

SUPREME COURT OF NOVA SCOTIA

Citation: *Landry v. Chisholm*, 2022 NSSC 207

Date: 20220719

Docket: *Sydney*, No. 480557

Registry: Sydney

Between:

James Colin Landry

Plaintiff

v.

Kyle Chisholm

Defendant

DECISION

Judge: The Honourable Justice Mona Lynch

Heard: March 7, 8, 9,10,11,14, 15,16, 23, 2022, in Sydney, Nova Scotia

Counsel: Duncan MacEachern and Nicholas Burke, for the Plaintiff
Ian Parker and Michelle Lahey, for the Defendant

By the Court:

Background

[1] On June 2, 2017, just after 15:00h the motor vehicle driven by the Plaintiff, Colin Landry, was involved in a motor vehicle accident with a motor vehicle driven by the Defendant, Kyle Chisholm. The Defendant has admitted that the accident was his fault.

[2] Colin Landry is 47 years old and was 42 years old on the day of the accident. As a young boy, Colin Landry was exposed to heavy equipment in his family's construction business. He learned to operate a back-hoe at the age of seven and continued his interest in heavy equipment operation into his adult life. Colin Landry also learned the craft of repairing and maintaining equipment at a young age.

[3] Colin Landry's formal education ended without him completing grade 10. He left school in that year and assisted his girlfriend, later his spouse, with childcare while he pursued work in Cape Breton at various trades including painting, drywalling, carpentry, small engine repair, etc.

[4] In 2005 Colin Landry traveled to western Canada seeking work and obtained work as a heavy equipment operator. In 2006, Colin Landry's spouse and three children moved to Alberta to be with him, and they purchased a home in Alberta in 2007.

[5] From 2006 to 2016 Colin Landry operated various pieces of heavy equipment, but most often, he operated a mulcher to clear trees for pipelines and power lines. The cab of the mulcher was about 12 feet off the ground and had stairs and handles to get into the cab.

[6] A typical day would have Colin Landry getting up at 05:00h and arriving early to work and arriving back home anywhere from 19:00h to 22:00h depending on what needed to be done. He worked 70 to 90 hours per week. He started out earning \$18.00 per hour. Colin Landry found operating the mulcher to be enjoyable and described it as "like playing a video game". He described the mulcher as being like "a big toy". Colin Landry worked as hard as he could and as much overtime as he could to make money. Colin Landry loved his job and was well paid for the work that he did.

[7] The family had a good life in Alberta, with various toys such as dirt bikes, four-wheelers, campers. While he did not spend of a lot of time with the children

when he was working, he would take the children camping and fishing after spring breakup when the work stopped.

[8] Colin Landry also passed down his knowledge to his sons, Brett and Tyler, who he taught to change oil, air filters and alternators at a young age.

[9] Colin Landry's income between 2007 and 2015 ranged from \$94,000 to \$146,000 per year while working for different companies in Alberta as a heavy equipment operator.

[10] In 2015, Colin Landry left a company he had been working with to take a job with another company at a higher rate of pay of \$37.00 an hour. However, with the downturn in the oil industry, the new company he was working for went into receivership. Another company was started but the financial difficulties continued, and it became difficult to collect his pay.

[11] In 2016, Colin Landry and his family moved home to Cape Breton after spring breakup. He planned to continue to work in Alberta but to travel back and forth between Cape Breton and Alberta to work. In the summer of 2016, Colin Landry and his long-time spouse were married. They planned to build a home on a piece of property given to them by Colin Landry's mother and Colin Landry started clearing the land. Colin Landry worked in Alberta and returned home two days prior to the wedding. In 2016, Colin Landry's earnings were \$42,572 with \$28,073 from employment income.

[12] In June of 2017, Colin Landry planned to return to Alberta and work on a six weeks on, two weeks off basis to clear trees for a utility line.

[13] On June 2, 2017, Colin Landry picked his son up from work and was on his way to pick up his daughter from school when the motor vehicle accident occurred. Colin Landry was driving on Keltic Drive in Sydney River, Nova Scotia, when the Defendant failed to stop at a stop sign and Colin Landry collided with the Defendant's motor vehicle. Colin Landry heard a snap and felt a sharp pain in his low back. His hands would not work, and his son opened the vehicle door for him. Colin Landry's spouse arrived and took him to the hospital. The 2003 Volkswagen Jetta Colin Landry was driving suffered extensive damage to the front driver's side and the air bags deployed.

[14] In the winter of 2017/2018, Colin Landry tried to return to work in Cape Breton, clearing snow, but had to stop working due to pain in his back.

[15] The trial was held on March 7, 8, 9, 10, 11, 14, 15, 16, 23, 2022 in Sydney, Nova Scotia.

Issues

1. Was the evidence of Colin Landry credible?
2. Which of Colin Landry's injuries were caused by the accident of June 2, 2017?
3. What amount of damages should be awarded to Colin Landry?

Credibility

[16] The Defendant suggests that Colin Landry's evidence regarding his marijuana use, inconsistent pain reports, behaviour, false statements to Employment Insurance and his potential for malingering call into question his credibility. As Justice Warner discussed in his recent decision *Blenus v. Fraser*, 2021 NSSC 79, there is a difference between credibility and reliability (paras. 88-89). I will consider both Colin Landry's credibility and his reliability.

[17] Colin Landry reported to various medical professionals that he consumed 3 grams, 5 grams or 10 grams of marijuana daily. When asked why he would make those reports if they were not true, Colin Landry provided two explanations, one was that he has a habit of just blurting out things such as numbers without thinking, and the other was that he had no idea how much three grams of marijuana was until his son showed him three grams of marijuana. I accept Colin Landry's explanation that he blurts things out as that was apparent when he was testifying. I also accept that Colin Landry had no idea how much 3 grams, 5 grams or 10 grams of marijuana was until he was shown how much 3 grams was by his son. Tyler, Colin Landry's son, provided evidence that he purchased the marijuana for his father and that he purchased seven grams a month with 3.5 grams going to his father and 3.5 for himself. Colin Landry has been receiving about \$1,000 a month in Canada Pension Plan benefits and he could not afford to purchase marijuana in the quantities he reported. I find that the information Colin Landry provided to the medical professionals about his marijuana use was not reliable and I accept that he is more of an occasional smoker of marijuana to help him sleep. I also accept that he has stopped using marijuana for periods of time since the accident. Prior to the motor vehicle accident Colin Landry would take an occasional puff of marijuana if a joint was being passed around. He did not and does not drink alcohol. Colin Landry was drug tested regularly in Alberta and I accept that he never failed a drug test.

