CITATION: Sharma v. Bublyk, 2025 ONSC 6245
COURT FILE NO.: CV-20-00001523-0000
DATE: 20251107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Diwakar Sharma and Aparna Sharma Plaintiffs	Jeffrey A. Preszler and Aron Zaltz, for the Plaintiffs
– and –	
Nataliya Bublyk and Mykola Bublyk Defendants	David Visschedyk, for the Defendants
	HEARD: January 14, 15, 16, 17, 20, 21, 2025. February 7, 2025.

REASONS FOR JUDGMENT

HENSCHEL J.

A. OVERVIEW

[1] On November 10, 2018, Diwakar and Aparna Sharma's lives changed. Diwaker, his wife Aparna, and their five-year-old son were passengers in a Honda minivan operated by their friend Mayur Patel when they were struck by a vehicle that failed to stop for a red light. Mr. Sharma's parents, his brother, and his sister in law were also in the van.

[2] At the time of the accident, the Honda minivan was travelling northbound on Ferndale Drive North in Barrie, Ontario. Mr. Sharma was seated in the back third row seat of the van on the driver's side. Mrs. Sharma was seated beside Mr. Sharma in the middle seat and their son was seated beside her on the passenger side. They were wearing their seatbelts.

[3] The Defendant, Nataliya Bublyk, was driving the Hyundai vehicle that went through the red light. As she was travelling westbound on Cloughley Drive, she entered the intersection against the red light and struck the minivan on the driver's side, towards the back as it was travelling northbound through the intersection. The force of the collision caused the minivan to spin and come to a rest on the other side of the roadway. The second Defendant, Mykola Bublyk, is the owner of the Hyundai.

[4] The Defendants, Nataliya Bublyk and Mykola Bublyk, admit liability for the accident.

[5] The sole determination to be made is the assessment of damages claimed by the Plaintiffs Diwakar Sharma and Aparna Sharma.

[6] There is no dispute that Mr. Sharma suffered serious physical injuries because of the accident. He suffered multiple hairline non-displaced fractures in his pelvis and a rib fracture on his left side. At issue is whether Mr. Sharma has recovered from these injuries or whether he continues to suffer physically, psychologically, emotionally, and cognitively due to injuries caused by the accident. Mr. Sharma alleges he suffers from chronic pain, headaches, depression, and cognitive impairment because of the accident.

[7] Mr. Sharma seeks non-pecuniary damages, and pecuniary damages for his economic losses including past and future loss of income, loss of earning capacity and/or loss of competitive advantage. Mr. Sharma alleges that but for the accident, he would have been promoted from his current position, SAP consultant, to the higher paying role of SAP architect.

[8] Mr. Sharma also seeks damages for future care costs and damages for loss of capacity for housekeeping and home maintenance.

[9] Mr. Sharma is seeking:

i.) $250,000 in non-pecuniary damages;

ii.) $1,291,968.00 for economic losses, including past and future loss of income, loss of earning capacity, or in the alternative $575,000 for loss of competitive advantage;

iii.) $45,000 for future care costs; and

iv.) $34,445.00 in damages for loss of capacity for housekeeping and home maintenance.

[10] Mrs. Sharma seeks damages for her pecuniary loss resulting from Mr. Sharma's injuries pursuant to s. 61(1) of the *Family Law Act,* RSO 1990, c. F. 3 (*FLA*) for loss of income. She alleges that Mr. Sharma's income was household income shared equally, and his losses are her losses. Mrs. Sharma submits that if the aggregate damages to which Mr. Sharma is entitled exceed $400,000, then any portion of those damages that are specifically attributable to economic losses for Mr. Sharma's past and future earning capacity, or loss of competitive advantage, shift to her.

[11] Mrs. Sharma also seeks $30,000 damages for the value of nursing, housekeeping, or services provided by her to Mr. Sharma under s. 61(2)(d) of the *FLA*. Mrs. Sharma submits that she cared for Mr. Sharma during the six-month period of his convalescence immediately after the accident. She alleges that Mr. Sharma can no longer do housekeeping, and she has assumed responsibility for all domestic labour and childcare.

[12] Mrs. Sharma seeks $75,000 in damages under s. 61(2)(e) of the *FLA* for loss of care, guidance, and companionship.

[13] The action proceeded under the Simplified Procedure pursuant to Rule 76 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 (*Rules*), which limits the amount of money claimed to $200,000 per plaintiff and $200,000 per defendant. The Plaintiff submits that because there are two plaintiffs and two defendants, the maximum total damages that can be awarded is $800,000.

[14] The Defendants submit that Mr. Sharma has failed to establish past or future loss of income on a balance of probabilities. They submit there is no evidence to support the need for future care. Mr. Sharma did not obtain therapy despite having employment benefits that would have paid for therapy.

[15] The Defendants submit that while Mr. Sharma may have some minor impairments, they do not constitute "permanent and serious impairment" required for an award of non-pecuniary damages to be made.

[16] The Defendants concede that Mr. Sharma's non-displaced fractures would have had an impact on Aparna Sharma for a period. As such, the Defendant submits she should be awarded $15,000 to 20,000 in damages under s. 61(2)(e) of the *FLA* for loss of care, guidance, and companionship.

[17] The Defendants submit that no amount should be awarded to Mrs. Sharma for loss of housekeeping because she did all housekeeping prior to the accident and Mr. Sharma is able to carry out all housekeeping tasks with pacing.

[18] The parties agree that the following issues must be determined by the court:

i. Quantum of damages and vicarious liability;

ii. Mr. Sharma's economic losses: damages for past and future loss of income and/or earning capacity, or loss of competitive advantage;

iii. Mr. Sharma's damages for future care costs;

iv. Mr. Sharma's damages for loss of capacity for housekeeping and home maintenance;

v. Statutory threshold;

vi. Mr. Sharma's non-pecuniary damages;

vii. Mrs. Sharma's damages pursuant to ss. 61(1), 62(2)(d), and 62(2)(e) of the *FLA*; and

viii. Prejudgment interest on damages.

B. Quantum of Damages and Vicarious Liability

[19] In a Simplified Procedure action, the quantum of damages is governed by subrules 76.02(1), (2), and (2.1), which provide as follows:

> **76.02** (1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:
>
> 1. The plaintiff's claim is exclusively for one or more of the following:
>
> i. Money.
>
> ii. Real property.
>
> iii. Personal property.
>
> 2. The total of the following amounts is $200,000 or less exclusive of interest and costs:
>
> i. The amount of money claimed, if any.
>
> ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.
>
> (2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1).
>
> (2.1) If there are two or more defendants, the procedure set out in this Rule shall be used if the plaintiff's claim against each defendant, considered separately, meets the requirements of subrule (1).

[20] The Plaintiffs submit that under Rule 76.02, because there are two plaintiffs and two defendants, the quantum of damages at stake in this action is up to $800,000.00. The Plaintiffs submit Mr. Sharma and Mrs. Sharma may each claim $200,000 against each Defendant, Nataliya Bublyk and Mykola Bublyk.

[21] The Plaintiffs submit that when subrules 76.02(2) and (2.1) are read together, it is self-evident that the monetary limits of each claim at issue are multiplicative, subject to the number of plaintiffs and defendants in the action. The Plaintiffs, relying on *Guzha v. Eclipse Colour & Imaging Corp*., 2005 CanLII 2400 (Ont. S.C.), argue this has been a matter of settled law for decades.

[22] The Defendants agree they are jointly and severally liable under s. 192(2), and 192(6) of the *Highway Traffic Act*. Vicarious liability does not require any culpability or separate tortious conduct on the part of the owner of a vehicle who is held vicariously liable for the tortious acts of the driver of the vehicle.

[23] However, the Defendants submit that under the Simplified Procedure, the damages recoverable against a vicarious defendant are limited to those that the tortfeasor (the driver) would owe had the claim been brought against them directly. The Defendants submit that the principle of vicarious liability in effect asks the owner of the vehicle to step into the shoes of the negligent party to ensure the plaintiff can obtain damages. The shoes do not get larger because the owner steps into them. The Defendant who is vicariously liable can be responsible for no greater amount of damages than the driver.

[24] While the Defendants submit that Mykola Bublyk is vicariously liable for the actions of Nataliya Bublyk, they submit this does not increase the damages that Mykola Bublyk is exposed to. He is exposed to the limits of what the at-fault driver is exposed to, in this case, $200,000.

[25] The Defendants submit the maximum amount the court can order is $200,000 as against the two Defendants *vis a vis*, Mr. Sharma; and the maximum amount the court can order as against the two Defendants *vis a vis* Mrs. Sharma is $200,000, such that the total quantum of damages available are $400,000.

[26] I accept that Mykola Bublyk, as an owner, is jointly and severally liable for damages caused by Nataliya Bublyk, the driver of the vehicle. Section 192(2) of the *Highway Traffic Act* provides:

> The owner of a motor vehicle or streetcar is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or streetcar on a highway, unless the motor vehicle or streetcar was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.

[27] Section 192(6) of the *Highway Traffic Act* provides:

> The driver, owner, lessee and operator that are liable under this section are jointly and severally liable.

[28] In *Guzha*, the single plaintiff claimed a total of $100,000 against two defendants, based on the several liability of each Defendant for $50,000. The defendants objected to the plaintiff's use of Simplified Procedure because the amount of the claim exceeded $50,000. Master Hawkins outlined the issue at paras. 3- 4 as follows:

> The plaintiff claims damages of $50,000 from Eclipse and damages of $50,000 from AIG. Eclipse submits that the requirement two set out in subrule 76.02(1) means that the total amount of money claimed (exclusive of interest and costs) in an action brought under Rule 76 cannot exceed $50,000. Here, Eclipse points out,

> the total amount of money which the plaintiff claims is $100,000. In consequence Eclipse says, requirement two is not met and this action must continue under the regular procedure, not the Rule 76 simplified procedure.
>
> The plaintiff responds that he has met requirement two in subrule 76.02(1) because the amount of money claimed from any one defendant does not exceed $50,000 and the claim against Eclipse is separate and distinct form the claim against AIG.

[29] Master Hawkins rejected the defendant's objection and held the action met the monetary limit requirement of subrule 76.02(1). Master Hawkins held the cumulative amount claimed by the plaintiff could exceed $50,000 so long as the individual claim against any individual defendant by the plaintiff did not exceed $50,000. He stated as follows at para. 6:

> *Rule 76 clearly permits the use of the simplified procedure in actions for amounts in excess of $50,000*. Under subrule 76.02(2) two or more plaintiffs may bring a single action for an amount in excess of $50,000 if each plaintiff's claim, considered separately, meets the requirements of subrule 76.02(a). Thus, if no single plaintiff claims an amount in excess of $50,000 the requirements of subrule 76.02 (1) are met even though the total amount of money claimed in that single action far exceeds $50,000" (See also *Qubti v. Ontario Jockey Club* (2002), 62 O.R. (3d) 290 (Div. Ct.)).

[30] Master Hawkins, citing the Ontario Court of Appeal in *Lillie v. Bisson* (1996), 46.O.R. (3d) 94 (C.A.), held the court should encourage a liberal interpretation of Rule 76 to carry out the policy behind the rule, which is to reduce the cost of litigating claims of modest sums by reducing the amount of procedure available in such cases.

[31] No reported decision has considered these findings from *Guzha*. However, the conclusions in *Guzha* are supported by a plain reading of the Rule 76.02, and by *Qubti*, a Divisional Court decision that considered the effect of the monetary cap on the damages to be awarded under Simplified Procedure in a "slip and fall" case involving contributory negligence. At the time, the monetary cap for Simplified Procedure matters was $25,000. The trial judge assessed the plaintiff's damages at $34,933.14. She found the defendant was fifty percent liable for failing to maintain his property in a safe condition and the plaintiff was fifty percent responsible for ignoring barriers that were erected. As a result, the Court awarded judgment for $17,466.57.

[32] The defendant appealed to the Divisional Court and argued the trial judge should have applied the contributory negligence finding to the cap amount, $25,000 damages claimed, such that only $12,500 should have been awarded.

[33] The Divisional Court dismissed the appeal. As in *Guzha*, the Court in *Qubti*, at para. 14, adopted the finding in *Lillie* at para. 4, that Rule 76 should be given a liberal interpretation "to carry out the policy behind the rule which is to reduce the cost of litigating claims of

modest sums by reducing the amount of procedure available in such cases." In *Qubti*, at para. 16, the Court held:

> *The reasoning of Sothey J. in Lillie refutes the argument that by making a claim under the simplified procedure a defendant has abandoned the amount of his claim in excess of the $25,000 for all purposes* as was decided in *Kingsberry and Bonneville*. In keeping with the liberal interpretation of Rule 76 dictated by the Court of Appeal, I conclude that such abandonment relates to the amount of the claim for which judgment is awarded in excess of $25,000. Thus, if the damages of the Respondent had been assessed at more than $50,000 the judgment would have been limited to $25,000 (exclusive of interests and costs) regardless of the amount of the excess." (Emphasis added)

[34] I agree with the Defendants that vicarious liability imposes liability without fault but does not create new liabilities or increase damages beyond what the tortfeasor is responsible for. However, where a Plaintiff establishes damages that exceed $200,000, no "new" liability is created for the vicariously liable defendant. But for the cap of $200,000 under Rule 76, the Defendants would be jointly and severally responsible for the total amount of the damages. It is not a situation where the owner's vicarious liability for the driver's negligence results in greater liability for the owner than the driver. The owner is not in a worse position than the driver. Because there are two defendants, the Plaintiff is entitled to obtain judgment of up to $200,000 against each Defendant, in respect of the damages established. The Plaintiff abandons only those amounts that exceed the limit of $200,000 per Defendant.

[35] I agree with the Plaintiffs that *Guzha* and *Qubti* confirm that the words "each Plaintiff" and "each Defendant" in subrules 76.02(2) and (2.1) respectively, when read in their "entire context and in their grammatical and ordinary sense," indicate that the monetary limits of each claim at issue are multiplicative, subject to the number of plaintiffs and defendants in the action (see *Rizzo & Rizzo Shoes Ltd.* (Re), [1998] 1 S.C.R. 27, at para. 21).

[36] The correct approach is to determine the total amount of damages to which an individual Plaintiff is entitled. Because there are two defendants who are jointly and severally liable, if the total liability for that Plaintiff exceeds $400,000, he or she must abandon the amount in excess of $400,000 because he or she has chosen to proceed under Simplified Procedure: *Maxwell v. United Rentals*, 2015 ONSC 2580, at para. 26).

[37] Mr. Sharma's claim is for $200,000 against each defendant for a total claim of $400,000 against two defendants. Considered separately, these two claims meet the requirements of subrule 76.02(1). As in *Qubti,* he must abandon any damages assessed at more than $400,000.

[38] Similarly, Mrs. Sharma's claim is for $200,000 against each defendant for a total claim of $400,000. Considered separately, these two claims meet the requirements of subrule 76.02(1). Mrs. Sharma must abandon any damages assessed at more than $400,000.

[39] I recognize that as a practical consequence of this finding, a Plaintiff may have greater opportunity to proceed by Simplified Procedure when the driver responsible for the accident did not own the vehicle. A plaintiff who suffers injury in a motor vehicle accident where the defendant driver of the motor vehicle is also the owner of the vehicle would only be able to recover a maximum of $200,000 under Simplified Procedure, whereas a plaintiff who suffers similar injuries, could recover a maximum of $400,000 if the driver is not the owner.

C. Summary of the Evidence of Diwakar Sharma and Aparna Sharma

Background Mr. Sharma

[40] In accordance with the Simplified Procedure, Mr. Sharma gave evidence by affidavit and was cross-examined at trial.

[41] Mr. Sharma is 42 years old. He and Mrs. Sharma met in India in 2011 and married. They have two sons. Their older son was five years old at the time of the accident. Their younger son was born after the accident.

[42] Mr. and Mrs. Sharma currently live with their two sons in a condominium in Toronto. At the time of the accident, they lived with Mr. Sharma's brother and sister-in-law in a three-bedroom apartment.

[43] Mr. Sharma was born in India and obtained an engineering degree from the University of Mumbai. He initially immigrated to Canada in 2005 to attend a yearlong post-graduate business program at Vancouver Island University.

[44] After completing university, Mr. Sharma worked in sales at Hari Stone, a natural stone importer in Vancouver before returning to India for several years.[1]

[45] When he returned to India, Mr. Sharma worked in supply chain logistics. In 2013, he obtained his SAP (systems, applications, and products) certification in information technology. "SAP" is an enterprise management field within the IT sector that involves streamlining business processes using software. Between 2014 to 2018, Mr. Sharma worked for Bristlecone, a supply chain management company in India.

[46] In April 2018, Mr. Sharma returned to Canada with Mrs. Sharma and their young son. Shortly after coming to Canada, Mr. Sharma obtained work in the information technology

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[1] In the Vocational Assessment, Shelley Smilek reported that when Mr. Sharma first came to Canada he worked for Hari Stone doing supply chain and inventory management and was paid minimum wage. She said Mr. Sharma told her that in 2010 he began working for Direct Buy Flooring. She said he worked full-time and was paid minimum wage and, in 2011, accepted an offer of employment from West Star motors. He was paid between $16 to $18 per hour. Mr. Sharma did not give evidence about his employment income prior to returning to India.

sector with Illumiti, an SAP company. Illumiti was subsequently acquired by a company called Syntax.

[47] Before the accident, Mr. Sharma worked at Syntax in project implementation. He met with clients to understand the requirements of their business processes. He travelled to client sites and participated in group presentations and meetings with clients sometimes for several days. He mapped the business requirements into software with teams that developed the software code. He met with programmers and developers and held workshops for client employees. He reported weekly and monthly to project directors on the status of his team. His work required planning, organization, and strategic management. Research and trouble shooting were required to be responsive to complex business scenarios that differed from client to client.

[48] Mr. Sharma indicated that prior to the accident, he had no medical issues and was not taking any medications. He had not seen a doctor since coming to Canada. The Defendants did not dispute that Mr. Sharma was previously in good health and I accept that he was in good health before to the accident.

[49] Mr. Sharma indicated in his affidavit and testimony that prior to the accident he helped Mrs. Sharma with approximately 40% of the domestic labour required in terms of cooking, dishes, washing and folding laundry, vacuuming, cleaning bathrooms and common areas, buying groceries, and childcare. He said he took his son to school and playdates, played soccer with him outside, and took part in dressing him, bathing him, brushing his teeth, and putting him to bed.

[50] Mrs. Sharma said that prior to the accident, she and Mr. Sharma shared household responsibilities relatively equitably. She estimated that Mr. Sharma did at least 40% of the domestic labour.

[51] Mr.Visschedyk submitted there is a material inconsistency in Mrs. Sharma's evidence about whether Mr. Sharma did housework prior to the accident. During discovery, Mrs. Sharma testified that she and her sister-in-law did all the housekeeping. At trial, when confronted with her evidence at discovery, she said Mr. Sharma helped with their own family's domestic chores. At discovery it was not put to Mrs. Sharma that Mr. Sharma did nothing to help with domestic chores.

[52] I accept Mrs. Sharma's evidence that she did not mean to convey that Mr. Sharma did nothing to contribute to their family's household chores.

[53] When it was suggested to Mr. Sharma that his wife and sister-in-law did all the housework before the accident, he said he could not recall the specifics from before the accident.

[54] I accept that prior to the accident Mr. Sharma helped with some household duties and childcare, however, I find as a fact that Mrs. Sharma was the primary care giver for their son and took primary responsibility for the household chores before the accident. She was at home full time and Mr. Sharma was working full time.

Injuries Immediately Following the Accident

[55] The collision occurred on November 10, 2018, at approximately 11:00 a.m. Suddenly and without warning, the Hyundai struck the minivan in a T-bone collision on the left side. Mr. Sharma became aware of the vehicle heading for them seconds before the impact. In his affidavit, Mr. Sharma described the impact as follows:

> The force of the impact compelled the entire left side of my body into the side of the minivan. My left shoulder, ribs, pelvis, low back, and head were all impacted, as the force of the collision caused the minivan to spin and come to a rest on the other side of the roadway. During the course of these events, I suffered a momentary loss of consciousness.

[56] Mr. Sharma was unable to get out of the vehicle independently. His brother and Mr. Patel took the middle row out of the minivan to lift him out. He was taken by ambulance to Royal Victoria Hospital in Barrie.

[57] While in hospital, Mr. Sharma learned he had sustained a rib fracture and hairline non-displaced pelvis fractures from the accident. Although Mr. Sharma did not require surgery, he remained in hospital for 18 days after the accident.

[58] The Defendants do not dispute that Mr. Sharma suffered non-displaced pelvic and rib fractures. However, they submit the evidence does not establish that Mr. Sharma lost consciousness or suffered a traumatic brain injury, noting that the ambulance history suggests Mr. Sharma did not lose consciousness and the emergency records do not document or reflect that Mr. Sharma suffered a head injury. For reasons set out below, I am not satisfied that Mr. Sharma has established that he suffered a traumatic brain injury.

Initial Recovery Period

[59] There is no real dispute about Mr. Sharma's initial recovery period in the months after the accident or his gradual transition back to work.

[60] Once Mr. Sharma was discharged from hospital, he was taken home by ambulance to Toronto. He could walk a few steps at a time, but was provided with a wheelchair, walker, and cane. He was reliant on his wheelchair for mobility for one to two months. Subsequently, he was reliant on his walker for three months until March 2019. He indicated he was reliant on a cane for mobility until May or June 2019.

[61] Mrs. Sharma provided evidence consistent with that of Mr. Sharma about Mr. Sharma's initial period of recovery. Their description of Mr. Sharma's initial recovery period is also supported by the medical records. I accept Mr. Sharma's evidence about the significant impact the accident had on him during the first six to eight months after the accident. No real challenge was made to Mr. Sharma's evidence about his initial period of recovery. At

issue is the extent to which Mr. Sharma continued to be affected by injuries caused by the accident.

