IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moody v. Hejdanek*,
2018 BCSC 380

Date: 20180312
Docket: M148368
Registry: Vancouver

Between:

Aaron Moody

Plaintiff

And

Barbara Hejdanek

Defendant

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:	Pierre R. Bisbicis R. Bisbicis (A/S)
Counsel for the Defendant:	Meghann Bruneau Sanjana Singh J. Tarantino (A/S)
Place and Date of Trial:	Vancouver, B.C. December 4-8, 2017
Place and Date of Judgment:	Vancouver, B.C. March 12, 2018

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A. INTRODUCTION

[1] The plaintiff seeks damages as a result of injuries he suffered from a motor vehicle accident on January 3, 2013.

[2] The defendant admits liability but disputes the amounts of damages claimed by the plaintiff. Under some heads of damages, the defendant says the plaintiff is not entitled to damages.

B. BACKGROUND

(a) Before the January 2013 accident

[3] The plaintiff was born in 1981. He has played recreational golf since he was five years old and he has played very seriously since he was 13 years old. He attended university in the United States on a golf scholarship but he did not complete his business degree. He has worked and trained at a number of prestigious clubs in Canada and the United States. He is currently a professional golfer with a class A CPGA certification.

[4] Since 2012 the plaintiff has worked at GolfTEC in North Vancouver, British Columbia. His duties include teaching golf, fitting golf equipment to individuals ("club fitting") and administrative duties such as maintaining client contacts. He earns a salary plus commission from GolfTEC and he is consistently one of his employers' top performers in sales and other measures. He also receives prize money from tournaments where he plays, usually as part of a team.

[5] There is no previous medical history of any significance. He describes himself as a "germaphobe", being averse to visits to medical facilities and reluctant to take medication.

(b) The January 6, 2013 accident

[6] The plaintiff was 32 years old at the time of the accident on January 6, 2013.

[7] In his evidence he explained that he was driving his car during his lunch hour when the accident happened. The airbags in his care deployed. The plaintiff's car was written off and there was $17,354 damage to the defendant's vehicle.

[8] The plaintiff testified that the first symptoms he noticed immediately after the accident were pain in the middle of his back and shoulders. He also described being "foggy" from the deployment of the airbags, apparently a reference to dust or powder on the bags. Immediately after the accident the plaintiff checked in with work and then went home. During the evening he experienced pain from the top of his collarbone to his shoulder and a bad taste from the airbag deployment.

[9] The plaintiff saw a doctor at a walk-in clinic on January 15, 2013 and January 22, 2013. He was prescribed a pain medication but he told one of his doctors in this litigation that he doubts that he took the medication. He had four sessions of massage therapy beginning March 22, 2013. Some of his golf students are doctors and other health professionals such as physiotherapists. The plaintiff testified that he would discuss symptoms with them from time to time and they would give him advice about exercises and positions to avoid.

(c) After the January 2013 accident

[10] In the one-to-two-year period after the accident, the plaintiff had neck pain, "neck flare-ups", reduced range of motion and difficulty sleeping. He testified that his golf swing was affected by his symptoms. He also had headaches but these were rare in the first year after the accident, increasing into the second year. He continued to get advice from his clients about what to do.

[11] The plaintiff testified that in the third and fourth year after the January 2013 accident the neck pain became more frequent and was worse. He started to have nauseousness accompanying the pain. Cleaning his house became difficult and it was difficult to operate the equipment he used for his clients' club fitting.

[12] In the past year, the headaches have become worse and the plaintiff testified that for many days he would struggle to just get through the work day. He is

nauseous more often, about two times a week, and his sleeping is worse. He uses over-the-counter medication such as extra strength Advil, one or two pills three or four times a week. He testified that he "did not see a need" for prescribed medication and he was "morally opposed to opioids."

[13] Part of the work of the plaintiff is the maintenance and development of his client base. This and other related duties are called administrative work and the plaintiff testified that he never liked doing that work. Since the January 2013 accident, he takes time to stretch and rest from neck pain and headaches and this comes out of the time for his administrative duties. His employer is now considering termination of the plaintiff from his employment because of problems completing administrative duties. The plaintiff continues to be one of his employer's top performers. He also calculates that his golf swing has been affected, causing him to lose speed and distance. He testified that he has difficulty with housekeeping because of his injuries.

C. EXPERTS

[14] The plaintiff relies on the opinions of four experts:

(a) Dr. R. Gordon, neurology and headache disorders, report dated September 6, 2017.

(b) Dr. N. Stewart, physical medicine and rehabilitation, report dated September 6, 2017.

(c) Paul Pakuluk, occupational therapist and functional capacity evaluator, report dated September 6, 2017.

(d) Darren Benning, economist, reports dated September 7, and 8, 2017.

[15] The defendant relies on an expert response report from Dr. P. Winston, dated October 10, 2017. He is an expert in physical medicine and rehabilitation.

[16] Except for Mr. Benning, all experts were cross-examined.

[17] The following are excerpts from the expert reports that provide a basis for discussing the plaintiff's claim for damages from the January 2013 accident.

[18] The following excerpt is from Dr. Robinson, a neurologist for the plaintiff, in his report of May 10, 2017:

> This man was involved in a motor vehicle accident on January 6, 2013. As a result of the accident he sustained soft tissue injury to his neck and back. I do not believe that there was any damage to his nervous system.
>
> Since the accident he has had frequent headaches. His headaches are associated with increasing discomfort in his neck and upper back often precipitated by physical activity particularly in his job as a golf professional.
>
> His headaches continue to occur most days a week usually as a mild to moderate severity. Occasional headaches have been severe with associated gastrointestinal upset and stimulus sensitivity.
>
> He did not have a past history of headache.
>
> I believe that his history and examination is consistent with a diagnosis of chronic posttraumatic headache related to soft tissue injury to the neck (whiplash) sustained in the January 6, 2013 motor vehicle accident.
>
> Headache is a common symptom following soft tissue injury to the neck. The head pain may have various characteristics that are similar to primary headaches such as migraine and tension type headache.
>
> Migraine is characterized by a throbbing discomfort which may be one-sided. Attacks are of moderate to severe intensity and may be associated with gastrointestinal upset and sensitivity to light and sound.
>
> Tension type headache is a generalized dull non-throbbing discomfort without associated features. The intensity is mild to moderate without incapacitating attacks.
>
> In the majority of cases clinical examination and investigation is normal in patients suffering from recurring headache and the diagnosis rests on the temporal relationship to trauma and the historical features reported by the patient. The headaches may reflect a worsening of pre-existing migraine or the development of head pain arising de novo from head and neck injury. Headache related to head and neck injury may be present from the outset or gradually develop in the weeks and months following injury.
>
> …
>
> Research into chronic pain suggests that there are complex psychobiological factors surrounding the acute injury that may be responsible for changes in the neurological processing of sensory impulses within the pain system. These changes are responsible for pain in peripheral structures that do not have any ongoing tissue injury.
>
> I do not believe that there is any further investigation that will be helpful. CT and MRI scanning of the head and neck would undoubtedly be normal

although degenerative changes in the cervical spine may be reported. However, these changes would be pre-existing and not responsible for headache.

