

CANADA / JUDGMENT

Bains v. Brar

2013 BCSC 1828

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2013 BCSC 1828 Bains v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bains v. Brar,

2013 BCSC 1828

Date: 20131004

Docket: M102583

Registry: Vancouver

Between:

Randy Rajinder Bains

Plaintiff

And

Harjinder S. Brar

Jasvir Singh Brar

Defendants

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

April 15-19; 22-26 & 29, 2013

Place and Date of Judgment:

Vancouver, B.C.

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Introduction

- [1] The plaintiff, Randy Rajinder Bains, who was 26 years old at the time of the motor vehicle accident on June 11, 2008, was injured when his vehicle collided with a vehicle driven by the defendant, Jasvir Singh Brar. The accident took place at the intersection of 92nd Avenue and 132nd Street in Surrey, British Columbia, about a block from where the plaintiff and his wife, Sukhdeep, currently live in a rented house.
- [2] At the time of the accident, the plaintiff was driving to his place of employment at Hammer Mechanical Inc. ("Hammer") where he was working as a machinist. He has not been fully or partially employed in this or any other occupation since the accident.

- [3] The plaintiff is seeking general and special damages, as well as past and future wage loss and cost of future care. Liability for the accident is admitted and there is no allegation of contributory negligence. There is no issue of causation and the evidence is that the plaintiff has been an honest historian of his injuries with no evidence of exaggeration or malingering.
- [4] The plaintiff underwent an MRI of his lumbar spine on July 13, 2009. On his review of the MRI, Dr. R. Sahjpaul, a neurosurgeon, stated in his report dated September 30, 2009, that the MRI showed a very large L 4-5 disc herniation with significant bilateral compression of the L 5 nerve roots. He was of the opinion that the L 4-5 disc herniation warranted surgical consideration.
- [5] On October 14, 2009, Dr. R. Chan of the False Creek Surgery Centre performed a bilateral discectomy at L 4-5. In his operative report, Dr. Chan explained that there was a large disc herniation and that multiple huge chunks of protruded disc material were removed. Dr. Chan carried out his operative procedure on both sides of the affected area of the plaintiff's spine.
- [6] The defendants do not dispute the plaintiff's claim that the accident caused his physical and psychological injuries. Rather, they focused their opposition to the plaintiff's damages claim on essentially two main areas of contention: (1) whether the plaintiff has proven that he will require more back surgery; (2) whether the plaintiff has proven the severity of his depressive disorder. In addition, the defendants contend that the plaintiff failed to mitigate his damages claim for income loss.

The Plaintiff's Requirement for Further Back Surgery

- [7] Dr. Sahjpaul provided the plaintiff with medical legal reports dated May 27, 2009, September 30, 2009, and September 18, 2012. In his last report, the doctor set out his diagnosis as (1) Myofascial pain - neck, thoracolumbar spine and shoulders - secondary to the accident; (2) L4-5 disc herniation - secondary to the accident; (3) Neuropathic pain and sensory symptoms left leg - secondary to L4-5 disc herniation and "requirement for surgery"; (4) Mood disturbance, excessive alcohol use and chronic narcotic requirements, relationship issues - secondary to the accident - "[l]eft to more qualified individuals for further comment."
- [8] The doctor's prognosis was that, "more likely than not, with regards to the diagnoses 1, 2 and 3, Mr. Bains will have ongoing symptoms on a permanent basis. I do not anticipate any resolution or improvement. He is at risk for recurrent disc herniation at the L4-5 level and should this occur he may require further treatment and possibly surgery." The doctor also noted that the plaintiff's overall conditioning was aggravating his spinal pain complaints and said that if Mr. Bains was able to reduce his weight and improve his overall core conditioning he would probably notice an improvement in his overall pain level, but probably not to a significant degree.

[9] In his cross-examination of Dr. Sahjpaul, defence counsel dealt with the issue of whether the plaintiff will require more back surgery. Counsel referred the doctor to page 5 of his report dated September 18, 2012, and the following evidence was given by the doctor:

Q All right. The second diagnosis that you have there is the L4/5 disc herniation. That's the disc space that Dr. Chan operated on in 2009?

A Yes.

Q And we've been through that. Now, when you prepared this report, you looked at the MRI reports that had been sent to you; correct?