Current Symptoms

[62] In his affidavit, Mr. Sharma described his current symptoms as follows:

a. Headaches, once or twice weekly, painful in both temples with ringing in the ears. Mr. Sharma indicated that the headaches are a level of seven to eight on a scale of ten. He indicated that the headaches often occur in the course of his work, and he never experienced any such headaches from work before the accident.

b. Left sided neck pain, every other day, for half to a full day, gradual in onset over the working day, culminating in pain at a level of seven out of ten.

c. Constant left sided shoulder pain that is exacerbated by light physical activity, such as playing with his children or lifting grocery bags. The pain is a level of eight or nine on a ten point scale.

d. Left sided rib pain, which occurs after sitting for a long time or after light physical activity and reaches a level of five or six on a ten point scale.

e. Upper and lower back pain, almost every day that increases in severity with physical activity. He described that after sitting for half an hour, it often becomes *excruciating*. He also indicated that his standing tolerance is approximately half an hour before the pain becomes *excruciating*. When it occurs, the upper back pain is approximately at a level of seven on a ten point scale and the lower back pain is approximately at a level of nine out of ten, almost *unbearable* requiring him to lie down and medicate.

f. Constant pain in the iliotibial band approximately at a level of seven on a ten point scale, radiating several times per week all the way down his lower body to his left foot, causing his lower body to feel pain at approximately five or six on a ten point scale.

[63] Mr. Sharma said since the accident, he has felt anxious and depressed. He has cognitive issues with memory and maintaining focus and concentration. He has difficulty with word finding and learning new things. He often becomes anxious while working and overwhelmed by tasks with which he had no prior issues before the accident.

[64] Mr. Sharma indicated he practices yoga, meditates daily, and takes Escitalopram to mitigate his anxiety and depression. He sometimes takes Trazodone to help him sleep. He takes Vyvanse to help with memory, focus, and concentration. He takes extra strength Tylenol and Advil to help with his pain.

[65] Mr. Sharma indicated he has also obtained treatment through his statutory accident benefits, which were exhausted in February 2020. The treatment he received included

physiotherapy, chiropractic care, massage, and occupational therapy. In 2024, he reinitiated physiotherapy treatment.

[66] Mr. Sharma has received psychiatric treatment from two psychiatrists, Dr. Mohamed El-Saidi and Dr. Elias Khorasani-Zadeh. He continues to receive treatment from Dr. Khorasani-Zadeh.

Impact on Employment

[67] Mr. Sharma was off work between November 10, 2018 and March 2019 when he began a gradual return to work. Mr. Sharma worked part-time hours between March 2019 until August 2020, when he resumed full-time hours.

[68] Mr. Sharma works remotely from home most days. He uses an ergonomic chair and sit-to-stand desk. He attends the office once per month, and when he does so, his employer accommodates him with a similar ergonomic workstation.

[69] In his affidavit, Mr. Sharma indicated that SAP implementation is a fast-paced environment, requiring peak performance to meet the professional challenges. He indicated where he once excelled, he now struggles. He said he worries he will be forced into early retirement and relegated to inferior roles in the information technology industry due to his diminished ability to meet the high level of the SAP sector's professional demands.

[70] Mr. Sharma indicated that after returning to work, he worked in a support role, rather than a leadership role. He said this delayed his path to promotion from SAP consultant to SAP architect. He said he missed the opportunity to upgrade his skill set with respect to an SAP implementation module called "extended warehouse management" (EWM), which was a complement to his experience in the field of material management (MM) and after the accident, he missed the opportunity to participate on several projects involving extended warehouse management.

[71] Mr. Sharma said he was scheduled to participate in a full cycle implementation, which would have provided him valuable skills important for future advancement.

[72] He said since the accident because he finds it difficult to concentrate, he has not taken any SAP examinations, which are necessary to keep his skillset up to date in the field.

[73] He said his inability to travel until recently also interfered with his professional advancement because SAP consultants and architects are required to travel constantly to meet with clients and to observe and investigate business processes for which they design solutions. His inability to travel limited the projects he worked on to local projects. He did not take his first business trip after the accident until July 2023.

[74] While I accept that Mr. Sharma's injuries impacted his ability to travel until mid-2023, the extent to which this impacted his employment was reduced because of the pandemic, which drastically reduced business travel in 2020 and 2021 for everyone.

[75] Mr. Sharma advised that his pain interferes with his ability to perform, and he must take regular breaks. He said his sitting and standing tolerances are approximately 30-45 minutes before he must change positions. He indicated that because the positional changes are exhausting, an eight hour workday often extends to twelve hours which impacts his family life and ability to participate as a husband and father in family dinners and his children's evening routines.

[76] During the trial, Mr. Sharma became obviously uncomfortable and had to adjust his position while testifying and while observing the proceedings. As set out in more detail below, I accept that Mr. Sharma continues to suffer from ongoing back pain.

[77] Mr. Sharma indicates that he finds the client facing aspects of his work problematic because it is difficult for him to carry on any type of longer conversation since he loses focus after a few minutes. He said he struggles to make notes of what clients communicate in terms of deliverables, which leads to missed deliverables. He finds it difficult to communicate effectively and explain complex scenarios with business subject matter experts and business process owners, which he believes has impacted the growth of his professional responsibilities.

[78] Mr. Sharma said that while he was working part time he was unable to carry out the same type of work he did before the accident. During this period, he was providing project support rather than implementation and delivery. He explained that he was fixing client issues or "bugs," rather than providing service in a more direct client facing role. Clients would contact him to inform him of features of their software that were not working properly, and he would be responsible for fixing them. Mr. Sharma described this as a "major diminution" in responsibility relative to his previous role in SAP implementation, with a corresponding diminution in the value of the professional experience he was accruing during this time. Mr. Sharma did not return to an SAP implementation role until 2022.

[79] Mr. Sharma indicated that but for the accident, he believes he would have followed the natural vocational trajectory in the SAP field, from consultant to architect. He explained that this means that he would have gone from client-facing consultation on the requirements of projects, to taking direct responsibility for the design and delivery of projects.

Impact on Income

[80] Mr. Sharma indicated that his income has increased since the accident, but he does not believe it reflects what his earning capacity would have been but for the accident. He said his diminished responsibilities have impacted both his income and his professional trajectory since the accident.

[81] Mr. Sharma received short-term disability, long-term disability, and income replacement. He agreed that, during the period after the accident and before he returned full-time, he received short-term benefits of $14,142.86, long-term disability benefits of $30,210,94,

and income replacement of $17,314.28 (from $35,000), resulting in total benefits of $61,668.08.

[82] Mr. Sharma included his income tax records from 2018 to 2023 as an Exhibit to his affidavit. Several letters from Syntax set out Mr. Sharma's base salary and annual performance bonuses. The records from Syntax and Mr. Sharma's income tax records show the following:

YEAR	**Actual Employment Income**	**Annual Base Salary** **(eligible for additional annual bonus up to 7.5%)**
2018	$50,128.84	$110,000 *Employed full time from June 2018 to November 10, 2018.
2019	$52,887.30	$110,000 *Employed Part-time for the full year due to accident.
2020	$110,770.00	$115,000 *Employed Part-time until August 2020. (Base salary of $115,000.00 per annum effective March 1, 2020 – Exhibit 12A)
2021	$125,265.00	$115,000 Full time.
2022	$143,564.63	$125,000 Full Time. (Base salary increase to $125,000 effective March 24, 2022 – Exhibit 12C)

		(Additional one time $8333.33 bonus November 2022)
2023	$160,843.38	$150,124.93 Full time. (Base salary increase effective January 1, 2023 12E)
2024	$171,066.90	$159,132 Full Time (From Report of Amit Gore citing letter from Syntax dated November 26, 2024)

[83] Mr. Sharma was working in Canada for Syntax for less than six months in 2018 prior to the accident. He did not return full-time until August 2020. His years of full-time employment at Syntax: 2021, 2022, 2023, and 2024, show a steady increase in income.

[84] A review of his salary history also shows that in most years he received the maximum or close to the maximum annual bonus available.

[85] In cross-examination, it was put to Mr. Sharma that he received the maximum bonus in 2020. Mr. Sharma said he did not remember. When put to him that he had given that evidence at the discovery, he indicated “maybe then.”

[86] When Mr. Visschedyk put to Mr. Sharma that he received a raise every year since the accident, Mr. Sharma responded that it was not a raise. He said it was a correction in his salary. When it was put to him that every year since the accident he earned more money, Mr. Sharma said that was not fair. He said he did not receive a raise every year.

[87] In respect of Mr. Sharma’s belief that he was trailing in pay due to his accident, Mr. Sharma agreed he did not know how much other employees at Syntax were being paid or how much they received as bonuses.

[88] Mr. and Mrs. Sharma both indicated that they have always shared household finances and there is no separation between their money that goes into a single bank account.

[89] As I explain in more detail below, in my view, Mr. Sharma misperceived his level of success at work and the extent to which the accident impacted his renumeration at work after he returned full time.

Impact of Injuries on Personal Life

[90] Mr. Sharma indicated his relationship with his wife and children has suffered due to his injuries. They are affected by his irritability and shortness in temper. His marital relationship is less harmonious and intimate than it was before the accident.

[91] Mr. Sharma indicated that, due to pain, he cannot do things like play soccer with his sons, something he loved to do with his older son before the accident.

[92] Mr. Sharma said his cognitive issues also impact his personal life. He forgets family members birthdays and even his own anniversary. He forgets groceries on a grocery list and sometimes neglects to bathe daily, something he did before the accident.

[93] Mr. Sharma said his physical limitations have precluded him from making the contribution to domestic labour that he did before the accident. He indicated that he cannot wash or fold laundry, cook, do dishes, vacuum, clean the bathrooms, or make beds due to physical pain. He said he does grocery shopping but has trouble lifting heavy things. He said Mrs. Sharma takes responsibility for all other domestic chores and childcare.

Aparna Sharma

[94] Mrs. Sharma provided evidence by affidavit and was cross-examined during the trial. Mrs. Sharma is 39 years old. She was born in India where she completed her education. She obtained a Master of Business Administration at Kurukshetra University in 2010. After completing her university studies, she worked as an assistant purchasing manager for Vedang Radio Technologies.

[95] After coming to Canada with Mr. Sharma and their infant son, she completed a bridging program in supply chain management at George Brown College in July 2021.

Impact of the Accident

[96] Mrs. Sharma indicated in the initial months after the accident she helped Mr. Sharma with his hygiene, dressing, and took on responsibility for all domestic labour. She said she has continued to be responsible for all household responsibilities including childcare because Mr. Sharma is unable to help due to pain or feeling irritated. She said Mr. Sharma occasionally gets groceries, but she is primarily responsible for that task. She said Mr. Sharma is no longer able to cook, do dishes, vacuum, clean, wash or fold laundry, or make beds.

[97] Mrs. Sharma indicated that the change to their relationship since the accident has been very difficult. Her husband is short tempered, withdrawn, and isolated. The relationship is markedly different from the close communication and intimacy they enjoyed prior to the accident. Mrs. Sharma explained they have not gone to counselling because Mr. Sharma is very private.

[98] Mrs. Sharma indicated that Mr. Sharma's physical limitations preclude him from playing sports and engaging in physical activity with their sons.

[99] She said because she performs all household management and domestic labour, she can only take on professional roles that are below her education and experience. When she completed her affidavit in December 2024, she was on a short-term three-month contract in a data entry role with Syntax, Mr. Sharma's company. She was paid $28 per hour for 30 hours of work per week.

[100] In cross-examination, Mrs. Sharma agreed she worked at Creation Technologies as a buyer in 2021 doing supply chain management. She said the job was like her job in India, but she had greater responsibility in India. She was on contract for nine months but stopped due to lack of work. After the job ended they went to India to visit family. When she returned, she had difficulty finding an appropriate job because of her career gap, lack of Canadian experience, and market conditions. Mrs. Sharma agreed this explanation differed than her indication in her affidavit that she could not work because of her domestic obligations.

[101] Mrs. Sharma indicated that Mr. Sharma is constantly living with pain since the accident, and she can see his discomfort. When they go places, he wants to leave because of pain.

Credibility and Reliability – Diwakar and Aparna Sharma

[102] In making my findings, I must assess the credibility and reliability of Mr. Sharma and Mrs. Sharma.

[103] Most of Mr. Sharma's ongoing symptoms are not capable of objective determination. His treating practitioners, and the experts, rely upon Mr. Sharma's reports of his symptoms. Mr. Sharma's reliability and credibility, concerning the nature and extent of his injuries and their effect on his life is critical to his claim.

[104] I accept much of Mr. Sharma's evidence about the presence of ongoing symptoms caused by his injuries. I found him generally to be a forthright witness, albeit one who was frustrated by his circumstances. As I will explain in more detail below, I accept that he suffers from chronic pain, and depression, because of the injuries he suffered in the accident and that his chronic pain and depression have impacted his cognitive functioning.

[105] That Mr. Sharma continues to suffer physical, psychological, and emotion injury related to the accident is corroborated by the serious nature of the initial injuries he suffered, post-accident treatment records, and the expert evidence.

[106] However, I do not accept the description in Mr. Sharma's affidavit that his chronic pain is persistently extreme. I accept that he suffers from chronic pain daily, but it is variable. In respect of the level of pain he experiences daily, there were material inconsistencies between his description in his affidavit and statements he made to experts, such as Dr. Khumbare and Dr. Karabatsos and to his treating physicians regarding the level of pain he experiences daily.

[107] Since the accident, Mr. Sharma has been prescribed pain medication to address his pain. However, he primarily relies on over the counter pain medication to manage his pain.

[108] I accept Mr. Sharma's chronic pain and depression has impacted his cognitive functioning. I accept it has affected his concentration, focus, and communication skills. It has interfered with his ability to learn new things. It has also affected his confidence and subjective assessment of his cognitive functioning. To some extent, Mr. Sharma underestimates his post accident ability to contribute both at work and in the home.

[109] I find that through perseverance and hard work; despite experiencing chronic pain, Mr. Sharma has maintained a competent level of performance in the workplace. He has underestimated the quality of his work and his future potential.

[110] I accept chronic pain, and depression has had an impact on Mr. Sharma's ability to carry out household responsibilities, including caring for his children. However, I do not accept that it has left Mr. Sharma entirely incapable of carrying out any household tasks or contributing to the care of his children. This assertion is inconsistent with statements made by Mr. Sharma to health care professionals, and the expert witnesses. For example, Mr. Sharma told Dr. Khumbare he has difficulty with tasks that involve lifting and carrying and said he cannot play with his children *for long periods of time* due to his pain. He said he is unable to complete heavier tasks within the home, such as deeper cleaning, *and has to perform other activities with pacing/modifications*. He told Dr. Karabatsos that he can perform household duties with pacing. Similarly, he told Dr. Gavett-Liu that he continues to complete his household responsibilities but works in 15-20 minute increments.

[111] Despite inconsistencies about his level of pain and ability to conduct household tasks, there is a very substantial body of evidence that corroborates that Mr. Sharma has experienced significant daily ongoing chronic pain and depression. I have discussed this evidence in more detail below.

[112] To the extent that I find that Mr. Sharma has overstated or misperceived the impact of his injuries, in my view, it is, at least in part, a function of his negative self-perception, which is related to his psychiatric diagnosis, including rumination on his physical condition. As Dr. Gavett-Liu explained, his self-image has become marked by the sense that he is handicapped because of his painful experiences. I am not satisfied that Mr. Sharma intended to misstate his experience or the impact of his injuries on his life, or to mislead the court. Both Mr. and Mrs. Sharma were genuinely distressed and frustrated by the degree to which their lives have been changed by the injuries caused to Mr. Sharma by the accident.

[113] I found Mrs. Sharma's evidence to be generally credible and reliable. In respect of the alleged inconsistencies, such as the division of labour in the home prior to the accident, and her brief period of work at Creation Technologies, I accept Mrs. Sharma's explanation about the inconsistencies and that she should have answered more carefully when answering some of the questions at discovery.

[114] I accept Mrs. Sharma's evidence, which was genuine regarding the frustration and sadness she has experienced because of the changes in her life and in her family's life due to Mr. Sharma's accident. Although Mr. Sharma may not be assisting Mrs. Sharma with household tasks and childcare, he could contribute to household responsibilities with pacing.

D. Analysis of Medical Evidence, Expert Evidence, and Findings of Fact: Injuries

Mr. Sharma Suffers from Chronic Pain and Depression

[115] I find as a fact that Mr. Sharma has experienced and continues to experience chronic pain, most frequently back pain and headaches because of the injuries he suffered in the November 10, 2018 accident. I accept that sometimes he also experiences left sided neck pain, left sided rib pain, and left sided shoulder pain. I am not satisfied that his neck, rib, and shoulder pain is as persistent as his chronic back pain which is daily.

[116] I accept that chronic pain has made it difficult for Mr. Sharma to sit or stand for extended periods. I accept that it has impacted his work. I accept the pain has impacted his ability to focus, which has extended the time it takes him to complete tasks. I accept it has made it more difficult for him to travel.

[117] I am satisfied that Mr. Sharma suffers from depression which has had a significant impact on his wellbeing.

[118] I am satisfied that Mr. Sharma's chronic pain and depression has impacted his cognitive functioning.

[119] I am satisfied that Mr. Sharma's chronic pain, depression, and related impact to his cognitive functioning flowed from his injuries caused by the accident. But for the accident, it is more likely than not that he would not suffer from chronic pain, depression, and the related impact on his cognitive functioning.

Records of Dr. Fanipour Not Inconsistent

[120] Contrary to the Defendant's assertion that the clinical records are inconsistent with Mr. Sharma's claim of chronic pain, in my view, the clinical records of Dr. Fanipour between December 8, 2018 and November 18, 2024 show Mr. Sharma expressed ongoing concerns regarding pain, including lower back pain and difficulty maintaining posture for extended periods. In June 2019, July 2019, August 2020, October 2020, May 10, 2021, November

17, 2021, December 2021, February 2022, March 2022, May 27, 2022, October 24, 2022, December 22, 2022, and May 4, 2023, Dr. Fanipour documented that Mr. Sharma continued to identify intermittent body pain especially when maintaining posture for a long period of time and complained of back pain.

[121] Mr. Visschedyk suggested to Mr. Sharma that he made no complaints to Dr. Fanipour about accident-related pain for two years between October 24, 2022 until October 2024 when he saw Dr. Fanipour about shoulder pain. However, Dr. Fanipour's records show that on December 22, 2022, Mr. Sharma described experiencing lower back pain after hitting an uneven surface when walking and on May 4, 2023, during a visit to Dr. Fanipour for a cough and cold, he described ongoing back pain from the accident managed with medication.

[122] After May 4, 2023, there are no documented accident-related complaints in Dr. Fanipour's records until October 11, 2024, when Mr. Sharma advised him he was experiencing shoulder pain including a limited range of motion. On the same date, he raised ongoing concerns regarding cognitive decline. Mr. Sharma had four medical appointments for other matters during that period, such as heart palpitations and concerns regarding cholesterol.

[123] In response to questions about his failure to raise concerns during this period, Mr. Sharma said he did not raise his concerns at every appointment. He explained that a doctor told him his injuries were like broken glass and would be present for the rest of his life, so he learned to live with them. I accept that after three years of experiencing ongoing pain, Mr. Sharma resigned himself to the ongoing presence of discomfort and pain. I also accept his evidence that he limited or avoided going to his doctor during the COVID period and when necessary, managed his pain with medication.

[124] In cross-examination, when it was put to Mr. Sharma that he told his doctor he did not require pain medication regularly, Mr. Sharma said he did not remember saying that and he took medication regularly. Mr. Sharma also said that he tried to avoid taking medication because he did not want to become dependent.

[125] At times, Mr. Sharma managed pain using prescription analgesics. He was prescribed pain medication by Dr. Fanipour including Toradol beginning January 2019. He was prescribed ketorolac tromethamine, a pain killer, in August 2020, and in November 2021. He was prescribed mylan-baclofen in August 2022, naproxen in December 2022, and pms-diclofenac in December 2022. It appears that he was prescribed amounts that would last for ongoing periods of time. It appears from his medical history that Mr. Sharma did not always rely on prescription pain medication and often regulated pain with over-the-counter pain killers.

Physiotherapy Records

[126] Mr. Sharma obtained physiotherapy at Physiomed in Thornhill after the accident between January 2019 and November 2019. Dr. Fanipour's medical records include a Physiomed "excuse from work" letter dated July 11, 2019. The Physiomed records indicate Mr.

Sharma was treated for "constant pain" and severe pain in his lower back and pelvis. The physiotherapy records reference limitations in Mr. Sharma's ability to sit and stand for extended periods. They also refer to Mr. Sharma experiencing moderate pain above the shoulder.

[127] After moving to Toronto, Mr. Sharma went to Pro Life Wellness three times between February 4, 2020 and February 20, 2020. Mr. Sharma explained that he stopped going to physiotherapy during the COVID period to mitigate the risk that he or a member of his family may contract COVID. I accept Mr. Sharma's evidence that he, like most members of the public, avoided close personal contact with others during the COVID pandemic. I accept this was why Mr. Sharma discontinued physiotherapy in 2020, not because he no longer had any pain.

[128] The Pro-life records for February 4, 14, and 20, 2020 document pain and treatment for lower back, left hip, and "I.T." band pain. There is a record from November 7, 2022 from Pro-Life Wellness that indicates that Mr. Sharma's back, neck, shoulders, and left arm and leg were treated.

[129] Mr. Sharma agreed that although he had benefits that would cover physiotherapy, after February 2020, he did not obtain physiotherapy treatment again for approximately four years until 2024 at Axis Physio. Since starting at Axis Physio in 2024, Mr. Sharma has been going to Axis Physio monthly.