The treatment of chronic headache related to head and neck trauma is usually difficult. Research is limited despite the frequency and burden of these injuries to individuals and society. As yet there is no physical therapy that has been found to be curative. At most patients will experience temporary benefit and on occasion the headaches may be more severe following such therapy. I do not believe that there is any further advice to be given other than to maintain an active lifestyle. Regular exercise directed to improving general fitness may increase the sense of well-being and ability to cope with pain.

Medications are often unhelpful in treating chronic posttraumatic headache. Analgesics, muscle relaxants and anti-inflammatory drugs are usually of little value. Migraine abortive medications (triptans) such as sumatriptan (Imitrex) may be helpful when headaches have migrainous features.

These may include a throbbing quality, worsening with activity, gastrointestinal upset and stimulus sensitivity.

There are a number of drugs used to prevent migraine attacks. These include beta-blockers, calcium channel blockers, tricyclic antidepressants, botulinum neurotoxin and anticonvulsant medications.

These medications are occasionally useful in chronic posttraumatic headache being most efficacious for patients who have an aggravation of pre-existing migraine or posttraumatic headaches with migrainous characteristics.

He prefers to avoid any prescription medication. However, in my clinical experience patients with chronic posttraumatic headache related to soft tissue injury to the neck without any past history of migraine usually do not respond to acute and preventative medications.

He has frequent discomfort and stiffness in his neck, shoulders and upper back. Physical activity aggravating these complaints is the main factor in the frequency and severity of his posttraumatic headaches. I would defer to a specialist in physical medicine with regard to further assessment, causation, management and prognosis of his neck, shoulder and upper back pain.

He has had an increase in his previous difficulties with sleep. Chronic insomnia is probably a factor in the persistence and severity of his posttraumatic headaches. His insomnia is related to feelings of anxiety as well as physical discomfort.

It is now well over 4 years since the January 6, 2013 motor vehicle accident. I believe that it is probable that his chronic posttraumatic headaches will remain unchanged indefinitely. Any improvement is dependent on more successful management of his chronic neck, shoulder and upper back pain.

Since the accident he has continued to work full time as a golf professional. He does experience increasing discomfort related to the physical aspects of his occupation primarily teaching golf. The main impact of his accident-related symptoms is a reduction in his quality of life.

> By their nature the symptoms of headache and neck pain are subjective. There are no objective measures such as a blood test or image that can document the presence, absence or magnitude of these complaints. However, this is almost universally true in patients with chronic headache disorders.
>
> The assessment of the headaches which includes diagnosis and impact can only be determined by self- report.

[19] In her report of September 6, 2017 Dr. Nairn Stewart, an expert in physical medicine and rehabilitation for the plaintiff, opined as follows:

> Mr. Moody reported that he was well with no neck or back pain or headaches prior to the motor vehicle collision of January 6, 2013. I am unaware of any information to contradict that statement. Following the collision, in which the front of his vehicle collided with the passenger side of another vehicle, Mr. Moody complained of neck and back pain and headaches. Based on this history it is my opinion that he sustained soft tissue injury to his neck and back in the collision.
>
> His rehabilitation for his injuries was entirely passive although acquaintances in the medical field gave him stretching exercises which Mr. Moody has continued on his own to the present. His symptoms have been aggravated by the physical demands of his job as a golf pro and his tendency to push himself physically despite pain.
>
> It would be advisable for Mr. Moody to continue daily stretching exercises for his neck and back. I would recommend that he be provided with a kinesiologist to establish and monitor an active exercise program which he can continue on his own once the kinesiologist is no longer involved. It would be advisable for Mr. Moody to follow the active exercise program on his own three times a week indefinitely. He will need a gym pass for that purpose.
>
> It would be advisable for Mr. Moody to pay more attention to his physical limitations and to pace his activities to avoid aggravating his symptoms and I discussed this with him.
>
> Since the collision Mr. Moody has had difficulty doing his housekeeping because of his injuries. I would recommend that he have regular housekeeping help for two hours every other week.
>
> I would recommend that Mr. Moody undergo a Functional Capacity Evaluation to delineate his physical limitations resulting from his injuries.
>
> Mr. Moody's current work situation is not sustainable. In the future it is likely that he will be limited to part time work as a golf pro because of his injuries or alternatively that he will have to change his career. I would recommend that he have vocational rehabilitation counselling toward a change to alternative employment that does not aggravate his symptoms.
>
> It has now been 4.5 years since the collision and given the duration of his symptoms it is likely that Mr. Moody will continue to experience ail of his current symptoms and limitations resulting from his injuries in the future. The

> recommended measures should help him to gain somewhat better control over his symptoms.
>
> His injuries have interfered with his work, household and leisure activities.
>
> Mr. Moody will be unable to do physically demanding work in the future because of the injuries he sustained in the collision. In sedentary work he will require the flexibility to change his work tasks and position periodically throughout his workday. He will also require good ergonomics in his work station. He may require further education to prepare himself for alternative work and in a classroom situation he will need the flexibility to get up and move around periodically. It would be advisable for Mr. Moody ultimately to work no more than a standard work week (that is, 37.5 hours) so that he can have more opportunity to rest which will likely result in better control of his symptoms.
>
> It is likely that Mr. Moody will continue to be limited with respect to his household and leisure activities much as at present in the future because of his injuries. If he is no longer working as a golf pro in the future it is likely that his tolerance for playing golf in his leisure time will improve somewhat.
>
> Mr. Moody had no pre-existing conditions which have affected his injuries.
>
> Mr. Moody will not require any surgery in future because of the injuries he sustained in the motor vehicle collision. His injuries will not result in degenerative changes in his spine or joints in the future.

[20] Paul Pakulak is an expert in occupational therapy with expertise in functional evaluation and assessment of future care for the plaintiff. His report of September 6, 2017 includes the following findings:

> (a) **Range of motion:** cervical mobility was limited with reported increased neck pain with all movements tested. Shoulder mobility was minimally limited as was lumbar mobility the latter with no reported increases in symptoms. Elbow, wrist, hand, hip, knee and ankle mobility were average.
>
> (b)**Upper extremity strength:** Reported increased neck and upper back pain with resistance in right and left shoulder flexion and abduction. Otherwise no measured upper extremity weakness.
>
> (c)**Low extremity strength:** No measured lower extremity weakness, all scores above average or within standard deviation.
>
> (d)**Vertical reaching capacity:** The plaintiff demonstrated the capacity to reach from shoulder to overhead using both arms. There was reported increased neck and upper back pain as well as increased headache intensity with overhead work. He took frequent micro-breaks to stretch and roll out the neck and shoulders. Time vertical reaching results were very fast at the start, average part way through the exam and below average at the end of the exam.
>
> (e)**Horizontal reaching capacity:** The plaintiff demonstrated the capacity to reach from waist to shoulder level using both arms. There were no reported increases in symptoms and no apparent difficulties. At the

