

**User Name:** Sandra More

**Date and Time:** May 12, 2020 1:33:00 PM PDT

**Job Number:** 116684533

## Document (1)

1. [Puri v. Vuong, \[2020\] B.C.J. No. 35](#)

**Client/Matter:** -None-

**Search Terms:** Puri v. Vuong, 2020 BCSC 28

**Search Type:** Natural Language

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-None-

 [Puri v. Vuong, \[2020\] B.C.J. No. 35](#)

British Columbia Judgments

British Columbia Supreme Court  
New Westminster, British Columbia

M.B. Blok J.

Heard: April 15-18 and 23-26, 2019.

Judgment: January 13, 2020.

Dockets: M175289, M195951

Registry: New Westminster

[2020] B.C.J. No. 35 | 2020 BCSC 28

Between Vivek Puri, Plaintiff, and Vinh Van Vuong, Defendant And between Vivek Puri, Plaintiff, and Rheana Shaleshni Pal and Daniel Rattanes Pal, Defendants

(175 paras.)

## **Case Summary**

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**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Whiplash — Head injuries — Headaches — Action by 51-year-old plaintiff for personal injuries suffered in two motor vehicle accidents in 2014 and 2016 allowed in part — Plaintiff, manager of grocery store, worked 50 hours per work pre-accident and 35 hours per week post-accident — Plaintiff's primary ongoing difficulty were headaches — Plaintiff was awarded \$90,000 in non-pecuniary damages, \$52,820 for past loss of income, \$120,000 for loss of future earning capacity, \$6,945 for cost of future care for ongoing medications, and \$8,459 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action by 51-year-old plaintiff for personal injuries suffered in two motor vehicle accidents in 2014 and 2016 allowed in part — Plaintiff, manager of grocery store, worked 50 hours per work pre-accident and 35 hours per week post-accident — Plaintiff's primary ongoing difficulty were headaches — Plaintiff was awarded \$90,000 in non-pecuniary damages, \$52,820 for past loss of income, \$120,000 for loss of future earning capacity, \$6,945 for cost of future care for ongoing medications, and \$8,459 in special damages.**

Action by the 51-year-old plaintiff for personal injuries suffered in two motor vehicle accidents in 2014 and 2016. Liability for both accidents was admitted. The plaintiff was the manager of a grocery store. Prior to the accident, he worked 40 to 50 hours per week. He was off work for six weeks after the first accident. He returned to reduced hours and resumed 35 hours per week in December 2014. Pain in his wrists and back improved but he continued to experience neck and shoulder pain and numbness in his hands. The plaintiff's primary ongoing difficulty at trial were headaches. The plaintiff had received physiotherapy, massage therapy, chiropractic treatments, and acupuncture for his injuries. He received injections in his neck and shoulders and Botox injections for his headaches. Standing for long periods triggered his headaches. The plaintiff continued to play cricket every summer. The plaintiff's mother moved in with his family in 2015 to assist with the household and children.

HELD: Action allowed in part.

The plaintiff's bleak outlook and negative self-assessment did not reconcile with the objective evidence of his functioning. It was likely the plaintiff's headaches would continue for some time but there was a prospect that other treatments would further ameliorate his symptoms. The plaintiff's non-pecuniary damages were assessed at \$90,000. He was awarded \$52,820 for his past loss of income for his decreased work hours post-accident. For the foreseeable future, the plaintiff would continue to earn somewhat less than he would have earned but for the accident. Using a capital asset approach, the plaintiff's loss of future earning capacity was fixed at \$120,000. There was no basis to make an award for ongoing physiotherapy or similar treatments. The plaintiff was awarded \$6,945 for ongoing medication costs. Special damages of \$8,459 were awarded as agreed.

## Counsel

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Counsel for the Plaintiff: R. Patro.

Counsel for the Defendants: J. Newton.

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## Reasons for Judgment

### M.B. BLOK J.

#### I. Introduction

1 Vivek Puri was injured in two car accidents, the first occurring on June 21, 2014 and the second on February 17, 2016. Liability is admitted in both actions and so these reasons address damages only.

2 Mr. Puri's primary ongoing difficulty are the headaches he has experienced since the first accident. The focus of the case was on the degree to which Mr. Puri's ongoing headaches interfere with his work, home life and social life.

#### II. Plaintiff's Case

3 Part of the evidence in this case was presented by way of an agreed statement of facts. Most of the agreed facts related to damages issues (for example, Mr. Puri's various pay rates, hours worked and treatments), but the parties also agreed on the circumstances of the two accidents, which I summarize in the next section.

##### A. The Accidents

4 The first accident occurred on June 21, 2014. Mr. Puri was driving south on King George Highway in Surrey, B.C. His vehicle was in the left of the two southbound lanes and the Vuong vehicle was in the right lane. The Vuong vehicle changed lanes and struck the Puri vehicle. Both airbags deployed in Mr. Puri's vehicle. The Vuong vehicle, a 2001 Toyota Rav4, was rendered a total loss, as was Mr. Puri's vehicle, a 1998 Honda Accord. Damage to the Puri vehicle was estimated at \$14,667.

5 The second accident occurred on February 17, 2016. Mr. Puri's vehicle was rear-ended while he was stopped at a red light. There was minimal damage to both vehicles.

### **B. The Plaintiff**

6 Mr. Puri is 51 years old, married, and has two children, aged 14 and 8. He works as a manager of an ethnic Indian grocery store in Surrey, B.C.

7 Mr. Puri was educated in India and immigrated to Canada in 2010. In India, he achieved Grade 12 equivalency and worked as an administrator of a nursing college. On arrival in Canada, he secured employment as a money transfer clerk at a Western Union kiosk located within the same grocery store where he presently works. There, he dealt with customers and processed money transfers. He worked 40 to 50 hours per week and was paid at a minimum wage level.

8 In 2013 he was hired to manage the grocery store, including the Western Union outlet within it. In that position he earned \$2,700 per month, plus four percent vacation pay. This is the same position he holds to this day.

9 Mr. Puri said the grocery store is a very busy store and the Western Union outlet in the store often has long lineups. He does the ordering and accounts payable for the store and looks after the Western Union counter. He enjoys the work and particularly enjoys interacting with members of the community.

#### *Pre-Accident Life*

10 Mr. Puri described his pre-accident life. He said that, prior to the accident, he typically started work between noon and 1:00 p.m. and worked until 9:00 or 10:00 p.m. He worked five or six days a week.

11 As for recreational activities, he played cricket once a week in summer, went to the gym, jogged and spent time with his children. In cricket, he is a type of bowler known as a "leg spinner". In a typical 50-over game he would bowl 10 overs (an over consists of six bowls), and so he would bowl 60 times in a match. In addition to these activities, he and his wife would get together with friends perhaps once a week, and he attended his temple as well as larger cultural events such as the Diwali festival.

12 As for his home life, Mr. Puri said that after work each day he and his wife typically socialized with one another by discussing their respective days and watching television. He enjoyed time with his children. He helped with household tasks such as laundry and he took the children to their activities.

13 Mr. Puri said his pre-accident health was good. At one point he hurt his back in a fall, but the symptoms went away after a few weeks. He also had pain in his right shoulder that he attributed to cricket, for which he was referred to an orthopedic surgeon. He said that pain eventually subsided.

#### *The First Accident*

14 Mr. Puri said he never saw the collision coming. He was left shocked and stunned by it, but he did not lose consciousness. He remembers the events and people at the scene. He was taken to the hospital by ambulance and at the hospital he waited a number of hours before he was attended to. He was given some pain medication and sent home.

15 He saw his family doctor two days later. He had neck pain, headaches, pain in his shoulders, low back and wrists, and he had a bruise on his right arm. He said he felt nauseated during his headaches but he was not vomiting. His doctor told him to take time away from work. He stayed off work until August 2014, a period of about six weeks.

*Symptoms After Six Weeks*

**16** After six weeks the pain in his wrists and low back had improved, but he still had pain in his neck and shoulders and sometimes this pain was severe. He took medication, and had physiotherapy, but the pain would not go away.

**17** The wrist pain resolved. There are times he thinks the pain in his low back has resolved, but sometimes it returns when he stands for lengthy periods of time. He deals with it by taking pain medication.