[130] In cross-examination, it was suggested to Mr. Sharma that the Axis physiotherapy treatment in 2024 was for shoulder issues unrelated to his accident and not for back pain. Mr. Sharma maintained that he was treated for arm, back, and shoulder pain. Contrary to the defence suggestion that he was primarily treated for shoulder issues in 2024, the Axis physiotherapy notes between March 2024 and November 2024 make repeated references to "lb pain" (lower back pain). The records also indicate that treatment and exercises were provided to Mr. Sharma for back/tailbone pain.

[131] Further, shoulder pain was not raised for the first time in 2024. It was documented in the Royal Victoria Hospital records when Mr. Sharma was in hospital after the accident in November 2018.

[132] The physiotherapy records reflect that Mr. Sharma went to physiotherapy in 2024 not only for his shoulder, but also because of ongoing lower back pain. I find as a fact that in 2024, Mr. Sharma was continuing to experience lower back, hip, and shoulder pain that originated from his injuries from the accident, and he was being treated for his pain with physiotherapy.

Evidence of Dr. Khumbare

[133] Dr. Khumbare is a physiatrist. He is well-qualified to give expert opinion evidence in physical medicine and rehabilitation, specifically chronic pain. He is a medical doctor,

qualified as a specialist in physiatry. He has taught physiatry as an Associate Professor at McMaster University and has studied and treated chronic pain for 30 years.

[134] Dr. Khumbare also has a doctorate from the University of Toronto Institute of Biomaterials and Biomedical Engineering. He is the Lead Assessor, Physical Medicine and Rehabilitation for the College and Physicians and Surgeons. He is the Director of the Chronic Pain Management Unit at Hamilton Health Sciences and is a Staff Physiatrist at the Toronto Rehabilitation Institute. He has published widely, including in well-respected textbooks and peer reviewed journals. He co-wrote the chapter on chronic pain in "The Assessment of Physical Medicine and Rehabilitation," a standard textbook used by doctors training to qualify with a subspecialty in physical medicine and rehabilitation.

[135] Dr. Khumbare typically sees patients in his practice who continue to suffer from pain following medical interventions, such as orthopaedic surgery, where even though it appears the procedure went well, the patients continue to suffer pain. He assesses the source of the pain and recommends a rehabilitation plan.

[136] I found Dr. Khumbare's evidence to be thoughtful, careful, and balanced. As I will explain, where his evidence conflicts with that of Dr. Karabatsos, I prefer Dr. Khumbare's evidence. Dr. Khumbare is better qualified to provide opinion evidence about chronic pain. I accept his evidence that Mr. Sharma experienced and continues to experience chronic pain because of the injuries he suffered in the November 10, 2018 car accident. Dr. Khumbare's findings are well supported by Mr. Sharma's medical history and assessment.

[137] Dr. Khumbare conducted a medicolegal physiatry examination of Mr. Sharma at the request of Mr. Preszler on April 19, 2023. He completed a Rule 53.03 report dated May 15, 2023. In addition to seeing Mr. Sharma, Dr. Khumbare reviewed Mr. Sharma's medical records. He did not have the records of his treating psychiatrists and had very limited employment records.

[138] In describing his current complaints to Dr. Khumbare, Mr. Sharma described:

i.) Headaches generally twice a week of varying intensity and duration.

ii.) Mid and lower backpain. He described constant, stiff type pain *of variable intensity*, depending on the activity. Aggravating factors were described as activities that involve sitting, standing, bending, and lifting. Alleviating factors included rest, stretching, and medication. He indicated there was minimal improvement and it can impact on most daily activities. *The pain was described as variable between 4 to 9/10*.

iii.) Difficulty Sleeping.

iv.) Cognitive difficulties, including issues with memory, focus, and concentration, which impacts his functioning in particular while at work.

v.) Weight gain due to inactivity of five to six kilograms.

[139] In terms of his functional status, Mr. Sharma told Dr. Khumbare he has difficulty with tasks that involve lifting and carrying and said he cannot play with his children *for long periods of time* due to his pain. He said he is unable to complete heavier tasks within the home, such as deeper cleaning, *and has to perform other activities with pacing/modifications*. He said he was unable to participate in most physical activities like playing soccer and socialized less with friends.

[140] Dr. Khumbare conduct a number of standardized self-report measures with Mr. Sharma. Dr. Khumbare concluded that the testing showed Mr. Sharma has a high level of "Kinesio phobia," fear of movement for injured persons, a high level of pain interference with general functioning, and he experienced pain in the lower back and left hemi-pelvis.

[141] Dr. Khumbare made the following conclusions with respect to Mr. Sharma's impairment as a result of the accident:

i.) Chronic mid/low back pain with no clinical evidence of myelopathy or radiculopathy.

ii.) Post traumatic headaches. Dr. Khumbare indicated that Mr. Sharma has muscle tension contribution and believed that there were also difficulties with non-restorative sleep, and distracting elements of pain.

iii.) Deconditioning Syndrome. Dr. Khumbare indicated that Mr. Sharma has difficulties with chronic musculoskeletal pain. "The injured musculature has become less resilient with a reduced pain threshold when fatigue is reached." He also noted there was weight gain since the accident.

iv.) Mood disorder. Dr. Khumbare deferred to experts with training in mental health. However, he observed that Mr. Sharma has issues with respect to pain impacting his function, as well as difficulties with anxiety and depression. He indicated it is well understood that there is a connection between psychological stress and physical manifestation of pain.

[142] Dr. Khumbare testified that Mr. Sharma's pelvic fractures and the rib fracture are consistent with the areas of pain he described "for the most part." He explained that Mr. Sharma suffered fractures and damage to the soft tissue in the area including hematoma. He explained pain can originate from soft tissue injuries.

[143] Dr. Khumbare concluded that Mr. Sharma suffers from chronic pain syndrome that is directly and causally related to the November 10, 2018 accident and despite having received appropriate care, he has been left with residual deficits. He concluded to "a reasonable degree of medical certainty, there is no other plausible explanation for his presentation other than the motor vehicle accident in question."

[144] Dr. Khumbare indicated that there does not need to be an abnormal physical finding for a diagnosis of chronic pain. Pain can come from nerves, or nociplastic pain, such as migraine headaches, and affects the way an individual's brain and spinal cord interprets painful signals. Dr. Khumbare said even thought migraines cause significant pain, they do not show up on a physical exam. Dr. Khumbare testified that even though Mr. Sharma may have a normal physical exam, it does not preclude the presence of chronic pain. He indicated that to understand a patient's experience with pain you must consider the input of the patient.

[145] Dr. Khumbare indicated that chronic pain disorders often present with many medically unexplained symptoms and maladaptive thoughts, feelings, and behaviours that define the disorder, in addition to somatic symptoms, which include headaches, shoulder pain, neck pain, and lower back pain.

[146] Dr. Khumbare explained that chronic pain develops over time. He explained that the criteria to diagnose chronic pain is well-recognized. To be diagnosed, it must have been ongoing for at least six months.

[147] In reaching his conclusion that Mr. Sharma suffers from chronic pain, Dr. Khumbare indicated that Mr. Sharma had many factors seen in chronic pain syndrome (three of which are required for diagnosis) including:

i.) Use of prescription drugs beyond the recommended duration and/or abuse or dependence on prescription drugs or other substances. Dr. Khumbare said Mr. Sharma was using multiple medications to control chronic pain and mood. Dr. Khumbare agreed he did not have information about abuse of drugs, but did have information of consistent use of drugs for depression and occasional use of analgesics.

ii.) Dependence on health care providers and family for assistance.

iii.) Secondary physical deconditioning due to disuse and/or fear of avoidance. Dr. Khumbare indicated that Mr. Sharma has experienced weight gain since the accident and has difficulties with repetitive and sustained postures.

iv.) Withdrawal from social milieu including work, avocation, and social activities. Dr. Khumbare said that Mr. Sharma has virtually discontinued such activities due to his issues with chronic pain.

v.) Failure to restore pre-injury function after a period of stability. Dr. Khumbare indicated that while Mr. Sharma has returned to work, it is not in the same capacity.

vi.) Development of psychosocial sequalae, including anxiety, depression, and other non-organic illness behaviours. Dr. Khumbare explained in his report that Mr. Sharma presented with issues relating to memory, focus, and

> concentration. Despite the conclusions of Dr. Steiner, Dr. Khumbare concluded that the issues did not appear to be related to concussion, but rather "are more likely than not related to other factors ….including non-restorative sleep, the chronic distracting elements of chronic pain, as well as mood disorder."

[148] Dr. Khumbare concluded that it is probable and in fact likely that Mr. Sharma will continue to experience the symptoms (headaches, back pain, mood disorder) given the length of time since the accident and his current presentation.

[149] Dr. Khumbare concluded that Mr. Sharma's prognosis is "guarded but more likely than not poor" because of the nature of the injuries and the long-standing duration of the problems. He stated that "there appear to be issues from a physical, psycho-emotional, and cognitive perspective, which tend to act synergistically to potentiate and extend pain and disability into the long term." He did not expect improvement. In his opinion, Mr. Sharma has plateaued, and he will probably stay the way he is. He said that treatment recommendations could assist, but he was concerned about Mr. Sharma's compliance. Dr. Khumbare concluded that it is his overall opinion that Mr. Sharma has reached maximal medical recovery. I accept this evidence.

[150] Dr. Khumbare's treatment recommendations include physical conditioning, psychological/psychiatric support, functional support following an updated occupational assessment, and interventional pain management by a physician with training in the diagnosis and management of chronic musculoskeletal pain.

[151] Dr. Khumbare concluded by indicating that Mr. Sharma has had difficulties in multiple domains since the accident. In addition to suffering soft tissue and bony injuries, he has experienced difficulties with respect to mood and cognitive impairment. The cumulative effect of the trauma has impacted him in the physical, psycho-emotional, and cognitive domains, and the difficulties have impacted his ability to complete activities at home and in the workplace. He opined that from a chronic pain treatment provider perspective, concentration, memory, and ability to multi-task is affected negatively by chronic pain.

[152] Mr. Visschedyk challenged Dr. Khumbare's opinion on the basis that Mr. Sharma's physical examination by Dr. Khumbare was normal and he relied heavily on Mr. Sharma's self report of pain. During cross-examination, Mr. Visschedyk raised several issues, which he submits undermine the conclusions of Dr. Khumbare:

- Dr. Khumbare did not have the psychiatric treatment records.
- Mr. Sharma told him he was not experiencing neck or upper back pain when he examined him. However, he concluded that Mr. Sharma experiences chronic spinal pain in his neck and lower back.

- Dr. Sharma referenced Mr. Sharma gaining 5 to 6 kilograms since the accident due to inactivity, however according to the ambulance call report and Mr. Sharma's evidence, any weight gain was minimal and could be an ordinary fluctuation.

- He told Dr. Khumbare that his wife had to take time off work to support him after the accident.

- He told Dr. Khumbare that he could not complete heavier tasks in the home, such as deep cleaning, but could perform other activities with pacing and modification, inconsistent with other statements he has made about his ability to perform household tasks.

- Although he described the range of motion findings, he did not explicitly indicate in his report that Mr. Sharma's range of motion was normal.

- In terms of his medication use, his use of extra-strength Tylenol was low for what a person with the pain described by Mr. Sharma.

[153] While it would have been preferable for Dr. Khumbare to have reviewed the psychiatric records, Mr. Sharma's psychiatric history is well-documented. He has received ongoing psychiatric treatment and has consistently been taking prescribed medication to treat his depression since not long after the accident.

[154] In respect of Dr. Khumbare's description of range of motion, his findings were set out in detail in his report. At times he used descriptors indicating the absence of pain and in some instances explicitly described a normal range of motion. In instances where he was not explicit that the range of motion described was "normal" his findings were readily available to other experts such as Dr. Karabatsos to interpret.

[155] In respect of use of pain medication, Dr. Khumbare testified that pain is a personalized experience and on re-examination, Dr. Khumbare confirmed that Mr. Sharma was prescribed Toradol (ketorolac), a pain killer. Nonetheless, Mr. Sharma ability to manage his pain with over the counter medication is relevant to the assessment of the level of pain Mr. Sharma was experiencing and his ability to manage it.

[156] That Mr. Sharma was not experiencing neck or upper back pain on the day he was assessed does not detract from Dr. Khumbare's conclusions. Mr. Sharma's ongoing concerns regarding back pain, including, neck and upper back pain are well documented.

[157] I am not satisfied that any discrepancies regarding the extent of weight loss are of significance. Nor is Mr. Sharma's indication that his wife took off time from work to care for him. I accept that Mr. Sharma required significant support and care from Mrs. Sharma during his initial recovery period, which impacted Mrs. Sharma's ability to enter the work force. In addition, in respect of the diagnostic criteria I have no doubt that Mr. Sharma has become dependent on health care providers and Mrs. Sharma for support and assistance.

[158] Dr. Khumbare testified that he did not use a validity test, but he considered whether the medical history was inconsistent with Mr. Sharma's subjective report. I am satisfied that the extrinsic medical records support Dr. Khumbare's conclusions.

Evidence of Dr. Gavett-Liu

[159] Dr. Emily Gavett-Liu is a psychiatrist. She practices clinical psychiatry and conducts medico legal assessments. She provided a Rule 53 expert report and affidavit and was cross-examined at trial.

[160] Dr. Gavett-Liu assessed Mr. Sharma on March 21, 2023. She diagnosed him with Somatic Symptom Disorder, with predominant pain, persistent, moderate; Major Depressive Disorder, and Generalized Anxiety Disorder.

Chronic Pain Syndrome/Somatic Symptom Disorder

[161] Dr. Gavett-Liu explained that when referring to persistent pain, physical medicine clinicians use the term Chronic Pain Syndrome (CPS) while mental health clinicians use the term Somatic Symptom Disorder. She explained that CPS is described as pain that continues beyond the normal healing time for an individual's diagnosis and includes psychosocial dysfunction. CPS is a condition that adversely affects an individual's wellbeing, level of function, and quality of life. Dr. Gavett-Liu used the same diagnostic criteria as those described by Dr. Khumbare to diagnose chronic pain syndrome.

[162] Dr. Gavett-Liu explained that those with CPS tend to ruminate excessively on their physical condition and "their self-image becomes marked by the sense they are handicapped because of their pain experience – lending to the development of a fixed and deeply entrenched pain-patient identity." Dr. Gavett-Liu indicated that the individual may not purposefully mediate the identity. She said it has a significant influence on the individual's ability to engage in a variety of functional activities. Individuals with CPS lapse into a state in which they regard themselves as disabled, overwhelmed, and incapable of coping with their pain experiences. I find that this accurately characterizes Mr. Sharma's experience.

[163] In Dr. Gavett-Liu's opinion, there is a link between Mr. Sharma's physical and emotional symptoms. She concluded that "psychological factors substantially contribute to the experience of physical symptoms, resulting in functional limitation that physical assessments may not necessarily explain." She indicated that cognitive distortions (physical symptom-related catastrophic thinking) along with poor physical symptom coping capabilities lead to a perception of disability and physical symptom/mood related avoidance behavior. She explained that "…Mr. Sharma is caught up in a physical symptom/mood-anxiety-depression cycle whereby persistent physical symptoms result in decreased activity and increased depression and anxiety, which in turn result in

depressogenic and catastrophic thinking which in turn results in increased perceptions of physical and activity impairment, thereby fueling and maintaining a vicious cycle."

Major Depressive Disorder

[164] In respect of the diagnosis of Major Depressive Disorder, Dr. Gavett-Liu explained that for the diagnosis to be made, an individual must experience for a two-week period five or more of the following symptoms:

- Depressed mood most of the day, nearly every day, as indicated in the subjective report or in observation made by others.
- Markedly diminished interest in pleasure in all, or almost all, activities most of the day and nearly every day.
- Significant weight loss when not dieting or weight gain or decrease or increase in appetite nearly every day.
- Insomnia or hypersomnia nearly every day.
- Psychomotor agitation or retardation nearly every day.
- Fatigue or loss of energy nearly every day.
- Feelings of worthlessness or excessive or inappropriate guilt nearly every day.
- Diminished ability to think or concentrate, or indecisiveness nearly every day.
- Recurrent thoughts of death, recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide.

[165] At least one of the symptoms must be either depressed mood, or loss of interest or pleasure; and the symptoms must cause clinically significant distress or impairment in social, occupation, or other important areas of functioning. The episode cannot be attributable to the physiological effects of a substance or other medical condition, and it cannot be better explained by another psychiatric disorder.

[166] Dr. Gavett-Liu indicated Mr. Sharma's diagnosis of Major Depressive Disorder is well supported. She explained that:

- He had seven of the criteria for diagnosis of Major Depressive Disorder and at the time of her diagnosis, he had been experiencing symptoms for at least four years since the accident. Dr. Gavett-Liu indicated that Mr. Sharma did not have sleep disturbance and was not actively suicidal, although he expressed that he had experienced thoughts of harming himself.

- He was previously diagnosed with major mental disorder.

- His symptoms were not explained by another condition or substance use.

[167] Dr. Gavett-Liu indicated that Mr. Sharma had significant symptoms, and they caused cognitive difficulties for him at work that impacted his performance. She noted that he has been seeing a psychiatrist for a significant period of time. She emphasized that for his family doctor to refer him to a psychiatrist meant the concerns were significant because psychiatric resources are very limited and if he was doing well, he would have been under the care of his family doctor, not a psychiatrist. She also emphasized that he had been prescribed and was taking anti-depressant medication consistently over that period.

[168] In her report, Dr. Gavett-Liu indicated that in her assessment of Mr. Sharma, she found no evidence of malingering.

[169] I found the evidence of Dr. Gavett-Liu compelling, particularly in respect of the significance of Mr. Sharma's longstanding treatment for depression and anxiety, and his ongoing reliance on anti-depressant medication. Mr. Sharma's medical records show consistent and ongoing psychiatric treatment by Dr. El-Said and Dr. Khorasani-Zadeh. His prescription records show consistent reliance on anti-depressant medication since the accident. I find as a fact that Mr. Sharma did not suffer from depression before the accident, and his injuries and chronic pain he suffered because of his injuries caused his longstanding depression. I am satisfied that that Mr. Sharma suffers from Major Depressive Disorder because of the injuries he suffered in the car accident.

Prognosis

[170] Dr. Gavett-Liu concluded that Mr. Sharma's prognosis for psychiatric recovery is guarded, noting that over time his psychiatric symptoms and dysfunction have plateaued and persisted. In Dr. Gavett-Liu's opinion, Mr. Sharma's psychiatric impairments are permanent serious impairments of an important mental and psychological function. She concluded that Mr. Sharma's impairments have been continuous since shortly after the accident and are unlikely to improve substantially for the indefinite future as treatments had been largely unsuccessful to date.

[171] Dr. Gavett-Liu indicated that Mr. Sharma has been taking psychotropic medications, Escitalopram and Aripiprazole, to manage his psychiatric symptoms. He reported that they have "reduced considerably" his depressive and anxiety symptoms. Dr. Gavett-Liu agreed in cross-examination that Mr. Sharma reported that Vyvanse was helpful to him to focus. However, she indicated that he continued to have difficulty with attention. While some improvement has been achieved with medication, Mr. Sharma continues to rely upon and require medication.

[172] Dr. Gavett-Liu recommended that Mr. Sharma continue seeing a psychiatrist for ongoing rehabilitation and continue with prescribed medication. She recommended more intensive Cognitive Behavioural Therapy. Dr. Gavett-Liu indicated that Mr. Sharma would benefit from a multidisciplinary pain program to help improve his pain experience and overall function. She indicated that an improvement in his pain experience could provide some relief in his emotional symptoms but would not likely cure his psychiatric disorders.

Causation

[173] Dr. Gavett-Liu indicated that Mr. Sharma was physically and mentally well prior to the accident and in her opinion, but for the motor vehicle collision, on a balance of probabilities, Mr. Sharma would not have sustained the psychiatric impairments that he is currently faced with. I agree.

Impact on Employment

[174] In Dr. Gavett-Liu's opinion, Mr. Sharma was competitively disadvantaged in the workforce due to a diminished ability to cope with work demands. He reported poor memory, focus, and lack of interest in his work. She also indicated that he reported experiencing outbursts of anger towards his co-workers and project manager.

[175] I note that at trial, Mr. Sharma described being more irritable since the accident but did not describe having angry outbursts at work and this is not described elsewhere in the court record. Ms. Joshi gave no indication that Mr. Sharma experienced such difficulties at work.

[176] Dr. Gavett-Liu concluded Mr. Sharma's psychiatric impairments likely resulted in loss of earning/economic potential when compared to the possible trajectory of promotion/advancement and success that could be expected of his best self, based on his pre-loss educational and vocational strengths and goals. She indicated that he has impaired stress tolerance and is at risk of periods of medical leave.

[177] Dr. Gavett-Liu agreed that she did not perform formal cognitive testing on Mr. Sharma. However, she indicated that during her assessment of him, his recollection of events was grossly normal.

[178] Dr. Gavett-Liu could not recall whether she received Mr. Sharma's work file. She agreed that without it her opinion was based on his self-report regarding the change to his work performance. In my view, this impacts the probative value of Dr. Gavett-Liu's evidence about the extent to which his psychiatric diagnosis has impacted his employment. As I have indicated below, Mr. Sharma's subjective assessment of his work performance does not correlate with his actual work performance based on the evidence of his supervisor Ms. Joshi, and the limited workplace records provided to the court. Those limited records suggest that after Mr. Sharma returned to work on a full-time basis in August 2020, he appears to have demonstrated good workplace performance, and received corresponding salary increases and bonuses generally close to the maximum available.