> completion of one test their were reported increases in neck and upper back pain as well as headache intensity. His speed declined consistent with reported increases in symptoms. The timed horizontal reaching results were very fast or fast.
>
> (f) **Bending, crouching, squatting, and kneeling:** the plaintiff demonstrated the capacity to perform below waist work. He was not able to achieve "industrial standards" in some areas. He did achieve entry level competitive standards. There was reported increased neck and upper back pain as well as increased headache intensity. Timed bending results were in the expected range.
>
> (g) **Grip strength:** the plaintiff strength was within normal limits and there is no apparent unilateral weakness.
>
> (h) **Two-handed lifting:** the plaintiff could lift a maximum of 40 pounds from floor to shoulder level on an occasional basis and had the capacity to safely lift a maximum of 35 pounds from floor to knuckle level on a frequent basis. There was reported increased neck and upper back pain.
>
> (i) **Two handed carrying:** the plaintiff demonstrated the capacity to safely carry a maximum of 50 pounds over a distance of 50 feet. Compared to other men, his strength was in the 19th percentile. There was reported increased neck and upper back pain with trials above 30 pounds.
>
> (j) **Sitting tolerance:** there were no noted limitations.
>
> (k) **Standing tolerance:** there were no noted limitations.
>
> (l) **Walking tolerance**: the maximum walking tolerance was within average range, his speed was above average initially and remained consistent. There were no noted difficulties are reported increases in symptoms.
>
> (m) **Level of effort:** formal screening procedures demonstrated that the plaintiff put forth a high level of effort and consistent effort.

[21] Mr. Pakulak's opinion about the plaintiff's overall functional capacity is stated as follows:

> In my opinion, Mr. Moody is best suited for activity requiring up to modified medium level strength. He demonstrated the strength sufficient for some functional strength activity in the modified heavy range but he did not demonstrate the capacity to sustain that level of activity. He demonstrated functional limitations specific to prolonged and repetitive overhead work, prolonged and repetitive positioning of the neck and shoulders for work in front of the body, and prolonged and repetitive below waist level work. Given his response to testing (significant increases in pain levels during the testing and a reduction in work pace and capacity over the course of the assessment) it is anticipated that prolonged activity above a modified medium level and/or without provisions for the above limitations will adversely impact his productivity and safety.

[22] Mr. Pakulak's opinion about the physical demands/characteristics of work:

In my opinion, Mr. Moody demonstrated the physical capacity to be employable at up to a modified medium level on a full time and part time basis with restrictions and limitations as noted above. Below waist level work, overhead work and prolonged positioning of the neck and upper extremities for work in front of the body should be kept to an occasional basis. He would not be well suited for work that does not allow him to move about and change positions frequently. If this provision is not available he may not be able to sustain a productive work pace in full time work.

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 forgiven his physical limitations is significantly limited.

With respect to his work as a Golf Teaching Pro and Club Fitter, the physical demands of that work are described in the NOC under the category of Program Leaders and Instructors in Recreation and Sport (5254) and in the DOT under the category of Instructor, Sports (153.227-018). Given the descriptions in the NOC and DOT, his reported job demands and my experience working with others in this type of occupation the work would be best described as requiring light to medium level strength, prolonged standing, prolonged sitting, walking, multiple limb coordination, other body positions, verbal interaction and near and far vision. Based on he testing results, It is my opinion that he did demonstrate the capacity to complete this work on a full time basis at a gainful level. Testing results suggest that the demand for prolonged and repetitive positioning of the neck and shoulders for work in front of the body and bending will continue to result in increases in symptoms and reduced capacity and productivity over time (especially outside of work). To his credit he has continued to work in this occupation on a greater than full time basis despite his ongoing difficulties. His ability to continue in this manner will depend largely on his ability to manage symptoms and his willingness to continue to work with increases in symptoms and reduced activity levels outside of work.

It should be noted that his ability to tolerate the movements associated with repeated golf swings for demonstration purposes was not assessed as this would have required equipment not available in the clinical setting. For this reason, it is also not possible to provide an opinion regarding his ability to play golf or to practice based on the results of this assessment.

The following chart outlines this writer’s opinion of his capacity to complete this work based on the results of this assessment.

Physical Demands	Frequency	Force Required	Demonstrated Capacity	Comments
Sitting	Frequent		Able	
Standing	Frequent		Able	
Walking	Occasional		Able	
Reaching Out	Frequent		Restricted	
Reaching Overhead	Occasional		Able	
Gripping/Pinching	Frequent		Able	
Handling	Frequent		Able	
Bending/Stooping	Frequent		Restricted	
Crouching	Occasional		Able	
Kneeling	Occasional		Able	
Lifting	Occasional	**40** lbs.	Able	
Carrying	Occasional	**40** lbs.	Able	

> With respect to avocational activities he did demonstrate the capacity to complete most aspects of light household cleaning chores required in his present residence. He demonstrated limited capacity for the more physically demanding household chores consistent with his reported ongoing difficulties.

[23] Dr. Paul Winston, an expert in physical medicine and rehabilitation for the defendant did not examine the plaintiff and his report is dated October 10, 2017. He was responding to the report of Dr. Stewart. Dr. Winston's opinion includes the following:

> I respectfully disagree with Dr. Stewart's opinions. Other than some tenderness in the neck, she found no abnormalities. The functional capacity evaluation found him able to do his job. As noted his job has numerous aspects; he is a teacher, a salesman and a coach. As he only missed approximately two days of work and has worked with little time off since that time I am frankly baffled by the comment that he will be unable to work in his line of work and must be retrained. Mr. Moody has been doing his job for over four years with hours that far exceed her suggestion of 37.5. Mr. Moody has not sought medical attention for his problems. I do not think I recall ever seeing a case of someone claiming disability but having had no treatment. Dr. Robinson was quoted by Dr. Stewart as saying he probably has permanent headaches and that his neck should be treated. Dr. Stewart found no abnormalities in the neck other than some tenderness. His neck also did not make cause his functional capacity evaluation to restrict his ability to perform his own job.
>
> [paragraph struck as being inappropriate for a response report under Rule 11-6(4)].
>
> While I have not examined Mr. Moody, I have not been provided with any objective evidence of impairment. There is no medical imaging to suggest impairment. There are no medical treatments to suggest impairment nor is there any suggestion that he underwent a rehabilitation program. It is a contradiction to conclude that someone is permanently impaired or disabled from her job when they are actually doing their job for over four years. I do

> not understand why a functional capacity evaluation was suggested. If someone does their job and is a top performer we know they can do the job. This was proven by the functional capacity evaluation. Hence I do not understand why it is ordered in the first place.
>
> There are subjective reports of pain. As a specialist that works extensively with soft tissue injury and headache, all patients, no matter what they self-report, should be given an adequate treatment plan. There is excellent step wise management for chronic headaches and migraines as well as neck pain. Even if Mr. Moody's self-reports reflected his claims, there would be ample opportunity to treat and offer strengthening. Despite being deconditioned, he met the requirements of his functional capacity evaluation. One would therefore extrapolate if he underwent a treatment protocol and strengthened and addressed his self-reported headaches and sleeping problems that he would be much better. There are well established treatments for both.
>
> Headache and neck pain are intermittently intertwined. Lack of sleep can also affect function. I would immediately order a sleep study to assess his qualities of sleep and to see if there is a sleep misperception. We have no objective measure of his sleep. There are many ways to treat sleeping problems without requiring medications. This includes melatonin and the use of cognitive behavioural techniques. Sleep hygiene, however is the starting point in easy to apply.
>
> …

D. ANALYSIS

[24] As above, the defendant admits liability for the January 6, 2013 accident.