[18] The independent medical examination report from Dr. Edwin Koshi, an expert in physical medicine and rehabilitation, found that Colin Landry exaggerated his level of pain. However, as Dr. Koshi says in his report, pain is subjective. I take Colin Landry's report of having a 20/10 level of pain to be Colin Landry's attempt to impress on Dr. Koshi how much pain he is in. Colin Landry was not using the same scale as Dr. Koshi which would have required Colin Landry to be "thrashing and writhing in agony" with a 10/10 pain level. I do not find that Colin Landry's credibility or reliability are diminished by his subjective reports to Dr. Koshi.

[19] Mr. Landry made inaccurate reports to Employment Insurance. Colin Landry acknowledged that the inaccurate reports were a mistake. For the period when Colin Landry was driving the snow plow in Cape Breton, he seemed to be confused as to whether he had to report work that was not full time. For the other period of time during 2014 and 2015 when Colin Landry's reports to Employment Insurance were erroneous, it was during the period when the companies he was working for were in financial difficulty. Colin Landry described, and I accept, that he was sometimes very late, weeks late, getting paid. He testified that on occasion he had to drive 120 kms to another area to try to find his pay cheque. It would not be surprising that Colin Landry reported no earnings to Employment Insurance for a period but then received the pay cheque from the company later. There were also periods when Colin Landry reported that he had received earnings and the company he worked for reported that he had received no earnings. While I find Colin Landry's erroneous reports to Employment Insurance troubling, I do not find that they seriously undermine his credibility or that they show that Colin Landry has a tendency to lie for financial gain.

[20] The Defendant also asks that I find the potential for malingering raised in the Independent Medical Examination report by Dr. Edward Yuzda to be a reason to disbelieve Colin Landry. In his testimony Dr. Yuzda said that malingering had to be considered in certain situations such as where there is secondary gain such as in a legal case where financial gain is considerable. Dr. Yuzda relied on Dr. Koshi's diagnosis to base his concerns of somatic symptoms and malingering. Dr. Yuzda testified that if the symptoms described by Colin Landry are real, somatic disorder would not be relevant. Dr. Yuzda's description of unconscious somatic symptoms and the conscious malingering would seem to suggest that all litigants who stand to gain from the result of a civil claim should not be believed. That is not a finding that I am willing to make.

[21] I was also asked to take an adverse inference because medical records from Alberta were not provided. Dr. Carol Critchley testified that she asked Colin Landry

about medical records when he first came to see her before the accident, and he indicated that he had not seen in a doctor in over 10 years. The only evidence of Colin Landry seeing a doctor was when he was checked out after an oil spill in 2006 and was put off work for a day or two because of headaches. I do not take an adverse inference from the lack of medical records as I accept that Colin Landry did not consult medical professionals for many years prior to the accident.

[22] Even though Colin Landry repeated things and had outbursts during his testimony, I found his evidence to be credible. His evidence was provided in a candid fashion. He was not evasive or hesitant. Mr. Landry admitted to his mistakes with Employment Insurance. He appeared to me to be a man very much changed and damaged by the injuries he suffered in the accident and a man very frustrated by the pain he is suffering and the inability to get relief from that pain.

Causation

[23] Colin Landry has the burden of proving on a balance of probabilities that the Defendant caused or materially contributed to his injuries (*Clements v. Clements*, 2012 SCC 32).

[24] Colin Landry suffered injuries to his neck, arms, knee, and back from the motor vehicle accident. The medical records and the evidence show that Colin Landry had no complaints of pain in any of these areas prior to the June 2, 2017, accident. Colin Landry did not miss any time from work for pain prior to the June 2, 2017, accident. I accept Colin Landry's evidence that he suffered no back pain prior to the June 2, 2017, accident and the medical records do not show any evidence of Colin Landry reporting such pain.

[25] After the June 2, 2017, accident, Colin Landry's personality changed. The evidence from Colin Landry, his mother, sister, and son, provide clear evidence that Colin Landry went from a pleasant, easy going, polite, kind, fun person to an angry, aggressive, disrespectful, negative person who others do not want to be around. They all noted a marked change in Colin Landry after the accident. Colin Landry's mother described a significant change in Colin Landry. She said that he was not the same person after the accident. He strikes out at her and his father, something he would never do prior to the accident. Colin Landry had approximately 10 attendants stand with him at his wedding in August of 2016. Except for family members, Colin Landry sees none of the friends who stood with him and does not socialize at all. He pushed away all of his friends and his wife. He has totally isolated himself.

[26] Colin Landry has been diagnosed with a major depressive disorder, anxiety, and post traumatic stress disorder since the June 2, 2017, accident. Dr. Yuzda found that the major depressive disorder and post-traumatic stress disorder were as a result of the accident.

[27] The assertion that the psychological injuries suffered were not caused from the motor vehicle accident come mostly from the expert report and testimony from Dr. Koshi. Dr. Koshi attributes the personality changes and cognitive issues to an oil spill in 2006. This oil spill was mentioned in the medical records of both Colin Landry's family physician Dr. Critchley and his treating psychiatrist Dr. Neil Christians. Both treating doctors said it as something mentioned by Colin Landry and that they ordered tests to rule out damage to Colin Landry's lungs, and brain. Dr. Christians' records were relied on by Dr. Koshi to find that Colin Landry suffered from functional impairments and personality changes from the oil spill, however neither Dr. Christians nor Dr. Critchley came to that conclusion. The evidence does not support that the oil spill was the cause of Colin Landry's psychological issues. Colin Landry missed one or two days of work after the oil spill due to headaches. He did not miss another day of work for the next ten years for a medical issue related to himself. Family reported no change in Colin Landry's personality until after the accident.

[28] The evidence satisfies me that the psychological issues of depression, anxiety and post traumatic stress disorder were caused by the motor vehicle accident.

Damages for Pain and Suffering

[29] The Plaintiff submits that he suffered some injuries in the accident which have resolved. The injuries to his neck, arms, and knee have resolved. However, the injuries to his back and the psychological injuries have not resolved and take the Plaintiff's injuries outside the minor injuries cap pursuant to s. 113E of the *Insurance Act*, R.S.N.S. 1989, c. 231 (the "Act") and s. 13 of the *Automobile Accident Minor Injury Regulations*, N.S. Reg. 94/2010 (the "Regulations").