A Correct.

Q You had not looked at the actual MRIs; correct?

A Correct.

Q And in the MRI report dated May 13th, 2011, which is now in evidence, it states:

There are no findings to suggest recurrent disc protrusion.

Correct?

A Correct.

Q And at page 4 of your report under the heading "Tab 4," so about a third of the way down the page --

A Yes.

Q -- you state that you looked at the report for the last MRI, which was August 3rd, 2012?

A Yes.

Q And you state that that report again says:

There does not appear to be any mention of recurrent residual disc herniation of significance.

A Yes.

Q So from a surgical perspective, the discectomy was a success; the disc herniation was eliminated and there was no sign on these two MRIs of a recurrent disc herniation at the L4/5 level; correct?

A I think it's important -- before I answer that, it's important to define success of surgery, and that goes back to the discussion that the surgeon would have with the patient. And I, for example, would make it very clear to the patient that the goal of the surgery is to improve, but I cannot guarantee, in fact, no surgeon really should be able to guarantee complete, 100 percent resolution of their pain.

And so if one defines success in those terms, yes, there was a substantial improvement in his pain, but not resolution.

Q Right. But that's not the question that I directed you to. The surgical operation was to remove the disc herniation?

A Yes.

Q The two MRIs, taken after the operation, showed that the disc herniation was removed and there was no recurrent disc herniation; correct?

MR. VECCHIO: My Lord, I just stand to -- I think the witness should finish his comment because I think he was answering that.

MR. VOS: He did.

MR. VECCHIO: He was answering it -- well, he had more to offer, and I think Mr. Vos cut him off, in my submission.

THE COURT: Go ahead.

THE WITNESS: Sorry, the report indicated that the radiologist, at least, did not see a -- if you'll allow me just to read the report before I answer. Yes, based on the report, I agree that the radiologist has indicated there is no recurrent disc herniation. However, I specifically like to review the MRI scans myself as opposed to relying on the radiologist's report and, indeed, I don't quite agree with the radiologist's summation of the MRI scan, again, looking at it from a surgical and therapeutic perspective as opposed to just a radiological perspective. No disrespect to the radiologist. It's just when I look at MRI scans I'm looking at it from a different angle.

MR. VOS:

Q All right. Your third diagnosis on page 5 of your report -- sorry, on page 3 of your -- 4 of your report, right at the bottom, is with respect to the neuropathic pain and sensory symptoms in the left leg. You state:

These symptoms will be ongoing.

To be clear, Mr. Bains told you that there was a marked reduction in the left leg shooting pain; correct? If you go to page 2 of your report, paragraph 6, right at the end.

A Yes.

Q He indicates that the pain in the left leg went from 10 out of 10 to approximately 3 out of 10.

A Yes.

Q So that's a marked improvement; correct?

A Yes.

Q And then in the next -- you also indicate in the sentence before that there was a complete elimination of the right leg shooting pain after the operation; correct?

A Yes.

Q And the symptom that was left over was this buzzing discomfort in the left ankle; correct? You can see that that's a little further down on the same page, page 2, paragraph 8.

A Yes. Well, that occurred on a daily basis after surgery, but, yes, that was a presenting symptom when I saw him in 2012.

Q All right. To be clear, none of these symptoms prevented Mr. Bains from walking, standing or exercising, did they? He could do those activities. The length of time he could do them might have been affected, but he could do all of those activities; correct?

A He could do them, yes.

Q So later in -- let's go back to page 5 of your report. You state that:

Mr. Bains is at risk for recurrent disc herniation at the L4/5 level.

Now, we've already been through the MRI reports, and it states that the disc herniations were -- there was no recurrent dis[c] herniations according to the radiologist; correct?

A Yes, that's correct.

Q And the MRI is the diagnostic tool that's used to determine if there would be a recurrent disc herniation; correct?

A Correct.

[10] The defendants rely on the report of their expert, Dr. I. M. Turnbull, a neurosurgeon. In his medical legal report dated January 24, 2013, Dr. Turnbull states:

The surgical treatment undertaken was appropriate and usually leads to a marked improvement in pain. The MRI scan of May 2011 reveals that the surgery was technically successful. There is no indication that further surgery on the lumbar spine would be of any value.