[25] With respect to the quantum of damages the following heads of damages are to be considered:

(a) Special damages;

(b) Past wage loss;

(c) Non-pecuniary damages;

(d) Future income loss; and

(e) Future care.

[26] My discussion of those issues follows.

(a) Special damages

[27] The plaintiff seeks special damages in the amount of $2,871. The defendant submits no special damages are justified.

[28] The plaintiff's claim is $2,471 for a new bed and four pillows and $400 for massage therapy. The bed and pillows were purchased on April 18, 2015. The massage therapy took place over four sessions (at $100 each session) according to a single invoice dated November 22, 2017. The actual dates of the therapies are not available. There is no claim for the massage therapy in March 2013.

[29] Housekeeping costs from the January 2013 accident to the date of trial, December 2017, are included under housekeeping in the plaintiff's submission. I will consider them here.

[30] The plaintiff testified that he needed the new bed to sleep better but he also said his previous bed had been "crappy." He sleeps with two pillows on each side when he is sleeping. He also agreed in his evidence that no doctor or other health professional advised him on or about early 2015 (or anytime) to get a new bed and pillows.

[31] The available medical evidence is from Dr. Robinson, Dr. Stewart and Dr. Winston. They did describe sleeping problems but this was in May and September 2017, after the purchase of the bed and pillows in 2015. Neither refer to the plaintiff having previously purchased a new bed and pillows or whether they made any difference to the sleep of the plaintiff.

[32] With respect to massage therapy, Dr. Robinson does not refer to this as an appropriate treatment modality in this case. The November 2017 massage therapy took place after Dr. Stewart's assessment in September 2017 but she too makes no recommendation or reference to massage therapy. Dr. Winston, an expert for the defendant, does not mention the bed, pillows and massage therapy in his report of October 2017.

[33] Special damages are subject only to a standard of reasonableness but some evidence of medical justification is required as a factor going to reasonableness (*Redl v. Sellin,* 2013 BCSC 581, at para. 55). In the subject case I am unable to find a medical justification for the claim for the bed, pillows and massage therapy.

[34] With respect to housekeeping assistance from the time of the January 2013 accident to the December 2017 trial, the plaintiff testified that he had difficulty cleaning his 750 square foot apartment. His mother or a friend helped him some times. There is no evidence he paid for any assistance and there is no evidence as to the frequency of assistance he received from family and friends.

[35] As below there is medical support for future home assistance and I have found that home assistance in the future is justified at two hours per month over five years. I accept there is some medical justification for special damages for home assistance by transposing Dr. Stewart's opinion on future home assistance to past assistance. However, again, there is no detailed evidence of the frequency of past care.

[36] As will be seen, the decision on future home assistance is given in the context of the plaintiff working with a kinesiologist and developing his own plan to increase strength and conditioning and to permit him to concentrate on that goal. It is not given on an ongoing and indefinite basis. I conclude past home assistance would have been less intense and I conclude that one-hour per month is appropriate. On the basis of $29.50 per hour per week this is $354. For the period January 2013 to December 2017, essentially four years, the total is $1,416.

[37] Total special damages are $1,416.

(b) Past loss of income

[38] The plaintiff claims $15,000 for past loss of earning. He relies on *Suthakar v. Humble,* 2016 BCSC 155, and the authorities cited therein. The defendants say no damages are justified under this head.

[39] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, at para. 30). As well, such a claim is for the loss of earning capacity rather than the loss of actual income, although the loss of income can be a way to measure loss of capacity (*Personal Injury Damages in Canada* at p. 205-06; see also *Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649, at p. 658, [1968] H.C.A. 9), cited in *Rowe,* at para. 32). In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, 2014 BCSC 1329, at para. 165).

[40] As above the plaintiff earns money from his work (based on a salary and bonuses) and from tournament winnings. The following is the evidence about the plaintiff's income before and after his January 2013 accident:

	Income*	Tournaments**
2011	$13,362	$2,062.50
2012	$23,318	$670
2013	$39,844	$1,354
	[accident: January 6, 2013]	
2014	$39,533	$1,490
2015	$41,565	$1,000
2016	$56,367	$1,295
2017	not available	$1,100

*Line 101, income tax returns

**The winnings from tournaments are complicated by fees, expenses and sharing with team members.

[41] There are difficulties for the plaintiff in this evidence. As can be seen, the plaintiff's employment income has risen steadily beginning in 2013, the year of the accident. The accident took place at lunch time on January 6, 2013 so he was able

to earn money for virtually all of 2013. He testified that he reported back to work after the accident on January 6, 2013, but he took the rest of the day off to recover. He also said he took “a couple of days” off work. There is no evidence that the plaintiff lost any income from this absence. This may be because his working hours are flexible to accommodate the schedules of his clients.

[42] Tournament earnings appear to have been more in the year of the accident, 2013, than in the year before, 2012. Other than that observation, it is difficult to see a pattern of tournament earnings that assists the plaintiff.

[43] Despite the evidentiary issues in this claim for damages I accept the plaintiff was absent from work for two days because of the January 2013 accident. The evidence does not explain the plaintiff’s hourly or daily rates of pay and the plaintiff’s claim for what appears to be $15,000 for past wage loss is greatly exaggerated.

[44] Using the 2013 earnings of about $40,000, monthly earnings would be $3,333, weekly earnings would be $833 and daily earnings would be $166. Using these figures, I assess the plaintiff’s claim for damages for two days past income loss at $350.

(c) Non-pecuniary damages

[45] The plaintiff seeks damages for non-pecuniary loss in the amount of $110,000. Cases cited by the plaintiff to support this figure include: *Athey v. Leonati*, [1996] 3 SCR 458; *Suthakar;* and *Forder v. Linde,* 2014 BCSC 1600.

[46] According to the defendant, total non-pecuniary damages in the range of $35,000 to $45,000 are appropriate in this case. Cases relied on include: *Rogalsky v. Harrett,* 2014 BCSC 1255; and *McKenzie v. Mills,* 2013 BCSC 1505. The defendant also submits that the plaintiff failed to mitigate his damages by unreasonably failing to seek actual medical treatment.

[47] An award of non-pecuniary damages “acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible,

the pain and suffering that the plaintiff has endured and will have to endure in the future" (*Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 106). The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal (*Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804):

> [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54). [Emphasis omitted.]

