

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thandi v. Try*,
2021 BCSC 22

Date: 20210107
Docket: M176246
Registry: Vancouver

Between:

Ragbir Thandi

Plaintiff

And

Christopher John Try

Defendant

Before: The Honourable Mr. Justice E.M. Myers

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.
September 14-18, 21, 2020 and
October 26-29, 2020

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January 7, 2021

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I. INTRODUCTION

[1] The plaintiff, Mr. Thandi, claims for damages for an accident which took place on July 25, 2015, when he was on his motorcycle.

[2] The defendant, Mr. Try, recognises that he bears some – but not all – responsibility for the accident and that Mr. Thandi suffered some soft tissue injury. Other than that, there is almost no area of agreement between the parties. There is an issue of whether an assault of the plaintiff, approximately two years after the Accident, constitutes an intervening event.

II. FACTS

[3] Mr. Thandi is 55 years old. He is married and has a son who lives at home and a daughter who lives in Prince George.

[4] Mr. Thandi has lived in Terrace since approximately 1973, where he graduated high school. He got his first aid certificate and worked in logging camps. After that he worked at several sawmills.

[5] In about 2012, Mr. Thandi started work at Skeena Sawmills, where he was employed at the time of the accident. He was a debarker operator and a first aid attendant. He has not worked at Skeena since the accident.

[6] Mr. Thandi is also a self-employed driving instructor. He conducts this business through a corporation; he is its only employee. He gave driving lessons when working for Skeena and since the accident that has been his only work.

[7] Mr. Thandi has a complicated health history. Insofar as that is relevant to his damage claim, I will detail that later.

A. The accident

[8] I will provide details of the accident when I come to determine liability. At the present it will be sufficient to say that Mr. Thandi was riding his motorcycle on Lakelse Avenue in Terrace. Mr. Try was exiting a parking lot onto Lakelse in his

pickup truck when Mr. Thandi struck the truck. Mr. Thandi was thrown off the motorcycle and went over the bed of the truck landing on the other side.

[9] Mr. Thandi testified that he lost consciousness immediately after the impact. His first subsequent memory was somebody tapping on his helmet visor trying to rouse him.

[10] Mr. Thandi was taken to hospital in an ambulance. He was discharged to the care of his wife several hours later.

B. After the accident

[11] The day after the accident, Mr. Thandi called his supervisor to tell him about the accident and that he was not feeling well. His supervisor asked Mr. Thandi if, instead of operating the debarker, he could come sit in the lunchroom in case a first aid attendant was required. (As I noted above, he had his first aid certificate and was a designated first aid provider at the mill.) Mr. Thandi agreed but when there, his head was spinning, he was dizzy, nauseated and his body was sore all over. He returned home.

[12] Mr. Thandi never returned to work for Skeena; rather he went on short term disability and is now on long term disability to age 60. He continues to provide driving lessons. He has not looked for other employment.

[13] Mr. Thandi testified that after the accident he went to see his doctor and complained about his headaches, his neck pain, his difficulty with movement, and sensitivity to light and noise. He also described to his medical caregivers an inability to concentrate and focus.

[14] Mr. Thandi testified that the concentration issues magnified. He found he could not watch television if someone was talking in the background. He would have to stop watching the television in order to have a conversation and during the conversation he would forget what he had said moments earlier.

[15] He also described that his peripheral vision deteriorated and he began to trip over any uneven surfaces he came upon. He said that his legs did not seem to do what he wanted any longer.

[16] Mr. Thandi said that he had significant shoulder pain. Not only was his right shoulder sore in constant pain, but his left shoulder, which he said was previously injury-free, was significantly troublesome for him.

[17] Mr. Thandi testified that he had hip pain which he reported in the early days after the accident. While he initially thought the pain was focussed only in the hips, he realized as time went on that it was also emanating from his back and that he also had back pain. He testified that sometimes when getting in or out of his car, his left hip will freeze and then he can barely move at all for some time. He is unable to put any weight on his leg and has to hold on to the car, enduring significant pain.

[18] Mr. Thandi said it was distressing to him that he could not care for his family and that his son and his wife had become caregivers for him.

[19] Mr. Thandi went for physiotherapy but when funding from ICBC stopped he ceased the treatments because of the expense.

[20] Mr. Thandi said his headaches have not meaningfully improved.

[21] In July 2015, Mr. Thandi and his family went to Price George for their daughter's wedding where his back pain flared up.

[22] In May 2016, when jogging with his dog, Mr. Thandi had a flare-up of his back pain once again.

[23] In January 2017, the Mr. Thandi underwent a L4-L5 disc removal surgery. I deal with this below (para. 104) as part of the intervening event analysis.

[24] In May 2017, Mr. Thandi was assaulted by a homeless man in a park. In the tussle, Mr. Thandi aggravated his back condition. (The assailant pleaded guilty to assault in provincial court.)

[25] Mr. Thandi says the exacerbation to his back injury was temporary; Mr. Try says the assault was an intervening act, which broke the chain of causation. I deal with this below at para. 104.

C. Effect of the injuries

[26] Mr. Thandi testified that he has not been able to continue to mountain bike, hike, do activities with his children, walk his dog, ski, and generally enjoy personal hobbies such as reading and watching T.V.