**18** On some occasions when he has shoulder pain he feels short-term numbness in his hands. The numbness goes away when he exercises his hands. He finds that physiotherapy and massage gives him some relief from shoulder pain.

**19** Mr. Puri said he still gets headaches and they never go away. He feels these are now part of him and he has to deal with them. If his headache is severe he may feel nauseated. He finds that if he works a lot on the computer he has to take breaks by doing something else. His boss is very understanding and allows him to do that. The Western Union work is all computer work. He also finds that standing for long periods tends to increase the symptoms in his shoulders and neck, and this can trigger his headaches.

**20** If his headaches are particularly acute then he finds he cannot focus properly. He is less able to concentrate, he cannot remember names and is preoccupied. He feels he cannot communicate with his children. If his headache is bad he cannot concentrate enough to bowl in cricket.

**21** His difficulties have affected him emotionally. He said before the accident he was "brave" but now he is "down", he lacks confidence and finds he has to push himself. He does not want to look "emotionally weak" and so he pushes on and tries to smile. He worries about his future.

*Medical Treatment*

**22** Mr. Puri continued to see his family doctor, Dr. Sekhon, who prescribed physiotherapy, massage therapy and pain medications. Mr. Puri also tried acupuncture on the recommendation of Dr. Sekhon. He complied with all of the treatment recommendations of his family doctor.

**23** Dr. Sekhon referred him to a neurologist, Dr. Nagaria, who prescribed different pain medication and, on four or five occasions in 2015, gave him injections of a local anaesthetic in his neck and shoulders. Between September 2016 and December 2017, Dr. Nagaria also did five rounds of Botox injections. Each round involved 30 to 40 needle pricks to his head, which were very painful. None of the injections, whether anaesthetic or Botox, helped for more than a couple of hours.

**24** Mr. Puri said that some of the treatments (including massage) helped for a couple of days, but the symptoms then returned. He said "active physiotherapy" or massage helped him the most, "active" meaning active movement and not merely using electrodes on him.

*Post-Accident Work Life*

**25** Mr. Puri said he was off work completely until August 1, 2014. He then worked four or five hour days from that point to December 12, 2014. Since then he has worked 30 to 40 hours each week.

**26** Mr. Puri said that on his return to work he had difficulty standing for long periods of time as this would trigger his headaches. He said his boss was very accommodating and gave him extended breaks.

**27** Presently, his work schedule is from 2:30-3:00 p.m. to 9:00 p.m. Sometimes he works longer, as when his boss is away or in busy times such as the Diwali festival.

**28** Mr. Puri wanted to augment his income, so he took an insurance certification course and became licensed to sell insurance products. He said he failed the examination twice before passing it in August 2016. He made some sales to friends at the beginning, when he was spending four or five hours a week on this sideline business, but he did not do much business after that. He felt that his lack of concentration made it such that he could not explain the products properly to the customers. He made \$10,000 from insurance sales in 2016, but in the subsequent two years he earned just \$2,000 and \$3,500, respectively. He quit that work in March 2019.

**29** Mr. Puri plans to continue with his same employment. He feels he does not have a lot of skills. He worries about losing his job. He said, "If I lose my job I am nowhere". He has no plans to retire.

#### *Post-Accident Family and Social Life*

**30** Mr. Puri said his post-accident social life is "not good". At the end of a work day he feels tired and looks forward to laying on the couch. He does not enjoy family or social events. He does not interact with his daughter as he did with his son when his son was at the same age, and he feels badly about that. Socially, people notice he is not as engaged, although he tries to put on a brave face.

**31** He does all the same housework as he did before, but now he does it more slowly. His mother lives with them (and has since 2015), and she "takes care of everything" such as cooking and the children, but he wants to be helpful and would like to help his mother more than he does.

**32** His relationship with his wife has changed. Formerly, he was the "leader" in the family, but now she is the leader because his confidence is low due to his headaches. His lack of confidence has affected intimacy between them as well.

#### *The Second Accident*

**33** As noted, the second accident occurred on February 17, 2016. Mr. Puri said "it was not a big impact but it gave me a headache" and so he took pain medication as a result. This headache reduced over time and he did not miss any work.

#### *Cross-Examination*

**34** In cross-examination, Mr. Puri said:

- a) after the first accident, his employer changed his pay structure from salary-based to hourly-based, effective June 1, 2014;
- b) in the time he was on salary, any raises were entirely up to his employer. He himself had no idea when or if raises would be given, other than being told (in 2013) that he would get raises;
- c) his wife works as a health care assistant. She currently earns \$24 per hour. She has always earned more than he has done;
- d) in 2014 (after the accident), he took a course to train as a home inspector. The classes took place once a week for six months. He decided not to pursue that line of work;
- e) his mother lived with them for 18 months after their daughter was born (in 2011). She returned to live with them in November 2015 and has lived with them full-time since. She does the housework and cooking, and she looks after the children;
- f) he acknowledged that he worked 147 hours in December 2014, which counsel calculated was 36.5 hours per week, or close to full-time. He also acknowledged that he played cricket in the summer of 2014 and was taking the home inspection course around this time;

- g) he agreed that he worked 159 hours in June 2015 and 160 hours in November 2015;
- h) he acknowledged that there are times when his headaches do not bother him. At those times, his headache is merely a "normal" headache;
- i) his insurance business was always intended as a side business, not as a primary occupation;
- j) his work involves a lot of standing at a counter. He has never asked for a chair to sit on because there is no space for a chair.
- k) he does stretching exercises a few times a week but he does not do anything for fitness. One physiotherapist recommended that he do fitness exercise but he did not do it;
- l) he did not have a gym membership prior to the accidents. For those times that he went to the gym he paid by the day because his attendance was infrequent. He said that prior to the first accident he would go jogging for 15 to 20 minutes, two or three times a week; and
- m) he takes Tylenol and Advil every day, as well as Vimovo: two in the morning, two more before work, and the same at night.

### **C. Reena Puri**

**35** Ms. Puri is Mr. Puri's spouse. They married in 2002. She works with Fraser Health as a health care assistant on a casual employment basis. Her usual shift is from 7:00 a.m. to 3:00 p.m., although she can take other shifts if she chooses.

**36** Prior to the 2014 accident she was working at facilities run by Vancouver Coastal Health. Her hours of work were 35 to 40 hours each week, working both a six-hour day shift and a six-hour evening shift. After the accident she stopped working the evening shifts, and she cut out some of the day shifts as well. She cut down her hours of work because Mr. Puri was unable to help at home and she had to look after the children and household. In cross-examination, Ms. Puri said this reduction in hours lasted until March 2015.

**37** Ms. Puri said she no longer has to help out in this same way because Mr. Puri's mother now lives with them and helps out with the children and household. Her mother-in-law came to live with them in December 2015.

**38** The children do not have to be picked up at school because their son is old enough to walk home by himself, and he walks his sister home as well. Neighbours also help out. Their daughter's school is just a block away.

**39** Prior to the 2014 accident, Mr. Puri looked after the children and household. She never had to tell him what to do because he did everything without being asked or directed. Now she has to tell him what to do. If she does not give him specific direction, he will just lie down on the couch without doing anything. Mr. Puri probably does half of the household tasks he did pre-accident. Although this has improved starting in 2017, his household work is still not back to what it was.

**40** Mr. Puri had few health issues prior to the 2014 accident. He had springtime allergies, he had a fall that caused him some temporary pain, and he strained his right shoulder playing cricket.

**41** The weeks after the 2014 accident were "a really hard time". Mr. Puri complained of headaches and backaches, and he was very uncomfortable. He even had problems sitting. He then started losing confidence and he became sad and depressed. He was not the same person he was before.

**42** Ms. Puri has noticed that Mr. Puri gets irritated easily, has a shorter temper and is impatient. He was not like that before. Formerly, he was an extrovert and now he is an introvert. Formerly, he motivated her; now she has to motivate him. She said his headaches make Mr. Puri lose concentration and focus. She also said he does not spend as much time with the children as he did before, although he is getting better about that. When he comes home he is "so tired" and they do not converse as they used to do pre-accident.