[48] The ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life; "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per Dickson C.J. dissenting, but not on this point, at para. 91); see also *Boyd v. Harris*, 2004 BCCA 146, at para. 54).

[49] In the subject case, the plaintiff was born in 1981 and he was 32 years old at the time of the 2013 accident. He has been fortunate enough to develop his talent as a golfer into a post-secondary scholarship and then into full time employment. He also participates in tournaments that provide him with modest winnings. In addition, as the plaintiff testified, it is clear that golf gives him self-confidence and is an

important part of his identity; in his evidence, he described playing golf as his “Zen” moment.

[50] Measured by the damage to the vehicles involved (the plaintiff’s vehicle was a write-off and there was damage in excess of $17,000 to the defendant’s vehicle) the January 2013 accident was of some severity. However, as sometimes happens, the consequences for the plaintiff were, fortunately, not severe.

[51] The plaintiff testified that immediately after the accident he felt pain in the middle of his back and in his shoulders. This continued into the evening and night. He did not return to work on the day of the accident and he told Dr. Robinson that he was off work for a “couple of days.” He attended at a walk-in clinic on January 15 and January 23, 2013. He was prescribed pain medication but he told Dr. Robinson that he doubted that he took it. He had four massage treatments in March 2013. Dr. Winston stated that there were no references to headaches in the record he saw from the walk-in clinic or massage therapist.

[52] He did not lose any other work and, indeed, he continues to be a top performer for his employer. He took over the new duties of club fitting after the accident. He continues to work as a golf pro and instructor, albeit with symptoms as discussed below, including headaches and sometimes nauseousness.

[53] The plaintiff testified that a number of his golf clients were doctors, including specialists, and also physiotherapists, and they answered his questions or noticed he was not well and they suggested exercises for him. The times and frequency of the people who the plaintiff talked to are not in evidence. I accept that the plaintiff talked to his clients who were medical professionals and that they gave him some advice from time to time.

[54] Nonetheless, the fact that there are no records of medical assessment or treatment of the plaintiff for his injuries from the March 2013 accident until he obtained expert evidence for his trial is significant. He saw Dr. Robinson, an expert in neurology and headaches, in May 2017 and Dr. Stewart, a specialist in physical

medicine and rehabilitation medicine, in September 2017. He also saw Dr. Winston in October 2017. Typically, in this type of litigation, there is information, sometimes extensive information and chart entries, from a plaintiff's family physician. In the subject case, this evidence is absent.

[55] This situation creates a number of complications for the plaintiff. First, it requires the doctors that he saw in 2017 to make judgments about the medical consequences of the 2013 accident with limited medical information about his history. The primary, or only, source of information available to the doctors for the 2013 to 2017 period is the account of the plaintiff four years after the fact. For example, Dr. Robinson stated in his May 2017 report that "[e]ver since the accident [the plaintiff] has had headache, neck, shoulder and upper back pain." The only way that this could be known is from what the plaintiff told Dr. Robinson. This is not so much a credibility issue as a problem establishing continuity of medical history.

[56] I conclude that the absence of contemporaneous medical information about the plaintiff between 2013 and 2017 raises an issue of the weight that is to be given to the plaintiff's expert evidence.

[57] A further conclusion that can reasonably be drawn from the absence of medical information between 2013 and 2017 is that there were minimal injuries caused by that accident. Accepting that the plaintiff talked to his golf clients who had medical training, his own evidence is that none of them suggested making an appointment for an examination or treatment. It cannot be the case, as urged by the plaintiff, that conversations on the golf course with people with medical training is the same as seeing those people in their offices and undergoing an examination. Put another way, even on the evidence of the plaintiff, these medical professionals did not think it necessary for him to be examined in their office.

[58] As partial explanation for this, the plaintiff says he has an aversion to doctors and he is a "germaphobe." I accept the plaintiff's evidence that he is uncomfortable seeing doctors but he has seen them for other reasons in the past (for example, an abscessed tooth). He also saw three specialists and underwent a functional

evaluation for this litigation without any recorded problems. He apparently did not take pain medication prescribed when he attended at a walk-in clinic in January 2013 but he currently takes Advil for pain. I conclude that the plaintiff would have sought out further medical attention after March 2013 if the injuries he suffered from the 2013 accident had been serious enough, as any sensible person would do.

[59] According to the defendant, the lack of medical attention at the time of the January 2013 accident means that the plaintiff did not take reasonable steps to mitigate his injuries. There is a logic to that submission but, as above, I conclude that the situation is one of weight to be given to the plaintiff's expert evidence rather than of mitigation.

[60] Turning more specifically to the expert evidence, Dr. Robinson has opined that the plaintiff's history is "… consistent with a diagnosis of chronic posttraumatic headache related to soft tissue injury to the neck (whiplash) sustained in the January 6, 2013 motor vehicle accident." Similarly, Dr. Stewart reviewed the plaintiff's history and stated in her report of September 6, 2017 that, "[b]ased on this history it is my opinion that he sustained soft tissue injury to his neck and back in the collision."

[61] For his part, Dr. Winston certainly disputes that the plaintiff has any ongoing impairment. However, he does not opine on the specific issue of causation. He notes the initial medical treatment at the walk-in clinic and he apparently had the chart from the physiotherapist available to him. The latter was two months after the accident, in March 2013, and there is no reference on the chart to headaches. He notes that the plaintiff "never sought medical attention again" after March 2013 and he does not believe there was impairment after that. Dr. Winston does not state it expressly, but I take his opinion to be that there was an accident and it did cause some mild soft-tissue injury. However, there was no impairment to speak off after March 2013.

[62] From these opinions, I conclude that the plaintiff did suffer a soft-tissue injury to his neck from the January 2013 accident, as described by Dr. Robinson. I conclude that headaches are included in this assessment. As above, Dr. Winston's

opinion is broadly consistent with this at least on the initial causation issue (but he is very skeptical about any ongoing impairment). In her opinion, Dr. Stewart includes an injury to the back but in cross-examination, she agreed this was possible but not probable. It is also not the opinion of Dr. Robinson. I do accept the opinion of Dr. Robinson that "[c]hronic insomnia is probably a factor in the persistence and severity of his posttraumatic headaches".

[63] The plaintiff's notice of civil claim identifies injuries to his neck, shoulders, back, headaches and other injuries "as counsel may advise." As above, I accept there were injuries to the neck and I include some injury to the shoulders. I also accept headaches are causally related to the January 2013 accident. For the reasons above, I do not accept any back complaints as causally related to the January 2013 accident.

[64] In his evidence, the plaintiff described neck problems, headaches and problems sleeping the first two years after the accident. In years three and four the neck pain was worse and the nauseousness he had infrequently in the first two years with his headaches became more frequent. In year five his headaches have become worse and for most days he has been "just trying to get through the day." He gets the nauseousness about twice a week now. He uses extra-strength Advil three or four times a week. He does not see a need for anything stronger and he is opposed to the use of opioids. A good night's sleep would be four to five hours because of headaches and neck pain. He testified that he now has difficulty cleaning his small apartment.