[27] Mr. Thandi said he does not often see his friends. He testified that he feels different about life and those friendships do not seem to interest him any longer. He testified that he is unable to hold meaningful conversations, is easily lost in the conversation and feels embarrassed. His difficulties have left him with no desire to continue most social interaction.

[28] Mr. Thandi says he is depressed and feels guilty about not being able to do the housework and grocery shopping, for which his wife is now fully responsible. He feels he is a burden on his family.

[29] Mr. Thandi's wife and son testified as to their observations of Mr. Thandi after the accident. I will not go into detail because their evidence corroborates Mr. Thandi's evidence. They both observed he was not the same person he used to be.

III. LIABILITY

[30] As I said in the introduction, Mr. Try says that Mr. Thandi was partly responsible for the accident.

[31] The accident occurred July 25, 2015 a bit past the intersection of Lakelse Avenue and Sparks Street in Terrace. In the area of the accident, Lakelse has two eastbound lanes and a curbside lane which had parked cars in it. There were no lane markings between the right-most traffic lane and the parking lane. I will refer to the lanes as the left lane, the right lane and the parking lane.

[32] Mr. Thandi was riding his motorcycle from home to meet a friend. It was about 7:30 p.m. and the light was still bright. The roads were clear and dry. He turned onto Lakelse heading east. He said he was in the left lane and about half a block before Sparks Street (at the Tim Horton's) he pulled into the right-hand lane "out of habit." He then stopped for a red light at the intersection of Sparks.

[33] To the left of Mr. Thandi at the light was a car which happened to be driven by a high school acquaintance, Henry Craveiro, with his wife in the passenger seat. Neither the Craveiro's nor Mr. Thandi recognised each other.

[34] Mr. Thandi testified that when the traffic light at Sparks Street turned green, he accelerated forward at a moderate pace and was traveling at approximately 50 kilometres per hour. He was scanning the roadway ahead of him.

[35] The Craveiro's said that they pulled away from the traffic light more slowly than Mr. Thandi and they were travelling at approximately 30 kilometres per hour. They could see Mr. Thandi in front of them.

[36] As Mr. Thandi approached an exit from a strip mall to his right, he saw a flash of blue in front of him and realized it was a blue pickup truck which came into the roadway from the parking lot without braking or slowing. It pulled in front of him apparently intending to make a left turn to head west on Lakelse Avenue when he was only a few feet from the parking lot exit.

[37] Mr. Thandi testified that he immediately took his hand off the accelerator and locked his brakes. Mr. Craveiro testified that he saw the brake light of Mr. Thandi's motorcycle illuminate. The front forks of his motorcycle impacted with the rear of the blue pickup truck that was driven by Mr. Try. Mr. Thandi flipped over the bed of Mr. Try's truck and landed on the other side.

[38] The Craveiro's testified that Mr. Try's vehicle came out of the strip mall parking lot and then accelerated rapidly onto Lakelse without braking and attempted to complete the turn before any vehicle may have collided with it.

[39] Mr. Craveiro testified that Mr. Try was looking toward him as he attempted his manoeuvre into Lakelse. Mr. Craveiro could see Mr. Try's face and Mr. Craveiro assumed that Mr. Try was going to attempt to enter Lakelse ahead of the Craveiro vehicle. Mr. Craveiro had to brake in order to avoid a possible collision with Mr. Try's truck.

[40] Mr. Craveiro testified that Mr. Thandi had no opportunity to avoid the impact.

[41] The Craveiro's testified that Mr. Thandi was ejected into the air when his motorcycle made impact with Mr. Try's vehicle. Ms. Craveiro described the accident as "horrific."

[42] Mr. Craveiro said he went over to Mr. Thandi and asked him if he was alright. He said Mr. Thandi was stunned and that his response was not comprehensible.

[43] There was a conflict in the evidence as to who came to Mr. Thandi's assistance first and whether Mr. Try banged on Mr. Thandi's helmet and apologised. Nothing hinges on this and I do not agree with Mr. Try that it has anything to do with Mr. Thandi's credibility, given the shock that he would have suffered. Nor could Mr. Craveiro's apology be taken as an admission of liability.

[44] For his part, Mr. Try said in direct that he came to a complete stop before the sidewalk; he checked for pedestrians; he began to advance forward and came to a second stop because he could not see clearly onto Lekelse due to the parked vehicles blocking his line of sight. He edged into the line of traffic as far as he could while not blocking traffic. He did not see anything in either lane coming towards so he headed forward. He then saw a motorcycle in the inside lane. He made a split-second decision to accelerate because if he did that there was a chance the motorcyclist might not hit his truck.

[45] In his examination for discovery put to him in cross-examination there was this:

165 Q: Well, I want to get this straight because you said in your evidence, I wasn't a hundred percent. And what I'm suggesting to you is that

when you took your foot off the brake at that moment and started moving into the lane, you had zero percent knowledge of what was coming to you in that inside lane; correct?

A: I would have to say that is correct.

[46] Mr. Try's main argument in support of a finding of contributory negligence is that Mr. Thandi should not have accelerated to 50 kilometres per hour. If he had proceeded slower – as the Craveiro's did – he would have seen the truck.