Housekeeping and Home Maintenance Activities

[179] Dr. Gavett-Liu concluded that Mr. Sharma could not consistently complete or enjoy normal activities of daily living such as socializing with others, having intimate relations, enjoying his children/family, and engaging in leisure activities due to his psychiatric impairments

and persistent pain. She concluded that his psychiatric impairments substantially (constantly and consistently) interfere with most of the usual activities of daily living. I accept these findings.

[180] Dr. Sharma concluded that psychiatrically speaking there were no restrictions on his ability to complete housekeeping and home maintenance activities. In respect of the impact of his physical injuries on his ability to carry out such duties she deferred to other appropriate health care professionals.

[181] Contrary to Mr. and Mrs. Sharma's evidence at trial, that he is incapable of performing any household or domestic tasks, or caring for the children, Dr. Gavett-Liu reported that Mr. Sharma told her that he continues to complete his household chores but can only perform tasks in fifteen-to-twenty minute increments due to pain. He told Dr. Gavett-Liu that he could no longer complete outdoor maintenance such as shoveling or mowing grass as "if I start to do it, it will aggravate my pain more". I note that Mr. Sharma lives in a condominium and as a result is not required to carry out such tasks. Mr. Sharma told Dr. Gavett-Liu that both he and his wife care for their two children.

[182] Dr. Gavett-Liu gave detailed, careful, balanced evidence. I accept her evidence. Her medical conclusions, that Mr. Sharma suffers from Somatic Symptom Disorder and Major Depressive Disorder, are well supported by Mr. Sharma's medical history, in particular his psychiatric history, and I accept her evidence that his disorders have a serious impact on Mr. Sharma and are "permanent".

Psychiatric History

[183] Mr. Sharma raised the concern of forgetfulness with Dr. Fanipour, his family doctor, including his belief it may be accident related beginning in May 2019.

- In August 2019 he indicated his confidence and sharpness of mind had decreased.
- Mr. Sharma saw psychiatrist Dr. Mohammed El-Saidi, beginning in September 2019 and the notes of Dr. El-Saidi make reference to Mr. Sharma indicating that his concentration was low and his realization that there was a mental component when he returned to work in March 2019.
- Dr. Fanipour referred Mr. Sharma to a memory clinic in September 2020 regarding memory decline but the clinic did not see him because he did not fall within the scope of their practice.
- The records of Dr. Fanipour continue to reflect concerns about memory trouble and attention deficit between October 2022 and October 2024.
- Dr. Fanipour referred Mr. Sharma to Dr. Marjan Dolatshahi, on March 8, 2022 at the Neuro-Diagnostics Centre regarding memory decline. Dr. Dolatshahi also saw Mr. Sharma in March 2024.

[184] When Mr. Sharma was referred to psychiatrist Dr. El-Saidi in August 2019, he underwent an assessment and thereafter saw Dr. El-Saidi approximately every three months between November 2019 and February 2022. Dr. El-Saidi diagnosed Mr. Sharma with Major Depressive Disorder on September 17, 2019, and recommended supportive therapy. Dr. El-Saidi prescribed ciprolex and trazodone.

[185] Mr. Sharma agreed there was a nine month gap of psychiatric treatment between February 2022 and November 2022 when he began to see Dr. Khorsani-Zadeh.

[186] Dr. Khorsani-Zadeh's records for the period between November 2022 up until November 2024 Show that Dr. Khorsani-Zadeh initially saw Mr. Sharma every two to three weeks, and later saw him monthly. Dr. Khorsani-Zadeh treated Mr. Sharma for depression and anxiety with medication and psychotherapy. In 2024 Mr. Sharma was prescribed Vyvanse, Escitalopram, and Abilify.

[187] In an initial consultation letter dated November 8, 2022 to Dr. Fanipour, Dr. Khorsani-Zadeh referred to seeing Mr. Sharma about accident related anxiety, and concerns regarding concentration and memory post-accident which was described as his "biggest concern". He initially presented with symptoms of generalized anxiety disorder and post traumatic stress disorder secondary to his motor vehicle accident. In his records, Dr. Khorsani-Zadeh described Mr. Sharma as having a history of anxiety, ADHD, and depression.

[188] Dr. Khorsani-Zadeh's records make frequent reference to improvement in Mr. Sharma's ADHD and anxiety symptoms and improvement in mood, concentration, and irritability. However, on November 13, 2023 Mr. Sharma reported significant issues around work and other psychosocial stressors because of debilitation. In 2024, Mr. Sharma spoke of slight irritability, ongoing low mood and anxiety from time to time.

[189] The records suggested that overall Mr. Sharma was "managing appropriately" and his mood is most frequently described as better during 2024. Throughout the records, Dr. Khorsani-Zadeh described Mr. Sharma's cognition as "grossly intact" and described him as having "average intelligence". He described an increase in focus and attention with adjustment of medication.

[190] When cross-examined about Dr. Khorsani-Zadeh's records that suggested improvements in mood and concentration when taking medication, Mr. Sharma said he felt better when taking medication, but he believes he will need to take medication for the rest of his life. He said he has very bad thoughts about his future. He said if he is in a good mood, his responses to his doctor are different. Mr. Sharma said he did not mention bad thoughts to his doctor but did to his wife and parents. I accept that Mr. Sharma is a private person and has not always disclosed the full extent of his symptoms, especially psychiatric symptoms, to his doctors. Further, the medical notes reflect a specific point in time and are taken for treatment purposes, not evidentiary purposes.

Evidence of Dr. Steiner

[191] The Plaintiff also filed an affidavit from Dr. Leon Steiner, a treating neuropsychologist. Dr. Steiner did not testify.

[192] Mr. Sharma was referred to Dr. Steiner for assessment on October 29, 2019. His November 11, 2019 report was included with his affidavit. Dr. Steiner's report was based on a review of medical records and his assessment of Mr. Sharma on October 29, 2019. Dr. Steiner did extensive neuropsychological testing with Mr. Sharma during his assessment.

[193] The outcome of the neuropsychological tests included:

- Mr. Sharma scored in the average or high average range in intellectual testing. Dr. Steiner indicated that Mr. Sharma's general cognitive ability was in the average range of functioning. Notably, Mr. Sharma's ability to sustain attention, concentrate, and exert mental control was in the high average range.

- On Academic achievement, Mr. Sharma scored in the average or high average range.

- On Memory testing, he performed in the average range.

- On Executive functioning, he performed in the average range. The assessment noted that Mr. Sharma's testing suggested problem solving rigidity with emotional dysregulation. Dr. Steiner indicated that individuals with this profile tend to lose emotional control when their routines or perspective are challenged.

- In visuospatial and constructional abilities, Mr. Sharma performed in the average range.

- In the Attention module, Mr. Sharma's results were in the average to low average range, but his auditory working memory was in the high average range. His divided attention was in the borderline range and low average for accuracy.

- Mr. Sharma's results in the Language module were average.

[194] In respect of the "Pain Patient Profile," Dr. Steiner indicated that Mr. Sharma's score on the depression scale was within the below average range (29th percentile), which "suggests he is not experiencing affective distress associated with pain and he is optimistic about pain relief." His score on the anxiety scale was within the average range, which "suggests that Mr. Sharma is bothered by the intensity or duration of his pain. His score on the somatization scale was within the below average range, suggesting "his coping skills related to pain are effective and he sees his pain as a relatively minor or temporary inconvenience."

[195] Mr. Sharma's scores on the Beck Anxiety inventory showed a moderate level of anxiety and on the Beck Depression Inventory showed a moderate level of depression.

[196] In the summary section of his report, Dr. Steiner said the following with respect to Mr. Sharma's concerns about memory and concentration:

> Mr. Sharma's most salient complaint is related to his perceived memory and concentration concerns. Additionally, he reported decreased stamina and poor organizational skills. He identified that he has begun to "overthink' or ruminate over simple and complex decisions making daily living difficult, at best. Mr. Sharma is concerned about this future, his health and most predominantly, his cognitive function which in turn impacts his memory and concentration.
>
> Despite Mr. Sharma's complaints regarding his memory and concentration and his difficulty with planning and organization he scored in the average range in these areas in neuropsychological testing.
>
> The testing did reveal difficulty with problem solving rigidity and cognitive inflexibility. There was also evidence of low average performance *on selective attention and processing tasks.*

[197] In respect of psychological sequelae, Dr. Steiner concluded that the November 10, 2018 accident was the direct cause of Mr. Sharma's impairment in psychological function and stated as follows:

> > Prior to his motor vehicle accident, Mr. Sharma was engaged in activities of daily living, enjoyed a robust work and personal life that he excelled in with no difficulty. His responses to the psychological inventories, report and presentation all suggest the presence of psychological impairment. He suffers from frequent mood lability, loss of interest in previously enjoyed activities, a dispirited and demoralized stance, irritability, feelings of sadness, difficulty making decisions, obsessive ruminations (i.e. overthinking), and paucity of energy. He struggles with self-motivation and engagement with others.

[198] In terms of diagnosis, Dr. Steiner concluded that Mr. Sharma's psychological symptomology met the diagnostic criteria for Major Depressive Disorder.

[199] Dr. Steiner also opined that Mr. Sharma suffered a traumatic brain injury. I am not satisfied that the evidence establishes that Mr. Sharma suffered a traumatic brain injury, and I have placed no reliance on Dr. Steiner's conclusion that Mr. Sharma suffered a mild traumatic brain injury.

[200] In reaching his conclusion, Dr. Steiner *speculated* that Mr. Sharma's pre-accident intelligence was likely above average to superior based on his education and qualifications. He relied on selective scores on the neuropsychological testing in areas regarding memory, concentration, sustained and divided attention, problem-solving, processing, and accuracy,

to find, based on what Dr. Steiner assumed was Mr. Sharma's pre-accident intelligence, that the accident caused some degree of impairment in neurocognitive function suggesting a Mild Traumatic Brain Injury. In reaching his conclusion, Dr. Steiner had no baseline to compare Mr. Sharma's 2019 psychological testing to. Dr. Steiner opined that Mr. Sharma's school and work provided "quite reliable *room for conjecture*."

[201] In finding that Mr. Sharma suffered from a Mild Traumatic Brain Injury, Dr. Steiner does not appear to have considered that none of the treating physicians, including those from Royal Victoria Hospital identified a head injury or traumatic brain injury. Dr. Steiner's conclusions focus on a limited and selective portion of the neuropsychological testing, whereas the preponderance of testing appears to indicate that Mr. Sharma's overall cognitive functioning was intact and in the average to high average range.

[202] In Dr. Khumbare's opinion, Mr. Sharma's cognitive issues were more likely related to poor sleep and "the distracting elements of chronic pain, as well as mood disorder."

MRI findings

[203] Mr. Sharma's family physician, Dr. Fanipour referred Mr. Sharma to Dr. Marjan Dolatshahi, on March 8, 2022 at the Neuro-Diagnostics Centre regarding memory decline. An MRI was done on January 16, 2022. The findings of the MRI included a parasagittal lesion within the centrum semioval, above the lateral ventricle. In a reporting letter to Dr. Fanipour, dated March 8, 2022, Dr. Dolatshahi concluded that Mr. Sharma had mild cognitive impairment and suggested increasing Vyvanse. Dr. Dolatshahi suggested reducing his workload for a couple months and doing yoga mediation, and stress release techniques and removing provoking factors of migraine from the work environment.

[204] There was no expert evidence at trial that explained the MRI findings, linked them to the accident, or suggested that they established that Mr. Sharma suffered a traumatic brain injury.

[205] There is an insufficient evidentiary basis to find that Mr. Sharma suffered a traumatic brain injury.

Evidence of Dr. Karabatsos

[206] Dr. Karabatsos is an experienced orthopaedic surgeon. He has a specialty certificate in Orthopaedic Surgery and has completed postgraduate fellowships in General Orthopaedics and Lower Extremity Reconstruction. He practices at William Osler Health Centre in Brampton. His area of surgical expertise is the management of musculoskeletal injuries. He was qualified to give expert opinion evidence in orthopaedic surgery with a specialty in trauma and lower extremities.

[207] Dr. Karabatsos conducted an evaluation of Mr. Sharma on March 29, 2023, reviewed Mr. Sharma's medical records, and provided a Rule. 53.03 expert report dated June 2, 2023.

He testified during the trial. Dr. Karabatsos did not review the reports of Dr. Gavett-Liu, Dr. Khumbare, or Shelley Smilek.

[208] Mr. Sharma reported constant back pain, intermittent hip pain, intermittent neck pain, left sided rib pain, and bi-temporal headaches to Dr. Karabatsos. He also reported intermittent pain in both knees. He told Dr. Karabatsos he suffered from depression and anxiety from the accident. Mr. Sharma described walking and standing as activities that caused pain. At the time he saw Dr. Karabatsos, he was taking Escitalopram, Vyvanse, and Aripiprazole.

[209] Mr. Sharma informed Dr. Karabatsos that he can perform household chores with pacing, and occasionally plays soccer with his children. He said he can walk short distances but has been unable to resume playing cricket.

[210] Dr. Karabatsos performed a number of physical examination tests with Mr. Sharma, including range of motion tests. He concluded that Mr. Sharma had full range of motion no instability, and no pain on bony or soft tissue palpitation.

[211] Dr. Karabatsos explained that Mr. Sharma originally sustained non-displaced fractures of the left pelvis, including the left inferior pubic ramus, left suprapubic ramus, and left sacral wing with associated hematomas, a nondisplaced posterior fracture of the left 11th rib, in addition to sprain/strain injury to the lower back from the accident. Surgical intervention was not required.

[212] Dr. Karabatsos indicated that because the pelvis is a ring, if you have one fracture, there will be more than one. He disagreed the hematomas were soft tissue injury. He said it was likely bleeding from breaking of the bone.

[213] In describing the pelvic fractures, Dr. Karabatsos explained that there are significant variations in pelvic fractures, and they can be very serious. He said Mr. Sharma's fractures were the least severe type.

[214] Dr. Karabatsos agreed it would take significant force to cause the fractures, and they would be painful.

[215] Dr. Karabatsos testified that the prognosis for such injuries is excellent, and they generally heal in six to eight weeks. He noted it would not be uncommon for such an injury to result in some residual back pain due to an associated posterior injury. Dr. Karabatsos agreed that sometimes after bones heal, patients will continue to feel pain, and it can cause disability. He did not agree that it will cause impairment. Dr. Karabatsos said he has treated thousands of patients with injuries like Mr. Sharma's, and most individuals make a full recovery and have minimal residual pain.

[216] Regarding soft tissue injury, Dr. Karabatsos indicated that in his opinion because it was a compression injury, there was not the type of stretching involved that will cause soft tissue injury and pain.

[217] In Dr. Karabatsos opinion, from a clinical perspective, Mr. Sharma's examination was unremarkable for any objective physical impairment in relation to the accident. His gait and range of motion, paravertebral soft tissues, and neurological examinations were normal.

[218] Dr. Karabatsos testified that pain is stratified as mild, moderate, and severe. A person with mild pain may be taking over-the-counter medicine and it can be correlated with their presentation, as to whether they are walking and sitting, and moving normally. He concluded that Mr. Sharma had mild pain, based on his clinical presentation, the nature of his injury, and the fact he was addressing his pain with over-the-counter pain medication.

[219] Dr. Karabatsos said an individual with moderate pain will take prescribed medication, and there will be clinical signs they cannot bend or move comfortably and cannot bend and straighten. He said when individuals have severe pain they are usually on strong narcotics or taking strong analgesics and have severe abnormal movements when examined.

[220] Dr. Karabatsos indicated that Mr. Sharma showed no physical manifestations of pain and was not taking prescription pain killing medications. He said in his opinion, if Mr. Sharma was experiencing pain, it was mild.

[221] Dr. Karabatsos agreed that pain will not show up on a radiological study, but said it is detectable from a clinical assessment. He indicated that a clinical assessment would correlate well with real world impairment. As noted above, I accept that Mr. Sharma suffers from chronic pain, but I am not satisfied that Mr. Sharma experiences *extreme* pain daily. Nonetheless, I do not accept Dr. Karabatsos finding that Mr. Sharma experienced only mild pain that did not impact his functioning. I find that Mr. Sharma had variable pain that was often moderate, and at times became more severe.

[222] Dr. Karabatsos concluded that Mr. Sharma did not suffer from any objective functional impairment with respect to any usual daily living activities because of the injuries he sustained in the accident. He concluded that Mr. Sharma does not suffer from a substantial inability to perform his pre-accident daily living activities because of the accident in question.

[223] Dr. Karabatsos also concluded that from an orthopedic perspective, Mr. Sharma can perform the essential duties of his pre-accident/current occupation, as well as any other vocational position suited for his training and experience. He concluded that Mr. Sharma will be able to perform his pre-accident occupation until a normal retirement age. He was not aware that Mr. Sharma was not able to travel for work or was being accommodated, or that he was working in a support role. Dr. Karabatsos indicated that Mr. Sharma did not tell him he was disadvantaged at work. He said there is nothing physically preventing him from becoming an SAP architect.

[224] In Dr. Karabatsos's professional opinion, Mr. Sharma suffered from no physical or functional limitation as a direct result of the accident. He also concluded that Mr. Sharma

did not require in-facility rehabilitation. He said his clinical indication is for consistent participation in a home-based exercise program.

[225] In respect of mental health diagnoses including depression and anxiety, and mild traumatic brain injury, Dr. Karabatsos indicated that such conditions are outside of his area of medical practice, and he declined to comment on them.

[226] Dr. Karabatsos disagreed that he does not treat pain and disagreed that soft tissue injuries are outside of his scope of expertise. He said that his expertise includes treating musculoskeletal pain.

[227] Dr. Karabatsos said he has not referred anyone to a physiatrist.

[228] Dr. Karabatsos agreed a small percentage of patients with injuries like Mr. Sharma will experience some residual back pain. Dr. Karabatsos testified that usually pain correlates with the amount of displacement of the pelvis and Mr. Sharma had no displacement. He accepted that Mr. Sharma has some residual backpain.

[229] Dr. Karabatsos is an experienced, knowledgeable, and well-qualified orthopaedic surgeon. I accept his evidence about the nature of the fractures suffered by Mr. Sharma, and the usual course of healing for such fractures. I accept his evidence regarding his examination of Mr. Sharma and the *typical* indicia of level of pain.

[230] However, to the extent that his evidence conflicts with the evidence of Dr. Khumbare and Dr. Gavett-Liu regarding whether Mr. Sharma continues to suffer from chronic pain, I prefer Dr. Khumbare's and Dr. Gavett-Liu's evidence. Dr. Khumbare and Dr. Gavett-Liu are better qualified to testify about and diagnose chronic pain, especially given its interconnectedness to Mr. Sharma's psychiatric diagnosis, as explained by Dr. Gavett-Liu.

[231] I accept that Dr. Karabatsos has treated many patients with injuries like Mr. Sharma's and has knowledge of the experience and treatment of pain for those patients. However, I accept Dr. Khumbare and Dr. Gavett-Liu's evidence that there is a small percentage of patients who after suffering an injury do not recover, and experience chronic pain. I accept there is an interrelationship between Mr. Sharma's psychiatric diagnosis and his chronic pain diagnosis.

[232] I accept that most individuals who suffer pelvic and rib fractures go on to make a full recovery. However, I accept that a small percentage do not. Some patients, like Mr. Sharma, suffer from chronic pain and depression. Some suffer related impact to their cognitive functioning. I prefer Dr. Khumbare's and Dr. Gavett-Liu's evidence to that of Dr. Karabatsos's regarding whether Mr. Sharma continues to suffer from chronic pain and depression because of the accident and there evidence about the impact on Mr. Sharma's functioning.

[233] Dr. Karabatsos was unduly dismissive of the field of physiatry, and the reality of chronic pain experienced by some patients, including Mr. Sharma, after broken bones have healed.

Conclusions Regarding Injuries and Causation

[234] The test for causation is the "but for" test articulated by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8 as:

> The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for'" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words, that the injury would not have occurred without the defendant's negligence.

[235] There is no dispute in this case that Mr. Sharma suffered non-displaced pelvic fractures and a fracture of the 11th rib on the left side because of the accident. These injuries would not have occurred but for the accident.

[236] I also find as a fact that because of the accident, Mr. Sharma suffers from chronic pain, headaches, and depression, and his chronic pain and depression has impacted his cognitive functioning. But for Nataliya Bublyk's negligence, Mr. Sharma's injuries, including chronic pain and depression and the related compromise to his cognitive functioning would not have occurred.

E. Summary of Evidence Regarding Pecuniary Losses: Damages for Past and Future Loss of Income and/or Earning Capacity, or Loss of Competitive Advantage

Evidence of Shafali Joshi – Syntax

[237] Shafali Joshi provided an affidavit and testified in the proceedings. She is the Director of Consulting & Resourcing for Syntax, Mr. Sharma's employer. Ms. Joshi's affidavit indicates that Syntax is a "SAP" multinational organization with more than 2000 employees. Mr. Sharma was employed as a "Systems Application Product Functional Consultant" with Syntax since 2018.

[238] There are 68 SAP employees that work underneath Ms. Joshi. She has indirectly supervised Mr. Sharma since he started with the company in June 2018. He reported to a manager who reported to her, but she had frequent contact with him.

[239] Ms. Joshi indicated that after the accident, Mr. Sharma required half a year short-term disability leave, and thereafter he was accommodated with a graduated return to work that involved a transition from part-time work half days to full-time work over several months. Ms. Joshi indicated that Syntax allows workers to work hybrid, and they are required to come to the office from time to time. She confirmed Mr. Sharma worked from home and came into the office once a month.

[240] Ms. Joshi explained that the role of an SAP architect is different from a SAP consultant in that a SAP architect has absolute responsibility for the delivery of the project they design in partnership with the client.