[65] The plaintiff continues in his pre-accident employment as a golf-pro with some additional duties. He testified that he does not like the administrative side of his work such as developing and keeping contact with clients. He also stated that he was falling behind in his administrative work and this has put his employment in jeopardy. His supervisor testified and, even though the plaintiff continues to be a top performer for the company across Canada, the supervisor confirmed this. This is discussed further below under future loss of income.

[66] During his evidence, the plaintiff described and demonstrated in some detail the different parts of a golf swing. This is obviously a complex set of physical movements and application of force using many different parts of the body. He described problems with the neck and back while he demonstrated a golf swing. He explained the difficulties he had at some stages of his demonstrated swing but he was able to go through all the motions and with minimal apparent pain behaviour. In cross-examination he was asked why he did not rub his neck during the demonstration, as he testified he does that whenever he has neck pain but he also said rubbing the neck is "not the solution." Despite the symptoms described by the plaintiff, his supervisor testified that he observed the plaintiff playing and practicing golf and he currently has a "beautiful" swing.

[67] Friends and relatives of the plaintiff testified that they observed the plaintiff guarding and rubbing his neck and they described him as more withdrawn since the 2013 accident. His mother testified that the plaintiff no longer golfs with her because of his impairment. A friend sometimes helps with housework.

[68] Looking at the authorities of the plaintiff, in *Suthakar* the plaintiff was awarded $70,000 in non-pecuniary damages following a vehicle accident. She had neck and shoulder pain and headaches from an accident. She was in her early 30's and had worked two jobs with long hours before the accident. There are some differences between this case and the subject litigation. In *Suthakar* there were no significant periods when the plaintiff did not attend for medical treatment. In addition, she was off work for three to four months after the accident (para. 22) and she ultimately quit one of her jobs because of ongoing problems with the accident (para. 28).

[69] In *Benson,* the plaintiff had ongoing headaches and neck pain and he was awarded $110,000 for non-pecuniary damages. In my view that award can be distinguished by the finding of the trial judge of minor cognitive difficulties including coping with mental demands of the plaintiff's work (he hit his head on the door frame in the accident: paras. 18, 33, 94), there was some time away from work after the accident (paras. 21-23), "considerable emotional distress" (para. 26), anxiety while

driving (para. 27), and tinnitus (para. 28). In addition, there was also a complete medical history without, as in the subject case, a four-year period without medical treatment.

[70] The authorities of the defendant include *Rogalsky* where a 58 year old plaintiff with some pre-exiting problems was awarded $35,000 for non-pecuniary damages. As a result of the accident in that case she had headaches, soft tissue injuries to her neck, upper back and right shoulder, including a rotator cuff tear. The trial judge stated that “significant caution” was required when evaluating the plaintiff’s evidence because the objective evidence did not support all of her complaints (para. 40). As well as credibility issues the failure to call evidence from her doctor was troubling (paras. 42, 44).

[71] In *McKenzie,* another judgment relied on by the defendant, a 40-year-old plaintiff was awarded $40,000 for non-pecuniary damages for neck and right shoulder injuries and short-term memory loss attributed to the accident in that case. She had been very active in sports before the accident but her participation after the accident was restricted (para. 51). She also had restrictions in her personal life and employment and she could not work for some time after the accident (para. 55).

[72] Considering the evidence in the subject case in the context of these authorities, I conclude that the judgments relied on by the defendant are a better indicator of the range of damages here. The authorities relied on by the plaintiff do not account for the four-year period this plaintiff had without medical treatment and his explanation that he talked to his golfing clients is not sufficient to offset that problem. In addition, in the authorities relied on by the plaintiff, there were significant periods of absences from work and, in one case, cognitive difficulties.

[73] Overall, I conclude that non-pecuniary damages in the amount of $55,000 are appropriate in this case.

(d) Future loss of earning

[74] According to the plaintiff, the loss of his future earning capacity justifies damages in the amount of $199,101 based on a loss of a capital asset. He relies on *Suthakar* and the authorities cited therein.

[75] The plaintiff's calculation includes two figures. First, it is based on one year's salary for each of the three decades the plaintiff has remaining in his working life. Using a salary of $56,367, this amount is $169,101. Also included in the total of $199,101 is tournament earnings the plaintiff says he will lose in the future because of the 2013 accident. This second figure is $30,000.

[76] The defendant submits that no damages for loss of future earning capacity are justified.

[77] The following sets out the general approach to the assessment of future earning capacity (*Tsalamandris v. McLeod*, 2012 BCCA 239, at para. 31):

> [31] The appellants do contest how the trial judge then went about assessing that loss [of future earning capacity]. The trial judge set out to apply the principles canvassed in *Rosvold v. Dunlop,* 2001 BCCA 1, saying at para. 259:
>
> > The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:
> >
> > 1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
> >
> > 2. a plaintiff is entitled to be put in the position she would have been but for the accident;
> >
> > 3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
> >
> > 4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
> >
> > 5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;

> 6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
>
> 7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[78] Loss of future earning capacity can be quantified on an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140, at para. 32. The two approaches were usefully summarized by Madam Justice Warren in *Hosseinzadeh v. Leung,* 2014 BCSC 2260, as follows:

> [126] The earnings approach is generally appropriate where the loss is more easily measured, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate what the plaintiff's likely future earning capacity will be: *Perren*, at para. 32; *Clemas v. Gabrlik*, 2013 BCSC 1412 at para. 170. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Clemas*, at para. 170. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.
>
> [127] The capital asset approach, typically used in cases where the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

[79] The capital asset approach is not restricted to cases where the plaintiff has no clear earnings history. It is more appropriate than the earnings approach in any case "where the loss, though proven, is not measurable in a pecuniary way" (*Perren*, at para. 12). This was discussed further in another previous judgment (*Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), cited in *Perren* at para. 11):

> ... In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok* [(1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.), Taggart J.A., speaking for the Court, held that the correct approach was to consider

> the factors described by Finch J., as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the *Brown* factors with approval:
>
> > [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Golaiy*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:
> >
> > > The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
> > >
> > > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> > >
> > > 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> > >
> > > 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> > >
> > > 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[80] In the subject case there is a factual issue with respect to any loss of future earnings of the plaintiff. He has worked as a golf pro and instructor with GolfTEC since 2012. He currently works Sunday to Thursday and his hours can be irregular, depending on lessons. He also does club fitting and he has administrative duties, the latter primarily developing and maintaining client relationships. About six hours in a day is taken up with lessons and about two hours with administrative work. His supervisor, Donald Davies, testified and Mr. Davies estimated that each instructor at GolfTEC has a client base of 60 to 85 students.

[81] According to Mr. Davies, the plaintiff is the "best in Canada" as a teacher. By this, he means that students can see progress in their game right away and they progress through the program faster with the plaintiff than with other instructors. He is in the top five for overall sales in Canada. In 2015-2016, the plaintiff was the best

in his company at converting initial customer contact into sales. Mr. Davies described the plaintiff's teaching ability as "exceptional" and "world class".