[30] The Defendant's position is that Colin Landry suffered only minor injuries in the accident and that his psychological issues are related to multiple factors and should be manageable with proper treatment. The injuries that the Defendant agrees Colin Landry suffered are soft tissue injuries in his arms, and back. These injuries resolved over the summer of 2017 with the exception of his back pain and there is no objective cause for Colin Landry's back pain. The back pain, the Defendant submits, is psychological in nature.

[31] The onus is on the Defendant to prove, on a balance of probabilities, that the Plaintiff's injuries fall under the minor injury cap (*Pratt v. Cameron*, 2021 NSSC 129, para 60).

[32] The records from the ER on June 2, 2017, show that Colin Landry complained of pain in both arms/wrists, low back pain on the right side that was better when he was standing, a sore left knee and sore left neck and trapezius. Colin Landry returned to the ER on June 4, 2017, complaining that the pain in his lower back was not improving and was worse with movement. Various tests, x rays, CT scans and MRIs, were ordered of Colin Landry's back.

[33] Section 9 of the *Regulations* requires me to assess Colin Landry's injuries separately.

Arms, Neck, Shoulder, and Knee

[34] Based on all of the evidence, these injuries would be classified as sprains or strains. They have resolved and would not be considered to have resulted in a serious impairment. Damages will be assessed as set out in the *Regulations* as minor injuries.

Back

[35] Dr. Koshi's opinion is that Colin Landry suffered a WAD I as a result of the accident and likely suffered similar injuries to his low back which should have resolved in a matter of weeks. Dr. Koshi was unable to find any anatomical diagnosis for Colin Landry's subjective reports of low back pain and found that the pain reported by Colin Landry was actually in the middle part of the tailbone. He found that Colin Landry's pain was "non-specific pain" as it was pain which continues to be present after the expected recovery and there is no anatomical diagnosis or source of pain based on objective findings (page 1518 of the joint exhibit book). Dr. Koshi questioned Colin Landry's truthfulness regarding back pain prior to the accident, although there is no evidence of any back pain prior to the accident. Dr. Koshi placed great emphasis on the oil spill which was mentioned in the medical records of Dr. Critchley and Dr. Christians although neither Dr. Critchley nor Dr. Christians did. Dr. Koshi was under the impression that Colin Landry attended six physiotherapy sessions, when the records show that Colin Landry attended over 40 sessions. Dr. Koshi described the nature of the accident incorrectly as Colin Landry's car being t-boned by another car when, in fact, Colin Landry's car t-boned the Defendant's car. Dr. Koshi disagreed with Dr. Reardon's diagnosis and found no clinical evidence of a disc disruption. Dr. Koshi noted the

large amount of marijuana consumed by Mr. Landry as a result of the inaccurate report of 10 grams a day. Dr. Koshi did note that Colin Landry's range of motion in his lumbar spine was decreased but that could be explained as behavioural. Dr. Koshi could not find a medical reason why Colin Landry's lower back pain was not resolved. Dr. Koshi's opinion was that the damage to Colin Landry's back started and stopped with the noted bruising which was a sprain or strain.

[36] Dr. Koshi placed reliance on both the personal health and pain evaluation form, although the evidence shows that form was filled out by Colin Landry's spouse, not Colin Landry himself. Dr. Koshi also placed reliance on the Post-Assessment Client Satisfaction Survey to show Colin Landry's level of satisfaction with his assessment although it is Colin Landry's spouse's signature on that form. Colin Landry's evidence was that he had never, in his life, felt so demeaned and disrespected by a doctor in his life as he did by Dr. Koshi. Colin Landry left the assessment, more than once, due to his frustration with the process.

[37] Dr. Gerald Reardon, an expert in orthopaedic surgery and medicine, also provided a report and testified at the trial in relation to the injuries to Colin Landry's back. Dr. Reardon testified that the diagnostic imaging reports showed nothing overly unusual for a man of Colin Landry's age and there was no evidence of longstanding degenerative changes. Dr. Reardon noted the bulge shown in the MRI performed on November 9, 2017, at L5-S1 and the mild impingement on the nerve root. He found no evidence of nerve root compromise. Dr. Reardon noted the snap that occurred at the time of the accident and testified that it was likely secondary to a disc rupture. Dr. Reardon noted that a rupture may not show up in an MRI. Dr. Reardon considered Colin Landry's history, the snap experienced from the violent trauma of the accident, the acute onset of the pain in the lower back, the bruising on Colin Landry's back after the accident in coming to the conclusion that Colin Landry had a disc rupture. He particularly noted that acute onset of the pain and the fact that it had not gone away. Based on the whole picture, Dr. Reardon found that a disc injury was more likely than a soft tissue injury such as a sprain, strain, or whiplash-associated disorder.

[38] Dr. Reardon diagnosed Colin Landry with a permanent serious impairment to his bodily function secondary to the injury to his lower back from the accident. Dr. Reardon found that it was highly unlikely that Colin Landry would return to work. If not for the accident Dr. Reardon found, that in all likelihood, Colin Landry would be pain free. Dr. Reardon based his findings partially on the fact that there was no evidence of any pre-existing degenerative issues in Colin Landry's lumbar spine and no history of previous problems. Dr. Reardon classified Colin Landry's injuries as

severe, a permanent impairment, and having significant impact on his day-to-day activities. Dr. Reardon found that all Colin Landry's physical activity is impaired. Colin Landry's ability to bend and lift is markedly impaired and his ability to perform regular household activities and chores has become markedly limited as a result of the injuries sustained in the accident. Physiotherapy and massage therapy could be tried but they would be unlikely to provide a permanent fix to Colin Landry's injuries according to Dr. Reardon.

[39] While Dr. Reardon agreed with Dr. Koshi that the majority of adults experience back pain he noted the degree of back pain suffered by Colin Landry and the effect of that pain on Colin Landry's life activities. He also noted that the pain has not gotten any better and is most likely not going to get any better. With run of the mill back pain, Dr. Reardon noted that there is one episode that resolves on its own after a short period of time. Colin Landry's situation is totally different as there was a violent car accident which resulted in acute pain for the first time in his life. Dr. Reardon also testified that during his 40 years of experience as an orthopaedic surgeon that he has had to determine, with experience, who was malingering and who is genuine. In Dr. Reardon's opinion Colin Landry is genuine.