**43** Ms. Puri said the period from 2014 to 2017 was very difficult in terms of their interactions at home. Although it is now getting better, it is still "depressed".

**44** In cross-examination, Ms. Puri said:

- a) Mr. Puri's cricket-related right shoulder strain lasted no more than a week and he worked normally;
- b) at the time of the 2014 accident there were various people living with them: their friends Navjot and Sharanjot, as well as Sharanjot's family. Sharanjot helped with the children;
- c) Mr. Puri could not do the household chores in the time immediately after the accident. He is now able to do everything but it takes him more time;
- d) Mr. Puri complains of standing too long at work so now he goes to work later (at 3:00 p.m.) than he did prior to the accident; and
- e) things improved starting in 2017, including with their relationship. When asked if "things are starting to look better", Ms. Puri said "I hope so, but I feel it's not going to be the same".

#### **D. Ravinder Narula**

**45** Mr. Narula owns the grocery store where Mr. Puri works. He described it as an "ethnic Indian market" and said it was a very busy store. The store includes a Western Union outlet that itself is very busy, servicing 150-200 people each day.

**46** Mr. Puri was hired in 2010. He earned minimum wage. Mr. Puri was promoted to manager in 2013. Mr. Puri's duties include running the Western Union outlet, scheduling staff and doing the accounts payable. Most of Mr. Puri's work involves work on a computer, and the Western Union work involves standing at a counter. Mr. Puri's job does not involve any lifting or carrying.

**47** Mr. Narula is at the store full-time. He is the overall supervisor, and he also does the ordering and deals with staff issues.

**48** Prior to the 2014 accident, Mr. Puri worked 40-50 hours per week, five or sometimes six days a week. He started work between noon and 1:00 p.m. and left at 9:30-10:00 p.m. His salary was \$2,700 per month plus 4% vacation pay. The figure of \$2,700 per month was based on a minimum of 173 hours of work a month.

**49** Mr. Narula changed Mr. Puri's pay after the June 21, 2014 car accident. He said, "[Mr. Puri] didn't work that many hours so we had to bring him back to an hourly wage". His new rate was \$13.00 per hour, plus 4% vacation pay. The change was made retroactive to June 1, 2014.

**50** Mr. Puri returned to work on August 1, 2014. Mr. Narula noted that Mr. Puri was "a little bit slow" and was "getting tired". Mr. Narula gave Mr. Puri extra breaks and jobs that allowed Mr. Puri to sit. He is still "a little slow" and confused at times, and "he is eating a lot of tablets". In later cross-examination Mr. Puri clarified that this was in 2014. He said Mr. Puri mentioned his health issues "a lot". Mr. Puri has sometimes asked to go home early.

**51** Mr. Narula did not notice any changes in Mr. Puri after the latter's car accident of February 17, 2016.

**52** Mr. Narula has increased Mr. Puri's hourly pay since the 2014 accident and his pay has now risen to \$20 per hour. He would also have given raises to Mr. Puri had Mr. Puri remained on salary. He estimated he would have given raises of \$500 per month every year or so. He said each year he would have looked at Mr. Puri's performance and assessed whether he should give Mr. Puri a raise.

**53** In cross-examination, Mr. Narula was questioned about his evidence that he would have given significant raises

every year, as his estimated raise for 2015 would have amounted to a 30% raise. Mr. Narula said he would have given that raise because the store was very busy and Mr. Puri looks after the store when Mr. Narula is away. Mr. Narula said he is away on lengthy absences (15 to 30 days) twice a year. He agreed that the figures for raises are just estimates, there was never an actual plan or schedule for any raises and any raises would have depended on the store performance.

**54** Mr. Narula said Mr. Puri's hourly rate raises depend on his performance, and he noted that Mr. Puri's performance was "getting better". Mr. Puri is the one employee in the store who Mr. Narula can rely upon when he (Mr. Narula) goes away.

#### **E. Navjot Thandi**

**55** Ms. Thandi is a long-time friend of Mr. Puri. She met him at a nursing college in India, where she worked as an instructor and he was the administrator. She also lived with the Puri family for six months in 2014.

**56** Ms. Thandi said that, as the college administrator, Mr. Puri was very hard-working, active, energetic and confident. He was highly regarded at the college.

**57** Prior to the 2014 accident, Mr. Puri was very involved with his friends and family. He also helped with such household tasks as cooking and cleaning.

**58** After the 2014 accident, Mr. Puri was in a lot of pain. He now avoids social events. At those events he does attend, he lies down on a couch or leaves early. His energy and confidence is down. There are times when he prefers that others do the driving. He does not interact with his daughter the same way he interacted with his son when his son was a similar age pre-accident.

#### **F. Dr. Charan Preet Chahal**

**59** Dr. Chahal is a neurologist. He provided a report dated January 31, 2018.

**60** In his report, Dr. Chahal said Mr. Puri told him he had developed headaches that Dr. Chahal described as "holocephalic" headaches. In his testimony, Dr. Chahal explained that holocephalic headaches are diffuse rather than localized. Mr. Puri also reported decreased mood, difficulty with short-term memory and reduced concentration.

**61** Dr. Chahal said that based on Mr. Puri's symptoms history, he was of the opinion that Mr. Puri has "persistent headache attributed to a whiplash injury". He also said this "is directly a result of the injury he sustained in MVA #1". He said "MVA #2 led to worsening of this headache".

**62** As to prognosis, Dr. Chahal said:

Given that his headaches have persisted for more than 3 years with satisfactory management through his Neurologist, Dr. Nagaria, it is my opinion that his chronic persistent headaches are likely to persist for the foreseeable future, impacting and interfering with his activity levels, both physically and cognitively.

**63** As for treatment, Dr. Chahal recommended nerve conduction studies to investigate Mr. Puri's complaints of numbness and tingling in his hands "to evaluate for any peripheral nerve entrapment syndromes such as carpal tunnel syndrome ... that could be contributing to his symptoms". He also suggested Mr. Puri undergo a formal psychiatry assessment for management of his neck and low back pain.

**64** In cross-examination, Dr. Chahal agreed that it is outside his role as a neurologist to comment on any musculoskeletal aspects of Mr. Puri's condition. He said his opinion concerning persistent headaches was based on Mr. Puri's self-report of headaches occurring after his car accident. He emphasized that he was not diagnosing a

whiplash injury, but instead he was *attributing* the headaches to the whiplash injury. He agreed that where headaches are attributable to whiplash then they may resolve if the whiplash injury resolves, but he also said that sometimes headaches continue even if the whiplash injury resolves.

#### **G. Dr. Kamaljit Sekhon**

**65** Dr. Sekhon has been Mr. Puri's family physician since 2011. He did not give any opinion evidence, just fact evidence.

**66** Concerning pre-accident treatments, among other things Dr. Sekhon testified that he treated Mr. Puri in April and June 2014 for right shoulder strain. He did so by prescribing Naproxen and pain medication, recommending an x-ray and referring Mr. Puri to an orthopedic surgeon, Dr. Shahid. He treated Mr. Puri for back pain in February 2014, but did not see Mr. Puri for any complaints of back pain between February and June 2014.

**67** Dr. Sekhon first saw Mr. Puri, post-accident, on June 23, 2014. Mr. Puri complained of pain in his neck, low back, right chest and headaches. His right arm was bruised. His neck and back were tender and his movements were limited. He recommended to Mr. Puri that he take time off work.

**68** Dr. Sekhon next saw Mr. Puri on June 26, 2014, when the reported complaints were similar. Ultimately, he told Mr. Puri he could return to work on July 31, 2014.

**69** Mr. Puri had 11 more accident-related visits with Dr. Sekhon in 2014, and five accident-related visits in 2015. Mr. Puri's back pain was better and his headaches improved somewhat (from 10 out of 10 on a subjective pain scale to 7 or 8 out of 10).

**70** As for the second accident, Mr. Puri saw him the next day (February 18, 2016). Mr. Puri's headache was worse and he had pain in his neck and shoulders.

**71** In 2016, Mr. Puri had five visits with him for accident-related issues. His back movements improved, though they were still limited, and both shoulders were normal. Mr. Puri's neck was tender and its movement was limited.

**72** Dr. Sekhon saw Mr. Puri once in each of 2017 and 2018 for accident-related issues. Mr. Puri was being treated by Dr. Nagaria during this time.