[11] In his cross-examination, Dr. Turnbull said that he looked at the May 2011 MRI and he did not think there needed to be any more surgery. However, he also said that he did not see the August 2012 MRI. Counsel referred Dr. Turnbull to the January 2013 report and the fact that it contained no reference to Dr. Sahjpaul's reports even though Dr. Turnbull had previously seen them. He testified as follows:

Q And again, Doctor, I don't mean to be critical, but can you just tell us why you didn't reference Dr. Sahjpaul's report in here?

A No. I thought Dr. Sahjpaul's conclusions were, let's say, tentative, and I'm not sure that he is recommending surgical treatment, he was saying it's a possibility I think.

Q That's his second report; right?

A Well, I'm trying to remember.

Q But you are a neurosurgeon, you were hired by the defence and you have a doctor talking about a possible surgery, second surgery, and you don't even comment on it; right?

A Well, it's so common for doctors and surgeons to comment on the possibility of surgery. No, I don't necessarily comment on that.

[12] The plaintiff's position is that it is implicit in Dr. Sahjpaul's report that his prognosis of further surgery is connected to his analysis of the results of the August 2012 MRI. However, I prefer the defence position that Dr. Sahjpaul's evidence does not support a conclusion that future surgery is more than just a possibility. As defence counsel argued, there is no evidence from the doctor as to the degree of the possibility, nor is there evidence as to the timing of future surgery, or even the kind of event which might trigger the need for more surgery. Thus, I find that the plaintiff has failed to prove that he will have to undergo more back surgery. In my view, the evidence on this point does not elevate Dr. Sahjpaul's prognosis from a possibility of more surgery to that of a requirement for more surgery.

Severity of Depressive Disorder

[13] The psychiatric experts for both sides have diagnosed the plaintiff with a pain disorder and depression. They agree that the plaintiff's condition of major depression is in partial remission. However, the defence submitted that their expert's opinion should be preferred where the opinions differ with respect to the severity and prognosis of the plaintiff's symptoms.

[14] Evidence from several witnesses indicated that the plaintiff's mental health has shown improvement over time. The plaintiff attended a pain management program at Orion Health ("Orion") between February and April 2012. Ms. C. Douglas, an occupational therapist with Orion testified that the plaintiff emerged from the program better able to manage his pain as well as his symptoms of frustration and irritability. She said:

I think we helped him have a more durable perception of going to work, that he would be able to manage it better because we had skills that we had taught him, and that he knew what he was capable of doing on a daily basis, whereas when he came into the program he was absolutely certain that he wouldn't be able to go back to the work he was doing, for example, and he didn't know what he would be able to do and he didn't have any direction for the future.

I think by the end of the program he had felt more confident in his own ability to direct that cause forwards.

[15] The defence noted that the plaintiff confirmed in his direct testimony that he felt more positive upon his discharge from the Orion program and said that it had helped him to understand the psychological component of pain and how to control it mentally. The

program also provided structure to his day, which he tried to maintain following his discharge. In cross-examination, the plaintiff described his state around September 2012: "I was focused mentally just trying to get better and physically better and I was. I was mentally getting better and I was feeling better and that's when I applied to [the BC Institute of Technology AutoCad program]."

[16] The defence also pointed to the evidence of the plaintiff's friend who testified that he observed an improvement in the plaintiff's mood. He testified, "I'm happy to see a little bit of progression. He's happier, I'll say that for sure."

[17] The plaintiff's expert is Dr. S. Lu, an addiction and consult psychiatrist. He wrote two medical legal reports dated June 28, 2011 and May 31, 2012. In his June 2011 report, Dr. Lu states:

There is a low chance that [the plaintiff] can have a full remission of his major depression in the foreseeable two years. Even with successful treatment, he faces at least a 20% risk of relapse of his major depression in the next five years. Ongoing monitoring of his mood is necessary. How [the plaintiff] adjusts to his chronic pain and physical limitations in face of life stressors, is an important determinant of his future success. [The plaintiff's] long term prognosis is highly guarded due to the complexity and mutually reinforcing nature of his current symptoms.