[47] There is nothing to indicate that Mr. Thandi was negligent in accelerating as he did or that he should have expected Mr. Try to pull out of the parking lot as he did. The following from *Nerval v. Khera*, 2012 BCCA 436 is apt:

[22] The burden of proving that the speed of the dominant vehicle caused or contributed to the accident rests in this case with the driver in the position of Ms. Nerval. In [*Pacheco (Guardian ad litem of) v. Robinson* (1993), 1993 CanLII 383 (BC CA), 75 B.C.L.R. (2d) 273 (B.C.C.A.)], the court described the burden as follows:

[18] In my opinion, when a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, then to fix any blame on the dominant driver, the servient driver must establish that after the dominant driver became aware, or by the exercise of reasonable care should have become aware, of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself. In such circumstance any doubt should be resolved in favour of the dominant driver. As stated by Cartwright, J. in [*Walker v. Brownlee* 1952 CanLII 328 (SCC), [1952], 2 D.L.R. 450 (S.C.C.)] at 461:

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

[48] Mr. Try also says that in one hospital record Mr. Thandi said he was looking back just before the accident. Mr. Thandi denied telling anyone that, said that it was hard to look behind on a motorcycle and that he had no reason to do so. The Craveiro's did not notice him looking backward.

[49] I conclude that Mr. Try is 100% liable for the accident.

IV. WHAT INJURIES DID THE ACCIDENT CAUSE?

A. Pre-existing health

[50] As I noted at the outset, Mr. Thandi had a complicated medical history before the accident which makes attributing causation of injuries to the accident complicated. This includes:

- Right side shoulder pain and dysfunction arising from a ski accident and workplace incident. This was reported by Mr. Thandi to a medical provider as late as February 4, 2015;
- Functionally limiting low back pain, although Mr. Thandi says he was not experiencing symptoms prior to the accident;
- A coronary bypass operation in 2014;
- Use of marijuana and cocaine abuse;
- Prior concussions in 1998 due to a work injury and in 1999 from a previous motor vehicle accident;
- Diabetes diagnosed in 2011 resulting in hospitalisation and major depressive disorder and the prescription of anti-depressants. He mentioned to Dr. Schultz – the neuro-psychologist who prepared a report for Mr. Thandi – that his depression never fully dissipated and fluctuated;

- A black-out on stairs in 2013 causing a fall during which he landed on his knees;
- Back strain in 2013 after lifting a piece of wood at work;
- Major depression in 2013; and
- Psychological difficulties related to childhood sexual abuse by his grandfather, and two other traumatic incidents. After his diabetes diagnosis he was diagnosed with depressive disorder. Dr. Schultz said that Mr. Thandi told her that his depression never fully dissipated and fluctuated.

[51] Mr. Thandi said that after his heart surgery in 2014 he reformed his life. He brought his diabetes under control, stopped using cocaine and got in better shape by watching his diet and becoming more active. He does continue to use medical marijuana.

B. Soft Tissue Injuries

1. Medical Evidence

a) Dr. Helper – Psychiatrist

[52] Dr. Helper provided a report and gave evidence for Mr. Thandi.

[53] Dr. Helper opined that Mr. Thandi was in moderately severe distress and was not purposely feigning or embellishing his pain. Rather, he had a maladaptive emotional/cognitive response to his injuries such that his experienced pain and his displayed disability exceed that of the average individual with a similar clinical history. In his evidence at trial he stated that “maladaptive” is “outside the bell curve.”

[54] He provided the following diagnoses and causes:

- a) Left side dominant post-traumatic headache. Noting that Mr. Thandi did not complain of headaches before the accident, he attributed this to it;
- b) Musculotendinous pain or myofascial left neck pain. Noting that Mr. Thandi did not have a pre-accident history of this, and that it was consistent with the mechanics of the accident, he attributed causation to the accident.
- c) Left shoulder pain and immobility, the most likely diagnosis being a combination of rotator cuff tendinopathy and soft tissue mediated pain. Dr. Helper said it was directly related to the accident; and
- d) Discogenic (L4-5) low back pain. It is unlikely he has ongoing compromise to the neurological structures. While Dr. Helper observed that Mr. Thandi had prior back complaints, he noted that he did not have active complaints of low back pain in the time leading up to the accident. He said that Mr. Thandi's complaints about back pain appeared to be minor after the accident but increased in severity on 2016. He said:

Mr. Thandi's disc herniation could have occurred spontaneously without an obvious traumatic or vocational event in the 2016 calendar year. However, it is difficult to ignore the fact that Mr. Thandi did have low back pain complaints following this event (2015 clinical records). Low back pain was included in his clinical complaints when he originally presented for physical therapy. Although there is a delay in the obvious deterioration of his lumbar spine symptoms, it is logical to consider the traumatic event of July 27, 2015 as a likely contributing factor.

Dr. Helper concluded that the current low back pain was "more likely than not partially related" to the accident. In his evidence at trial, he said this meant that previous factors contribute to his back pain.

[55] Dr. Helper said that Mr. Thandi was suffering chronic pain. He noted:

In my opinion, Mr. Thandi is having a maladaptive emotional/cognitive response to his pain condition. This is enhancing the intensity of his pain and contributing to functional limitations which exceed those of the average patient with similar assumed injuries (leading diagnoses).