[241] Ms. Joshi said she has always regarded Mr. Sharma as a good SAP consultant. She said after starting with the company in June 2018, Mr. Sharma was "looking good" and the role of SAP architect was something potentially on his future path of professional development. She said generally a person would require four to five years of experience, completion of full cycle projects, qualitative performance, and demonstration of mastery of technology and stakeholder management before moving to the next level. She said the path may be shorter for high performers and specialized certifications may assist.

[242] Ms. Joshi indicated that the most important criteria for promotion from a consultant to an architect is completion of full cycle implementations. She said that certifications are keys to open the gates to promotion but once you open the gates, it is the hands-on experience that counts.

[243] Ms. Joshi indicated in her affidavit that Mr. Sharma's path to promotion to SAP architect, was setback by the accident and his injuries. He did not progress in the manner expected based on his pre-accident performance and qualifications. She said if Mr. Sharma had not been injured, she believed his promotion to SAP architect would have been sooner.

[244] Ms. Joshi said Mr. Sharma's loss of experience has most adversely impacted his opportunities for promotion. He was not back to work full-time until approximately a year after the accident, and for the next several years, he played a background role. She indicated that until 2024, Mr. Sharma was unable to travel, which limited the clients he would otherwise have had the opportunity to work with and the projects he could work on. Further, he missed several opportunities for full cycle implementation of projects, including an end-to-end warehouse management module in 2019 that would have made him more valuable as an SAP consultant and more eligible for promotion to SAP architect.

[245] Ms. Joshi indicated that Syntax does yearly reviews for employees in December and January. The reviews are based on various factors, such as feedback from projects, manager assessment, and employee feedback. Mr. Sharma would have had a series of reviews since his employment and there is likely documentation in the Human Resources file about accommodations required for Mr. Sharma, such as his requirement for a special desk.

[246] Ms. Joshi indicated that Mr. Sharma missed the opportunity for full annual reviews in 2018 and 2019 because he did not work full time/full year in those years. As a result, he did not

achieve the salary increases or bonuses that would typically accompany a full review of his performance. She indicated he is behind in the earnings trajectory that would have been expected for an SAP consultant with his professional history. I note that Mr. Sharma did not begin working for Syntax until after June 2018, so he would not have had the opportunity for a full annual review in 2018, irrespective of the accident.

[247] Ms. Joshi did not provide precise details about Mr. Sharma's salary. She initially testified that Mr. Sharma's salary was in the median range, and that he is now towards the high end of the range for SAP consultants. She agreed he was paid approximately $110,000 when he started, and said she believed his 2023-2024 salary was in the $150,000 to $160,000 range. Later in her evidence, Ms. Joshi said she would have to check his current salary and was unable to confirm whether he was in fact paid towards the high end of the range for SAP consultants, adding that he was in the middle, not the top end, of the range for SAP consultants.

[248] Although in her affidavit Ms. Joshi said it would be impossible to say when or if Mr. Sharma would receive a promotion to SAP architect, during cross-examination she said Mr. Sharma is on the path to becoming an SAP architect. She was optimistic about his future. She agreed he was a good employee, who worked hard, and she had high hopes for him.

[249] Ms. Joshi was unable to specify when Mr. Sharma would achieve promotion to SAP architect, but she expected she would know at the end of January 2025. She said she had not received any bad feedback regarding the projects he was working on.

Evidence of Shelley Smilek

[250] Shelley Smilek is a vocational assessor. She has a four-year undergraduate degree in psychology and a master's degree in social work. She has also received training in vocational rehabilitation. Ms. Smilek has extensive experience in conducting vocational assessments of claimants injured in motor vehicle accidents and those suffering from other significant medical, emotional, and physical disabilities from other causes. In addition to conducting assessments, she provides vocational rehabilitation counselling and planning and placement services. Ms. Smilek provided a Rule 53.03 expert report and testified at trial.

[251] Ms. Smilek met with Mr. Sharma virtually on April 21, 2023. In respect of the impact of the accident on his employment, Mr. Sharma described experiencing ongoing pain in his pelvis, lower back, IT band, and ribs. He said the pain limited his ability to sit for longer than 15 to 20 minutes. He also told her that he suffered from poor quality sleep and headaches.

[252] Mr. Sharma told Ms. Smilek that he suffers from depressed mood and anxious thoughts post-accident and described cognitive deficits including poor concentration, communication difficulties, reduced processing speed, and said he has difficulty learning

new skills. He said he was short-tempered and impatient and felt overwhelmed because he is functioning at a lower level than he did pre-accident.

[253] Mr. Sharma provided Ms. Smilek with background information about his work. He said shortly before the accident he was given the opportunity to work on an Enhanced Warehouse Management (EWM) project. He said SAP consultants with that skill set at the time of the accident typically earned $180,000-200,000 per year and now earn $210,000-230,00 per year. He told her he was removed from the project due to the accident and moved to a support role when he returned.

[254] Mr. Sharma said in 2022, he was assigned to a new MM project working under a senior solution architect. But for the accident, he believes he would likely have been in the solution architect role. He indicated that since returning to work he asked to be put on two EWM projects but was passed over on three occasions. When Mr. Sharma was cross-examined about the persons who received the position instead of him, he acknowledged two individuals had more experience and he did not know the qualifications of the third. He agreed he did not know if he was not promoted because of the accident.

[255] Mr. Sharma told Ms. Smilek that he works extra hours to meet his performance requirements because he works at a slow pace due to ongoing impacts of the accident. He said that because of his memory deficits and slow processing speed, he is struggling to complete upgrading courses and certifications required to remain current.

[256] Ms. Smilek conducted standardized vocational testing with Mr. Sharma. She concluded that his tests results were slightly lower than would be expected given his premorbid vocational history. Ms. Smilek relied upon Mr. Sharma's self-report and past medical records. She placed significant reliance on the expert reports of Dr. Steiner, Dr. Khumbare, and Dr. Gavett-Liu. Ms. Smilek concluded that:

- Mr. Sharma has been unable to progress to his pre-accident level of function and he remains in a support role.

- Even with ergonomic accommodations, he is struggling to keep pace and often feels overwhelmed.

- Even if able to maintain a full-time work schedule, he might struggle to progress or meet full productivity expectations in a job and may have problems advancing in the workplace or doing so as quickly and with work attachment over time.

[257] Ms. Smilek concluded that the combination of Mr. Sharma's self-reported and documented physical cognitive and psychological/psychiatric issues has led to a competitive disadvantage in the workforce. She said they give rise to guarded vocational prognosis and suggest that he will encounter further disadvantages going forward.

[258] In her opinion, but for the accident, Mr. Sharma would have at a minimum continued to work as an SAP-MM consultant into the foreseeable future. She indicated that "It is

reasonable to assume that had the accident not occurred, at a minimum he would have continued to work full time hours as an SAP-MM consultant, progressing his career in a naturalized manner and probably more expediently….It is reasonable to assume that he would have continued to meet productivity expectations, received performance bonuses and more rapid promotion."

[259] Ms. Smilek noted that at the time of the accident, with a salary of $110,000 Mr. Sharma was at the median level statistically for his position. She noted that a survey of the local market identified many job advertisements for "*solution architects*" in the Toronto area with salary ranges up to $150,000 with 5-7 years experience, with some up to $200,000 for those with 8-15 years experience, and others up to $250,000 for those with 15 years experience.

[260] Ms. Smilek noted that S.i. systems, a Canadian tech recruitment firm, indicated that *intermediate architects* earn $161,493 per year and senior architects earn $188,663. These salary ranges were relied upon by Amit Gore, Chartered Business Evaluator, to assess Mr. Sharma's future income loss.

[261] Ms. Smilek also identified hourly salary ranges in her report for occupations, as per the National Occupation Classification (NOC) for the Toronto Region as per Employment and Social Development Canada (ESDC) to provide insight as to what one might expect to earn at the low, median, and high level in the related occupations of Software Engineer and Designer, and Computer and Information Systems Manager.[2]

[262] Ms. Smilek advised that the range of salary for Software Engineer and Designers annually was between $65,000 at the low end of the range and $150,000 at the high end of the range and the range of salary for Computer and Information Systems managers was between $72,000 and $161,705.

[263] Ms. Smilek concluded that if not impacted by the accident, Mr. Sharma would likely have continued to progress his career and remunerative status in a naturalized manner and would likely have worked until the age of 62 because, statistically, the Canadian Occupational Projection Systems indicate that the average age of retirement for related workers was 62.

[264] Ms. Smilek concluded it is likely that Mr. Sharma's work life will end prematurely because of his injuries.

[265] Ms. Smilek relied on several academic articles to assess the ongoing and long-term employment impacts of Mr. Sharma's accident-related sequelae. She relied upon statistics that demonstrate that working age adults with disabilities are 26% less likely to participate

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[2] The two categories referred to by Ms. Smilek included: i.) NOC-2173 – Software Engineers and Designers: Low $31.25, Median $50.00, High $72.12. This equates to a low annual salary, based on a 40-hour work week, of $65,000, median rate of $104,000, and a high rate of $150,000 annually; and ii.) NOC 0213 – Computer and Informaiton Systems managers: Low $34.62, Median $55.29, and High $77.44, which equals $72,000, $115,000, and $161,705.00 annually.

in the labour market as their able-bodied counterparts and that those individuals with disabilities who continue to work have a 36% on average lower income than their nondisabled counterparts. She concluded that it is reasonable to expect that Mr. Sharma will have reduced productivity, greater absenteeism, and a reduced work life expectancy as compared to unafflicted counterparts.

[266] Ms. Smilek noted that Mr. Sharma struggles not only with chronic pain, but also ongoing headaches, depression, and cognitive deficits and that comorbidity carries with it a significantly higher loss in productivity. She concluded Mr. Sharma is at statistically heightened risk to experience problems in the labour market including missed or lost opportunity, diminished work performance and productivity, problems with work attachment, difficulties progressing in the labour market to opportunities of greater seniority and pay, and ultimately lost future income and potential unemployment.

[267] Ms. Smilek said Mr. Sharma is now "less likely to progress to senior level opportunities" and that it was "doubtful that he will be able to work as a manger or senior manager. These conclusions to some extent appear to conflict with the evidence of Ms. Joshi, who was optimistic about Mr. Sharma's future for promotion with Syntax. However, Mr. Sharma has yet to be promoted to SAP architect.

[268] Significantly, Ms. Smilek reached her conclusions without speaking with Mr. Sharma's employer or supervisor, and without the benefit of his employment records, such as performance appraisals.

[269] Ms. Smilek opined that Mr. Sharma, because of the impact of his injuries may be unable to persist in his current role. She identified alternative suitable occupations and wage data from the National Occupational Classification 2016 that "might reflect Mr. Sharma's residual work potential if he is unable to persist in his current role," such as purchasing and inventory control workers, production logistics coordinators, user support technicians, and information system testing technicians. The annualized employment income for these occupations ranged from $33,800 to $98,800. Mr. Gore used the high range of these alternate employment categories to assess Mr. Sharma's future loss of income assuming Mr. Sharma left his current occupation and moved into one of these alternate lower paying occupations at age 50.

[270] Ms. Smilek concluded as follows:

> …While he continues to work and more recently has experienced an increase in pay, it is reasonable to consider, on balance of probabilities, that he probably would have been making more money by now had he not been involved in the index accident. He would have been able to gain further experience in a lucrative industry where his niche skills are sought after. He probably would have been able to advance to better paying and/or more senior level opportunities on a comparatively expedited basis. While more recently he has experienced a raise, his ability to realize same must be considered again in a sector of the industry where his skills are in high demand and probably valued by his employer despite his circumstances.

> Yet, even in this context his employer has promoted others ahead of him or sought to hire externally which suggests that he has been looked over/missed out on opportunities for advancement for which he probably would have been a more competitive candidate had he never been injured…

[271] Ms. Smilek concluded that Mr. Sharma has sustained a loss of competitive advantage in the marketplace to a considerable degree.

[272] Ms. Smilek opined that Mr. Sharma would have difficulty functioning with a new employer who was not familiar with his circumstances and was less benevolent than his existing employer. She concluded he will probably have difficulty transitioning to alternate work that would offer him the same remunerative potential.

Limitations of Ms. Smilek's Opinion

[273] I accept that the accident has impacted Mr. Sharma's employment and income because of the significant time he spent away from work while recovering from the accident and because of the ongoing impact of his injuries both physical and psychological. I accept that he missed opportunities, including participation in a full cycle SAP implementation. I accept that it is likely that Mr. Sharma would have progressed more quickly and earned more but for the accident.

[274] However, Ms. Smilek's opinion is of limited assistance in ascertaining the extent of employment-related loss suffered by Mr. Sharma because of its reliance on broad generalizations, and the deficiencies in the foundation for her opinion.

[275] Ms. Smilek's report was dependent on Mr. Sharma's self-report about his job performance before and after the accident. Ms. Smilek did not have an independent evidentiary foundation about Mr. Sharma's work performance. She was not provided with performance appraisals from Syntax for the period before or after the accident. She was not provided with any performance appraisals from previous employers, or independent documents regarding the nature of Mr. Sharma's employment, prior to his position with Syntax.

[276] Mr. Sharma told Ms. Smilek he was passed over for promotion. This was not verified with his employer.

[277] Notably, Ms. Smilek reached conclusions about Mr. Sharma's likelihood of future advancement that appear to be inconsistent with Ms. Joshi's assessment of Mr. Sharma's potential for future advancement to senior positions with Syntax. Ms. Joshi believed that Mr. Sharma was a strong candidate to advance to becoming an SAP architect.

[278] Ms. Smilek did not have the benefit of information setting out the salary ranges for different roles at Syntax so that she could situate Mr. Sharma within those ranges and independently assess his indication that he was progressing more slowly than others.

[279] In concluding that Mr. Sharma was trailing in renumeration, Ms. Smilek relied upon Mr. Sharma's self-report, that consultants with EWM knowledge were typically paid $180,00 at the time of the accident and are now paid $210,000 to $230,000, and her survey of the local labour market noting that S.I. Systems, advised that *intermediate architects* earn $161,493 per year and *senior architects* earn $188,663. However, in relying on those salary ranges Ms. Smilek did not reconcile that Mr. Sharma is not an architect and would not have been an *intermediate* or *senior architect* even if he was promoted to the architect position within a few years of joining Syntax. In terms of his salary ranges, Mr. Sharma is an SAP *consultant*, who had 11 years of experience at the time of the report as a consultant.

[280] By 2023, the year of Ms. Smilek's report, Mr. Sharma was progressing positively, having achieved a 20% raise that year, and achieving a gross salary of approximately $160,000, consistent with the pay level of intermediate architects according to Ms. Smilek's conclusions. His salary in 2023, when compared to Ms. Smilek's market research, did not necessarily support the inference that Mr. Sharma was trailing when compared to SAP consultants. Unfortunately, there is no specific evidence of the salary ranges of SAP employees or architects at Syntax to understand how Mr. Sharma's pay and progress compared to other employees in the company, to situate him on the salary grid, or to compare his income at Syntax as a consultant with what his salary would have been as an architect.

[281] Ms. Smilek focused on Mr. Sharma's less than 6-month pre-accident employment performance with Syntax, in assessing his future earning potential and advancement, with little consideration of his full history. Mr. Sharma told Ms. Smilek he was paid minimum wage at two companies in Canada in 2010, and in 2011, and that he moved to West Star Motors where he was paid between $16 and $18 per hour working full-time. He worked for Bristlecone as an SAP MM consultant between 2012 and 2018; however, no detailed information was provided about his SAP MM experience in India. It does not appear that Mr. Sharma completed any additional SAP certifications during the years he was working for Bristlecone.

[282] In cross-examination, Ms. Smilek agreed the statistics regarding the impact of disability on persons in the workplace capture a wide range of disabilities and employment, and there was no study that looked at the impact of disability on SAP consultants. There is no evidence that Mr. Sharma in fact earns less than his similarly situated peers at Syntax.

[283] Finally, Ms. Smilek relied upon Dr. Steiner's report that Mr. Sharma suffered from a mild traumatic brain injury and studies that considered the impact of mild traumatic brain injury on employment. As indicated above, I am not satisfied that the evidence establishes that Mr. Sharma suffered from a mild traumatic brain injury.

[284] Overall, Ms. Smilek's report was of limited assistance in assessing Mr. Sharma's future loss of income because of its heavy reliance on general information and general statistics.

Evidence of Amit Gore

[285] Amit Gore is a chartered business valuator specializing in litigation accounting. He provided a Rule 53.03 report and testified at trial. He was qualified to give opinion evidence as a business valuator in litigation accounting. He has worked as a litigation valuator for 16 years and provides litigation support services conducting valuations to family law and personal motor vehicle clients. This was the first time Mr. Gore was qualified to give expert opinion evidence as a business valuator.

[286] Mr. Gore's initial report was completed on May 24, 2023. He completed an updated report on December 5, 2024.

[287] Mr. Gore concluded that Mr. Sharma's past loss of income is $59,700 after deductions for Short-Term Disability benefits and Long-Term disability benefits.

[288] Mr. Gore provided an opinion about Mr. Sharma's pre-accident earning capacity based on an annual income of $118,250 ($110,000 plus bonus) in 2018, increasing gradually to $199,000 by January 1, 2025, to an expected retirement at age 65.

[289] Mr. Gore concluded that if Mr. Sharma continued to work as an SAP MM consultant earning his post-accident 2025 expected income of $199,000 by January 1, 2025, his past lost income would be $59,707.

[290] Mr. Gore agreed that in his report, he did not account for income replacement, which he agreed must be deducted from $59,707 to determine Mr. Sharma's total past lost income. As a result, because Mr. Sharma received $17,314 in income replacement, Mr. Gore testified that Mr. Sharma's past lost income would be $42,393, rather than $59,707 as reflected in his report.

[291] Using present value multipliers marked as an exhibit during the trial, Mr. Gore concluded that Mr. Sharma's future lost income, assuming but for the accident, he would have earned $199,000 as of January 6, 2025, as follows:

- *$1,031,081* assuming Mr. Sharma continued to work as an SAP MM consultant until age 60, with an income of $175,420 on January 6, 2025. (this assumes 5 years of lost income)

- *$439,039* assuming Mr. Sharma continued to work as an SAP MM consultant until age 65, with an income of $175,420 on January 6, 2025.

- *$1,636,917* assuming Mr. Sharma continued to work as an SAP MM consultant until age 50 and then was forced to work in an alternate lower paying occupation, (with an income equivalent of $102,207 in 2025) until retiring at age 60.

- *$1,291,968* assuming Mr. Sharma continued to work as an SAP MM consultant until age 50 and then was forced to work in an alternate lower paying occupation, (with an income equivalent of $102,207 in 2025) until retiring at age 65.

Mr. Gore's Evidence was Not Impartial

[292] I place little weight on the evidence of Amit Gore. Despite acknowledging his duties as an expert in his affidavit, he did not understand his duty to provide a fair, objective, and non-partisan opinion. Mr. Gore believed his role was to be an advocate for the Plaintiff and bias is evident in his report, which shows a lack of objectivity. In reaching his conclusions about Mr. Sharma's past and future loss of income, Mr. Gore made assumptions unduly favourable to Mr. Sharma.

[293] Mr. Gore agreed he did not receive Dr. Karabatsos's report. When asked if a defence report that indicated that Mr. Sharma was *not* competitively disadvantaged might change his opinion or play a part in his decision-making, Mr. Gore responded that he has always found that the plaintiff's and defendant's medical reports "are on opposite sides, and without sounding biased, I would say that I would refer to the Plaintiff's reports more than I would refer to the Defendant's reports regardless of what they say unless [an] opinion in [the] Defendant's report says the client could be impaired."

[294] Mr. Visschedyk asked Mr. Gore if he was saying that a plaintiff's report that says the plaintiff is injured is more important than reports that may say the opposite. Mr. Gore responded, "No, I said I would look at them, but it is not necessary that I include the information." Mr. Gore said he would refer to the plaintiff's reports.

[295] Mr. Visschedyk asked Mr. Gore whether he understood that if he only relied on reports that said there was an income loss his opinion would appear biased. Mr. Gore agreed and said he would also say an expert hired by defence counsel would refer more to the defence reports than the plaintiff reports. When asked by me to explain his response, Mr. Gore said:

> As an independent expert I am given information to calculate income losses for the client and if there is any supporting evidence that can help me I will use that. Because these reports are obviously tilted one way or the other, the plaintiff reports would have information about the plaintiff's post accident injuries and the defence reports may say something else. *In a way, I have to go with one position*. Here, I am assuming that it is a question of law that….(inaudible) not for me to decide, but I take this information, and say it is helping me with my report so I will use this.
>
> Using [a] defence report that says the plaintiff …is not impaired and has no loss of income it does not help me. For my work it does not help me. If I am given a defence medical report, I will include it as part of the scope of review and will review them quickly, but it is not necessary that I use them as part of my calculations.

[296] Mr. Gore was asked about the Acknowledgment of Expert's Duty in which he acknowledged that he must be fair, objective, and non-partisan. Mr. Visschedyk suggested to him that he was saying he would slant his report for the person who hired him. Mr. Gore responded that his work as an independent expert is given to him by "the client" and …. to arrive at a conclusion if the reports from defence are not helpful he could not use it.

[297] At the end of his examination in chief, I asked Mr. Gore further questions about his understanding of his role as an expert and his evidence that he tends to rely on the plaintiffs' materials. He said it is attributed to how he has been trained. He said he is not trying to be biased. He said it helps if there is evidence that the plaintiff is impaired, and they tend to use it.

[298] Mr. Gore's lack of understanding of his role to be impartial impacted his report in various ways:

- He relied upon overly advantageous salary information provided by Ms. Smilek. He used the anticipated salary for a *senior architect* beginning in 2025 to calculate what Mr. Sharma's future income would have been but for the accident. Even if Mr. Sharma had become an architect at some point after 2018, he would not have been a "senior" architect by 2025. It is "foundational" to Mr. Gore's report that Mr. Sharma would have become a *senior* architect, or earned the equivalent of a senior architect, by 2025.