[18] In his May 2012 report, Dr. Lu acknowledged that the plaintiff's overall clinical psychiatric presentation had improved when compared to his assessment of the plaintiff in June 2011. He wrote:

He has made positive changes in his life. In particular, he has dramatically decreased his alcohol use and substantial decrease in his opiate use. As anticipated there has been corresponding improvement in his mood and general neurovegetative symptoms. Reduction in alcohol and opiate use has not increased his pain. Psychological treatment and support has improved his self-awareness with regards to chronic pain and chronic pain related issues. He has gained understanding that it is important to maintain his activities despite his chronic pain. He recognizes that pain is not necessarily a barrier to keep up with activities. He recognizes that weight loss, maintaining structure and routine is an important part of his overall recovery.

[19] In Appendix 1 of the May 2012 report, Dr. Lu reported, inter alia, from his interview notes that the plaintiff did not feel depressed, he wanted to progress to having activities five days per week, he was treating his rehabilitation and activities as a job, and that he was trying to keep up with some social activities with his friends.

[20] However, Dr. Lu commented again on the plaintiff's long term prognosis:

[The plaintiff] is a young man with his life trajectory affected by his physical disability, changes in his career and chronic pain. His major depressive disorder though in partial remission has long term impact on his future risk. Even with complete relief of pain and return to his previous level of function, he has a prolonged episode of major depression. [The plaintiff] now has at least a 30% chance of relapse over the next five years with similar functional impairment strictly from a

mental health standpoint. [The plaintiff's] guarded prognosis noted in the previous assessment remains unchanged.

[21] The defence expert is Dr. R. J. O'Shaughnessy. He is on active staff, medico-legal clinic at St. Paul's Hospital and a Member, Advisory Committee, Department of Psychiatry at UBC.

[22] Dr. O'Shaughnessy wrote two medical legal reports dated March 19, 2012 and March 4, 2013. In his March 2012 report, Dr. O'Shaughnessy said:

In review of the symptoms in the records, it is clear [the plaintiff] likely did meet the threshold criteria of Major Depressive Disorder and was certainly diagnosed by Dr. Mallavarapu in 2011 with a Major Depressive Illness. By the time I saw him, many of the symptoms had abated likely due to a combination of treatment and anticipated recovery physically as well as anticipation of further training etc.

[23] Dr. O'Shaughnessy explained in his report that a major depressive disorder is one of the mood disorders characterized by sustained depressed mood over a prolonged period of time generally associated with physiological symptoms of depression. He also explained that a pain disorder is one of the somatoform illnesses in which the person's primary complaints of pain are noted to have psychological factors either in the genesis or perpetuation of the pain. He said, "The most common subtype of Pain Disorder is one in which there are mixed psychological and medical factors as in this instance. The medical factors here are clear, i.e. the disc injury and soft tissue injuries leading to the initial pain." Dr. O'Shaughnessy then went on to state:

It is clear that psychological factors, however, have become important over time and in particular I note from other records that this man has developed a number of common symptoms seen in Pain Disorder; i.e. he has become pain-avoidant, activity-avoidant, perceives himself as being more disabled than he truly is, and is acting more as an invalid than is required. Mr. Bains has some insight in recognizing this issue and in fact this was addressed appropriately by [Dr. Aboussafy] in a cognitive-behavioural therapy program that seemed to benefit Mr. Bains. Unfortunately, this treatment ended and he reverted to previous behaviours that are counterproductive, i.e. spending more time resting, doing less activities physically, and becoming more deconditioned.

I note Dr. Lu's opinion that he was much more depressed than certainly Mr. Bains described in my interviews or was seen in other medical records. He does not live the lifestyle of a severely depressed man; i.e. he is actively engaged in social activities daily with a number of activities on the weekends and he has been able to maintain interests in hobbies he enjoys such as cooking, camping, fishing, etc. He certainly describes himself as unhappy but on examination shows a good range of affect without clear signs or symptoms of depression. Dr. Lu's descriptions are very different from the records noted in Dr. Iriarte and others' files and I do not think he is as depressed as Dr. Lu has suggested. Dr. Lu has also offered a very grim prognosis that frankly is not warranted, especially since he has not been optimally treated and has not had the type of interventions we would normally recommend in individuals with this degree of Pain Disorder

and depression. I do not think his prognosis is poor and in fact it is interesting that he is looking forward to the pain program and also looking forward to retraining to become a mechanical engineering technologist. These are behaviours and attitudes that are in fact quite positive and suggest a much better prognosis. Ultimately his prognosis will depend on how well he does in the pain program and his reconditioning process. I expect he will also show a substantial improvement in his mood and self-esteem if he were to be accepted in the technology program. He certainly seems to be future-oriented and wants to get on with his life and should be encouraged to do so as quickly as possible.