[56] With respect to the 2017 assault Dr. Helper stated in his report: "It is not clear whether the event of May 4, 2017 had a direct influence on Mr. Thandi's low back recovery or not. However, he had a regression of his symptoms in July 2017." In his testimony, he said this was incorrect and that the assault did have an effect.

[57] Dealing with functional impairment, Dr. Helper canvassed and set out in his report what Mr. Thandi relayed to him, so there was no independent opinion or evaluation of functionality, but for this conclusion:

In my opinion, Mr. Thandi is having a maladaptive emotional/cognitive response to his pain condition. This is enhancing the intensity of his pain and contributing to functional limitations which exceed those of the average patient with similar assumed injuries (leading diagnoses).

[58] In his direct evidence he said that Mr. Thandi "had a history of past injuries which could be affecting his function."

[59] In his report, he recommended "Mr. Thandi titrate his activity level upward."

b) Dr. Khan – Physiatrist

[60] Dr. Kahn provided a report and gave evidence on behalf of Mr. Try. He made the following diagnoses:

- a) Cervical spine sprain/strain;
- b) Bilateral trapezius/posterior shoulder girdle sprain/strain;
- c) Thoracolumbar spine sprain/strain (resolved as it relates to the subject accident);
- d) Bilateral superolateral gluteal musculature sprain/strain; and
- e) Bilateral knee sprain/strain/contusion.

[61] Regarding causation, Dr. Kahn's opinion was:

- a) The pain in Mr. Thandi's neck, left shoulder, bilateral hip and bilateral knee symptoms were caused by the accident because of the temporal link of the onset of symptoms.
- b) With respect to his right shoulder symptoms, Dr. Kahn noted that Mr. Thandi had a right shoulder injury in a ski accident. He said that it was likely that the accident temporarily exacerbated the injury and that Mr. Thandi is now likely back to his pre-accident baseline level of pain given his long history of right shoulder pain. (I note here that Mr. Thandi's main complaint was with his left shoulder.)
- c) Finally, with respect to the back pain he said:

The findings identified on the MRI of the lumbar spine in November 2016 more likely than not pre-dated the subject accident. It is difficult to state with certainty if he was symptomatic in this region prior to the accident as he reported that his lower back symptoms began immediately thereafter. However, as documented above, the neurosurgical follow-up report states that he was certainly asymptomatic with respect to lower back pain following surgery in early 2017. Furthermore, he stated that prior to the assault in May 2017 he had "no pain" with respect to his lower back symptoms, but it has been symptomatic since the assault.

He reported that his back symptoms returned following an assault. Therefore, although he may have experienced back pain as a result of the subject accident, his current presentation more likely than not represents symptoms related to his assault in May 2017.

[62] Dr. Kahn was asked to provide his view as to whether any of the symptoms would have occurred if the accident had not happened. His report stated:

- a) He likely would have experienced right shoulder pain given his lengthy past history;

- b) It was possible that he may have experienced back symptoms in the absence of the accident given the physical nature of his job; and
- c) Mr. Thandi's neck, left shoulder, bilateral hip and bilateral knee symptoms would likely not have occurred in the absence of the accident.

[63] His opinion regarding functionality was that Mr. Thandi was partially disabled from doing household work. In cross-examination, Dr. Kahn said that this was based both on what he was told by Mr. Thandi and his examination. He said it was not a medical diagnosis or a structural pathology; rather it is based on Mr. Thandi's apprehension of pain and self-imposed limitations.

[64] With respect to work, Dr. Kahn noted that Mr. Thandi reported inability to work at Skeena and difficulty with driving lessons but:

Although Mr. Thandi may experience ongoing soft tissue pain and self-limiting behavior due to pain, considering the above, there is no accident-related medical diagnosis or impairment for which I would restrict or prevent Mr. Thandi from independently performing his vocational functions. I recommend that he continue to work full hours and full duties, and find no contraindications (as they relate to the subject accident) to him doing so.

In addition, I would encourage him to work, as this prevents the negative effects of physical inactivity and deconditioning. I would counsel him to find balance in maximizing function while avoiding flare ups, and provide him with education on hurt versus harm concepts.

[65] In cross-examination, Dr. Kahn agreed that Mr. Thandi has chronic pain symptomology and that there could be a psychological element to his presentations.

[66] Dr. Kahn said he did not think that Mr. Thandi was malingering or embellishing his injuries.

c) Dr. Mohammed and Dr. Bukhres – family physicians

[67] Dr. Bukhres was Mr. Thandi's family doctor from approximately March 2019. Both sides said that his report –at least significant parts of it – should be ignored or

not given any weight. I therefore do not propose to address it or rely on it. In any event, I do not think it adds anything to this analysis.

[68] Prior to Dr. Bukhres, Dr. Mohammed was Mr. Thandi's family doctor from September 2014. He provided a report and gave evidence at trial. His evidence does not add anything to that of the specialists and neither side placed any emphasis on it in their arguments. I will therefore not deal with it in these reasons.

2. Analysis – Soft tissue injuries

[69] Mr. Try accepts that the accident caused (quoting from his written argument):

- Injury to neck – mild and bearable as described to Dr. Khan;
- Injury to shoulders – with consideration for a pre-accident chronic right shoulder;
- Injury to gluteal muscles; and
- Injury to knees.