- In arriving at an assumption of what Mr. Sharma's salary would have been but for the accident, rather than relying on a range of statistical wage information for the annual income of persons working in similar positions to that of a SAP consultant in the Toronto Region, or the range of salary earned by architects, Mr. Gore relied upon the data from S.i. Systems, pertaining to senior architects: $188,663. He adjusted the amount for inflation to $199,000. This was the figure used by Mr. Gore to generate Mr. Sharma's future income but for the accident. It assumed Mr. Sharma would be a *senior architect* by 2025.[3]

- Rather than expressing a range of potential future income reflecting the potential that Mr. Sharma may have continued as an SAP consultant (not architect) or may have become a new SAP architect, Mr. Gore based his calculations on the most advantageous scenario for Mr. Sharma. When asked why he picked the higher amount, Mr. Gore said he would have earned that amount as a senior architect. He said Mr. Sharma would have graduated from a consultant to an architect.

- Mr. Gore's sources of information relied upon in preparing his report included two letters from Maria Dimitropoulos, Manager of Human Resources for Illumiti, from January 6, 2020, and May 27, 2020. One of the letters indicated that Mr. Sharma completed a full cycle implementation in India before the accident, something not otherwise proven in evidence. Mr. Gore said he assumed if Mr. Sharma completed the 2019 project, he would have had the skill set to be a seasoned SAP professional and get paid more. The letters from Maria Dimitropoulos were admitted for a limited purpose. They formed part of the foundation for Mr. Gore's expert opinion

[3] Ms. Smilek's report indicated that salary data from S.i. Systems was for *intermediate and senior architects*; however, in Schedule 1, note 1 of his report, Mr. Gore refers to the S.i. Systems data as relating *to intermediate and senior consultants.*

report. The letters were not admitted for the truth of their contents. I held they were hearsay documents that did not fall within the business records exception. To the extent the facts in the letters were not otherwise proven by admissible evidence, and were relied upon by Mr. Gore, in reaching his conclusions it impacts the weight to be attached to his opinion.

- In calculating Mr. Sharma's likely future income as of January 2025 but for the accident, Mr. Gore did not rely on information about the actual salary ranges of SAP consultants and architects at Syntax. Mr. Gore does not appear to have considered that in her letter, Ms. Dimitropoulos said Mr. Sharma received a $5000 increase on March 1, 2020, and *she did not believe his salary increase in 2020 would have been more if he had completed the full-cycle implementation*. She said, at that stage it was more of an experience loss vs. a monetary loss. Thus, according to Ms. Dimitropoulos, Mr. Sharma's actual income in 2020, but for the accident, would have been $115,000 plus 7.5%, which equals $123,625. In her May 27, 2020 letter, Ms. Dimitropoulos said the compensation Illumiti pays employees who have completed full SAP implementation depends on years of experience along with full cycle implementation. She said with his years of experience and with *4-5 full cycle implementations,* Mr. Sharma may have earned up to $15,000 more per year.[4] In respect of the amount that Mr. Sharma would earn if he completed the warehouse management module, Ms. Dimitropoulos said that it was not an easy estimate, as there were many variables, but depending on the market it could have given Mr. Sharma an edge *to eventually* make $10,000 to $20,000 more. Mr. Gore does not appear to have considered or relied on the information he was provided from Mr. Sharma's employer in reaching his conclusions.

- In respect of age of retirement, in calculating Mr. Sharma's lost income, Mr. Gore assumed that Mr. Sharma would work to 65.9 years of age if not injured. 65.9 is the average age of retirement for all males in Canada in 2023. Mr. Gore made this assumption even though Ms. Smilek's report indicated that 62 is the average age of retirement for related workers carrying out similar work to Mr. Sharma. Mr. Gore said he assumed Mr. Sharma would work until 65 based on his own experience and his belief that new Canadians tend to work longer. Ultimately, he agreed he did not have any evidence to support his conclusion. The assumption that but for the accident Mr. Sharma would have worked until the age of 65.9, instead of 62, increased Mr. Sharma's future income loss estimates.

- Mr. Gore assumed that Mr. Sharma would have annually received a full bonus but for the accident. He acknowledged there was no guarantee he would receive the full 7.5% bonus and that bonuses are based on an employee's performance and the company's performance. Mr. Gore said he picked 7.5% because Mr. Sharma was

[4] Ms. Dimitropoulos also indicated: there is no pay scale, it is based on market demand and experience along with the number of full-cycle implementations. The loss of the full-cycle implementation credit is a year's worth of valuable experience that he cannot take back.

an experienced professional in his field, and from what he read, he had already done a project that required a high skill level. He concluded he was a "capable profession" in that area and would have received the bonus at 100%. While Mr. Gore's reasoning may not support his assumption, in fact, a review of Mr. Sharma's bonus history indicates he usually received the maximum or close to maximum bonus.

- When asked why he assumed Mr. Sharma may have to retire at age 50 from his current role, Mr. Gore said it was a more conservative assumption than assuming that he would need to transition to another position immediately. Mr. Gore agreed the medical reports do not indicate that Mr. Sharma will be unable to work at age 50. Mr. Gore relied on Ms. Smilek's report, which relied on general statistics to predict it was likely that Mr. Sharma would retire early.

- In projecting future income, Mr. Gore considered only two scenarios, one in which Mr. Sharma remains a SAP consultant and continues to work to 60 or 65; and a second in which Mr. Sharma stops working in his field at age 50 because he is no longer able to perform the work as a SAP consultant and takes a lower paying job in a related field, until retiring at age 60 or 65. Mr. Gore did not consider the potential that Mr. Sharma may be promoted. Such a scenario is not inconsistent with Ms. Joshi's evidence about Mr. Sharma's future potential, and his earnings history that shows substantial pay increases between 2022 and 2025.

[299] I do not accept Mr. Gore's conclusions, and they are of little assistance to me in determining the past and future income losses of Mr. Sharma.

F. What are Mr. Sharma's past and future economic losses?

Governing Legal Principles

[300] Whether a plaintiff is entitled to compensation for past and future income loss is based on the premise that "but for" the accident, he or she would have secured employment at an elevated earning capacity: *West v. Knowles*, 2021 ONCA 296, at para. 2.

[301] "But for" is the test for causation. Once causation is proven, past and future economic losses are determined using a standard of proof on a balance of probabilities for past facts. The threshold of "real and substantial possibility" is the standard of proof in respect of hypothetical events both past and future: *West*, at paras. 42-46, 72; *Higashi* v. *Chiarot*, 2021 ONSC 8201, at para. 139.

[302] A plaintiff should be awarded compensation for past economic loss if there is a "real and substantial risk or possibility" that he or she suffered a loss of past income because of the injuries sustained: *West*, at para. 76.

[303] Where the plaintiff continues to earn income at or close to his or her pre-accident level, there will be a "real and substantial possibility of future economic loss" if he or she has suffered an impairment that may affect the plaintiff's ability to continue working at some point in the future: *Rab v. Prescott*, 2021 BCCA 345, at para. 71.

Uncertainty in Calculating Damages

[304] Mr. Sharma's income losses are difficult to calculate because of the nature of his ongoing injuries, chronic pain, depression, and cognitive impairment, combined with the fact that he has continued to work, despite the impairment caused by his injuries.

[305] As noted above, Mr. Gore's evidence is of little assistance to me. I dis not agree with his assumptions, which were biased in favour of Mr. Sharma. However, I have considered his methodology, including the standard multipliers he employed to calculate future income loss.

[306] My ability to assess Mr. Sharma's past and future economic losses is made more difficult because of the limited information about his employment history and his pre-and post-accident performance at Syntax. In respect of Mr. Sharma's self-assessment and evidence of his work performance, Mr. Sharma has underestimated the ongoing quality of his work and his potential for future advancement.

[307] Ms. Joshi was the only representative from Syntax who testified. She was familiar with Mr. Sharma's work. However, she was not his direct supervisor. During her evidence, she was unaware of or mistaken about some of the details about Mr. Sharma's work history and present employment, including his pay level and the certifications he had completed. She initially gave erroneous evidence about courses she believed Mr. Sharma had completed since he began working for Syntax. She did not provide Mr. Sharma's performance reviews or his current salary.

[308] However, I accept Ms. Joshi's evidence that Mr. Sharma was a good employee who shows good potential to become a SAP architect and I accept her evidence that Mr. Sharma's path to promotion to SAP architect was setback by the accident and his injuries and that it is likely his promotion to SAP architect would have been sooner but for the accident.

[309] The Defendants have requested that an adverse inference be drawn because the Plaintiffs did not tender Mr. Sharma's employment file including such things as yearly reviews, attendance, and work done. I am not satisfied that is appropriate to do so.

[310] The failure to call a witness (or in this case documentary evidence) can be open to different interpretations and the decision to draw an adverse inference is a discretionary one. The decision to draw an adverse inference is premised on the likelihood that the evidence *would* have been harmful to the party who failed to call the evidence.

[311] An adverse inference should only be drawn when it is warranted "in all the surrounding circumstances": *Davison v. Nova Scotia Government Employees Union* (2005), 231 N.S.R. (2d) 245 (C.A.), at para. 73.

[312] In Law of Witnesses and Evidence in Canada, Peter J. Sankoff. 2022 Thomson Reuters Canada. Toronto, at p. 7:13, Sankoff lists several factors a court should consider in determining whether to draw an adverse inference for failure to call a witness including whether:

- There is a legitimate explanation for the failure to call the witness.
- The witness is within the "exclusive control" of the party, and is not "equally available to both parties",
- The witness has material evidence to provide, and
- The witness is the only person or the best person who can provide the evidence.

[313] The onus rests on the party requesting the inference to demonstrate that it is warranted in the circumstances.

[314] In this case, the Defendant's acknowledge that they could have summonsed Mr. Sharma's employment file. As such the evidence in issue was not within the exclusive control of the Plaintiffs. They made a tactical decision not to summons the file.

[315] This was not a circumstance where no information from the employer was provided. Ms. Joshi provided an affidavit and was cross-examined about Mr. Sharma's renumeration and performance. The exhibit 12 documents provide information about Mr. Sharma's pay, bonuses, and performance.

[316] My finding that an adverse inference should not be drawn does not relieve the evidentiary burden on the Plaintiffs to establish their claim which may be impacted by the absence of evidence.

[317] I am satisfied that despite gaps in the evidence, Mr. Sharma has clearly established that he has experienced past and future economic loss, including loss of income because of the accident.

[318] Mr. Sharma was in the hospital for 18 days after the accident, off work for six months, and did not return to work full-time until almost two years after the accident in August 2020. I am satisfied there is a "real and substantial possibility" that Mr. Sharma's earning capacity has been and will be impaired. I am satisfied that he has and will suffer a corresponding financial loss because of the accident.

[319] The quantum of damages is difficult to ascertain, not only because of the problems with Mr. Gore's expert evidence, but also because of contingencies that render the assessment

imprecise and speculative. In these circumstances, being satisfied that Mr. Sharma has suffered past and future income loss, I must arrive at a "best estimate" of his past and future income loss. *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.), at para. 75; *Maldazy v. Nassar*, 2025 ONCA 590, at para. 53; *Meady v. Greyhound Canada Transportation Corp.*, 2012 ONSC 657, at para. 237, citing *Wood v. Grand Valley Railway Company* (1914), 51 S.C.R. 283, at p. 289.

[320] In *Martin*, at para. 75, the Ontario Court of Appeal stated as follows:

> Where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities…is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

Past Economic Losses

[321] Mr. Sharma's past loss of income is the loss of income from the date of the accident to the date of the trial, January 14, 2025. In addition, according to s. 267.5(1) of the *Insurance Act*, R.S.O. 1990, c. I.8, Mr. Sharma's recoverable pre-trial income is restricted to 70 percent of the amount of gross income.[5]

[322] Mr. Sharma completed his SAP certification in 2013 and worked as an SAP consultant for Bristlecone in India. After coming to Canada in 2018, Mr. Sharma began working for Syntax on or about June 18, 2018. He worked for Syntax for less than five months before the accident on November 10, 2018. Ms. Joshi testified that Mr. Sharma was performing well and "looking good." She said the role of SAP architect was on Mr. Sharma's future path of professional development.

[323] Ms. Joshi said a person would usually require four to five years of experience, completion of full cycle projects, qualitative performance, and demonstration of mastery of technology before moving to the next level. She said the path may be shorter for high performers and there are specialized certifications that may assist a person to become an SAP architect. Ms. Joshi indicated that the most important criteria for promotion from a consultant to an architect is completion of full cycle implementations. She said certifications are "keys to open the gates to promotion" but once you open the gates, it is hands-on experience that counts.

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[5] Under s. 267.5(1) of the *Insurance Act* the Defendants also are not liable for damages for income loss suffered in the seven days after the accident.

[324] I accept Ms. Joshi and Mr. Sharma's evidence that Mr. Sharma's path to promotion to SAP architect was setback by the accident and his injuries.

[325] Although I was not provided performance appraisals for Mr. Sharma, the information in Exhibit 12 regarding his performance between 2019 and 2023 was very positive.

[326] After returning to full time employment, I find that Mr. Sharma continued to perform well through perseverance and the many extra hours he put in to complete his work. This was a significant personal cost. While Mr. Sharma subjectively believed he was not performing well, this is not reflected in the evidence of Ms. Joshi who said she always considered him to be a good SAP consultant with potential. Nor is his self-assessment consistent with the Exhibit 12 documentation. The documents in Exhibit 12 show that Mr. Sharma consistently received positive reviews and usually received full bonuses. He received several raises between 2018 and 2025.

[327] There is compelling evidence that Mr. Sharma's employment was significantly impacted by the injuries he suffered because of the accident. Mr. Sharma was not working at all between November 10, 2018, and March 2019 and did not return to full-time work until August 2020. He missed a full cycle implementation in 2018 and 2019, and participation in an Enhanced Warehouse Management module. When he did return to work, he was working in a support role with lesser responsibility than his pre-accident role. Mr. Sharma missed valuable experience he otherwise would have obtained. He missed a full cycle implementation and the opportunity to participate in the Enhanced Warehouse Module.

[328] I accept Ms. Joshi's evidence that generally an individual would require 4 to 5 years of experience, and participation in a full cycle implementation with demonstration of mastery of the technology before moving to the next level. I also accept her evidence that while certifications are the keys to open the gates to promotion, hands-on experience is the most important factor for promotion.

[329] In my view, but for the accident, Mr. Sharma would have secured employment at an elevated earning capacity. He likely would have become an SAP architect by 2023. Ms. Joshi testified that Mr. Sharma's path to promotion to SAP architect was setback by the accident and his injuries. She said he did not progress in the manner expected based on his pre-accident performance and qualifications.

[330] I am satisfied that but for the accident, between November 10, 2018 and January 14, 2025, Mr. Sharma would have progressed more quickly with Syntax, would have achieved greater increases in salary, and by 2023 would have become an SAP architect.

[331] I am satisfied that there is a real and substantial possibility that Mr. Sharma would have become an SAP architect by 2023. But for the accident, he would have obtained employment at an elevated earning capacity. I find as a fact that he would have been paid more as an SAP architect than as an SAP MM consultant.

[332] While Ms. Joshi testified that Mr. Sharma's progress was delayed, her evidence was of limited assistance in understanding the extent to which his salary was impacted. I do not know how much a starting SAP architect at Syntax makes, or the range of salary for architects at Syntax.

[333] Mr. Sharma's base income in 2023 was $150,000. Given the limitations in the evidence, I have assumed that Mr. Sharma would have been paid at least $155,000 in 2023, progressing to an annual salary of $181,330.91 in January 2025. This modest increase is a conservative estimate. I am satisfied that there is a real and substantial possibility that but for the accident he would have been paid at least $155,000 in base salary in 2023.[6]

[334] I am satisfied there is a real and substantial possibility that Mr. Sharma suffered past and future income losses. I have summarized my findings of past and future income loss in Appendix A.

2018

[335] Mr. Gore accurately set out Mr. Sharma's expected income in 2018 as $63,823. Mr. Sharma's annual salary in 2018 was $110,000. If his work had not been interrupted by the accident, his regular salary for the 28-week period between June 18 and December 31, 2018, with a 7.5% bonus would have been $63,823. Mr. Sharma's T4 establishes that his actual employment income was $50,128. The difference between his actual gross income and expected gross income is $13,695. During the period before trial, Mr. Sharma is entitled to obtain 70% of his gross loss of income. 70% of $13,695 is ***$9,586.50***.

2019

[336] Mr. Sharma's salary remained at $110,000 in 2019. Had he worked full time and received the maximum bonus, his expected salary with bonus would have been $118,250. His T4 for 2019 establishes his employment income was $52,887.30. The difference is $65,362.70. 70% of $65,362.70 is ***$45,753.89***.[7]

2020

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[6] According to the vocational assessment, solution architects with 5 to 7 years' experience were paid up to $150,000. Data from S.i. systems indicated that intermediate SAP architects earned $161,493. Ms. Smilek did not know if the market data referring to SAP architects with 8-15 years' experience earning up $200,000 included all experience of an employee in the SAP sector, or only architect experience.

[7] Mr. Sharma did not receive a raise in 2019. The Plaintiff has not established that Mr. Sharma would have received a raise in 2019 at Syntax. Even if the accident had not occurred, he would not have completed his first full year of work until June 18, 2019, and as a result, I have assumed he would not have received a raise until 2020. Even if the accident had not occurred, he would not have received a full review until the end of 2019.

[337] At the end of 2019, Mr. Sharma received a 4.5% raise. His base salary increased to $115,000 for 2020. Had Mr. Sharma worked full-time and received the maximum bonus, his expected salary with a bonus would have been $123,625.

[338] Mr. Sharma's 2020 T4 establishes that his employment income was $110,770. The difference between his expected income and his actual income is $12,855. 70% of $12,855 is ***$8,998.50.***

2021

[339] In 2021, Mr. Sharma did not receive a raise. He received the 7.5% maximum bonus, as established by Exhibit 12B, an Annual Performance Bonus Summary.

[340] In 2021, Mr. Sharma worked full-time and received the maximum bonus. His expected salary with a bonus was $123,625. His total income from his tax assessment (no T4 was provided) was $125,265. It is unclear whether the additional $1640 is income from employment from Syntax.

[341] Notably, Mr. Sharma's Annual Performance Bonus Summary for 2021 described his personal goal achievement and quality as 100%, and his Total Personal Eligibility factor as 120%. The Plaintiff has not established that Mr. Sharma suffered an income loss in 2021.

2022 to 2025

[342] Between 2022 and 2025, Mr. Sharma received bonuses at or close to the maximum of 7.5% annually and received significant raises between 2022 and 2024.

2022

[343] In 2022, Mr. Sharma worked full-time and received a base salary increase of 8.7% so that his annual salary was $125,000 effective March 1, 2022. His expected annual income blending his salary at $115,000 for January and February, and his raise effective March 1, 2022, results in a gross annual income of $134,375 assuming a 7.5% bonus.

[344] On November 1, 2022, Mr. Sharma received a one-time bonus of $8,333.33. Exhibit 12D, from Stephen Thomas, Vice President, Consulting and Solutions, Syntax, indicated Mr. Sharma received the one-time bonus for "extraordinary efforts, dedication and hard work." There was some suggestion that this lump sum one-time bonus was to "catch up" Mr. Sharma for periods when he did not receive a raise.

[345] Mr. Sharma also received a bonus of $10,514.99 for his 2022 performance. This was an approximately 8.4% bonus. I am not satisfied that Mr. Sharma has established loss of income in 2022.

2023

[346] In 2023, Mr. Sharma's base salary was $150,124.93. This is a 20% increase from his 2022 annual salary of $125,000. If Mr. Sharma received a 7.5% bonus, his gross salary would be $161,384.30. Mr. Sharma actually received a bonus of $10,514.99. Mr. Sharma's T4 for 2023 indicates that his gross income for 2023 was $160,843.48. This is $540.82 less than a 7.5% bonus.

[347] Assuming Mr. Sharma would have become an SAP architect by 2023, my best estimate is that in 2023, Mr. Sharma's base salary would have been at least $155,000. This equals $166,625 with a 7.5% bonus. This is a difference of $5,781.62 from his actual gross salary of $160,843.38. 70% of $5,781.62 is **$4,047.13** which represents Mr. Sharma's actual loss of income in 2023.

2024

[348] According to Mr. Gore's report, in 2024 Mr. Sharma's base salary was $159,132 and he received a bonus of $12,801, $866 more than a 7.5% award. If the information in Mr. Gore's report is correct, Mr. Sharma's 2024 salary is a 6% pay raise from his 2023 salary. This appears in keeping with past salary increases.

[349] Assuming Mr. Sharma's base salary in 2024 was $160,000, and his bonus was $12,801, his gross income was $172,801.[8] Mr. Sharma's 2024 T4 was not available at the time of trial.

[350] Assuming Mr. Sharma became an SAP architect in 2023 with a base salary of $155,000, and assuming he received a 6% raise (consistent with his actual raise), but for the accident his base salary as an SAP architect would have been $164,300 in 2024. With a 7.5% bonus his gross pay would have been $176,622.50. I am satisfied there is a real and substantial possibility that Mr. Sharma would have achieved this gross salary as a second year SAP architect but for the accident. The difference between this and his actual gross salary, $171,066.90, is $5,555.60. 70% of $5,555.60 is **$3,888.92**.