**73** The last time Dr. Sekhon saw Mr. Puri was on October 19, 2018. At that time Mr. Puri's shoulders were normal, his neck movement was normal and neck pain had improved, his low back was better but still had some limited movement and his headaches were still present.

**74** In cross-examination, Dr. Sekhon acknowledged that in the months immediately preceding the first accident, Mr. Puri had complained of right shoulder pain. In June 2014, Mr. Puri reported the pain had been persisting for three months. He referred Mr. Puri to Dr. Shahid, as noted earlier. The problem was described as "intermittent bursitis".

**75** Dr. Sekhon agreed that his advice to Mr. Puri has been for him to work, stay active and exercise.

#### **H. Dr. William Neufeld**

**76** Dr. Neufeld is a medical doctor whose practice is focused on work fitness evaluations. He prepared a report dated December 8, 2017.

**77** In his report, Dr. Neufeld summarized the symptoms Mr. Puri reported to him:

- a) headaches: a constant aching pain at a reported level of 4/10 occurring 20 days a month;

- b) neck pain: constant aching pain at a level of 2/10 occurring 20 days a month;
- c) shoulder pain: aching pain at a level 2/10 occurring 10 days a month for two or three hours per day;
- d) low back pain: aching pain at a level of 1/10 occurring an hour per day for four or five days a month;
- e) arm numbness: occurring four or five days a month for an hour a day; and
- f) leg numbness: occurs after prolonged sitting on the floor as is required during prayers.

**78** Dr. Neufeld said that the results of a mental status questionnaire completed by Mr. Puri "suggests a mild range of depressive symptoms", but he also said Mr. Puri's responses indicate that his chronic headache pain "has had only a mild negative impact on his mood".

**79** Dr. Neufeld described Mr. Puri's neck and back problems as having "resolved to the extent that currently there is only intermittent neck and back discomfort not causing any significant functional limitation". He noted Mr. Puri was "aerobically and musculoskeletally deconditioned".

**80** As to the headaches, Dr. Neufeld said Mr. Puri's debilitating post-traumatic headache had decreased in severity over time and Mr. Puri's tolerance for functioning with headache had improved. He said, however that it continues to interfere with Mr. Puri's functioning "to a moderate extent". Dr. Neufeld concluded that Mr. Puri cannot fully meet the physical activity requirements of his occupation because of his reduced tolerance for sustaining the body position requirements for a full work day. He also noted that the severity of his headache increased with increasing duration of standing and walking and this limits his tolerance for a full day's work.

**81** Dr. Neufeld concluded that Mr. Puri's condition has plateaued and that he has a permanent functional impairment. He felt it was unlikely further treatments or rehabilitation would improve his situation.

**82** Dr. Neufeld opined that "a few months of twice per week training sessions" with a qualified kinesiologist would assist Mr. Puri in optimizing his regular exercise program. He recommended "life-long access to a gym as well as exercise equipment in the home".

**83** Finally, Dr. Neufeld noted that while Mr. Puri was presently able to tolerate the demands of his work due to an accommodating employer, he might not be able to do so with a less accommodating employer.

**84** In cross-examination, Dr. Neufeld agreed Mr. Puri could "use some conditioning", which would help alleviate the impacts of his pain and provide Mr. Puri with a better sense of well-being.

#### **I. Bruce Hunt**

**85** Bruce Hunt is a kinesiologist and work capacity evaluator. He prepared a report dated January 11, 2018. He assessed Mr. Puri on January 9, 2018.

**86** Mr. Hunt put Mr. Puri through a variety of physical tests designed to evaluate his capacity for sitting, standing, strength, and various movements and tasks. He noted that Mr. Puri did not present with any "maladaptive, overt or non-organic pain behaviours" and the test results appeared valid. Mr. Hunt observed that during the testing, occasions of "low back tension resolved with cessation of the activity and a brief sitting positional break". In cross-examination, Mr. Hunt said the seated breaks were about two minutes long.

**87** Mr. Hunt's main conclusions were as follows:

- a) Mr. Puri was currently meeting the physical demands of a Grocery Manager (a category within the National Occupational Classification), although with "chronic headache and fluctuating neck and upper back pain/ tension";
- b) there were no medical indicators or physical barriers identified during his testing necessitating a cost of care analysis for medical or occupational aids, support systems or treatments, although in his testimony he added "except medication";
- c) Mr. Puri is presently working full-time at his employment and is meeting the physical and cognitive demands of the work. His current symptoms are not impairing his ability to work, manage self-care or engage in activities of daily living and domestic routines. In his testimony, Mr. Hunt noted that "full time" in this context meant 35 hours per week and his conclusion about Mr. Puri's lack of impairment in various realms was based on these hours, which were less than his pre-accident hours; and
- d) his testing of Mr. Puri revealed "significant aerobic and musculoskeletal deconditioning and reduced stamina and physical endurance". In cross-examination, Mr. Hunt said this concern arose as a result of a stair climbing test where Mr. Puri asked to stop after just four minutes. He felt Mr. Puri would benefit from 12 weeks of one-to-one training, two times a week, at an estimated costs of \$2,160, plus a gym membership.

**88** In cross-examination, Mr. Hunt said Mr. Puri's self-report of headache severity went from 1 out of 10 to 4 out of 10 after four and a half hours of testing.

### **III. Defendant's Case**

#### **A. Dr. Manu Mehdiratta**

**89** Dr. Mehdiratta is a neurologist. He saw Mr. Puri on December 13, 2017 and authored a report of the same date.

**90** In his report, Dr. Mehdiratta noted that his own physical examination of Mr. Puri was unremarkable, other than reduced range of motion throughout the cervical and lumbar spines. His neurological diagnosis was of tension-type headaches and migraines, along with medication overuse. He concluded there were "no permanent disabilities from a neurological perspective".

**91** Dr. Mehdiratta was of the opinion that Mr. Puri had not yet received appropriate and effective treatment for tension-type headaches, and he recommended decreased use of Vimovo (an anti-inflammatory) and Tylenol, and suggested a trial of Elavil.

**92** In his examination in chief, Dr. Mehdiratta explained that a "tension-type headache" is a headache commonly associated with neck strain or whiplash-type injuries. He said they are still "important", but need proper treatment.

**93** As to his comment about medication overuse, Dr. Mehdiratta said medications such as those taken by Mr. Puri are like "candy for the brain" in that the brain will tend to want more "candy". He said there is a need to stop the "rebound" effect of coming off the medication or the headaches will not stop.

**94** In cross-examination, Dr. Mehdiratta was doubtful that Mr. Puri actually had any cognitive impairment, preferring to say that his headaches may affect his attention; that is, the ability to use the frontal lobe of the brain to attend to tasks. He agreed he had administered a cognitive screening test called the MOCA which revealed a score suggesting mild cognitive impairment, but for various reasons he concluded the MOCA was not helpful. Those reasons were: (1) this MOCA score was not consistent with the MOCA score reported by one of Mr. Puri's physicians, which was normal; (2) the MOCA is not suitable for people whose first language is not English, and Mr. Puri's English was not good enough; (3) the MOCA is focused more on head injury or concussion cases and so is not really appropriate here; (4) the MOCA is a screening tool, not a diagnostic tool; and (5) the MOCA does not

distinguish between cognitive problems, on the one hand, and *attention* problems caused by headaches, on the other. Dr. Mehdiratta felt Mr. Puri's problems were due to reduced attention rather than reduced cognition.

**95** Dr. Mehdiratta felt that the role of medication overuse had not been adequately addressed in Mr. Puri's case. He agreed that if the headache is associated with a cause (that is, whiplash) it is correctly described as being secondary to that cause, but he said if the headache continues, then medication overuse must be considered as a potential primary cause for the continuation of symptoms. A whiplash-associated headache would tend to resolve, and if it does not then one has to consider why the headache persists. He also noted that Mr. Puri's headache was not aggravated by routine physical activity, which also suggests it is not related to a whiplash-type injury.

**96** Dr. Mehdiratta was not in favour of ongoing physiotherapy and massage therapy. He said if Mr. Puri's treatment focused on better medication management, then those modalities will not be needed. Even if the headache is in fact whiplash-based then these therapies would only be useful for a limited period of time.