[40] Dr. Reardon acknowledged that another orthopaedic surgeon saw Colin Landry about six months after the accident, but Dr. Reardon noted that when he saw Colin Landry years after the accident, he was still experiencing pain.

[41] Dr. Reardon described Dr. Koshi's diagnosis as the "motherhood standard approach" with the goal to get patients back to work. Dr. Reardon agreed with Dr. Koshi that degenerative changes show in the back as the normal process of aging and without a disc injury. He agreed with Dr. Koshi's statements that most people suffer back pain, and most people get back to work even if in some pain. Dr. Reardon also agreed with Dr. Koshi that if a patient can tolerate the pain to go back to work, they should. However, Dr. Reardon noted that people with severe, disabling pain do not go back to work as the pain cannot be tolerated. Not everyone gets better from a back injury and some people never go back to work.

[42] Dr. Reardon noted Colin Landry's exemplary work history and his wish to get back to work and back to the lifestyle that came with that work. Colin Landry had no pain prior to the accident. Immediately after the accident Colin Landry suffered acute pain that has not gone away or resolved. This injury resulted in a marked impairment to Colin Landry's physical ability.

[43] Neither expert who testified regarding Colin Landry's back injury said he would change his opinion after reading the report of the other.

[44] In addition to the expert evidence, there was evidence from Colin Landry and his family members about the effect on Colin Landry as a result of his back injury.

[45] Colin Landry described loving his work and his life. He never missed a day of work for pain in his back and he never had back pain. He described an incident at work when two of his fingers were smashed when a pipe rolled onto his fingers. He put electrical tape on his fingers and finished his work for the day. Colin Landry was the first person at work and the last to leave. After the accident he describes being in constant pain that never changes. He described trying to work through the pain, as was suggested by medical professionals, but his pain would increase. Colin Landry took for granted his ability to climb in and out of heavy machinery until he tried to clear snow after the accident. He could not physically do the job.

[46] Donna Landry, Colin Landry's mother, testified that prior to accident, Colin Landry did chores around her property such as mowing the grass, trimming, and shaping trees, clearing land, washing down walls, and painting. Donna Landry did not notice any difficulties with Colin Landry completing these chores prior to the accident. After the accident happened, Colin Landry told his mother his back was sore, and she noted that Colin had difficulty moving around. He has problems walking. She testified that he was able to do everything and now she sees him coming up the stairs of the house in the early morning bent over like an old man. Donna Landry described Colin Landry as struggling since the accident and his personality changed. She said that after the accident he was not the same boy she raised. Donna Landry says that the accident aged Colin ten years, he is 47 but appears to be 57 years old. Donna Landry said that Colin can barely walk and cannot get comfortable. Donna Landry described the struggles that Colin Landry has putting on socks and pants as he gets dressed in the morning. Colin Landry tried to fix boards on steps of the house, he did it, but it took him many days and then he was laid up for a couple of days after. Donna Landry spoke of a day when she brought Colin Landry a coffee to where he was working on the snow plow after the accident. She described Colin Landry trying to get out of the machine and almost going to his knees with pain and how angry he was that he was not going to be able to continue to work. Donna Landry described her son as being in constant pain.

[47] Celine Bordon, Colin Landry's sister, testified about the changes in her brother after the accident. She described a close relationship with her brother and that she did not know of any physical or emotional struggles that Colin Landry had before the accident. Celine described Colin Landry helping around the house with yard work, vacuuming, moping, and having no difficulties performing those tasks. After the accident, she saw Colin Landry for the first time in August 2017 and noted

that her brother could not sit for long and that he walked like an old man. Celine has seen no improvement in her brother since the accident.

[48] Tyler Landry, Colin Landry's son, was a compelling witness. Tyler described an idyllic life in Alberta growing up. Tyler was in the car at the time of the accident. Tyler said all of the airbags deployed and there were airbags all over the car. After the accident Tyler got out of the car and went around to the driver's side of the car expecting to see his father getting out of the car. Tyler had to help his father get out of the car and his father said that he had big problems. For the first three or four weeks his father could not use his hands at full strength. Colin Landry began walking differently, hunched over, which was a noticeable difference. After the accident Tyler went back to Alberta to work and was making \$100,000 a year. In August 2018, Tyler spoke to his father on the phone from Alberta and Tyler could tell in his father's voice that his father was not "doing too good". Tyler packed up and left Alberta to come to Cape Breton to be with his father. Tyler said that his father was his hero, he always looked up to his father but now he feels sorry for him. Tyler finds it difficult as he does not want to see his father like this. Tyler described a very close relationship "best friends" with his father and that his father doesn't have anyone else. Since the accident Tyler said that Colin Landry had lost everyone else but Tyler and his parents. Tyler described his father's inability to lift things as he had before the accident. Prior to the accident his father could cut with a chain saw for 12 hours a day. Now he describes his father as not going out and having trouble putting on his socks and pants. Tyler described his father's physical limitations in walking, lifting, and bending.

[49] I must look at the overall evidence when deciding whether the injury to Colin Landry's back is a minor injury as described by Dr. Koshi or a severe, permanent injury as described by Dr. Reardon. As outlined above, I have problems with Dr. Koshi's report. Also, Dr. Koshi's diagnosis of a sprain or strain or whiplash associated disorder does not account for the pain experienced by Colin Landry for the last seven years as was described by Colin Landry and his family. By all accounts, Colin Landry was a man who loved to go to work and loved his job. Immediately after the accident he went from that man to a man unable to perform the tasks required for him to return to work and has had difficulties with the normal activities of daily living. I do not find that Colin Landry is malingering or that his pain is psychological rather than physical. I accept Dr. Reardon's diagnosis that the injury to Colin Landry's back is not a sprain, strain, or whiplash-associated disorder. Also, I find that the injury to Colin Landry's back resulted and continues to result in a serious impairment which results in a substantial inability to perform the essential tasks of his regular employment and the normal activities of daily living.

[50] The Defendant has not shown that the back injury suffered by Colin Landry is a minor injury.