Conclusion: Past Income Loss

[351] Based on the above, Mr. Sharma's actual losses by the start of the trial in January 2025 are **$72,274.94.** This amount is subject to collateral set off under s. 267.8(1)(1)-(3) of the *Insurance Act* for all payments received for income replacement benefits pursuant to

[8] Mr. Gore's report indicates that he determined Mr. Sharma's 2024 annual salary from a November 26, 2024 letter from Maria Fracassi, Syntax. The letter did not form part of the trial record and was not included in the Exhibit 12 series of letters from Syntax, which set out Mr. Sharma's annual salary, salary increases, and bonuses awarded. Mr. Sharma's 2024 T4 was not available at the time of trial. During his evidence, Mr. Sharma disagreed that his base salary is $160,000. He suggested the amount was inclusive of his bonus. This would result in a greater amount of lost income for Mr. Sharma. Because of the lack of clarity, I have relied upon the more conservative estimate of Mr. Sharma's loss of income for 2024.

O.Reg. 34/10, and for short and long-term disability benefits. Mr. Sharma received $61,668.08 for short-term disability, long-term disability, and income replacement. The difference, $72,274.94 -$61,668.08, equals a past income loss of **$10,606.86**. I am satisfied on a balance or probabilities that Mr. Sharma's past income loss was a minimum of $10,606.86. This is my best estimate of his past income loss.

Future Income Loss

[352] If Mr. Sharma became an SAP architect in 2023 with a starting base salary of $155,000, assuming Mr. Sharma received a 6% raise in 2024 and 2025, his base salary for 2025 would be $174,158. With the 7.5% bonus, this would result in a gross salary of $187,219.85.

[353] If Mr. Sharma remained an SAP MM consultant, his estimated salary, assuming a 6% raise in 2025 would be **$168,679.92**, and with the 7.5% bonus this equals **$181,330.91**.

[354] Ms. Smilek's vocational report indicated that the average age of retirement for related workers classified under NOC 2173 (Software Designer and Computer Engineer) was 62. I have relied on the average age of retirement for workers engaged in similar work. I find that but for the accident it is likely that Mr. Sharma would have worked until he was 62.

[355] I accept that it is likely that Mr. Sharma will continue to suffer from chronic pain, and depression, and he will continue to experience impact to his cognitive functioning. I accept that he will continue to work long hours to fulfill his duties and complete his work responsibilities.

[356] I accept Ms. Smilek's conclusion that because Mr. Sharma suffers from chronic pain and depression, with cognitive impacts, his work life will likely be shorter. I accept that "ongoing pain takes a toll on people and one's ability to tolerate chronic pain diminishes with age.": *Davidge v. Fairholm*, 2014 BCSC 1948, at para. 166; *Grant v. Ditmarsia Holdings Ltd.*, 2020 BCSC 1705, at para. 101.

[357] I find there is a real and substantial possibility that Mr. Sharma's work life will be shortened by 5 years, so that he will retire at 57 instead of 62.

[358] In my view, Mr. Sharma will continue to work as an SAP consultant or will progress to an SAP architect. Given Mr. Sharma's success for 7 years since the accident, I do not believe it is a real and substantial possibility that it will be necessary for him to move from the role of SAP consultant at Syntax to a lower paying role. He is well regarded and well established at Syntax and has been reasonably accommodated there. He may become an SAP architect at some point in the future at Syntax.

[359] As a result, in terms of his future losses, assuming Mr. Sharma remains an SAP MM consultant with a gross income of $181,330.91 in 2025 and works until the age of 57, his earnings, using the multipliers in exhibit 12F (13.440 x $181,330) will equal $2,437,075.20.

[360] If the accident did not occur, assuming Mr. Sharma became an SAP architect with a gross income of $187,219.85 in 2025 and continued to work until the age of 62, his earnings, using the multipliers in Exhibit 12F (17.094 x 187,219.85) would equal $3,200,336.12.

[361] $3,200,336.12 less $2,437,075.20 equals $763,260.92. In my view, this represents the upper range of Mr. Sharma's future income losses. If he becomes an SAP architect, and if he receives corresponding pay raises, those losses may be reduced. The losses may also be reduced if Mr. Sharma continues to receive significant pay raises as an SAP consultant, as was the case in 2023. There is also the potential that Mr. Sharma will be able to work longer than age 57.

[362] In my view, the appropriate damage award for Mr. Sharma's future income loss is $600,000. This results in a total past and future income loss of $610,606.86. This represents my best estimate of Mr. Sharma's loss of income. It is commensurate with an approximately 80% chance that Mr. Sharma would such earning capacity but for the defendant's actions. Damages must be commensurate with the value of the chance of earning that income: *Athea v. Leanati*, [1996] 3 S.C.R. 458, at para. 27.

[363] The objective of awarding damages for past and future loss of income is to put Mr. Sharma in the same financial position he would have been in, had he not been in the November 10, 2018 accident.

[364] On the evidence available to me, $610,606.86 is my "best estimate" of Mr. Sharma's past and future income loss.

G. Future Care Costs

[365] Mr. Sharma submits that he continues to medically manage and mitigate the effects of impairment through physiotherapy, chiropractic care, massage, and prescription medications. The Plaintiff submits that between January 25, 2019, and January 29, 2020, he incurred $4157.77 in care costs, of which $1964.49 was covered, leaving him at a loss of $2,193.28. He settled the Statutory Accident Benefit Claim for $35,000. Although the Plaintiff concedes that Mr. Sharma's medical expenses were significantly greater during the acute period following the accident, he submits that $80,000 would be a fair and reasonable award for future care costs. After collateral set off of the $35,000 settlement, he seeks an award of $45,000.

[366] The Defendants submit the best evidence of Mr. Sharma's future needs are his past and current needs. The Defendant's submit Mr. Sharma did not attend physiotherapy after February 2020, except on November 7, 2022, until March 2024. The Defendants submit his attendance in 2024 was for an unrelated shoulder issue.

[367] The Defendants submit that Mr. Sharma had access to therapy and benefits to pay for it, but did not use. As such there is no evidence to support the need for future cost of care.

[368] The leading restatement of the common law test governing entitlement to future care costs is *Gray v. Macklin*, [2000] O.J. No. 4603 (SC), cited in *Boone v. O'Kelly*, 2021 ONSC 2308, at para. 320:

1. There must be a medical justification for the claims.

2. The award must be fair and moderate.

3. The claims must be "reasonably necessary" having in mind the personal circumstances.

[369] Future care costs, like other future pecuniary loss, are to be proven on the "real and substantial possibility" standard. *Tarrington v. Havcare Investments inc.*, 2021 ONSC 2175, at para. 145

[370] The Plaintiff has not provided a sufficient evidentiary basis for the future care costs they seek. I am not satisfied that sufficient evidence was led to establish that there is a "real and substantial possibility that the amounts sought by the Plaintiff will be incurred. The Plaintiff provided copies of his Sun Life disability claim file, however, as conceded by the Plaintiff, his expenses in the acute phase of care post-accident are not comparable to what his future expenses will be.

[371] Mr. Sharma is attending physiotherapy monthly. As set out above, I am satisfied that he has a need for continued physiotherapy because of the November 10, 2018 accident. The receipts provided for physiotherapy care show that Mr. Sharma pays approximately $25.00 out of pocket monthly. The records show he occasionally saw a physiotherapist more frequently. In 2024 his personal cost of physiotherapy was approximately $300 to $400 dollars a year. He has not consistently attended for physiotherapy treatment.

[372] Mr. Sharma sees a psychiatrist regularly. He is prescribed medication to treat depression. Mr. Sharma's benefits cover a significant proportion of the expenses related to his prescribed medication.

[373] The evidence does not establish how frequently Mr. Sharma obtains massage or chiropractic treatment or his out-of-pocket expense.

[374] The Plaintiff has not established a medical justification for the claimed $45,000 for future care costs. The proposed award is neither moderate nor fair. The Plaintiff has not established that a $45,000 award of damages is "reasonably necessary" having regard to Mr. Sharma's personal circumstances and his current medical needs and expenses.

[375] I was not provided with expert evidence from an occupational therapist or future care planner, or associated table of costs to assist me in quantifying future care costs for Mr. Sharma.

[376] I find there are damages in the amount of $5,000 for future care for physiotherapy and medication expenses. No amount is awarded after collateral set off.

H. Damages for Mr. Sharma's Loss of Housekeeping and Home Maintenance Capacity

[377] As set out above, I accept Mr. and Mrs. Sharma's evidence that Mr. Sharma contributed to domestic labour, including housekeeping prior to the accident. However, I do not accept Mr. Sharma and Mrs. Sharma's evidence that he is incapable of assisting with domestic labour. Mr. Sharma made inconsistent statements to Dr. Karabatsos and Dr. Khumbare about the extent to which he is able to contribute to domestic labour. He told them he can do household chores with pacing. In the factum, the Plaintiff's submitted that Mr. Sharma occasionally helps with groceries. In his evidence he said he takes primary responsibility for getting groceries.

[378] I find as a fact that Mr. Sharma can contribute, with pacing, to domestic labour and the care of his two sons. Mr. Sharma and his family live in a condo and as such any home maintenance involving heavy lifting is limited. I find as a fact that although Mr. Sharma contributed to the household duties prior to the accident, Mrs. Sharma took primary responsibility for the domestic duties. Taking into account the non-pecuniary damages I have awarded to Mr. Sharma and the damages I have awarded Mrs. Sharma under the *Family Law Act* for housekeeping and other services provided, I decline to award Mr. Sharma damages for housekeeping and home maintenance capacity. Any such award would be nominal and would potentially lead to double recovery.

I. The Threshold is Met: 267.5 of the *Insurance Act*

[379] The Defendant's submit that Mr. Sharma's claim for non-pecuniary loss is barred because his injuries do not fall within the exceptions to the statutory immunity contained in s. 267.5(5)(b) of the *Insurance Act*, R.S.O. 1990 c. I.8 and the applicable regulations.

[380] Section 267.5(5)(a) and (b) of the *Insurance Act* stipulates that the owner of an automobile is not liable in an action for non-pecuniary loss unless the injured person has sustained "permanent, serious impairment of an important physical, mental, or psychological function".

[381] Section 267.5(5)(a) and (b) provide as follows:

Non-pecuniary loss.

(5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, and from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function.

[382] Sections 4.1, 4.2, and 4.3 of C*ourt Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O.Reg. 461/96 help define the meaning of "permanent serious impairment of an important physical, mental or psychological function," and confirm the evidence which must be adduced to prove that the statutory exception or "threshold" has been met. They provide as follows:

4.1 For the purposes of section 267.5 of the Act,

"permanent serious impairment of an important physical, mental or psychological function" means impairment of a person that meets the criteria set out in section 4.2.

4.2 (1) A person suffers from permanent serious impairment of an important physical, mental, or psychological function if all of the following criteria are met:

1. The impairment must,

i. substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training, or

iii. substantially interfere with most of the usual activities of daily living, considering the person's age.

2. For the function that is impaired to be an important function of the impaired person, the function must,

i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

ii. be necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account reasonable efforts to accommodate

the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,

iii. be necessary for the person to provide for his or her own care or well-being, or

iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be permanent, the impairment must,

i. have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve,

ii. continue to meet the criteria in paragraph 1, and

iii. be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

Evidence Required to be Adduced to Prove Permanent Serious Impairment

4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical, mental, or psychological function for the purposes of section 267.5 of the *Act*.

(2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,

(a) the nature of the impairment;

(b) the permanence of the impairment;

(c) the specific function that is impaired; and

(d) the importance of the specific function to the person.

(3) The evidence of the physician,

(a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and

(b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine.

(4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.

(5) In addition to the evidence of the physician, the person shall adduce evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical, mental or psychological function.

[383] The onus of proof to establish that the Plaintiff's impairments meet the statutory exceptions or "threshold" rests with the plaintiff. *Malfara v. Vukojevic*, 2015 ONSC 78, at para. 11.

[384] The three-part inquiry to be undertaken in the threshold analysis is as follows:

1. Has the injured person sustained permanent impairment of a physical, mental, or psychological function?

2. If yes, is the function which is permanently impaired important?

3. If yes, is the impairment of the important function serious?

[385] Under s. 4.2(1)(3) of O.Reg. 461/96, for the impairment to be permanent, impairment must:

i.) Have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve,

ii.) Continue to meet the criteria in paragraph 1, and

iii.) Be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

All of these components must be satisfied: *Malfara*, at paras. 12 and 13.

[386] The word "permanent" does not necessarily mean strictly forever until death. It means the sense of a weakened condition lasting into the indefinite future without any predicted time period or definite end: See *Malfara*, at paras. 14 and 15; *Brak v. Walsh*, 2008 ONCA 221, 90 O.R. (3d) 34, at para. 4.

[387] The determination of whether the impaired function under 4.2(1)2 is "important" involves a qualitative test. *Malfara*, at para. 19.

[388] The determination of whether the impairment is "serious" as required by 4.2(1)1 relates to *the seriousness of the impairment to the person* and not to the injury itself. The degree of

impairment in the plaintiff's daily life must go beyond tolerable. *Malfara,* at paras. 21 and 22.

[389] In *Malfara,* Justice Firestone explained that it is the effect of the injury on the person and not the type of injury which should be focus of the analysis. He stated as follows at para. 23:

> It is important to recognize that it is "the effect of the injury" on the person and not the "type of injury" or labels attached to it which should be the focus of the threshold analysis. The effects of chronic pain are just as real and just as likely to meet or not meet the threshold as any other type of injury or impairment. It all depends on the manner in which the plaintiff has been impacted. The threshold determination is to be done on a case-by-case basis.

[390] I accept Dr. Khumbare and Dr. Gavett-Liu's opinions that Mr. Sharma's chronic pain and depression constitute a "permanent serious impairment of an important physical, mental or psychological function."

[391] Dr. Khumbare and Dr. Gavett-Liu both concluded that Mr. Sharma's impairments are permanent and serious, and as I have explained, I agree. Mr. Sharma's impairments have been continuous since the collision and are predicted to last into the indefinite future. The combination of his chronic pain and depression and related impact on his cognitive functioning has impacted all facets of Mr. Sharma's life.

[392] Although some of Mr. Sharma's injuries have healed, including the pelvic fractures and rib fracture, Mr. Sharma's chronic pain and depression, including the impact to his cognitive functioning are just as real as other types of physical injuries.

[393] The changes in Mr. Sharma's physical, psychological, and emotional condition since the collision are significant. Before the collision Mr. Sharma had no health concerns. His physical ability was unrestricted, and he had no psychological or emotional issues. Now, he suffers from a constellation of symptoms related to chronic pain and depression. *Taylor v. Zents*, 2024 ONSC 166, at para. 400, affirmed 2025 ONCA 662.

[394] I find as a fact that Mr. Sharma's chronic pain and depression *substantially interferes* with:

i.) His ability to continue his regular or usual employment, despite reasonable efforts to accommodate his impairment and his reasonable efforts to use the accommodation to allow him to continue employment;

ii.) His ability to continue training (his ongoing SAP certifications) for a career in a field in which he was being trained before the incident, despite reasonable efforts to accommodate him and his reasonable efforts to use the accommodation to allow him to continue his SAP training.

iii.) His usual activities of daily living, considering his age.

[395] Although Mr. Sharma has persevered in his work, I find that Mr. Sharma's chronic pain and depression has substantially interfered with his employment. He has continued to work successfully but at significant personal expense. I accept that his pain and depression has impacted his ability to sit for extended periods, his focus and concentration and communication skills. As a result, he must work significantly longer hours to complete his work.

[396] Mr. Sharma's chronic pain and depression has impacted his cognitive functioning substantially interfering with his ability to complete additional SAP certifications in the field that he was working and being trained in before the accident. This has impacted his progression to SAP architect. He has been unable to complete the certifications because of his difficulties with focus and concentration especially when combined with the additional hours he spends to complete his day-to-day work.

[397] Mr. Sharma's chronic pain and depression has substantially interfered with most of the usual activities of Mr. Sharma's daily life. It has impacted his ability to contribute within his home to household and child rearing duties. It has affected his relationship with his wife and children and has impacted his life in the community. Because of the accident, his chronic pain, and depression, he no longer enjoys the social activities he once participated in, he has become withdrawn and rarely socializes, and he is no longer able to participate in sports he once enjoyed, such as soccer and cricket.

[398] On the basis of the evidence of Dr. Khumbare and Dr. Gavett-Liu, which I accept, I find that his impairment is permanent. It has been continuous since the accident. Mr. Sharma has participated in recommended treatment of his impairment. The medical evidence establishes that at this point, now 7 years after the accident, he is not expected to substantially improve. I am satisfied that he will continue to meet the *Insurance Act* criteria, and that his impairment is expected to continue without substantial improvement.

[399] Mr. Sharma's chronic pain and depression will last into the indefinite future. There is no predicted time period within which it will end.

[400] His functioning that is impaired is important. It affects the quality of life he enjoyed prior to the accident. It has affected his ability to carry out his job. He continues to meet his job expectations, but in order to do so he must work substantial extra hours giving up a significant portion of personal and family time. He is left tired and frustrated. This is important to him.

[401] The impairment of his bodily and psychological functioning is serious. His ongoing discomfort is experienced daily and has an impact on all aspects of his life. It is serious, even though through determination he continues to work. He does so despite experiencing pain and difficulty carrying out his work duties. *Malfara v. Vukojevic*, 2015 ONSC 78, at para. 23.

[402] In respect of the defendant's threshold motion pursuant to s. 267.5 of the *Insurance Act*, R.S.O. 1990, C. I.8, I am satisfied that Mr. Sharma sustained a permanent, serious

impairment of an important physical, mental, or psychological function as a result of the accident. Mr. Sharma's chronic pain and depression occurred because of the injuries he suffered from the accident and have resulted in serious impairment of his physical, mental, and psychological functioning.

Treatment

[403] Mr. Sharma has done all he can to address his depression and anxiety. He has remained under the regular care of a psychiatrist. He takes medication daily to treat his depression and has done so since shortly after the accident.

[404] Mr. Sharma has sought assistance to address his difficulty with concentration, focus, and communication skills including word finding. He was prescribed Vyvanse and sought support from a memory clinic and underwent neurological testing.

[405] Mr. Sharma could have taken additional steps to address his physical pain. His treatment was impacted by the pandemic. I accept that he chose not to attend physiotherapy during the pandemic because he did not want to expose his family to the risk of contracting COVID-19. This long interruption of his physiotherapy contributed to stoicism about his pain and delayed him from recommencing physiotherapy following the pandemic. He has since recommenced physiotherapy.

J. Mr. Sharma's Non-Pecuniary Losses

[406] Mr. Sharma seeks $250,000 for pain and suffering and loss of enjoyment of life.

[407] The Defendant's submit that Mr. Sharma suffered hairline non-displaced fractures in his pelvis and one rib and suffers from moderate depression, but he has received little treatment since 2022.

[408] The Defendant's submit that based on consideration of similar cases, Mr. Sharma should be awarded non-pecuniary damages of $75,000 to $100,000. However, he submits that Mr. Sharma has not established the threshold required to receive non-pecuniary damages because he did not suffer permanent serious impairment.

[409] The determination of non-pecuniary losses is "a policy exercise more than a legal or logical one". An award of non-pecuniary damages turns on the experience of the individual, both in terms of physical and psychological suffering. It must be fair and reasonable. It should be consistent with other decisions involving similar injuries. The award must "by necessity be arbitrary or conventional" because no money can provide true restitution". Non-pecuniary damages are not to be treated as a top up of general damages. They are intended to provide an injured person with reasonable solace for the misfortune. *Andrews v. Grand & Toy Alberta Ltd*; 1978 CanLii 1 (SCC); *Higashi v. Chiarot*, 2021 ONSC 8201.

[410] A non-exhaustive list of factors relevant to the determination of non-pecuniary damages, as identified in *Stapley v. Hejslet*, 2006 BCCA 34, at para. 46, citing *Boyd v. Harris*, 2004 BCCA 146, at para. 42, include:

i.) *The Plaintiff's age*. Mr. Sharma is 43 years old. At the time of the accident, he was 35 years old.

ii.) *The nature of the injury*. Mr. Sharma initially suffered non-displaced pelvic fractures, and a rib fracture. However, as a result of the accident, he suffers from chronic pain, headaches, and depression which has impacted his cognitive functioning affecting his concentration and focus, communication skills, confidence, and his ability to learn new things.

iii.) *The severity and duration of the Plaintiff's pain*. Mr. Sharma has experienced ongoing pain and depression of varying levels daily since the accident.

iv.) *Emotional Suffering*. Mr. Sharma's injuries have had a significant emotional toll by undermining his confidence in the workplace and by straining his family relationships.

v.) *The extent of any disability*. Mr. Sharma's disability impacts his daily functioning. He is able to continue working, but at personal expense. He can do household chores in moderation. He can participate in his children's lives and activities, but cannot enjoy many activities, such as playing soccer with them, that he previously enjoyed. He is unable to engage in recreational activities he use to enjoy such as soccer and cricket. He has become frustrated, withdrawn, and disengaged from others which has significantly impacted his quality of life.

vi.) *The effect on family and social relationships.* Mr. Sharma's ongoing sequalae have detrimentally impacted his relationship with his wife and children, limiting his ability to fully participate in and enjoy those relationships.

vii.) *Impairment of the plaintiff's mental and physical abilities*. As noted, Mr. Sharma can continue to work, and continue to contribute to his family, however, I am satisfied that his injuries substantially interfere with his work, family, and social life. His injuries have a daily impact and take away from his ability to fully enjoy his life and relationships.

viii.) *The impact on the Plaintiff's lifestyle*. Mr. Sharma has withdrawn socially because of his chronic pain and depression. He is unable to enjoy physical activities he previously enjoyed such as soccer and cricket. More significantly is that they have caused him to have a singular focus on completing his work. He is otherwise withdrawn and disconnected from his family and friends. Mr. Sharma's injuries have diminished Mr. Sharma's ability to experience happiness in his life, something that is not replaceable.

ix.) *Any evidence of stoicism, with this last factor being a consideration that should not operate to penalize the plaintiff.* Mr. Sharma presents with stoicism. He has resigned himself to living with pain for the rest of his life. It has impacted his hope for a better future and has impacted his engagement with treatment such as physiotherapy.