[70] Mr. Try did not directly address the issue of chronic pain syndrome in his argument.

[71] Mr. Try does not accept that the accident injured Mr. Thandi's back. As I noted above, Dr. Helper opined that Mr. Thandi's back injuries were the result of the accident. Dr. Kahn said that the back injury might have resulted from the accident, but that it was more likely that they arose from the assault. He did not appear to consider whether the assault aggravated back injuries that may have been caused or exacerbated by the accident.

[72] The main reason for Mr. Try contesting that a back injury was caused by the accident was the lack of the plaintiff complaining about back pain immediately after the accident. However, within about six weeks Mr. Thandi reported significant back difficulties to his physiotherapist.

[73] There is no evidence that anything occurred between the accident and the report to the physiotherapist that would have caused a back injury. It is not surprising that the plaintiff would have injured his back having been tossed over the bed of a

pickup truck. Dr. Helper noted that disc problems do not always present as acute; they can present in a gradual fashion.

[74] I find that the accident caused Mr. Thandi's back injury and pain or exacerbated a prior condition.

C. Brain injury and cognitive impairment

[75] I turn to brain injury, cognitive impairment, depression, chronic pain and in general the psychological components of this case. Some of the opinions referred to above referred to these elements, but the main opinion relied on by Mr. Thandi with respect to alleged brain injury is that of Dr. Schultz, which I will summarise now.

1. Evidence of Dr. Schultz – Neuropsychologist

[76] Mr. Thandi provided an expert opinion of Dr. Izabella Schultz, a neuropsychologist and clinical psychologist. She performed assessments (via Zoom) of Mr. Thandi in April and May 2020. The tests were administered by her assistant.

[77] Dr. Schultz found that Mr. Thandi had suffered from depression, generalized anxiety, insomnia, chronic headaches and multisite pain and fatigue. She said that he had residual posttraumatic anxiety symptoms, but that they did not meet the full DSM-5 criteria for post traumatic stress disorder. She did, however, diagnose a number of DSM conditions:

- a) Mild neurocognitive disorder due to multiple etiologies;
- b) Persistent depressive disorder with anxious distress and intermittent major depressive episodes;
- c) Moderate to severe generalized anxiety disorder;
- d) Insomnia disorder; and
- e) Aomatic symptom disorder with predominant pain.

[78] She stated:

Mr. Thandi's generalized anxiety disorder is complicated by prominent health anxiety and post traumatic anxiety features with dissociative symptoms and negative alterations in his sense of self. His multisite pain is associated with pain preoccupation, catastrophizing, perception of injustice and heavy reliance on an array of medications...

[79] Dr. Schultz's conclusion within respect to cognitive functioning was:

Most of Mr. Thandi's cognitive test results were in the broadly defined average range. His overall neuropsychological impairment was mild and specific to aspects of auditory attention, memory and working memory, as well as naming, inhibition and higher order concept formation with mental flexibility. Some of his difficulties were task-dependent. The domain that was most consistently affected was auditory processing area, with poor results in auditory working memory confirmed with self-reported severe personal concerns in this domain. In acquired knowledge and academic testing there was no evidence of any prior learning disorder although Mr. Thandi's academic test results were low average (rather than consistently average), likely a reflection of lower quality of academic instruction in school and gaps in skill acquisition, possibly related to being transferred to a vocational stream and having ESL background.

[80] While not entitled to make a medical diagnosis of mild traumatic brain injury (concussion), Dr. Schultz opined that a number of factors were consistent with Mr. Thandi having suffered a concussion in the accident:

- (1) Lack of memory for the actual crash with likely brief (about a minute) loss of consciousness; no memory until tapping on the face shield woke him up.
- (2) Post-accident fragmentation of memory for several hours
- (3) Immediate post-accident symptoms included: headache, light, sound and motion sensitivity, distractibility, difficulty following conversations and TV programs, mixing days, fogginess and trouble reading. Dizziness with nausea and fatigue, and irritability also developed. Most of these symptoms persisted. Depth perception difficulties were later noticed.
- (4) Intermediate and chronic sensory, cognitive, emotional and behavioural symptoms were consistent with mild traumatic brain injury (documented in the "Facts and Assumptions" section of this report).
- (5) In the present assessment, Mr. Thandi reported light, sound and motion sensitivity, tinnitus, balance and dizziness problems, headaches and fatigue. He complained about difficulties with immediate and working memory, thinking clearly and quickly, making conversations, understanding, word finding, speech, reading, writing and the use of tools. He was easily distracted and had difficulty with inhibition, planning, organization and task monitoring.

- (6) Current neuropsychological assessment identified mild cognitive diminishments in aspects of auditory attention, immediate and working auditory memory and executive functions.
- (7) There was significant consistency among the self-report of cognitive difficulties, neuropsychological test results, collateral data, reviewed records and behavioural observation.