[82] However, Mr. Davies also testified that the plaintiff is poor when it comes to his administrative duties. He "doesn't get it done" and he is the worst instructor for losing clients. In general, the plaintiff is the "best in the bay," where he teaches, and "worst out of the bay," when he is doing administrative duties. Mr. Davies explained that the plaintiff's performance has become a problem and he has been told to change or the "relationship ends."

[83] The plaintiff accepts he has problems with administrative work. He testified that he has to do stretching exercises for his neck and shoulders when he should be doing administrative work. He estimated that he loses 15 to 90 minutes a day with exercises and he "only has so much energy." Sometimes he gets nauseous and he even has to vomit. Dr. Robinson relates the nauseousness to the headaches. The plaintiff acknowledges that he never liked doing administrative duties, they were never "my best thing" but, before the 2013 accident, he got them done.

[84] There are some difficulties with this evidence. First, it is not at all clear why a business that relies so much on client satisfaction would terminate the employee who is the best at satisfying clients. When asked why the employer could not work out a different arrangement to take advantage of the plaintiff's strengths, Mr. Davies did not have an answer. And, as put to the plaintiff in cross-examination, employees with legitimate disabilities are entitled to be accommodated by employers (to the point of undue hardship to the employer) under human rights protections, without losing their employment. The plaintiff's answer to this is that any human rights accommodation would not be consistent with the culture of his employer. This is more a matter for the employer but that is not a satisfactory response. Mr. Davies was not asked about this.

[85] It also has to be pointed out that, on the plaintiff's own evidence, it is not clear why he cannot do some administrative duties and do his exercises. Mr. Davies testified that administrative duties take up about two hours of the workday and the

plaintiff testified that he needs 15 to 90 minutes a day for his exercises. I accept that the plaintiff requires some time during the day to exercise his neck but I also conclude that he has also continued his pre-injury dis-interest in administrative duties, a necessary part of his work. That is, the plaintiff retains some control over how much time he spends on administrative duties.

[86] In any event, the plaintiff obviously likes his work, he is very good at it and he does not say he will be losing his employment because of the injuries he suffered in the 2013 accident. Instead, he says that, using a capital asset approach, his ability to work is less than before the accident.

[87] Looking at earnings as one way to measure any loss suffered by the plaintiff, the overall earnings and tournament winnings of the plaintiff since 2011 have been:

	Income*	Tournaments**
2011	$13,362	$20,625
2012	$23,318	$670
2013	$39,844	$1,354
	[date of accident: January 6, 2013]	
2014	$39,533	$1,490
2015	$41,565	$1,000
2016	$56,367	$1,295
2017	not available	$1,100

*Line 101, income tax returns

**The winnings from tournaments are complicated by fees, expenses and sharing with team members.

[88] As can be seen, in 2016 the plaintiff earned $33,049 more than he did in 2012, the year before his 2013 accident. His increased earnings are partly explained by taking on the new duties of club fitting which the plaintiff managed without difficulty. He continues to be a top performer in teaching and sales but problems with his administrative duties continue. With respect to tournament winnings, the accident occurred on January 6, 2013 so any limitations from the accident applied for

essentially the whole year. But his tournament winnings that year were more than double those of the year before. They have decreased slightly since 2013.

[89] There is also the functional capacity evaluation of September 6, 2017. The evaluation assessed the plaintiff's ability to perform the duties of his current position. I reproduce again the conclusion of the assessment:

> Based on the testing results, *it is my opinion that he did demonstrate the capacity to complete this work on a full time basis at a gainful level.* Testing results suggest that the demand for prolonged and repetitive positioning of the neck and shoulders for work in front of the body and bending will continue to result in increases in symptoms and reduced capacity and productivity over time (especially outside of work). To his credit he has continued to work in this occupation on a greater than full time basis despite his ongoing difficulties. His ability to continue in this manner will depend largely on his ability to manage symptoms and his willingness to continue to work with increases in symptoms and reduced activity levels outside of work.
>
> [Emphasis added].

[90] This opinion was accepted by Dr. Stewart, the plaintiff's expert in physical medicine and rehabilitation, in her cross-examination. Dr. Robinson, the plaintiff's expert in neurology and headaches, testified that he would not advise someone in the plaintiff's position to quit their job. This opinion also accords with plaintiff's views of his work situation: golf is an important part of his personal identity, he is good at it and he wants to continue playing and teaching.

[91] The FCE also described some limitations for the plaintiff as a result of the 2013 accident. According to Mr. Bakulak, the plaintiff had "functional limitations specific to prolonged and repetitive overhead work, prolonged and repetitive positioning of the neck and shoulders for work in front of his body, and prolonged and repetitive below waist level work." He would not be "well suited for work that does not allow him to move about and change positions frequently". His "… overall ability to compete for work in an open job market is significantly reduced due to his ongoing physical limitations."

[92] Overall, the evidence is that the plaintiff currently has minimal limitations from the 2013 accident with respect to his current employment. Fortunately, he is capable

of performing the duties of that position at a gainful level. Indeed, he has taken on increased duties since the accident and his income has increased significantly.

[93] Having said that, the evidence is also that the plaintiff has some continuing symptoms as described in the functional evaluation report and expert evidence. While he can continue to work in his current position he cannot perform at the level he could before the accident. He has a sophisticated knowledge of the physics of golf and he has calculated that he has lost 10-15 miles per hour in his swing and this translates into a loss of 37 yards in the air. He does have neck and headache problems that restrict his movements and he has insomnia and nauseousness. I conclude that these limitations result in a real and substantial possibility of loss of future earning capacity. As described in the FCE, his limitations reduce his ability to compete for work in the general labour market.

[94] As to the measure of that loss, I do not accept the plaintiff's calculation based on three years salary, using the 2016 income. In my view, that overstates the loss of his earning capacity by a considerable degree. I also note that his earnings have increased since the 2013 accident; the 2016 earnings were more than double those in 2012. He may be less capable overall from earning income from all sources but, to his credit, he has done very well in his current employment. I accept that there is real and substantial possibility of some loss in the future but I also conclude that the evidence does not support the conclusion that it would be a significant loss.

[95] In summary, the plaintiff is currently 36 years old and he works at a position that gives him considerable satisfaction and he is very good at it. He has a number of years of work ahead of him and there are some limitations from the 2013 accident that he will carry into those years. However, it is not possible to predict the effect of the 2013 injury on his entire career. He may complete his working life as a golf pro with no impact on his earnings. Alternatively, he may move into other work where his limitations will affect his earnings. There have been about four years since the accident and Dr. Robinson has opined, "it is probable that his chronic posttraumatic headaches will remain unchanged indefinitely." Any improvement will depend on

more successful management of the affected areas. This is a positive prognosis but not one that puts the plaintiff in the position he was in before the 2013 accident.

[96] I conclude that some damages for future loss of income is justified. I assess those damages as $50,000, representing approximately one year of income. This is not a precise calculation of the plaintiff's future loss of income but an assessment based on current information.