Psychological Injuries

[51] Colin Landry has been diagnosed with a major depressive disorder, anxiety, and post traumatic stress disorder since the June 2, 2017, accident which I find were caused by the accident. Family members describe major changes in Colin Landry's personality and behaviour. Donna Landry describes her son as spending a lot of time in his room and striking out at everyone. Colin Landry is described as a totally different person from before the accident. Prior to the accident he was a calm, easy going man with lots of patience. After the accident he is described as having no patience, going off like a firecracker, cursing and swearing, argumentative, bad-tempered, having a crushed spirit, having no love of life, and not having a positive thing to say about anything. Colin Landry had many friends and hobbies before the accident. Now he has no hobbies and no friends. He excludes himself from everyone and everything. Tyler says he now sees his father crying in his bedroom which he had never seen before the accident. Tyler describes his family as going from having no problems that he could see to having totally dissolved with family members not even speaking to each other after the accident. Colin Landry describes himself as cranky, miserable and someone nobody wants to be around. Colin Landry lost his marriage, his ability to work. His whole life changed.

[52] Dr. Yuzda, a psychiatrist, performed an independent medical examination on Colin Landry. His general impression of Colin Landry was that he was very angry or upset about the accident and no matter the topic they discussed Colin Landry returned to the accident. Dr. Yuzda felt that Colin Landry was genuinely suffering. Dr. Yuzda described the psychiatric issues coming to light in the notes from Colin Landry's family physician. Dr. Yuzda also accepted that Colin Landry smoked between three and 10 grams of marijuana a day and diagnosed Colin Landry with a cannabis use disorder. If the consumption by Colin Landry was about two grams a month, Dr. Yuzda would not find that to be a major problem. Dr. Yuzda found no significant woes from the oil spill and nothing to indicate a psychiatric illness before the accident. Dr. Yuzda suggested that Colin Landry had somatic symptom disorder but then agreed if the pain was found to be real, as I have found, that the diagnosis would not be relevant.

[53] Dr. Yuzda took issue both with medication prescribed by the treating psychiatrist, Dr. Christians, and by the treating psychiatrist providing an independent medical examination. His issue with the medication was the prolonged use of an

benzodiazepines. His issue with the independent medical examination was with the impartiality of the report of the treating psychiatrist. Dr. Yuzda's opinion was that prolonged use of benzodiazepines is ill-advised as patients habituate to the dosage in five to six weeks and the benzodiazepine dosage needs to be increased. Dr. Yuzda's opinion was that Colin Landry would improve with Cognitive Behavioural Therapy (CBT) particularly because the major depressive disorder was single episode and not recurrent. However, Dr. Yuzda found it was difficult to definitively ascertain how much better Colin Landry can get given he had been off work for three years, now five years, due to his symptoms. Dr. Yuzda feels that the prognosis for Colin Landry is promising. Dr. Yuzda found that Colin Landry's impairments impact almost every aspect of his activities of daily living and are moderate to severe in nature. Dr. Yuzda's opinion was that Colin Landry was not being adequately treated and was undertreated both pharmacotherapeutically and psychotherapeutically. Dr. Yuzda recommended a change in medication and a course of CBT for about a year. Dr. Yuzda's opinion was that it was still possible for Colin Landry to work to his pre-accident occupation.

[54] I have some concerns with Dr. Yuzda's report. Dr. Yuzda accepted Dr. Koshi's opinion that there was no physical cause of Colin Landry's back pain. I have accepted Dr. Reardon's opinion that there is a physical cause. Dr. Yuzda's concern regarding benzodiazepines is not supported by the evidence. Colin Landry has been prescribed benzodiazepines for four years without an increase in dosage. Dr. Yuzda acknowledged that if there was a physical reason for Colin Landry's pain the somatic symptom disorder would not be relevant. Dr. Yuzda diagnosed Colin Landry with a marijuana use disorder, however, the evidence I have accepted would show that not to be an appropriate diagnosis as I have found Colin Landry to be an occasional user of marijuana. While there was a suggestion of malingering in Dr. Yuzda's report, I do not find that malingering has been established on the evidence.

[55] Dr. Christians, a psychiatrist, also provided an expert report. Dr. Christians is Colin Landry's treating psychiatrist and both his report and patient chart were admitted into evidence. Dr. Christians diagnosed Colin Landry with major depressive disorder which is moderate to severe and post traumatic stress disorder, mild to moderate. Dr. Christians started seeing Colin Landry in early 2018 and spent a lot of the early appointments discussing the oil spill in Alberta. Dr. Christians testified that he explored the oil spill, ordered an MRI, and then determined that the oil spill was not a problem or issue. Dr. Christians' finding that the oil spill was not a problem was primarily based on the fact that Colin Landry continued to work from the time of the oil spill in 2006 until 2016 without any cognitive problems.

[56] Dr. Christians is not trained in CBT but did use structured therapy. Dr. Christians agreed with Dr. Yuzda's recommendation of a change in medication for Colin Landry and plans to make that change. Dr. Christians testified that there was not much change in the level of Colin Landry's depression or post-traumatic stress disorder. Dr. Christians' opinion is that Colin Landry's mental health prognosis is dependant on the resolution of his back pain. Because the prognosis, accepted by Dr. Christians, from Dr. Reardon is very poor for the back pain, the prognosis for recovery from depression is also poor. Dr. Christians was concerned about using CBT with Colin Landry because of the homework which was necessary and Colin Landry's level of education and ability to do paperwork. Colin Landry was referred to a social worker by his family physician, but Colin Landry did not attend after the first session. Dr. Christians testified that no purpose was given for Colin Landry to see the social worker and that a purpose would be needed for Colin Landry to go to a social worker. Dr. Christians disagreed with Dr. Yuzda's diagnosis of somatic symptom disorder and was concerned because Dr. Yuzda did not address Colin Landry's attention deficit disorder.

[57] Dr. Christians acknowledged that he wants what is best for his client or patient and to improve his quality of life, but he would be objective about the diagnosis.

[58] Dr. Christians' understanding of the homework necessary for CBT was shown to be incorrect by Dr. Yuzda's testimony. Dr. Yuzda frequently uses CBT. The homework described by Dr. Yuzda could be doing certain tasks between sessions and does not necessarily require written work.

[59] I have a concern about the impartiality of Dr. Christians' report, but I accept his opinion regarding the diagnosis and prognosis for Colin Landry. From all of the evidence, Colin Landry's depression is a result of the back pain suffered. There was no depression prior to the accident and therefore I accept Dr. Christians' opinion that the depression is unlikely to resolve if the back pain does not resolve. Dr. Yuzda accepted that there was no physical reason for Colin Landry's back pain, the major cause of his depression, therefore I cannot accept his prognosis in relation to Colin Landry's depression. As Tyler Landry testified, his father feels like a failure. He feels he failed his family because he can no longer work.