[24] In his March 2013 report, Dr. O'Shaughnessy opined:

In my initial evaluation, I recommended a pain management program consisting of a combination of change to a different type of antidepressant medication as well as an increased activation program. From my review of the pain program, it contained many of the elements that have been empirically shown to be of benefit in chronic pain management and I note he did seem to improve to some extent. There have been ongoing issues related to his marriage and I gather from Dr. Iriarte's records that he is now engaged in marital counselling which I hope will be of some assistance. I also was of the view that he should wean himself from the opiates that I hoped would occur during the pain program. It is evident that he was able to reduce his dose although experienced an aggravation of his pain which is understandable and predictable.

I note as well Mr. Bains is now embarking on a career change and taking further courses at [the BC Institute of Technology]. I concur with my other colleagues that this is obviously a very critical factor for this man; i.e. he will never attain full remission of symptoms unless he finds a new career and is able to support himself and find something meaningful with regard to work. There is no indication as to how he is coping with this course or how he is faring with the academic demands and any information in this regard would be helpful.

I noted the report of Carlin Vocational Counselling. From my review of the material, it is evident they have accepted assumptions that I think are incorrect. In particular, they accepted the opinion that he will continue to have pain and also accepted the opinion of Dr. Lu that as long as he has pain he will experience depression. Accordingly, they conclude that he will never be able to be competitively employed. With respect, I think this is simply incorrect. While there is no question that chronic pain is a significant risk factor for depression, the majority of individuals who do have chronic pain are in fact not depressed. We can certainly assist him with his depression medications and cognitive-behavioural therapy. Just because he has pain does not mean he will be chronically depressed or unable to work. To the contrary, it is actually very important that this man find some meaningful skill and employment, not only for his financial stability but also for his psychological stability. I defer to my colleagues in physical medicine with regard to the limitations from any physical labour, but other than the physical limitations they describe he will be able to resume a career that is not physically demanding.

[25] In his direct testimony, when asked why he does not think that Dr. Lu's "grim diagnosis" was warranted, Dr. O'Shaughnessy said:

Well, I think there's two factors. One, Dr. Lu certainly describes the severity of his depression as much greater than what I saw or that has been seen in any other medical record. It's quite distinct, the departure from his view of Mr. Bains than anybody else. What I saw, there was nowhere near these type of symptoms that Dr. Lu described. They were not evident in Dr. Iriarte's or any other records either.

The second issue is he's clearly gotten better, he's gotten better with the partial [cognitive-behavioural therapy] treatment he had and then kind of fell by the wayside when it ended. He has also clearly gotten better with the medications. So by the time I saw him his symptoms of depression were really quite mild. He has not had a full kind of treatment that he needs for the pain, he hasn't gone to the pain program nor has he completed a [cognitive-behavioural therapy] program. One would expect improvement, not worsening with those treatments, so the prognosis being poor is simply I think not based on any data or findings, it just doesn't make sense.

[26] Dr. O'Shaughnessy was also asked in his direct testimony why he believed it is important for the plaintiff to find meaningful skill and employment for psychological stability. He responded:

It's a core function that we know in depression, if you can't get people back to work they get greater difficulties, that work itself is therapeutic in most individuals. Now, having said that, work you enjoy, not unpleasant work, because there's very clear evidence that certain tasks -- I mean, there's a whole literature on chronic pain and work. Work that is boring, unpleasant, difficult or in bad environments is bad for both pain and depression and we don't recommend that, but work that gives you a sense of purpose and meaning and fulfillment actually improves mood substantially and also improves functioning with pain. So if you were to return to a terrible job with a terrible boss, that would be something I would recommend strongly against, but he seemed very keen on what he wanted to do in the mechanical engineering field and that will in fact no doubt improve his moods, not worsen them.