#### **IV. Positions of the Parties**

##### **A. Plaintiff**

**97** The plaintiff submits that the evidence of his ongoing and permanent disability is clear. His neurological expert, Dr. Chahal, concluded Mr. Puri has persistent headache associated with a whiplash injury, and this is likely to persist for the foreseeable future.

**98** The plaintiff was very critical of the opinions of the defence neurologist, Dr. Mehdiratta. He submits Dr. Mehdiratta's opinion should carry no weight.

**99** The plaintiff reviewed the various effects his injuries have had on all aspects of his life. Formerly, he enjoyed his work and home life and he socialized easily. Now, his wife has had to assume the leadership role in the family, he is withdrawn socially, he feels distant from his children and both his mood and confidence are low. Given these profound effects on all aspects of his life, he submits that non-pecuniary damages ought to be assessed at \$100,000.

**100** As for past loss of income, the plaintiff emphasizes that his loss relates to his inability to work more than 40 hours per week, and so it is not merely a loss of the ability to work *up to* 40 hours per week.

**101** Based on the raises his boss (Mr. Narula) said the plaintiff would have received but for the accident, and based on the economist Mr. Lakhani's figures, the plaintiff claims past income loss in the amount of \$62,880.

**102** As for future loss of earning capacity, the plaintiff urged the Court to assess damages using a hybrid of both the lost earnings and loss of capital asset approaches. Using the figures developed by Mr. Lakhani, the economist, the plaintiff claims damages under this heading of \$220,912.

**103** As for cost of future care, the plaintiff claims for the life-long costs of medication, physiotherapy and a gym membership. The "few months" of kinesiology training sessions recommended by Dr. Neufeld can be subsumed as part of the physiotherapy costs since it is unlikely the plaintiff would do both at the same time. These annual care costs add up to about \$3,500 per year. The present value of those costs to age 82 is about \$81,000.

**104** The parties have come to an agreement on special damages in the amount of \$8,459.22, and so the total of the damages claimed is \$473,251.22.

##### **B. Defendants**

**105** The defendants concede that the second accident, though minor, contributed to the plaintiff's injuries. Given

the indivisible nature of the injuries, the driver in the second accident concedes she is jointly and severally liable. For that reason, the defendants do not seek an apportionment of damages between the accidents.

**106** The defendants note that the essential dispute between the parties is on the plaintiff's economic loss which, in turn, hinges on the degree of disability. The defendants submit that the evidence suggesting permanent disability should be given little or no weight and, similarly, no weight should be attributed to Mr. Narula's evidence of estimated salary increases for Mr. Puri. The defendants say damages for past and future income loss would be appropriately assessed in the range of \$50,000 to \$60,000.

**107** As to non-pecuniary damages, while recognizing that Mr. Puri has been dealing with headaches for some years, the defendants say that there is nothing remarkable about his injuries that warrants a deviation from a low to mid-range award. The defendants suggest the sum of \$55,000 for non-pecuniary damages.

**108** As for future cost of care, the defendants note that Mr. Puri obtained little relief from passive therapies, and so no award should be made for these. There also is no evidentiary basis to award a sum to pay for a lifetime gym membership.

## V. Discussion

### A. Findings

#### *Credibility and Reliability*

**109** I found Mr. Puri to be a credible and honest witness, in that he did his best to tell the truth as he saw it. However, I am less certain of the reliability of some aspects of his evidence, for reasons I will now explain.

**110** One aspect that stood out from Mr. Puri's testimony was his very negative mood and outlook. He broke down twice during his testimony, once when he said he did not want to show others he was "emotionally weak", and again when he said his wife was now the "leader" of the family. He is withdrawn and unsociable and he conveys the impression that he derives little joy from life. He attributes these things to his accident injuries generally, and to his headaches in particular.

**111** While I accept without question that his headaches affect him in various areas of his life, at the same time the severity of these must be measured against other facts, including the following: (1) he managed a work schedule of about 34 hours a week (147 hours in the month) by December 2014, which was five months after the first accident; (2) effective June 2015 his hours were in the range of 36 hours per month for most months; (3) in 2014, post-accident, he took a course (once a week for six months) to qualify as a home inspector; (4) in 2016, he took courses to qualify as a licensed insurance salesperson; (5) he played cricket in the summer of 2014 and has played cricket each summer since; (6) as Mr. Hunt concluded, Mr. Puri is meeting the physical and cognitive demands of his work, albeit in the context of somewhat fewer working hours each week; (7) the severity of his headaches has lessened over time and now there are times when his headache does not bother him even though it is still present; and (8) he likes his job. As to the latter, Mr. Puri said, "I like my job. I like interacting with the community and I have a good boss".

**112** Importantly, Dr. Neufeld administered a mental status questionnaire to Mr. Puri and, from those results, he concluded Mr. Puri's chronic headache pain "has had only a mild negative impact on his mood". This was not the impression Mr. Puri left from his testimony. Again I emphasize that I did not find Mr. Puri to be an untruthful or dishonest witness, but this is an additional basis on which I conclude Mr. Puri's undue emphasis on the negative has to be taken into account.

**113** In summary on this point, Mr. Puri's bleak outlook and negative self-assessment did not reconcile well, or at least fully, with the objective evidence of his functioning and of his situation generally. I conclude that his very low outlook and self-estimation coloured his evidence insofar as he tended to dwell on the negative to a

disproportionate extent. As noted earlier, however, I accept that his low mood and low confidence, which are attributable to his accident-related injuries (and in particular to his headaches), have affected him in various areas of his life.

**114** The other aspect that stands out from this is that Mr. Puri does not seem to have had any help with his low mood and low confidence which, from his trial testimony at least, obviously affects him greatly. There was no evidence, for example, that he has had any counselling or other mental health assistance.

#### *Injuries Other Than Headaches*

**115** Leaving the headaches aside for the moment, the essential aspects of Mr. Puri's injuries were not disputed. He was 47 years old at the time of the 2014 accident; he is 52 now. His primary injuries were to his neck, shoulders and low back, although he also had pain in his wrists and a bruised right arm. The wrist and arm injuries resolved.

**116** Mr. Puri was off work completely for about six weeks, when he returned to work on reduced hours, four or five hours each day, which lasted until mid-December 2014. At that point he resumed hours of work that approached full-time work (that is, 30 to 35 hours per week), although they were fewer hours than he worked before.

**117** Mr. Puri's neck and back pain improved in 2014 and 2015, but still caused him problems.

**118** Mr. Puri was involved in a second accident in February 2016. In his testimony, Mr. Puri did not make much of that accident, saying only that it "gave me a headache". Dr. Sekhon, Mr. Puri's family physician, testified that Mr. Puri reported increased symptoms in his neck and shoulders. Mr. Puri did not miss any work as a result of that accident. I conclude that the February 2016 accident aggravated Mr. Puri's symptoms, but only to a minor extent.

**119** Dr. Sekhon said that by 2016 Mr. Puri's back had improved, though his range of movement was still limited, as was the range of movement in his neck. The shoulders were normal by that point.

**120** According to Dr. Neufeld, as of December 8, 2017 (the date of his report), Mr. Puri's neck and back problems had "resolved to the extent that currently there is only intermittent neck and back discomfort not causing any significant functional limitation".

**121** The treatments undergone by Mr. Puri have included physiotherapy (55 sessions), other therapy described as both "active therapy" and "active rehabilitation" (25 sessions), massage therapy (20 sessions) and chiropractic treatments (37 sessions). Although Mr. Puri testified that he also tried acupuncture, no details of acupuncture treatment were included in the agreed statement of facts (as there were with other types of therapy) and I could not identify any receipts for acupuncture in the special damages documents. I should add that nothing of consequence turns on that latter point.

**122** Mr. Puri also received injections of local anaesthetic in his neck and shoulders from Dr. Nagaria, which the documents indicate were directed at Mr. Puri's neck and shoulder issues.