[81] Dr. Schultz attributed the cognitive impairment and constellation of symptoms she noted to the accident:

. . . it is unlikely that 'but for the accident' Mr. Thandi would have developed a mild cognitive impairment. It is more likely than not that his post concussive/mild traumatic brain injury sequelae associated with the 2015 MVA, triggered a constellation of symptoms that included cognitive impairment. These difficulties have failed to resolve over time likely due to the complicating effects of post-accident anxiety, depression, insomnia, headaches/pain and mental fatigue that tend to maintain them . . . the causality of Mr. Thandi's cognitive difficulties is presently multifactorial, with neuropsychological, psychological, pain and fatigue related sequelae of the 2015 MVA being of primary cognitive significance, and currently acting cumulatively.

[82] Dr. Schultz said that it is unlikely that Mr. Thandi's past or continuing marijuana use (which, it turns out, he under-rated to her) has a significant negative impact on his cognition. Similarly, she reached the same conclusion with respect to Mr. Thandi's prior cocaine use.

[83] Dr. Shultz's opinion regarding Mr. Thandi's work prospects were negative. She thought it doubtful that any employer would be able to make the number of accommodations Mr. Thandi would need. She also reached a similar conclusion regarding the prospects for him to do further training, given what she thought to be his learning disabilities.

[84] Dr. Shultz's opinion for the future prognosis of all of the above noted issues was negative.

[85] I think it fair to say that her attribution of causality to the accident was primary based on her conclusion that before the accident Mr. Thandi was functioning normally. She stated:

Before and at the time of the July 27, 2015 MVA, Mr. Thandi, a married man with two adult children, was emotionally stable and financially independent, employed full time as de-barker operator at a local sawmill and operating, on a part time basis, his own driving school. Before the accident he was likely emotionally vulnerable due to his past mental health, trauma and substance use history but in general functioned adequately in all key areas of his life: daily living, family, socialization, occupational training, work and recreation.

2. Analysis – brain injury, cognitive impairment, depression and chronic pain

[86] Dr. Helper opined that Mr. Thandi had chronic pain. He said that Mr. Thandi should be seen by a psychiatrist for a contributing depression or similar disorder, which is likely impeding his progress. He noted that the medical records in 2016 said that:

Additionally, post-concussion symptoms are still present including; dizziness, fatigue, loss of appetite, feeling a (sic) depression, memory and headaches.

[87] Dr. Kahn said in cross-examination that Mr. Thandi had chronic pain symptomology.

[88] Amongst other things, Dr. Schultz felt that Mr. Thandi was suffering from chronic pain and depression as a result of the accident.

[89] It is obviously true that a diagnosis of chronic pain and depression is based at least in part – or even in large measure – on self-reporting. However, Mr. Thandi's wife and his son corroborated the evidence of his mood and mental state. I accept that the accident caused Mr. Thandi to experience chronic pain (which had not been diagnosed before the accident) and caused or more likely exacerbated prior depression, something which the experts said was often associated with chronic pain.

[90] Turning to mild traumatic brain injury (concussion), there is no medical evidence on this. In essence, Mr. Thandi asks me to infer that he suffered a concussion from the circumstances of the accident and symptoms he exhibited after it, which are consistent with concussion.

[91] I set out above Dr. Shultz's opinion regarding mild traumatic brain injury. As noted, as a psychologist, Dr. Schultz is not qualified to give an opinion on the existence of concussion or brain injury. However, to quote from *Hawkins v. Kumar*, 2019 BCSC 1896 at para. 59, she is qualified to give an opinion:

. . . on the cognitive and behavioural sequelae of brain injuries and she could indicate the relative likelihood of any cognitive and behavioural abnormalities being the consequence of a traumatic brain injury. Put differently, she was entitled to give her opinion on whether test results, as evaluated by her, were of a nature, kind or quality seen in people who have been diagnosed as having had organic brain injuries.

[92] As I stated above, Mr. Craveiro went to Mr. Thandi after the collision and asked him if he was alright. He said Mr. Thandi's response was incoherent.

[93] On the other hand, as pointed out by Mr. Try, Mr. Thandi told the ambulance attendant that he had suffered no loss of consciousness. He also reported to the hospital staff that he suffered no head injury. He told at least two other physicians the same thing months after the accident. However, that is not necessarily a matter for self-diagnosis.

[94] As I said with respect to Mr. Thandi's back injury, it would not be surprising that Mr. Thandi suffered a concussion given the mechanics of the accident. I accept that Mr. Thandi suffered a concussion. However, that alone does not advance Mr. Thandi's case significantly because the real issue here – particularly with respect to income loss – is the effect the concussion may have had on Mr. Thandi.

[95] This brings me to the cognitive deficits that Dr. Schultz noted and attributes to the accident. It is not necessarily the case that a concussion inexorably results in all of the cognitive deficits identified by Dr. Schultz; she did not say so and there is no evidence to support that. There is no pre-accident testing of Mr. Thandi to use as a comparator. Dr. Schultz infers that the concussion caused the deficit because Mr. Thandi appeared to have been functioning well before the accident.

[96] I think that is a bridge too far. She had very little information about Mr. Thandi's functioning before the accident except for what he told her, and Mr. Thandi was frequently inaccurate with her and other providers. Notably, he significantly understated his marijuana use to her.

[97] She said in her report:

Notably, he might have had subclinical or partly remitted levels of low-grade depression and anxiety before the 2015 accident, but there is no evidence that his emotional vulnerabilities, although risk factors, actually met diagnostic criteria for any DSM-5 disorder.