[27] In my opinion, Dr. Lu's assessment and conclusions should be preferred to those of Dr. O'Shaughnessy when the whole of the evidence on this point is considered.

[28] Dr. H. Mallavarapu, a psychiatrist, examined the plaintiff on the same day as Dr. Lu. Although Dr. O'Shaughnessy initially stated in cross-examination that he was not sure when Dr. Lu had examined the plaintiff, when plaintiff's counsel pointed out to him that it was in fact the very same day that Dr. Mallavarapu examined the plaintiff, Dr. O'Shaughnessy replied, "You are quite right." He accepted that the plaintiff had been seen by both Dr. Lu and Dr. Mallavarapu on the same day, June 13, 2011, and that both psychiatrists had diagnosed him with a major depressive disorder.

[29] Counsel referred Dr. O'Shaughnessy to the discharge report from the Orion program and the fact that, when the plaintiff was released from the program, the discharge report noted that he had made some strides but that any improvement in his pain level and his function had not proved measurable. Dr. O'Shaughnessy replied:

A I'm not so sure that's true. They describe him as more hopeful regarding communication, his marriage. He was still experiencing significant pain, had difficulty using the cognitive skills to improve his moods and -- but they noted significant decline in symptoms of depression although the mood remained a concern according to them. He had come down considerably in the Oxycodone and they recommended a further decline in that. They actually indicated he had done relatively well, but he's still experiencing pain.

Q Yeah. Debilitating pain is what they said?

A Yes.

[30] Counsel referred Dr. O'Shaughnessy to his March 2012 report where he had said that the plaintiff perceived himself as being more disabled than he truly was, and was "acting more as an invalid than is required." The doctor continued as follows:

A Yes. I think the next sentence clarifies:

Mr. Bains has some insight in recognizing this issue ...

That's part of the discussion we had on these same matters. He recognized that and was trying to make some changes when I saw him.

Q Doctor, I asked you a question with respect to records. You reviewed that on the records and it was on your view, looking at the records, that that's how he presented; correct?

A Yeah. In fairness, what I asked her, I said in combination with my interview with him and the records.

Q Doctor, what it says there, on your review of the records he presented as an invalid?

A Yes.

Q Correct? And that he presented more disabled than he truly is; correct?

A Yes.

Q All right. And you've already said you defer to the neurosurgical doctor and Dr. Caillier in that regard?

A That's right.

Q And with respect to the people that saw him, the pain clinic -- maybe we'll go back, Mr. Moffat, you didn't feel that Mr. Moffat's records were helpful to your review of how he was functioning?

A I didn't say that, I said helpful in terms of the psychiatric aspects.

Q Okay. But one of the aspects that you are saying is invalid and your opinion in terms of what they said. Did you see any non-organic findings from any test that this man has had performed?

A Just to clarify, if you look at all the medical records, virtually every one of his treating physicians has recommended increased activity and that psychological factors have been playing a role in his perception of his status. This is not a new thing. There's no question that his perception of his incapacity is greater than his physical incapacity would suggest.

Q Doctor, let me -- answer the question, please. Did you see any non-organic findings through any test?

A I answered that question, I said I didn't see any.

Q You didn't see any. And you saw compliance; correct?

A Yes.

Q You saw motivation?

A Now, that varied, but yes.

Q Okay. He tried hard?

A I think in terms of certainly in the Orion they indicated he had good motivation and effort. Yeah, there's no question about that.

Q In fact, Community Therapists said he tried. In fact, do you know what they said when they discharged him at the end of 2011?

A I can't recall offhand. I don't think, and I have not said, nor is there any evidence that anybody said he is shirking.

[31] With respect to his disagreement with Dr. Lu's conclusions regarding the severity and prognosis of Mr. Bains' mental condition, Dr. O'Shaughnessy testified:

Q Dr. Lu reported that Mr. Bains was suffering moderately severe major depression and chronic pain as a result of the June 2008 accident. He opined that these conditions were mutually reinforcing, affecting his ability to maintain a full-time job and negatively impacted his attention, concentration, energy level and subjective sense of wellness. You would agree with that?

A In part, certainly the latter part. I think when I saw him it was milder and Dr. Lu I think saw him again only I think two months after I did. I thought again, as I said earlier, I thought Dr. Lu's description of the severity was greater than I think warranted, but the rest I agree with.