#### *Headaches*

**123** Mr. Puri's most significant symptom has been his persistent headaches, which at times have been debilitating. Based on the evidence, I make the following findings of fact with respect to the headaches:

- a) Mr. Puri has suffered from headaches since the 2014 accident. The headaches were caused by that accident. The 2016 accident aggravated his headaches to a minor extent;
- b) Mr. Puri's headaches are constant, varying only in intensity, although (as he acknowledged) there are times when his headache does not bother him even though it is still present. His headaches were severe in the initial period but they have improved somewhat over time.

To illustrate the latter point, on a subjective pain scale of 1 to 10, Mr. Puri reported his headaches had an intensity of 10 at the beginning, they moderated to 7 or 8 by 2015 (as reported by Dr. Sekhon), and moderated further by the end of 2017 (as per Dr. Neufeld) such that Mr. Puri reported he experienced headaches of 4/10 intensity on 20 days each month; and

- c) Mr. Puri's headaches are exacerbated by certain activities, the most common being lengthy periods of standing.

#### *Opinions of the Neurologists*

**124** Both of the neurologists who gave evidence accept that the plaintiff has ongoing headaches, but they differ somewhat on the diagnosis. Dr. Chahal, the plaintiff's expert, diagnosed "Persistent Headache attributed to a whiplash injury" and opined that Mr. Puri's headaches are likely to persist for the foreseeable future. While Dr. Chahal acknowledged that headaches associated with whiplash can resolve once the whiplash symptoms themselves resolve, he said sometimes this does not happen.

**125** Dr. Mehdiratta, the defence neurologist, diagnosed a "tension-type headache and migraine", along with medication overuse. He said a "tension-type headache" is a headache commonly associated with neck strain or whiplash-type injuries. He was of the view that Mr. Puri had not yet received appropriate and effective treatment for tension-type headaches, and he made some recommendations for a trial of different medications. He was also concerned about medication overuse and felt that this potential cause had not been adequately explored. He noted, in particular, that a whiplash-associated headache would tend to resolve, and if it does not then one has to consider why the headache persists. He also noted that Mr. Puri's headache is not aggravated by routine physical activity, which he said also suggests it is not related to a whiplash-type injury.

**126** Plaintiff's counsel cross-examined Dr. Mehdiratta vigorously and at length and, in submissions, counsel was highly critical of Dr. Mehdiratta. I do not agree with those criticisms.

**127** I will not review every point and counterpoint from the cross-examination, but will address a few key elements. Counsel cross-examined Dr. Mehdiratta on a reference work, *The International Classification of Headache Disorders, 3rd Edition [ICHD]*, which Dr. Mehdiratta acknowledged was an authoritative reference work. There was an extended debate between counsel and witness over specific entries and wording in the *ICHD*. Ultimately, counsel submitted that Dr. Mehdiratta had not shown Mr. Puri's situation fits in with the *ICHD* checklist of the "medication overuse" type of headache. Dr. Mehdiratta responded with words to this effect (from my notes):

But we don't normally do a checklist like this. If we did, you wouldn't need a neurologist. The *ICHD* is the science, clinical judgment is the art.

**128** I accept Dr. Mehdiratta's testimony that there is more to a diagnosis or potential diagnosis than merely following a checklist, and that clinical judgment plays an important role. I did not find Dr. Mehdiratta's opinion to be undermined to any extent on this point.

**129** A second criticism of Dr. Mehdiratta was aimed at his recommendation that Mr. Puri's pain medications be reduced together with a trial of Elavil (amitriptyline). The criticism was based on the fact that amitriptyline had been trialled before. Dr. Mehdiratta acknowledged that he had not seen a reference to that earlier medication trial, but he noted that the dosage involved in that trial would have been too low (10 mg., versus his recommended dose of 50 mg.), and the duration too short given that only a 10-day supply was prescribed and "a decent trial would be three months". Given that explanation, this aspect of cross-examination did not undermine Dr. Mehdiratta's opinion.

**130** Finally, plaintiff's counsel was critical of Dr. Mehdiratta for not reviewing a Pharmanet printout to ascertain exactly how much medication Mr. Puri was taking. In response, Dr. Mehdiratta pointed out that most of the medication Mr. Puri was taking consisted of over-the-counter medication, which does not show up on a Pharmanet printout. I note that in his report Dr. Mehdiratta set out the medications, and the amounts of medications, Mr. Puri said he was taking, something Dr. Mehdiratta could rightly rely upon. Parenthetically, I note that Mr. Puri testified at

trial to taking more medication than he apparently told Dr. Mehdiratta. In any event, there was a factual basis on which Dr. Mehdiratta could properly base his opinion.

**131** In brief, I found that Dr. Mehdiratta's opinion emerged unscathed after counsel's lengthy and vigorous cross-examination. I found Dr. Mehdiratta to be careful and thorough. I also had the impression that he delved deeper into Mr. Puri's headache problems than did Dr. Chahal.

**132** I will deal with one other matter before stating my conclusions on this subject. Defence counsel invited the Court to draw an adverse inference against the plaintiff for a failure to call Dr. Nagaria, his treating neurologist. Plaintiff's counsel argued that the plaintiff had no obligation to call Dr. Nagaria, and noted Dr. Nagaria's evidence had not fared well in a recent, unrelated case.

**133** In *Buksh v. Miles*, [2008 BCCA 318](#), the Court of Appeal set out (at para. 35) a number of factors for courts to consider when asked to draw an adverse inference in circumstances such as these. I have considered all of those factors, but two of them, in particular, cause me to conclude that an adverse inference ought not to be drawn against the plaintiff. First, as Dr. Nagaria was a treating physician the defence would have had access to his clinical records, and presumably could have called him as a defence witness if his expected evidence was unfavourable to the plaintiff. Second, plaintiff's counsel provided a reasonable and valid reason why the plaintiff did not call him as a witness in his case.

**134** To conclude on the expert neurological evidence, Dr. Chahal and Dr. Mehdiratta essentially agree that Mr. Puri's headaches, to a certain point in time at least, are related to his whiplash-type injuries. Dr. Chahal believes they still are, and says Mr. Puri's headaches are likely to persist for the foreseeable future. Dr. Mehdiratta believes Mr. Puri has not yet received appropriate and effective treatment for tension-type headaches and that medication overuse, as a cause of the ongoing headaches, had not been adequately explored.

**135** In my view, neither neurologist is obviously wrong or obviously right. I accept both of their opinions, at least to some extent. The difference between the two opinions seems to be one of treatability. Based on all of the evidence, and in particular the neurological opinions, I conclude that Mr. Puri's headaches will likely continue for some time, though they seem to be moderating at least somewhat, and there is a prospect that other treatments will further ameliorate his symptoms.

## **B. Non-Pecuniary Damages**

**136** The plaintiff cited the following cases as examples of non-pecuniary awards made in comparable situations: *Moreira v. Crichton*, [2018 BCSC 1281](#); *Evans v. Keill*, [2018 BCSC 1651](#); *Lauriente v. Schoonhoven*, [2017 BCSC 2246](#) [*Lauriente*]; *Carroll v. Hunter*, [2014 BCSC 2193](#) [*Carroll*]; *Forder v. Linde*, [2014 BCSC 1600](#); *Merko v. Plummer*, [2016 BCSC 1403](#) [*Merko*]; and *Palangio v. Tso*, [2017 BCSC 1573](#).

**137** Leaving aside the oft-cited case of *Stapley v. Hejslet*, [2006 BCCA 34](#) [*Stapley*], which sets out factors to consider in assessing non-pecuniary damages, the defendants cited just one case on non-pecuniary damages: *Clubine v. Paniagua*, [2018 BCSC 146](#).

**138** I have taken all of the *Stapley* factors into account. I will not review all of these again as they are summarized in my findings, but I will expand on one aspect, Mr. Puri's low mood and low confidence. As noted earlier, Mr. Puri's subjective view of his circumstances did not reconcile fully with the objective evidence of his functioning, his situation generally or the results of the mental status questionnaire administered by the rehabilitation physician. In terms of the assessment of non-pecuniary damages, I accept that Mr. Puri's subjective view of his situation, negative though it is, forms part of the consequences of the accidents and engages several of the *Stapley* factors (for example, impairment of relationships, emotional suffering and loss of lifestyle). The fact that there is an incongruity between Mr. Puri's subjective views and the objective facts and circumstances, I conclude, means that there is a greater likelihood that his outlook will improve than it would be in a case where both subjective and objective assessments align with one another.