[60] Based on the expert psychiatric evidence and the evidence from Colin Landry and his family, I find that Colin Landry's prognosis for recovery from his major depressive disorder is poor because it is tied to his back injury.

[61] Based on both his physical and mental impairments, Colin Landry is unable to work. Neither his back injury nor his psychological injuries would fall under the minor injury cap.

Assessment of Damages

[62] Section 14 of the *Regulations* requires that the assessment of damages for the non-minor injuries and minor be calculated separately.

[63] For the minor injury cap for 2017 was \$8,486.00.

[64] For Colin Landry's back injury, the Defendant asks that if the physical injuries suffered by Colin Landry are not under the minor injury cap that they be found to be on the lower end of *Smith v. Stubbart* (1992), 117 N.S.R. (2d) 118 (NSCA). *Smith v. Stubbart* provided a range of damages for soft tissue injuries, as Dr. Reardon stated, Colin Landry's injury was not a soft tissue injury. Dr. Reardon's opinion was that Colin Landry is permanently disabled from getting back into the workforce and from the point of view of day-to-day activities. Colin Landry's back injury is totally disabling. I do not find the *Smith v. Stubbart* range to be appropriate in this case.

[65] Colin Landry has lost the life he knew prior to the accident. He has lost family relationships, his marriage, his friends. Colin Landry has become a different person than he was prior to the accident of June 2, 2017. The pain has endured for five years and is not expected to ease. His ability to work and his ability to perform the functions of daily living have been severely diminished.

[66] Colin Landry loved his work and never missed a day of work. Colin Landry was an active man with many skills. He was clearing land to build a house for his family. His skills were not just as a heavy equipment operator. Colin Landry also had carpentry, painting, drywalling skills, among others. Colin Landry had an active lifestyle. Friends gathered with him. He fished and drove four-wheelers. The family camped and enjoyed the outdoors. Colin Landry now is isolated in his bedroom and sees no one but his children and his parents. As he himself testified he is "miserable to be around".

[67] The Plaintiff has provided case law from British Columbia which I do not find helpful in assessing damages. The Plaintiff has also provided *MacDonald v. MacVicar*, 2018 NSSC 271 where the general damages awarded for physical disabilities were \$75,000 and *Trenholm v. H & C Trucking Ltd.*, 2014 NSSC 90 where the general damages awarded were \$75,000 for a psychological injury.

[68] Colin Landry has both physical and psychological disabilities as a result of the accident. I award him damages in the amount of \$100,000.

Loss of Valuable Services

[69] Prior to the accident, Colin Landry did work on automobiles for the family and others. Tyler Landry was learning skills from his father such as changing oil and tires. Colin Landry helped his parents by doing the outside work at their house such as mowing and trimming. Colin Landry was clearing the land for the house that was going to be built. Colin Landry helped his mother with chores in the house such as washing walls and moping up. He did repairs and painting. Colin Landry can no longer perform those chores. Tyler Landry testified to replacing boards on the deck with his father after the accident. Tyler would take the lumber and place it and Colin Landry would screw in the board.

[70] Colin Landry's ability to perform some valuable services has greatly diminished and for others he is incapable of performing them at all. Dr. Reardon noted that Colin Landry's ability to perform regular household activities and chores around his house has become markedly limited as a result of his injuries.

[71] The Plaintiff seeks \$122,140.00 in past and future loss of valuable services. They provided an actuarial report for future valuable services of \$104,804 and past valuable services of \$17,336. The Defendant seeks a global amount of \$10,000.

[72] Jessie Gmeiner, who was qualified as an expert in the field of actuary science, calculated a loss of services of \$5,722 a year. She provided an expert report and testified. Ms. Gmeiner assumed 50% loss for services for household services for the heavier household tasks Colin Landry will be unable to perform and 100% loss for home maintenance and repairs. There was no expert evidence submitted from an occupational therapist as to what Colin Landry can and cannot do. While I am satisfied that his ability to perform the valuable services he previously provided has diminished, I am not clear that the assumptions underlying Ms. Gmeiner's opinion have been established. I would also note that Ms. Gmeiner's evidence and report did not account for the mechanical services provided by Colin Landry.

[73] As this Court found in *Pratt v. Cameron*, 2021 NSSC 129:

[108] An actual financial loss need not be established to make out a claim (Awalt, *supra*, para 48). As Justice Brothers said in *Gale v. Purcell*, 2018 NSSC 319, "loss of valuable services is often dealt with in a global way as a loss or an impairment of an asset" (para. 202). In that case, the Plaintiff was

found to have some impairment, for a period of time and \$10,000 was awarded. Justice Warner in Page 29 *Blenus*, supra, awarded \$25,000 for loss of housekeeping capacity and valuable services where the Plaintiff required assistance to do chores he had been able to do prior to the accident. Justice Warner reviewed cases where losses for valuable services were between \$5,715 and \$12,015 but awarded \$25,000 placing emphasis on the loss of ability to perform the heavier outdoor chores. In *Leslie v. S&B Apartment Holding Ltd.*, 2011 NSSC 48, Justice Scaravelli awarded \$35,000 based on the ability to perform duties being impaired and the continued need for assistance in the future. In *Warnell v. Cumby*, 2017 NSSC 88, Justice Robertson awarded the Plaintiff \$15,000 although she was able to resume most of her housekeeping duties and injuries in that case fell under the minor injury cap.

The \$10,000 suggested by the Plaintiff is inadequate. I accept the evidence of Colin Landry and his family that he did much of the household maintenance and repairs and the vehicle maintenance and repairs. Loss of valuable services in the case law in Nova Scotia vary greatly. In this case, a global amount of \$25,000 is appropriate for valuable services.

Lost Wages: Deduction of CPP benefits and Section B benefits

[74] The Nova Scotia Court of Appeal in *Sparks v. Holland*, 2019 NSCA 3, the Court was clear that CPP disability benefits are to be deducted from future income loss.