Q Okay. And then at paragraph 17, Dr. Lu opined that Mr. Bains is highly likely to have chronic pain indefinitely and to have persistent depressive symptoms for as long as he continues to have chronic pain. He stated that Mr. Bains' long term prognosis is highly guarded, going on with that. That's where you were having the dispute?

A We have a dispute on that issue.

Q Okay.

A Chronic pain is again common and yes, it can trigger depression. When you get over the pain, manage it, the depression gets better. It does not mean or equate that because you've got pain you will invariably have depression. That's just not what we see and it's not the literature.

Q But as the pain continues and it is debilitating, he's always going to be at risk of depressive symptoms?

A Yes, that's a fair comment.

Q And major depressive disorder; correct?

A Yes, that's a fair comment.

[32] Mr. R. Carlin, a vocational rehabilitation consultant, wrote a report dated December 27, 2012, in which he opined that, taking into consideration the total impact of the plaintiff's physical limitations, chronic pain, and psychological issues on his work capacity, the plaintiff is likely not competitively employable. In arriving at his conclusion, Mr. Carlin relied, in part, on the opinions of Dr. Lu and noted in his report: "According to Dr. Lu, [the plaintiff] will have persistent depressive symptoms for as long as he has chronic pain which is likely to be indefinitely. [Dr. Lu] also noted that the combination of chronic pain and depression negatively impact [the plaintiff's] attention, concentration and energy level."

[33] Dr. O'Shaughnessy testified in relation to Mr. Carlin's report that he thought Dr. Lu's opinion that the plaintiff would be experiencing depression and never able to work again was in error.

[34] With respect to Mr. Carlin's reliance on several of the other doctors' opinions, Dr. O'Shaughnessy testified as follows:

Q All right. So you understand he did an interview?

A Yes.

Q He's going through the medical information; correct?

A Yes.

Q You see, if you turn the page, like, paragraph 8 where he says:

Dr. Sahjpaul stated that Mr. Bains has myofascial pain in his neck, thoracic lumbar spine and shoulders and L4/5 disk herniation and neuropathic pain and sensory symptoms of his left leg, all which were secondary to the subject accident. In this regard he opined that Mr. Bains would more likely than not have ongoing symptoms on a permanent basis.

You would agree with that; right?

A I do.

Q And what Dr. Sahjpaul said, was of the opinion that Mr. Bains will not return to his pre-injury vocation that requires prolonged sitting, prolonged use of a computer or desk work or heavy lifting?

A Yes, I'm aware.

Q Okay. And you are agreeable with that; right?

A I deferred to that.

Q Yeah. And you've got Dr. Caillier talks about a psychological state, stated that -- this is paragraph 11, that Mr. Bains' primary limiting factors were his low back, soft tissue and mechanical pain, his emotional and psychological symptoms of depression, anxiety that would negatively impact his ability to cope with everyday stressors, including his physical symptoms. You would agree with that?

A Yes.

Q Functionally, this is paragraph 12, Dr. Caillier opined that Mr. Bains is limited in activities requiring sustained sitting or standing, heavy lifting and carrying, heavy-impact activities, bending, twisting, crouching, squatting or going up and down stairs. You agree?

A I deferred, yeah, on that. I think I made that clear.

Q She considered him limited for significant amounts of walking as he had decreased walking tolerance and endurance. Mr. Bains also has fatigueability in his left foot and ankle that would put him at increased risk of falls when pushing his activities during the day. You would agree with that too?

A Again, I defer to those issues, that's right.

Q And again paragraph 13, Dr. Caillier opined that the likelihood of Mr. Bains achieving a pain-free state was very poor and he was likely to have ongoing pain now and into the future beyond the next 12 months. She further opined that this altered sensation and weakness in Mr. Bains' left foot and ankle could be considered permanent and that Mr. Bains' chances of becoming headache free were poor. Again, you defer?

A I do.

Q And he's not misstating any of this evidence from your view; right?

A I don't think he misstated any evidence.

Q Okay. And Dr. Caillier did not anticipate Mr. Bains returning to work in his previous occupation as a machinist, or any occupation, without a significant improvement in his emotional and psychological wellbeing, sleep and management of his physical symptoms. You agree with that?