**139** I have also reviewed the cases cited by the parties. Some of the plaintiff's cases involved substantially more serious injuries or effects, or they had other distinguishing features. The case cited by the defendants involved less serious circumstances, and it also had some complicating factors that made a comparison difficult. The cases I found to be most similar to the present are *Lauriente*, *Carroll* and *Merko*, though my impression is that each of those cases involved circumstances marginally more serious than the present.

**140** I assess non-pecuniary damages at \$90,000.

### **C. Past Loss of Income**

**141** The facts surrounding Mr. Puri's past loss of income are straightforward enough, although the assessment of the loss is not.

**142** Mr. Puri was off work for six weeks after the first accident. He was on reduced hours (four or five hours each day) until December 2014, when he resumed work at a level that approached, but did not reach, full-time work.

**143** As for subsequent years, in 2015 Mr. Puri's hours of work ranged between 120 (rounded) in February (which is 30 hours per week) and 160 hours (in June and November), which for a 30-day month averages to about 37 hours per week. In 2016, 2017 and 2018, his work hours ranged from 125 to 185 hours per month. According to my calculations (which are based on the hours worked each month as listed in the agreed statement of facts), Mr. Puri has averaged about 35 hours of work per week in each of 2016, 2017 and 2018. For 2017, the average was 35.4 hours per week, and for 2018 it was 35.7 hours per week. Prior to the accident, Mr. Puri worked 40 to 50 hours per week.

**144** One of the difficulties with the assessment of past loss of income lies in the change that Mr. Puri's employer made to his remuneration. Formerly, Mr. Puri was paid a salary of \$2,700 per month, plus vacation pay. As a result of the accident, and the consequential effect on Mr. Puri's work capacity, the employer changed Mr. Puri's pay structure from a monthly salary to hourly wages at \$13 per hour, plus vacation pay. This change was made retroactive to June 1, 2014.

**145** The other issue arising here is that the plaintiff bases his income loss calculations on the salary increases the employer said he would have given Mr. Puri but for the accident. Mr. Narula said he would have given raises of \$500 per month every year or so, although the list of expected raises that he provided to plaintiff's counsel (Exhibit 4, Tab 59) differed somewhat from those figures:

Year	Monthly Salary (effective July 1)
2014	\$3,000
2015	\$3,500
2016	\$4,000
2017	\$4,250
2018	\$4,500

**146** The defendants say that these increases - indeed, any increases - are speculative and unproven, though they concede Mr. Puri has suffered some loss of income. Defence counsel provided calculations of past income loss that are based on work of 40 hours per week. These calculations resulted in a range of \$23,600 to \$40,200 for past income loss, with the first figure assuming no raises and the second figure assuming raises as estimated by Mr. Narula.

**147** I agree with the plaintiff that Mr. Puri's past loss of income is not properly calculated this way. Mr. Puri had a

salaried job that involved work beyond 40 hours per week. His somewhat limited work capacity, caused by the accident, prompted his employer to change his pay structure. But for the accident, Mr. Puri would have continued on salary and almost certainly would have had raises from time to time. Just what those raises would have been is the subject I now address.

**148** I accept that Mr. Narula may have the best of intentions in stating what raises he thinks he would have given to Mr. Puri, his loyal employee, but I am unable to place much, if any, weight on his projections. It is easy to be generous when one's money is not really on the line. When it came to paying actual money, Mr. Narula was not nearly that generous, as I will now explain.

**149** First, I note the change in pay structure from salary to hourly resulted in a drop in Mr. Puri's effective pay. His former effective hourly rate (based on \$2,700 monthly and a minimum of 173 hours per month, or 40 hours per week) was \$15.60. Mr. Narula reduced that to \$13 per hour, a 17% reduction. I appreciate that Mr. Puri typically worked more than 40 hours in a week, but still the \$13 rate would represent a reduction in his effective pay rate unless he worked 48 or more hours in a week. Second, not only did Mr. Narula reduce Mr. Puri's effective hourly pay, he did so retroactively, which does not seem to be the most generous of pay adjustments.

**150** In addition, in his testimony Mr. Narula emphasized that raises would be "based on store performance". It is impossible to gauge the likelihood or magnitude of the projected raises - in other words, to test Mr. Narula's testimony against other evidence - because there was no evidence about store performance.

**151** In cross-examination, Mr. Narula mentioned that there is a manager of another of his stores who in 2019 earns \$4,500 per month. While this is consistent with the 2018 salary figure shown in the table above, I conclude the two positions are not directly comparable. The other manager is on his own in managing that store and Mr. Puri is not. Mr. Narula works at Mr. Puri's store and does a good deal of the management of that store himself. Moreover, the other manager has worked with Mr. Narula for 20 years, far longer than Mr. Puri.

**152** Accordingly, I find it very difficult to accept that, but for the accident, by July 1, 2015 (just one year after the accident) Mr. Narula would have increased Mr. Puri's salary from \$2,700 to \$3,500 per month, which amounts to a 30% raise. I conclude the more reliable indicator of likely raises is found in the actual raises Mr. Puri received in his hourly rate. Those raises were \$1 per hour in each of January, August and December 2015; December 2016; and January, June and October 2018. This has brought his pay to \$20 per hour.

**153** Unfortunately, Mr. Lakhani's calculations of past income loss were based on the salary increases predicted by Mr. Narula, which I have not accepted. This has left me to do some arithmetic, which is reflected in the following table:

Year	Hourly Rate	Projected Monthly Salary	Projected Annual Earnings	Actual Earnings	Difference
2014*	\$13	\$2,700	\$16,200	\$6,513	\$9,687
2015	14	2,908	17,448	25,026	11,118
	15	3,116	<u>18,696</u> 36,144		
2016	16	3,324	39,888	32,833	7,055
2017	17	3,532	42,384	32,912	9,472
2018	18	3,740	22,440	35,795	11,581
	20	4,156	<u>24,936</u> 47,376		
2019*	20	4,156	14,546	10,638	3,908
Total					\$52,821

[Editor's Note: Note\* is included in the image above]

**154** By way of brief explanation, the "projected monthly salary" in the table above is the salary Mr. Puri would have received if salary raises were given according to the same percentage as his actual hourly raises. I have not attempted to carry out detailed calculations of all the hourly pay increases as sometimes there were three increases in a single year. Instead, I have simplified them in a way that I consider results in a fair calculation. For example, in 2018 there were three increases (from \$18 per hour to \$19 and then to \$20) and I have approximated these by using the \$18 rate for the first six months and the \$20 rate for the second six months.

**155** Based on the figures detailed above, I award the rounded figure of \$52,820 for past loss of income.

#### **D. Loss of Future Earning Capacity**

##### *General Principles*

**156** The parties were substantially in agreement on the general principles, which I will briefly summarize. In *Perren v. Lalari*, [2010 BCCA 140](#), the Court of Appeal reviewed the law relating to loss of future earning capacity and concluded as follows:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

**157** In *Grewal v. Naumann*, [2017 BCCA 158](#), the Court of Appeal expanded on the phrase "real and substantial

possibility":

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

**158** If the future loss cannot be more easily measured in a pecuniary way, the proper approach is to assess the loss as a form of capital asset by considering the factors set out in *Brown v. Golaiy* ([1985](#), [26 B.C.L.R. \(3d\) 353](#) (S.C.) [*Brown*]), which were endorsed by the Court of Appeal in *Kwei v. Boisclair* ([1991](#), [60 B.C.L.R. \(2d\) 393](#)). In *Brown* the court said the proper inquiry is whether:

- a) the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) the plaintiff is less marketable or attractive as an employee to potential employers;
- c) 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
- d) the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**159** In *Morgan v. Galbraith*, [2013 BCCA 305](#), the Court of Appeal provided further guidance when assessing future losses using the capital asset approach:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* ([1996](#), [23 B.C.L.R. \(3d\) 256](#) at para. 24, [75 B.C.A.C. 263](#); *Mulholland (Guardian ad litem of) v. Riley Estate* ([1995](#), [12 B.C.L.R. \(3d\) 248](#) at para. 43, [63 B.C.A.C. 145](#)).