[75] In the present case the Defendant asks that Section B benefits which were available to Colin Landry also be deducted as was done in *MacKay v. Rovers* (1987), 79 N.S.R. (2d) 237. Colin Landry received Section B benefits of \$250.00 a week or \$13,000 a year. He was paid weekly up to January 28, 2018, for a total of \$21,500. The insurer stopped paying the benefits due to non-compliance by Colin Landry. Christine Hefferan, the accident benefits adjuster for the insurance company was called as a witness. In late 2018, Ms. Hefferan tried to get an update on Colin Landry's condition and treatment. She said she communicated with Colin Landry mostly through his spouse by phone or email. Her efforts to reach Colin Landry through his spouse and his lawyer in early 2019 were not successful. A case manager was hired but the efforts of Ms. Hefferan and the case manager to reach and engage Colin Landry were not successful. On June 28, 2019, a letter was sent to Colin Landry at his parents' home to tell him that his weekly benefits were stopped as of February 18, 2019, due to non-compliance with recommended treatments. Ms.

Hefferan testified that Colin Landry's Section B benefits were terminated due to non-compliance and non-communication. The letter was sent by regular mail.

[76] The Plaintiff's position is that Section B benefits should not be deducted from any award for lost income. The Plaintiff also takes issue with the efforts of the insurance company to contact Colin Landry and the reason for the termination of benefits, particularly after the insurance company received the report of Dr. Reardon.

[77] Prior to the June 28, 2019, letter being sent to Colin Landry, Ms. Hefferan received Dr. Reardon's expert report from counsel for Colin Landry. Dr. Reardon's report clearly stated that Colin Landry could not work and that he was permanently disabled. She had also received letters from Dr. Christians about Colin Landry's mental state. Ms. Hefferan was under the impression that Colin Landry was not complying with medical advice, but it is unclear what advice she found he was not complying with. There was suggestion it was failing to attend physiotherapy, but Colin Landry attended 40 or more sessions of physiotherapy and found no relief. There was a suggestion of counselling, but Colin Landry was and is seeing Dr. Christians, a psychiatrist. Benefits were not restored to Colin Landry.

[78] In *MacKay v. Rovers (supra)*, the Court found that if the Defendant shows that payments have been made or are available to a Plaintiff then the payments should be deducted unless the Plaintiff is able to establish that the payments were claimed and refused. The Court found it was not necessary for the Plaintiff to litigate but only that the insurer has taken the position that the Plaintiff is not entitled. In *Corkum v. Sawatsky*, 1993 NSCA 201, the Court found that the trial judge was correct in finding that the respondents in that case had failed to establish that the appellant was entitled to the future stream of income payments. The appellant's entitlement was in dispute and the Court found that no other money was paid or available to the appellant.

[79] In *Boutilier v. Merrill*, 2000 NSCA 149 the Court was dealing with a plaintiff who did not have insurance. The trial judge deducted Section B benefits as they would have been available to him if he was insured. The Nova Scotia Court of Appeal found that there was no basis in law for the deduction of Section B benefits. Section 146(2) of the *Insurance Act* provides for the deduction if the benefits were made or available to the claimant. Justice Cromwell refused to extend the effect of s. 146(2) to uninsured drivers. Justice Cromwell found that deducting the Section B benefits would be contrary to the fundamental principle of compensation which provides that the plaintiff should be compensated for foreseeable losses caused by the defendant's negligence in the amount which will return the Plaintiff to the position he would have been in had the accident not occurred (paras. 32-34). It was also found to be contrary to the principle of private insurance and instead of avoiding

double recovery it would deny recovery to the Plaintiff and reduce damages to be paid by the Defendant (para. 40). He also found that no provision in the *Act* provided for the deduction, and it would be inappropriate to create a deduction by a judicial decision (para. 41). Justice Cromwell also noted the authority in *MacKay v. Rovers*, that benefits which are not available cannot be deducted and that it is not necessary for the Plaintiff to establish a disentitlement but sufficient if the Plaintiff provides some evidence of a refusal by the insurer (para. 48).

[80] In Colin Landry's situation the Defendant has not established that Section B benefits were available to Colin Landry. The Section B insurance company had stopped paying the benefit and was disputing whether Colin Landry was entitled to the weekly indemnity. The Defendant has not discharged their burden to show that the benefits have been made or are available to Colin Landry. Colin Landry has shown that the Section B insurance company has taken the position that Colin Landry is not entitled to the benefit (*MacKay v. Rovers*).

[81] Therefore, Section B benefits will not be deducted from any claim for loss of income other than in the amount paid which I find to be \$21,500.

Loss of Past Income and Diminished Earning Capacity

[82] The evidence with respect to Colin Landry's diminished earning capacity comes from two experts, both of whom testified. Ms. Gmeiner provided the net figure of \$206,847 plus interest of \$5,724 for a total of \$212,571 for past loss of income and a future earning capacity loss at \$1,133,190. Colin Landry seeks those amounts for loss of past and future wages.

[83] Ms. Gmeiner used the figure of \$72,825 to \$80,000 annual loss of income with the exception of 2017 when she used the figure of \$49,483.

[84] The other expert report was from Michael Devonshire, who was qualified as an expert in valuation, loss quantification and the economic conditions in Western Canada. Mr. Devonshire found the range of \$60,000 to \$65,000 per year more reasonable. Mr. Devonshire noted that the Gmeiner report does not account for potential periods of unemployment.

[85] It was clear from Ms. Gmeiner's evidence that the figure of \$80,000 per year originated with Colin Landry's former counsel and her original estimate for lost wages would have been in the \$46,000 per year range. Ms. Gmeiner did not deduct CPP from the income calculations. Ms. Gmeiner's report was prepared in 2020 and

she provided updated calculations deducting CPP and updates for 2020, 2021 and to March 2022.

[86] Mr. Devonshire's assumptions in his report and evidence were based on a substantial decline in the Alberta oil industry which resulted in lower employment opportunities and lower wages. Mr. Devonshire did not account for the work Colin Landry did cutting lines for utilities in Alberta. Mr. Devonshire did not take into account Colin Landry's work history and substantial overtime earnings. His calculations were based on 40 hours a week. Mr. Devonshire's report was prepared in 2020. Mr. Devonshire's report was based on the assumption that there would be no immediate recovery in the oil and gas industry and that oil prices were not expected to recover to 2015 levels until 2023.