However, the point with respect to Dr. Shultz's causation theory (comparing function before and after the accident) is not whether his pre-accident state met DSM-5 criteria; rather it is how his mental state was affecting his functioning.

[98] As I point out below in the income loss section, Mr. Thandi's pre-accident earnings were well below the industry average for sawmill workers. That is not an indication of being fully functional before the accident. In an application for medical cannabis in January 2015 – some seven months before the accident – Mr. Thandi said he was taking medical marijuana in order to cope with pain and to make him more active. He indicated he had substance abuse issues.

[99] With respect to functioning after the accident, insofar as his job was concerned, that is an unknown since he made no attempt to return to his former position or any alternative employment. He only continued giving driving lessons. I deal with this further later.

[100] Dr. Bukhres observed on July 26, August 21 and October 1, 2019 that Mr. Thandi was not in obvious distress or pain and appeared well. Although Dr. Bukhres was called by Mr. Thandi, he challenges his ability to make these observations because of the complexity of Mr. Thandi's condition. I will not make a determination of that, but simply say that Dr. Bukrhes did not observe any lack of cognitive functioning.

[101] Dr. Helper – referring to physical injuries – testified that Mr. Thandi had a history of past injuries which could be affecting his functioning.

[102] It appeared to me from her report and her evidence at the trial that Dr. Schultz was keen to find a causal connection by working backwards from her conclusion and has gone too far in her opinion. I do not find it meets the evidentiary or legal threshold for causation.

[103] I also have difficulty with her conclusion that Mr. Thandi is completely unemployable. I address that in the income loss section of this judgment.

D. Intervening Event – Was the chain of causation broken?

[104] Mr. Try says that there were two intervening events which justify a reduction in damages. The first is the worsening of Mr. Thandi's back when he was walking his dog. The second is the assault.

[105] The Court of Appeal summarised the approach to intervening acts in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670:

[36] Unrelated intervening events must be taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately (*Athey v. Leonati* ¶ 31-32).

[37] These principles of assessment apply equally to non-pecuniary damages and to damages for loss or impairment of earning capacity: see *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (B.C. C.A.) and *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 (B.C. C.A.), where this Court said:

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

[106] In *Khudabux v. McClary*, 2018 BCCA 234 at para. 37, the Court of Appeal noted that the issue of intervening events is more properly dealt with as a matter of causation and that a reduction of damages should be made for injuries not caused by the wrong of Mr. Try.

[107] Mr. Try has the onus of establishing an intervening event: *Lambert v. Tiwana* 2019 BCSC 1475 at para. 132.

[108] Where the injury is worsened by the plaintiff's own action, damages will not be reduced unless the plaintiff acted unreasonably. That standard is applicable to the plaintiff's jogging. There is nothing to indicate that he had been advised against that or that it was negligent. There is nothing to indicate that it was a new injury not related to the accident.

[109] That leaves the issue of the assault. Mr. Try says that the surgery completely healed Mr. Thandi's back injury and that the assault caused a new injury. Mr. Thandi testified that his back improved after the surgery, but it never returned to its pre-accident state. He said the assault exacerbated his existing back pain, but only for a few months.

[110] Mr. Try points out that Dr. Kahn reported that Mr. Thandi told him he experienced "new" back pain after the assault and that Dr. Helper said Mr. Thandi told him his back pain was worse after the assault.

[111] Dr. Helper testified that disc surgery is targeted at relieving leg pain. If back pain improves that is a "bonus" but some degree of back pain is almost inevitable.

[112] Whether Mr. Thandi's back pain was completely alleviated by the surgery or only improved, Mr. Try has not proved that the assault caused a new injury as opposed to exacerbating the back injury caused by Mr. Try, which was prone to further injury. Either way, Mr. Try has not proved that it broke the chain of causation. I also point out that even if Mr. Try were successful on this argument, it would not make a significant difference to the result, given that it is one amongst a constellation of injuries caused by the accident, including chronic pain.

V. NON-PECUNIARY OR GENERAL DAMAGES

[113] As set out above, Mr. Try acknowledges that Mr. Thandi suffered soft tissue injury to his neck, shoulders, gluteal muscle and knees. I have found that the accident caused back injury and caused or exacerbated chronic pain. I also found that he likely suffered a concussion, but that Mr. Thandi has not proved that caused any cognitive or long-lasting issues. The chronic pain is not likely to disappear.

[114] Mr. Thandi has submitted a number of cases providing for a damage range of between \$125,000-\$215,000. He advocates for a range of \$180,000-\$215,000. This is of course based on the the accident causing cognitive difficulties. The closest case he cited to the present circumstances is an older decision of *Goguen v. British Columbia*, 2002 BCSC 1598. The plaintiff sustained permanent wrist injury, extensive face lacerations, lost teeth, and a mild traumatic brain injury. Damages were assessed at \$125,000.

[115] For his part, Mr. Try cited cases ranging from \$45,000-\$85,000 and says damages should be assessed between \$60,000-\$90,000.

[116] As further guidance, I note that this case is not dissimilar – but for the concussion – from that I recently dealt with in *Gamesaee v. Priest*, 2020 BCSC 1763 in which I awarded the plaintiff \$100,000.