#### *Positions of the Parties*

**160** The plaintiff submits the evidence shows there is a real and substantial possibility of a future event leading to an income loss. Mr. Puri works reduced hours and will continue to work reduced hours, and his income will be less as a result.

**161** The plaintiff submits that the assessment of damages should be done on an earnings basis as a starting point (calculated by Mr. Lakhani at \$166,438, net of income taxes and EI premiums), but with an adjustment on a capital asset basis to reflect losses from foregone income from insurance sales, the likelihood of raises beyond the ordinary increases in the cost of living, and the risk of losing his current accommodated employment. To reflect these matters, the plaintiff suggests an additional one year's income of \$54,474, a figure that is based on Mr. Narula's projected raises. The total claimed is \$220,912.

**162** The defendants concede there is a loss of future earning capacity, but submit that Mr. Puri is essentially working full-time now and is capable of maintaining this level of work, so the loss is nowhere near as much as the plaintiff suggests. The defendants also submit that the assumptions utilized by Mr. Lakhani for his loss calculations have not been made out on the evidence.

#### *Analysis*

**163** I will begin with a few additional findings of fact. First of all, I do not agree with the defence submissions that Mr. Puri did not prove he worked in excess of 40 hours a week on a regular basis. The evidence of Mr. Puri and Mr. Narula, which I accept, is that Mr. Puri worked 40 to 50 hours each week. Mr. Puri said that, pre-accident, he started work between noon and 1 p.m. and worked until 9 or 10 p.m., five or six days a week. Ms. Puri said that after the accident Mr. Puri started work at 3 p.m., which was later than before. Ms. Puri's evidence was confirmatory of the other evidence.

**164** Mr. Hunt, the plaintiff's functional capacity expert, gave the opinion that Mr. Puri is presently working full-time at his employment and is meeting the physical and cognitive demands of the work, albeit in its present context of 35 hours of work each week. Interestingly, in submissions the plaintiff sought to discount Mr. Hunt's opinions by noting, among other things, that Mr. Puri had taken medication prior to the assessment, he had to take breaks, and so on. In my view, these mild (and unexpected) criticisms did not undermine Mr. Hunt's overall opinion in any way.

**165** Mr. Hunt's assessment differed from that of Dr. Neufeld in that Dr. Neufeld concluded that Mr. Puri cannot fully meet the physical requirements of his occupation as that occupation is described in the National Occupational Classification. Importantly, however, Dr. Neufeld was under the mistaken impression that Mr. Puri's duties included the stocking of store shelves, a significant physical task. For that reason I do not accept this particular aspect of Dr. Neufeld's opinion. I do accept his opinion that Mr. Puri is presently able to tolerate the demands of his work due to an accommodating employer. This opinion is essentially the same as that of Mr. Hunt.

**166** From these various opinions, and from the evidence generally, I conclude that for the foreseeable future Mr. Puri will continue to earn somewhat less than he would have earned but for the accident.

**167** My rejection of Mr. Narula's evidence of projected salary increases renders Mr. Lakhani's tables and calculations unhelpful in the context of a damages assessment based on the income approach. It does provide some general guidance in terms of the loss of capital asset approach.

**168** I am satisfied that Mr. Puri meets all of the *Brown* factors, which I outlined earlier. Mr. Puri has been rendered less capable overall from earning income from all types of employment, he is less marketable as an employee to potential employers, he has lost the ability to take advantage of all job opportunities which might otherwise have been open to him and he is less valuable to himself as a person capable of earning income in a competitive labour market.

**169** I conclude that I may arrive at a fair and reasonable assessment of loss of future earning capacity, using a loss of capital asset approach, by using Mr. Lakhani's future capacity loss figure of about \$166,000 as a starting point and then adjusting for the following: (1) the fact that Mr. Lakhani assumed Mr. Puri's "without accident" earnings would have been more than what I have determined them to be; (2) the fact that Mr. Puri's symptoms are moderating at least somewhat; and (3) the prospect that other treatments may further ameliorate his symptoms.

**170** Taking all of these considerations into account, I assess damages for loss of future earning capacity at \$120,000.

#### **E. Cost of Future Care**

**171** Before turning to the specific claims under this heading, I make the observation that Mr. Puri has had a lot of therapy (137 sessions of varying types), including "active rehabilitation", and despite being told (by both Dr. Sekhon and a physiotherapist) he should exercise, he does not exercise. As Mr. Hunt reported, the result is that Mr. Puri is significantly deconditioned. This leads me to doubt whether any award for kinesiology or gym membership costs, for example, would actually be used.

**172** I address the claims for cost of future care as follows:

- a) Physiotherapy, massage, etc.: Mr. Puri said he found that physiotherapy and massage gave him some relief from "shoulder pain". Dr. Neufeld said that, as of December 2017, Mr. Puri's neck and back problems were now intermittent and did not cause him any significant functional limitation. Dr. Neufeld himself did not recommend further physiotherapy or other therapies.

Although the plaintiff submits Dr. Mehdiratta recommended further treatments such as physiotherapy, chiropractic or massage, he only said these might be helpful for a period of time if the correct diagnosis for Mr. Puri's headaches is that they are whiplash-related.

Given that: (1) Mr. Puri's whiplash symptoms are now only intermittent; and (2) no physician recommends further therapies, I conclude that there is no proper basis for an award for ongoing physiotherapy or similar treatments.

- b) Kinesiology sessions and gym membership: Dr. Neufeld recommended "a few months of twice per week training sessions" with a qualified kinesiologist in order to assist Mr. Puri in optimizing his regular exercise program. Mr. Puri already knows he should exercise, having been told to exercise by both Dr. Sekhon and a physiotherapist, but aside from doing stretches a few times a week at most, he does not exercise. He has also had many sessions of active physiotherapy, which one would have to presume involved exercises, so Mr. Puri must know what exercises he should be doing.

Given these circumstances, I conclude it is unlikely Mr. Puri would benefit from, or perhaps even utilize, kinesiology sessions. As for a gym membership, Mr. Puri testified that, pre-accident, he utilized a gym on a "per-use" basis, and so I conclude he can do so again without involving any additional financial burden. I certainly see no basis to award an amount to fund a lifelong gym membership, as claimed, since I am satisfied that its benefits, beyond the pre-accident frequency of use, would be unused.

Medications: Mr. Puri's claim for future medication costs is based on his past cost of prescription medication averaging about \$295 per year between 2014 and 2019. I note that Mr. Puri's past prescription medication costs are odd insofar as his medication expenses were at their highest in 2017 and 2018, a time when his symptoms were improving. I also note that his prescription medication costs in 2019 average just \$16 per month to the date of trial, which translates to \$192 per year.

It may be that Mr. Puri did not submit all of his medication expenses to his counsel, but nonetheless I have to rely on the evidence as presented.

Plaintiff's counsel says that much of Mr. Puri's medication has been over-the-counter medication, which was not tracked. Counsel concedes there is no evidence of this cost but proposes a figure of \$240 per year for this type of medication.

I am satisfied that Mr. Puri has an ongoing medication cost and that this cost will continue indefinitely, but the evidence that would support an assessment of this future cost is highly unsatisfactory. In addition to the evidence concerning past expenditures, I take the following into account: (1) his condition is improving at least somewhat and so his need for medication should lessen to some extent; and (2) medication overuse may be part of his headache problem and thus there is a prospect that his medication use will be curtailed substantially.

Doing the best I can on the available evidence, I conclude that an average cost of about \$300 per year would adequately compensate Mr. Puri for his future medication costs. Using the multiplier supplied by Mr. Lakhani, this translates to \$6,945 for Mr. Puri's life expectancy.

## **F. Special Damages**

**173** Special damages are assessed at \$8,459.22, the amount agreed upon by the parties.

## **VI. Conclusion**

**174** I award the plaintiff damages as follows:

Non-pecuniary damages	\$90,000.00
Past loss of income	52,820.00
Loss of future earning capacity	120,000.00
Cost of future care	6,945.00
Special damages	8,459.22
Total	278,224.22

**175** Unless there are issues on costs which the parties wish to draw to my attention, the plaintiff will have his costs on the ordinary scale.

M.B. BLOK J.

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\* Part years.

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