[87] I also heard evidence from Annette Thomas who is a manager for Colin Landry's former employer, Exact Oilfield, in Alberta. Colin Landry worked for Exact from 2005 until 2013 when he left for a better paying job. Ms. Thomas was in daily contact with Colin Landry when he worked for her. Ms. Thomas described Colin Landry as an employee who never gave her a hard time and would do about anything he was asked to do. She said he was always on time and did not miss a day of work. Ms. Thomas provided wages for the years after the accident for employees who did the same work that Colin had done for the company: \$122,000 for 2017, \$98,000 for 2018, \$120,000 for 2019, \$100,000 for 2020, and \$160,000 in 2021. She did not see anything that would lower those wages for 2022. Ms. Thomas testified that things improved in 2019 but, with Covid, things decreased a bit in 2020. She described the company as being extremely busy in 2021 and so far in 2022. Ms. Thomas testified that there was a current shortage of manpower and if Colin Landry was in Alberta and able to work, he would be working.

[88] I have concern with Ms. Gmeiner's report and with her basing the wage calculations on information provided by Colin Landry's former counsel. I also, have concerns with the assumptions made by Mr. Devonshire in his report as it did not consider overtime or the current situation in the oil industry.

[89] In 2016, Colin Landry earned \$42,572 from income and employment insurance (EI). In 2017, Colin Landry was to go back to Alberta in June to work but because of the accident, he was unable to take that offer of employment. In 2017, Colin Landry earned \$20,583 from employment and EI and would have earned wages and further EI for the remainder of the year but for the accident.

[90] While I have concerns about the origin of the income used by Ms. Gmeiner, her income assumptions are in keeping with the evidence of Ms. Thomas. Therefore,

I find that the past lost wages are in the amount of \$206,847 which includes the deduction for CPP but no deduction for Section B benefits. It is \$185,347 with the deduction for \$21,500 of Section B benefits actually paid.

[91] For future income, Ms. Gmeiner used \$90,000 as the yearly income in her updated calculations. Mr. Devonshire would use \$60,000 to \$65,000 a year. The evidence from Ms. Thomas would have had an average income of about \$120,000. While Ms. Gmeiner did not account for periods of unemployment, her wage assumptions are more in keeping with the evidence of Ms. Thomas. I find that the figure used by Ms. Gmeiner is closer to the appropriate income than that of Mr. Devonshire.

[92] Ms. Gmeiner accounted for mortality and disability in her calculations, but she did not account for periods of employment or the inability of Colin Landry to work the long hours he had in the past as he aged. I will use the age of 63 for retirement for Colin Landry because of the long hours he has worked. I will reduce the lost earning capacity figure to account for future unemployment and reduced overtime hours. Also, CPP disability benefits must be considered. I accept Dr. Reardon's opinion that Colin Landry will have no residual earning capacity.

[93] I find that Colin Landry's earning capacity has been diminished by \$775,000.

Future Care

[94] There is little evidence of cost of future care except in the report of Ms. Gmeiner who is not an expert in future care or occupational therapy. Colin Landry has prescription costs, but it is unclear whether he has a plan for reimbursement of those costs. There is a recommendation by Dr. Yuzda that he attend for sessions of CBT and for mindfulness training to assist in his depression. Dr. Yuzda also recommended an independent psychological assessment. An award of \$6,000 to cover those future expenses is appropriate.

Failure to Mitigate

[95] The Defendant asks that I reduce any award by 20% for failing to mitigate for by failing to follow the treatment recommendations of his physicians (*Slawter v. White*, 1996 NSCA 76). In that case the plaintiff failed to cooperate with rehabilitation. An unreasonable refusal of treatment can lead to a reduction in damages. In *Hollett v. Yeager*, 2014 NSSC 207, Justice Coady reviewed the case law and reduced damages by 20% for failing to follow medical advice.

[96] The Defendant submits that Colin Landry failed to mitigate by failing to stop the use of marijuana when it was recommended, failing to go to his social worker; failing to go to more physiotherapy, and failing to follow the recommendations made by Dr. Yuzda.

[97] As set out above, the failure to stop the use of marijuana arose from Colin Landry's misunderstanding of the quantity of marijuana he was using and reporting that misunderstanding of 3 to 10 grams of marijuana a day to medical professionals. I also accept that Colin Landry did totally stop the use of marijuana for periods of time but was never a high user of marijuana.

[98] Colin Landry became upset with Dr. Critchley and did not attend the last appointment with her. He has continued to see Dr. Christians who is continuing his prescriptions. I do not find that Colin Landry acted unreasonably by seeing Dr. Christians and not Dr. Critchley.

[99] Colin Landry failed to attend with the social worker after his initial appointment. However, it was not clear to Colin Landry what the appointment was for as he thought that the person he was asked to see was going to help with his back. He told the social worker that he was already seeing a psychiatrist. Colin Landry was not told of any further appointments with the social worker, and he did not attend after the first appointment. It was unclear from the evidence what the social worker would help him with. Dr. Critchley suggested it was for motivation for Colin Landry. He was already attending counseling with Dr. Christians. As Dr. Christians testified, there has to be a purpose to see the social worker, and that purpose was not clear to Colin Landry or Dr. Christians. I do not find that Colin Landry acted unreasonably by not continuing to see the social worker.

[100] Colin Landry attended more than 40 physiotherapy sessions but found no relief for his pain. I do not find that Colin Landry acted unreasonably by stopping physiotherapy after over 40 sessions.

[101] Dr. Yuzda provided recommendations in his report. Colin Landry was not clear he read the report. Colin Landry cannot be faulted for failing to change medication when that change of medication was not suggested by his treating psychiatrist or for failing to attend CBT when he continued his counseling with Dr. Christians. He was following the advice of his treating psychiatrist.

[102] I do not find that Colin Landry behaved in an unreasonable manner in relation to his treatment and I do not find he failed to mitigate.

Conclusion:

I find the appropriate damages for Colin Landry to be:

| | |
|-----------------------------------|-------------|
| Pain and suffering minor injuries | \$8,486 |
| Non minor injuries | \$100,000 |
| Past Lost Wages | \$185,347 |
| Minus Advance | \$ 30,000 |
| Subtotal | \$263,833 |
| Interest 2.5% for 5 years | \$32, 979 |
| Total | \$296,812 |
| | |
| Loss of Valuable Services | \$25,000 |
| Diminished earning capacity | \$775,000 |
| Future Care | \$6,000 |
| | |
| Total | \$806,000 |
| | |
| Grand Total | \$1,102,812 |

If the parties cannot agree on costs, they should contact the Court for direction.

Lynch, J.