[411] The parties have referred to a number of cases they submit provide guidance as to the appropriate non-pecuniary damages that should be awarded.

[412] In *Taylor v. Zents*, the 47-year-old plaintiff suffered a mild traumatic brain injury when the vehicle he was driving was struck from behind while stopped. The Plaintiff's vehicle propelled his car into a gulley. The vehicle rolled and landed on its hood. The plaintiff suffered from significant cognitive defects, chronic pain, headaches, and dizziness. He became socially withdrawn and was *rendered unemployable* in his chosen career. In 2024, Mr. Taylor was awarded $250,000 for non-pecuniary damages.

[413] In *Higashi v. Chiarot*, 2021 ONSC 8201 the Court found that the Plaintiff was physically, psychologically, and cognitively impaired following a car accident. She was in the front passenger seat when a vehicle failed to stop for a red light and struck her vehicle on the passenger side. The Court concluded that the Plaintiff suffered soft tissue injuries and a mild traumatic brain injury, post-concussion syndrome, post-traumatic stress disorder, adjustment disorder with primary depressed mood, and chronic pain in the neck back and jaw. She suffered from ongoing symptoms including headaches, light and noise sensitivities, dizziness, cognitive difficulties with speech, word finding, slower thought process, and short-term memory loss. She continued to work running her jewelry design company for five years after the accident but became unable to continue working due to her injuries. The Court awarded her $225,000 in non-pecuniary damages.

[414] In *Watkins, v. Dormuth* 2014 BCSC 543, cited in *Higashi*, at para. 133, the plaintiff suffered whiplash-type injuries to her back, neck, and shoulders. She continued to suffer ongoing problems with her neck and shoulders. She sustained a mild traumatic brain injury, and she had ongoing cognitive difficulties including headaches, mood changes, anxiety, fears associated with driving, difficulty with memory, poor concentration, distractibility, fatigue, problems with balance, irritability, and noise intolerance. The injuries were expected to have permanent lingering effects. The Plaintiff was unlikely to be capable of full-time employment of the type that would garner the income she was capable of earning but for the accident. The court assessed non-pecuniary damages at $175,000.

[415] In *Khelifa v. Sunrise* et al. 2015 ONSC 74, also cited in *Higashi*, at para. 133, the plaintiff suffered a comminuted fracture of her left ankle and a more severe fracture of her right ankle because of a serious fall. The plaintiff suffered a mild head injury. Cognitive deficits were not made out. The accident worsened her pre-existing PTSD and depression, but it was a temporary worsening. The plaintiff's mood had much improved. The court assessed the plaintiff's non-pecuniary damages at $175,000.

[416] In *Mayer v. Umabao*, 2016 BCSC 506 the 69-year-old plaintiff suffered from mild traumatic brain injury, vestibular injury and somatoform disorder. He struggled with memory, and the ability to describe and find words. He closed his business after the accident. The court found that the plaintiff suffered a considerable loss in his enjoyment of life, family, friends, social interests, and vocational interests. The court concluded that the plaintiff was entitled to $175,000 in general damages.

[417] In *Sheldon v. Reyna* 2018 ONSC 5611, the 51-year-old plaintiff suffered from chronic pain disorder, adjustment disorder with primarily depressed mood and somatic symptom disorder, predominantly pain. The plaintiff had a wide variety of pain symptoms throughout her body. She had difficulty sleeping. She had been taking several medications for several years. She had been working as an engineer for 24 years and no longer worked because of the accident. At the time of the accident she was working four days a week. The court found she would have likely worked to the age of 62.64 if the accident had not happened. Her ability to take care of her home was impaired. Her family activities had been curtailed and volunteer work had been limited. She no longer participated in the leisure activities she previously enjoyed. The court assessed the non-pecuniary general damages at $100,000.

[418] Mr. Sharma's circumstances are distinguishable from some of the cases referenced by the Plaintiff where injuries had a greater impact on the lives of the plaintiff's. While Mr. Sharma's injuries have had a significant and permanent impact, his injuries are not of the magnitude of many of the cases referenced by the Plaintiff where injuries rendered the plaintiffs unemployable. Mr. Sharma can continue to work and, although in a diminished way, engage in the life of his family.

[419] In *Ashburn v. Storrey*, the plaintiff suffered an injured neck, left shoulder, lower back and left hip from a car accident. She had reduced function of her left arm and shoulder due to chronic pain and experienced frequent and longstanding headaches. The court found she *did not* suffer from any mental health disorder but did experience symptoms of depression and insomnia associated with her chronic pain. She rarely socialized outside of the home and was unable to do her housekeeping. After the accident the plaintiff was able to continue working at the LCBO and a general store performing modified duties and could continue to perform light housekeeping tasks, although the activities caused her pain and discomfort. The plaintiff was not awarded any loss of income damages but was awarded $62,500 for general damages by the jury.

[420] Counsel for the Defendant referred to *Bassuday v. Salomon*, 2018 ONSC 72, in which a pedestrian was struck by the defendant lessee's vehicle. The lessor settled the action with the pedestrian plaintiff and sought default judgment against the lessee. The 57-year-old pedestrian suffered ongoing soft-tissue injuries to her lower back and right knee as well as ongoing depression. A settlement of $150,000 was reached between the lessor and the pedestrian plaintiff, of which $50,000 was for general damages ($87,385.00 minus $37,385 deductible). Justice Favreau was satisfied that the "default judgment should be granted *based on the factual allegations in the statement of claim and the evidence in the affidavit*

of counsel for the lessor". In my view, this default judgment is of limited assistance in determining general damages in this matter.

[421] In *O'Brien v. O'Brien*, 2018 ONSC 4665, the 39-year-old plaintiff was asleep in the passenger seat when the driver fell asleep at the wheel and drove into oncoming traffic. The driver was killed, and the vehicle was severely damaged. The plaintiff had significant pre-existing health issues, including problems with his knees and back, and a long history of anxiety. The plaintiff suffered a pilon fracture to his left ankle, exacerbation of his pre-existing lower back problems which had resolved, post-traumatic stress disorder, and depression. His depression and post-traumatic stress disorder was controlled effectively by medication. The court found the depression and PTSD *had resolved over time and were found not play a significant role in his life*. As a result of the accident, the plaintiff suffered chronic ankle pain and sustained permanent impairment of physical functioning in his left ankle. He had returned to work since the accident and had overcome his injury through determination to continue working despite the fact his ankle injury substantially interfered with his ability to continue his regular employment. The mental health component of the plaintiff's injury did not meet the threshold of serious permanent injury. A jury awarded the plaintiff general damages in the amount of $50,000.

[422] In *Cornwall v. Al Bloushi*, 2022 ONSC 6388, the Court awarded general damages in the amount of $65,000. The plaintiff suffered a fractured right shoulder following a fall after she stepped on broken glass. The fracture did not require surgery, and the Court was not satisfied that she suffered from chronic pain or that the impact on her movement and range of motion was as significant as in cases where damages were awarded of $100,000 to$125,000.

[423] The cases cited by the Defendants, such as *O'Brien*, and *Cornwall*, where the general damages awarded were related to broken bones but where chronic pain, depression, and/or cognitive impact, was not an important factor are distinguishable from the injuries and impact in this case.

[424] In *Graul v. Kansal*, 2022 ONSC 1958, at para. 557, Lemon J. summarized the applicable principles in assessing general damages:

> The principles related to fixing personal injury damages are well known. I am to assess an amount to restore Mr. Graul to the position he would have enjoyed but for the accident, to the extent that money can do so. No such amount can be perfect compensation but must be reasonable and fair to both parties. The award must be consistent with other decisions involving similar injuries. It cannot be based on sympathy for the plaintiff nor retribution to the defendants. There can be no dispute that such an award will have to be arbitrary and be decided on the circumstances of each individual, both in terms of physical and psychological suffering: *Andrews v. Grand and Toy Alberta Ltd.* 1978 CanLii 1 (SCC), [1978] 2 S.C.R. 229, at p. 261.

[425] Mr. Sharma's quality of life has been impacted physically, psychologically, and emotionally. Having regard to the evidence and the authorities, I find that an appropriate award of non-pecuniary damages is $160,000.

K. Aparna Sharma's *Family Law Act Damages*

[426] Aparna Sharma claims damages under section 61 of the *Family Law Act.*

[427] Sections 61(1) and (2) of the *Family Law Act* provide:

> 61(1) *If a person is injured* or killed *by the fault or neglect of another under circumstances where the person is entitled to recover damages*, or would have been entitled if not killed, *the spouse*, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person *are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover* or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
>
> (2) The damages recoverable in a claim under subsection (1) may include,
>
> > (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
> >
> > (b) actual funeral expenses reasonably incurred;
> >
> > (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
> >
> > (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
> >
> > (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

[428] Mrs. Sharma claims damages under s. 61(1) and 61(2)(d) and (e) of the *Family Law Act*.

[429] Mrs. Sharma argues that pursuant to s. 61(1) of the *Family Law Act*, she may claim loss of Mr. Sharma's past and future income and earning capacity. Mrs. Sharma submits if the aggregate damages to which Mr. Sharma is entitled exceeds $400,000 then any portion of those damages which are specifically attributable to economic losses in respect of his past and future earning capacity, and/or loss of competitive advantage, shift to Mrs. Sharma pursuant to the action *per quod servitium amisit doctrine*, which is a method of shifting payment to a third party of the loss sustained by the victim.

[430] Mrs. Sharma submits she has sustained pecuniary loss in respect of her husband's services to the family unit, as an earner. She argues that Mr. Sharma was the primary breadwinner, and they shared their finances. His economic losses are losses sustained by her and are properly within the scope of the loss of the value of the injured person's services.

[431] The Defendant submits that in the Statement of Claim Mrs. Sharma originally claimed her own pecuniary and non-pecuniary damages for injuries she suffered as a result of the accident however she did not pursue damages from her own injuries at trial, and instead restricted her claim to damages under the *Family Law Act* for loss of care, guidance, and companionship.

[432] Section 61 of the *Family Law Act* requires a liberal and contextual analysis when assessing damages. The list of the types of damages recoverable under s. 61(2) are illustrative, not exhaustive. Section 61(2) does not restrict the scope of pecuniary loss in s. 61(1) that may be claimed. There are circumstances in which a family member could obtain a distributive award where the income earner's action and the family member's action, a claim under the *Family Law Act*, are tried together. *Stickel* (Litigation Guardian of) v. *Lezzaik* (2008), 2008 Canlii10057 (ONSC), 90 O.R. (3d) 40, at para. 7-8; *Fiddler v. Chiavetti*, (2008), 92 O.R. (3d) 219, at paras. 7-8.

[433] I am not satisfied this is a case where a "distributive award" should or can be made under s. 61(1) of the *Family Law Act*.

[434] The Plaintiff failed to identify any case that proceeded under the Simplified Procedure where liability or income loss of a spouse, which exceeded the damages the spouse could obtain due to the Rule 76.02 cap, was awarded to the other spouse under s. 61(1) of the *Family Law Act.* In my view, to make such an award, would enable Mr. Sharma to do indirectly what he cannot do directly *because he chose to proceed under the Rule 76 Simplified procedure* and abandon any entitlement to liability that exceeds the legislative cap.

[435] To allow a family member to claim "the remainder" of the income earner's proven loss of income in a case such as this one, would create a "loophole" inconsistent with the intention the legislative cap imposed by Rule 76.02. Not only a spouse but other family members such as children, parents, and grandparents could make a claim for the injured spouses left over income losses under s. 61(1), and thereby render the cap meaningless.

[436] Mrs. Sharma's claim is *derivative of* Mr. Sharma's income loss claim. Mr. Sharma's income loss claim has been determined, and because of Rule 76.02, any liability in excess of $400,000 (because there are two defendants) has been abandoned. As such, the cap governing the principal action, governs the claim made under s. 61 by Mrs. Sharma. In my view, because Mrs. Sharma's claim for Mr. Sharma's residual income losses is not a distinct cause of action, Rule 76.02(2) does not increase the cap to $400,000. There are not two Plaintiff's with independent claims. If Mr. Sharma wanted to obtain damages in excess of $400,000 for income losses he should not have proceeded under the Simplified

Procedure. *Camarata v. Morgan*, 2009 ONCA 38; *Malik v. Nikbakht*, 2021 ONCA 176; at para. 12.

[437] Further, it is unclear that Mrs. Sharma would be entitled to all of Mr. Sharma's remaining income losses. There was no valuation evidence on this point.

[438] Finally, Mrs. Sharma did not claim Mr. Sharma's loss of income under s.61 of the *Family Law Act* in the Statement of Claim. Mrs. Sharma's s.61 *Family Law Act* claim in the Statement of Claim was restricted to a claim for "loss of care, guidance and companionship", and for personal care, attendant care, and/or housekeeping and home maintenance activities that she has incurred and was required to do as a consequence of the accident.

[439] In my view, the absence of Mr. Sharma's income losses as a head of damages in the Statement of Claim resolves the issue, which does not require more in-depth consideration. However, even if a claim for Mr. Sharma's income loss had been made by Mrs. Sharma in the Statement of Claim, for the reasons above, no award to Mrs. Sharma for Mr. Sharma's income loss should be made.

L. Aparna Sharma's s. 61(2)(d) Claim for Nursing, Housekeeping, or Other Services

[440] Under s. 61(d) of the *Family Law Act* Mrs. Sharma seeks a lump sum payment of $30,000 for "nursing, housekeeping, or other services" provided by her to Mr. Sharma because of the accident.

[441] I accept that during the six-month period of Mr. Sharma's initial convalescence she assisted Mr. Sharma with his hygiene dressing, and grooming. After spending 18 days in hospital, Mr. Sharma returned home and initially used a wheelchair, before progressing to use of a walker until he regained his mobility. I accept that Mrs. Sharma provided significant care and support to Mr. Sharma during his recovery and that she was responsible for all of the household chores, and care of their son during this time.

[442] Mrs. Sharma gave evidence at discovery that she and her sister shared the household chores prior to the accident. The defence submits that I should find that prior to the accident she did all the housework so there has been no loss. As noted above, I am satisfied that at discovery Mrs. Sharma did not intend to convey that her husband did none of the housework. I accept prior to the accident that Mr. Sharma contributed to a portion of the household responsibilities and the domestic labour of their family.

[443] As set out above, Mr. Sharma is now capable of carrying out housekeeping and childcare responsibilities with pacing. He is capable of doing household chores that do not involve heavy lifting. I find as a fact that he is capable of assisting with most day-to-day domestic chores such as folding laundry, cooking, and doing dishes.

[444] Mr. Sharma is capable of contributing to the care of their two boys. While he may no longer be able to play soccer with the boys, he can take them to and from school and be present for their extra-curricular activities. He can help them with schoolwork.

[445] I do not accept that Mr. Sharma's injuries prevent Mrs. Sharma from working. Mrs. Sharma can re-enter the workforce in a position compatible with her training and experience. She has worked on contract for Syntax. As their boys become older and more independent, they will be able to contribute to the household chores.

[446] In my view, an award of $20,000 is appropriate for nursing, housekeeping or other services provided by Mrs. Sharma.

M. Aparna Sharma's s. 61(2)(e) Claim – Loss of Care Companionship and Guidance

[447] Aparna Sharma seeks an award of $75,000 for loss of care, companionship, and guidance under s. 61(2)(e) of the *Family Law Act*.

[448] I accept that the relationship between Aparna and Diwaker Sharma changed significantly because of Mr. Sharma's injuries caused by the accident. They love each other and remain in a committed relationship. However, because of Mr. Sharma's chronic pain, and depression he no longer provides for the day-to-day needs of Mrs. Sharma in the way he did before the accident. Mr. Sharma's injuries and treatment have impacted his provision of love, care, and affection to Mrs. Sharma. Treatment of his depression has resulted in a loss of marital intimacy between them because of the side effects of his anti-depressant medication.

[449] Mrs. Sharma also does not have the same level of companionship from Mr. Sharma, because he works longer hours to complete his work tasks. On a day-to-day basis, Mr. Sharma is more socially withdrawn, more irritable, and less affectionate. He does not enjoy life in the way he once did. Mr. and Mrs. Sharma's relationship is less joy-filled, and more duty filled. Mrs. Sharma has suffered because of Mr. Sharma's chronic pain and depression. She does not enjoy the fulsome family life she once had before the accident occurred.

[450] In *Taylor v. Zents, supra*, Mr. Taylor suffered a minor traumatic brain injury that rendered him unable to work and had a profound impact his relationship with his spouse. The Court awarded Mr. Taylor's partner, Ms. Young $75,000. Mr. Taylor's injuries were graver and had a larger impact on him than those of Mr. Sharma.

[451] In *Morris v. Prince*, 2023 ONSC 3922, the plaintiff sustained a brain injury that negatively affected the manner in which he interacted with his spouse. The court considered that the couple were still able to enjoy one another's company on a day-to-day basis, and they remained in a loving, caring, and committed relationship at the time of the trial. The Court assessed the spouse's damages at $70,000.

[452] In my view, an award of $60,000 is appropriate for Mrs. Sharma's loss of care, guidance, and companionship.

N. CONCLUSION

[453] Mr. Sharma and Mrs. Sharma are entitled to the following damages:

Diwakar Sharma

(a) $10,606.86 for past loss of income.

(b) $600,000 for future loss of income and earning capacity.

(c) $5,000 for future care expenses. After collateral set-off no amount is remaining.

(d) $160,000 for non-pecuniary damages for pain and suffering.

Aparna Sharma

(e) $20,000 to Aparna Shara for nursing, housekeeping or other services provided by Mrs. Sharma pursuant to s. 61(2).

(f) $60,000 to Aparna Sharma for the loss of care, guidance, and companionship, less the statutory deductible under s. 267.5(7).

(g) Applicable pre-judgment interest.

[454] As a result of Rule 76.02, the cap on the damages awarded to Mr. Sharma is $200,000 as against Nataliya Bublyk, and $200,000 as against Mykola Bublyk, for a total award of $400,000.

[455] Mrs. Sharma is entitled to an award of $20,000 for nursing, housekeeping, or other services. Her award of $60,000 for loss of care guidance and companionship is subject to the statutory deductible of $23,395.04. The difference remaining results in a net award of $36,605. Her total damages equal $56,605.

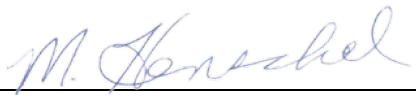
O. Costs and Prejudgment Interest

[456] The parties shall provide written submissions on costs and applicable pre-judgment interest.

[457] The Plaintiff's are requested to provide written submissions on costs and pre-judgment interest within 30 days of these reasons for judgment.

[458] The Defendant is requested to provide submissions on costs and prejudgment interest 15 days after receipt of the Plaintiff's submissions.

[459] I wish to thank the parties for their detailed and helpful written submissions.



Justice Marcella Henschel

Released: November 7, 2025

CITATION: Sharma v. Bublyk, 2025 ONSC 6245
COURT FILE NO.: CV-20-00001523-0000
DATE: 20251107

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Diwakar Sharma and Aparna Sharma

Plaintiffs

– and –

Nataliya Bublyk and Mykola Bublyk

Defendants

REASONS FOR JUDGMENT

Justice Marcella Henschel

Released: November 7, 2025

Appendix A

	2018	**2019**	**2020**	**2021**
	Base Salary$110,000 (*28 weeks expected in 2018 – June 18 to December 31, 2018)	Base Salary: $110,000 No Raise	Base Salary: $115,000 Raise: 4.5%	Base Salary: $115,000 No Raise
Expected Gross Annual Income *All figures in this row assume the addition of the 7.5% bonus	$63,823	$118,250 (It is reasonable to assume that if the accident had not occurred, Mr. Sharma would have had the same salary since the previous year was a partial year)	$123,625	$123,625
Actual Income	$50,128.84	$52,887.30	$110,770	$125,265 *Exhibit 12B shows Mr. Sharma received the full bonus. –
Difference	$13,695	$65,362.70	$12,855	N/A
70% of Difference	$9,586.50	$45,753.89	$8,998.50	N/A

	2022	**2023**	**2024**	**2025**
	Base Salary: $125,000 effective March 24, 2022. Raise = 8.7 % plus one-time bonus of $8333.33 (Additional 6.6%). Total Raise: 15.3%	Base Salary: $150,124.93 Raise = 20%	Base Salary $159,132 Raise = 6% Bonus payment of $12,801; amount includes retro pay of $866.10 (bonus $11,934.90 – exactly 7.5%)	***Unknown Assuming a 6% raise, this would equal $168,679.92** With 7.5% bonus this equals: $181,330.91
Expected Gross Annual Income *All figures in this row assume the addition of the 7.5% bonus	$134,375 ($134,375 with one-time bonus of $8333.33 = $142,708.33)	$161,384.30 (Mr. Sharma actually received a bonus of $10,514.99 = $744.38 short of full discretionary bonus)	$171,066	Unknown
Actual Income	$143,565 (The actual bonus awarded was $10,514.99 (12E), which was greater than 7.5%)	$160,843.38	$171,066.90 T4 Not available	
Estimated Income as SAP Architect	N/A	Base: $155,000 (with 7.5% bonus)	Base 164,300 (assumes 6% raise)	Base $174,158 (assumes 6% raise)

		$166,625	With 7.5% Bonus $176,622.50	With 7.5% Bonus: $187,219.85
Difference between Estimated Income as SAP Architect and Actual Income	N/A	$5,781.62	$5,555.60	$5,888.94
70% of Difference	N/A	$4,047.13	$3,888.92	$4,122.26