovery would be the more likely than not outcome. However, recovery from any psychiatric condition will be delayed or completely prevented if an individual chooses against engaging in proper treatment (and there are multiple entries in the medical record that reflect this claimant's decisions against accepting medical treatment recommendations). In my opinion, since Mr. Armbruster did not likely have a psychiatric injury, there is likely no mental health medication that he could have taken which would have had an impact on his engagement in employment.

[237] In oral argument defendant's counsel also detailed the plaintiff's failure to pursue recommended treatment – see Transcript November 23, 2023: 88/8 – 90/27.

[238] Absent asking one irrelevant question regarding the first sentence in Dr. Mundin's answer to question 10 (above), counsel for the plaintiff did not challenge the remainder of that answer nor any of the defendant counsel's written or oral submissions. I am persuaded by both. I find that the plaintiff conduct was unreasonable having regard to all the circumstances.

[239] I am further satisfied by the opinions of Dr. Pachet and Dr. Acharya, which I accept, that the plaintiff's unreasonable conduct has resulted in minimal recovery and a poor prognosis for the future with symptom entrenchment.

[240] Counsel for the defendant offered cases showing a range of reduction in damages based upon a failure to mitigate from 20% to 50%.

[241] Counsel seeks a 50% reduction on all heads of damages underscoring, in particular, that whatever permanency there is in plaintiff's ongoing pain, should not be the responsibility of the

defendant – particularly where a reasonably acting plaintiff should probably have fully recovered in 12 months at the latest.

[242] There was no reply by the plaintiff to these submissions during argument.

[243] I am persuaded that an appropriate reduction on all heads of damage is 40%. To be clear, the court will not cap the special damage award at $7,500 as was urged as an alternative by the defendant.

Conclusion

[244] Based on the foregoing I make the following award.

General Damages	$70,000
Special Damages	$51,898
Future costs of care	$30,000
Loss of income	$0
Future loss of income	$0
Loss of earning capacity	$0
H.M.T.K – subrogated claim	$7,765
Subtotal	**$159,663.00**
Less 40% failure to mitigate	$63,865.00
Total Judgment	**$95,798.00 (plus P.J.I., costs and disbursements)**

[245] If the parties are unable to resolve the matter of PJI, costs and disbursements, they may make submissions in writing, to the court who will decide which litigant is correct.

Heard on the 6th – 10th, 14th – 17th, 20th – 24th day of November, 2023.
Dated at the City of Calgary, Alberta this 19th day of January, 2024.

E.C. Wilson
J.C.K.B.A.

Appearances:

Derek Allchurch and Dan Thorn
for the Plaintiffs

Nabeel Peermohamed and Michael M. Thorne
for the Defendants