(e) Cost of future care

[97] The plaintiff seeks damages for future care of $12,141. The decision of *Suthakar* is relied on. The defendant says that no damages for future care are justified.

[98] A useful summary of the approach to be taken when considering the cost of future care is that of McLachlin J. (as she then was) in a previous decision of this Court (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at p. 83-84 (S.C.)):

> ... In *Andrews* [*Andrews v. Grand & Toy (Alta) Ltd*., [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577], supra, Dickson J. (as he then was) distinguished damages for cost of future care from damages for non-pecuniary loss in the following terms at p. 603 [W.W.R.]:
>
> > The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.
>
> The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews*, supra, Dickson J. said at p. 586:
>
> > ... to the extent, within reason, that money can be used *to sustain or improve the mental or physical health* of the injured person it may properly form part of a claim. [emphasis added]
>
> In *Thornton* [*Thornton v. School Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607], supra, the court, in defining "optimal care" stated at p. 609 [W.W.R.]:
>
> > ... it is clear from the *medical evidence* that the term merely connotes an ongoing practical level of orderly care in a home environment. [emphasis added]
>
> If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*,

> [1982] 3 W.W.R. 385, 20 C.C.L.T. 64, 14 M.V.R. 212, 15 Man. R. (2d) 35 (C.A.), leave to appeal to the Supreme Court of Canada refused [17 Man. R. (2d) 180n, 45 N.R. 180]. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership ... and greater opportunities for gardening, owning a pet, and more space for hobbies' ". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
>
> These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:
>
> > An award must be moderate, and fair to both parties … But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.
>
> This then must be the basis upon which damages for costs of future care are assessed.
>
> It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[99] In the subject case, as above, the plaintiff's history with health care and related support services is not extensive. After the January 2013 accident, he attended two sessions of massage therapy and then discontinued it. He testified this was for financial reasons. In his evidence, he agreed that he never asked the defendant's insurance carrier about payment for massage therapy and he denied that he was told they would pay for it. The plaintiff testified that he had conversations with golf clients who were doctors and physiotherapists about his injuries but none of these conversations led to actual appointments, assessments or treatments. As well, what the health professionals said is hearsay and we do not know when these conversations took place or their frequency. As described by Dr. Stewart, the plaintiff's rehabilitation was "entirely passive."

[100] The plaintiff relies on the expert report of Mr. Pakulak who applied the recommendations of Dr. Stewart. The latter recommended daily stretching exercises

with the assistance of kinesiologist and a gym pass. She also recommended a functional capacity evaluation and Mr. Pakulak did this. The specific items of care discussed by Mr. Pakulak were exercise therapy, a fitness pass, vocational rehabilitation services and homemaking services.

[101] The defendant relies on the expert opinion of Dr. Winston, who did not examine the plaintiff. He has provided a report in response to the one of Dr. Stewart. As can be seen above, Dr. Winston is highly skeptical of any claim by the plaintiff for future support. The plaintiff's history is described by Dr. Winston as "unusual", apparently because there was an accident with deployed airbags, minimal medical treatment at the time and now ongoing symptoms: "I do not think I recall ever seeing a case of someone claiming disability but having had no treatment." He could not understand why a FCE had been suggested. Dr. Winston disagrees with the conclusions of Dr. Stewart and he interprets her report as finding only some tenderness in the neck. As well, Dr. Winston pointed out that the FCE concluded the plaintiff could do his work, Dr. Winston could find no basis for home care assistance and he stated he would not have someone with pain working on a strengthening program with a kinesiologist. He nonetheless accepted that kinesiology would be of benefit to the plaintiff.

[102] Taken overall I conclude that the circumstances here do not justify an extensive program of future care. Simply put, except for two massage therapy sessions in March 2013 about two months after the January 2013 accident and some conversations the plaintiff had with his golf clients, there has not been a program in place to date. While he has not fully recovered, he has done well by this regime.

[103] Turning to specific future care issues, with respect to the claim for vocational rehabilitation services, the plaintiff takes considerable pleasure in his current employment and he is, by all accounts, very good at it. He has no plans to change his employment and his income has increased substantially since the 2013 accident. He did testify that his employer intends to terminate his employment if he does not

improve his administrative work. However, as above, it is not at all clear why the employer would dismiss its best employee. In addition, the plaintiff had problems with administrative work before the January 2013 accident and he has some control over how well and how much he does of that work. There is something of a causation difficulty accepting that the plaintiff's ability to do administrative work has been impaired by the accident, when he was not particularly good at administrative work before the accident. Finally, the time he says he needs to stretch and do other things to manage his symptoms is less than the time he says he requires for administrative work. I conclude that there is no medical justification for vocational rehabilitation services.

[104] With regards to physical exercise, I note that the plaintiff's work requires him to be physically active; he is in fact an athlete. However, as noted by Dr. Robinson and Dr. Stewart there is some remaining tenderness in the plaintiff's neck and shoulders and there are the headaches, sometime accompanied by nauseousness. I conclude some assistance to the plaintiff is medically justified in order to support the plaintiff's continued employment in his current position. The expectation is that he will learn techniques to perform his work duties and to increase his overall fitness. Dr. Winston is supportive of some time with a kinesiologist to develop a strengthening program.

[105] I conclude that ten sessions with a kinesiologist is justified at a cost of $65 per session, totaling $650 as a one-time payment. In addition, a gym pass is justified for a period of four years. At $380 per year, this is a one-time payment of $1,520. After four years, the expectation is that the plaintiff will have in place an exercise regime that he can manage himself. He also has a fitness center in his apartment. In his evidence, the plaintiff minimized the facilities there but I find it can be an important part of an effort to increase his strength and fitness.

[106] The plaintiff also seeks damages for homemaking services for two hours every other week. In his evidence, he said he could clean his small apartment (750 square feet) on his own. He does have some discomfort for the reasons described

by Dr. Robinson and Dr. Stewart. He also receives help from friends from time to time. I conclude that homemaking services are justified for two hours per month for a period of two years; at $29.50 per hour, this is a one-time cost of $1,529. The expectation is that, after two years, he will have improved his fitness to a level that he can do his own homemaking.

[107] Total damages for future care are $3,699.

(f) Loss of housekeeping capacity

[108] The plaintiff seeks damages for past and future loss of housekeeping capacity in the amount of $43,646. The defendant says no damages are payable.

[109] It is not explained how the claim for future loss of housekeeping capacity is different from the claim for homemaking services under future care above and, indeed, they are argued in the same terms.

E. SUMMARY

[110] As a result of the negligence of the defendant the plaintiff is entitled to the following damages that are causally related to the motor vehicle accident of January 6, 2013:

Special damages:	$1,416
Past income loss:	$350
Non-pecuniary damages:	$55,000
Future income loss	$50,000
Future care	$3,699
Housekeeping	$0
Total	$110,465

[111] The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), he is entitled to his costs at scale B against the defendant.

The Honourable Mr. Justice Steeves