[117] In my view the appropriate damage award here is \$115,000.

VI. INCOME LOSS

[118] Mr. Thandi's past and future wage loss claim is based on him being completely unemployable except for his driving business.

[119] His proposed past and future wage loss valuation is based on a report of Christiane Clark, an economist, who calculated the loss based on the average wages for sawmill operators in British Columbia. From this, the plaintiff deducts (i.e. credits Mr. Try) \$4,619 net income per year before tax he says he was able to earn from doing extra driving lessons because of no longer working at Skeena.

[120] This results in the following risk adjusted pre-tax calculations, which include non-wage benefits:

		credit for extra driving school income	claimed loss (before tax)
Past loss	320,000.00	27,714.00	292,286.00
Future loss to age 60	290,000.00	23,095.00	266,905.00
Future loss to age 65	592,900.00	46,190.00	546,710.00
Future wage loss to age 70	815,000.00	69,285.00	745,715.00

[121] In her report, Ms. Craig pointed out that in 2014 and 2015, Mr. Thandi's earnings were 45% and 29% lower than the average so I do not think the use of above figures which do not adjust for that is appropriate. That is no fault of Ms. Craig; she was following the assumptions she had been given.

[122] Mr. Try denies that Mr. Thandi suffered any loss of earning capacity. In the alternative he says past income loss should be assessed at \$50,000 and future loss should be based on 1-2 years of lost wages for an amount of between \$50,000-\$90,000.

[123] There is no meaningful difference between the evidence regarding past and future wage loss. I do not think this is a case which is susceptible to an earnings calculation. In my view, both past and future income loss should be approached using the capital asset approach, although the report of Ms. Clark informs the assessment.

[124] As I said above, the day after the accident Mr. Thandi felt he could not do his debarker job at Skeena Cellulose but went in at his supervisor's request to be on duty as a first-aid attendant. He felt nauseous and went home. He did not work at Skeena again. He did not request alternative work, nor did he ask for any accommodation.

[125] Mr. Thandi said that he could not do his former job at Skeena because “even the sounds from the chipper start to escalate my headaches.” He says he cannot operate a console all day because “his head is on a pivot; if he were able to look straight ahead, it would be ok.” All of this is speculative because Mr. Thandi never attempted to operate the equipment.

[126] The person in charge of human resources at Skeena Cellulose said that the company frequently gets requests for work accommodations and tries to meet them, including providing an alternate position. Mr. Thandi did not make such a request, as he acknowledged. In fact, the company sent three letters to him to see if he was returning. He did not reply and finally called and said he would not be returning to Skeena.

[127] With respect to his driving school business, Mr. Thandi has been able to conduct more lessons because of not working at Skeena. However, he says he needs a rest between lessons and cannot, therefore, fill his day with them.

[128] I set out above Dr. Shultz’s opinion with respect to Mr. Thandi being unemployable because of potential employers’ inability to make the necessary accommodations. However, that was never tested at Skeena or any other potential employer. I do not think much weight can be given to Mr. Thandi’s evidence with respect to being unable to operate the equipment at the mill since he never made the attempt after the accident. Further, there was the possibility of him being given a different job at Skeena, something he did not pursue. Mr. Thandi simply gave up on employment other than the operation of his driving school.

[129] I have read Dr. Schultz’s opinion with a view to determine if she was opining that Mr. Thandi did not and could not bring himself to apply for any work because of his depression or chronic pain, which may have been caused or exacerbated by the accident. However, that is not so. She bases her opinion regarding him being unemployable on his cognitive deficits.

[130] From a physical point of view, no functional capacity evaluation of Mr. Thandi was conducted. That is a major gap in the evidence here. And, as I noted above in his report, Dr. Helper – a physiatrist – recommended that “Mr. Thandi titrate his activity level upward.” In his report, Dr. Kahn encouraged Mr. Thandi to return to work.

[131] It is of note that Mr. Thandi has sufficient cognitive ability to have resumed riding his motorcycle one year after the accident. That is an activity that requires some focus. (He did tell Dr. Helper that he has some physical discomfort when riding on bumpy roads.)

[132] In summary, even if Mr. Thandi’s cognitive deficits can be attributed to the accident, I do not think he has demonstrated that he has been or will be completely unemployable. That is not to say that he has not suffered some loss of income earning capacity. I do not see how, on the evidence before me, I can conclude that he suffered more than a 40% loss of capacity.

[133] I assess Mr. Thandi’s past income loss claim at \$65,000. I leave it to counsel to agree on the required tax adjustment

[134] Turning to future income loss, given Mr. Thandi’s health history, and past under-average earnings, I think the longest he would have been likely to work at Skeena would have been to age 65, despite his stated desire to work to age 70. (I note that Dr. Kahn opined that it is possible that his shoulder and back problems would have occurred in any event of the accident, because of his past injuries.)

[135] While I have approached this on a partial loss of capacity basis, I would reach the same conclusion if analysed through the lens of failure to mitigate.

[136] I assess Mr. Thandi’s future income loss at \$110,000.

VII. SPECIAL DAMAGES

[137] Special damages have been agreed to at \$9,679.51.

[138] Lastly, any costs issues that need to be addressed should be done by way of brief written argument.

“E. M. Myers J.”