A Yes.

Q [Paragraph] 15, Dr. Caillier recommended seeking out retraining for a job more suited to Mr. Bains' physical capabilities. However, she further opined that his ability to succeed in retraining would [be] poor or guarded at best without improvement of his pain, sleep and psychological and emotional symptoms. You would agree with that?

A I would.

[35] In light of the above evidence, I place little weight on Dr. O'Shaughnessy's opinion regarding the plaintiff's long term mental health prognosis, and reject his view that Dr. Lu's opinion on this point is incorrect.

[36] Dr. Lu was asked in cross-examination about the opinions he expressed in his May 2012 and June 2011 reports. Strictly from a mental health standpoint, Dr. Lu opined in his May 2012 report that the plaintiff has at least a 30% chance of relapse over the next five years with similar functional impairment; whereas in his June 2011 report, he stated that even with successful treatment, the plaintiff faces at least a 20% risk of relapse of his major depression in the next five years. Dr. Lu testified as follows:

Q And then turning to your second report, it's at tab 7, My Lord, you see [the plaintiff] for the second time on May 29th, 2012?

A Yes.

Q And at that point in time he's already gone through the pain clinic?

A Yes.

Q And he actually had got off a lot of the opiates that you -- and the drinking issue, and when you saw him at that point in time, you felt that his major depression was in remission? If you start at page 4 of 17, Doctor, in terms of --

A That his overall has improved. There's constantly improvement in mood, yes. Okay.

Q Essentially --

A And then on page 6, I mention that he has about 30 percent chance of relapse. And at that point I increase the risk factor because, despite all of those things, he's still not back to work, he still have not regained his previous level of function. So now he's [indiscernible] at what we see an average relapse rate. And that's not even taking into consideration of his chronic pain. So that's why I put down at least 30 percent chance. From a statistics standpoint he's more likely than not to have higher than 30 percent chance of relapse over five years given these chronic pain status.

Q Can you please tell us what you mean by partial remission?

A Partial remission means the bulk of the symptoms relating to major depression has improved, yet there are still some ongoing symptoms, but they are not back to their normal self.

Q All right. Do you mean that he no longer met the criteria for major depression?

A The DSM-IV defines it as such, My Lord, which is once an individual meets the criteria for major depression, if they improve, let's say, substantially but still haven't got back to baseline, they are still considered in the same major depressive episode, but in partial remission. So if I were to cross-sectionally come in at that moment in time and did not know the previous issue and did not pay attention to the previous issue, just based on that gap, that person I would have diagnosed -- Mr. Bains would have been diagnosed as having no major depression. Now, if the previous dip is taken into consideration, then that gap, however small, would be still considered a continuation of the same episode of major depression in partial remission, and that's the DSM-IV criteria.

Q All right.

A Until a person is able to reach back to their baseline function for periods of time, they are not considered out of that episode.

Q But taken on its own, the analysis you did in May of 2012 would not have been considered major depression; correct? That's what you are saying?

A Taken on --

Q On its own.

A -- its own, without any of the previous finding, he would not meet the criteria for major depression.

Q Thank you. Now, when you said that Mr. Bains' depression was in partial remission, what factors led you to determine that it was in partial remission?

A Well, he just looked better in his functioning, he has better understanding, he has a better grasp of the situation, there's certainly more futuristic plan and hopes and aspirations about trying to do more. Those are regaining of interest, going back to the term interest, those are the factors that one determines and says Mr. Bains feels better, and if subjectively better --

Q I just want to make sure I've got my note correct. More future hopes, plans and interests; is that fair? That's a factor that you looked at?

A Yes.

Q And that meant that the depression was in remission?

A Partial remission.

Q Okay. So staying on page 6, later in that same paragraph you state:

Mr. Bains now has at least a 30 percent chance of relapse over the next five years similar to functional impairment strictly from a mental health standpoint.

Now, let's just quickly refer back to your first report and at page 8, paragraph 4 -- do you have that, Doctor?

A Yes, I do, sir.

Q There's a low chance that he can have full remission. Even with successful treatment, he faces at least a 20 percent risk of relapse of his major depression over the next five years.

Do you see that?

A Yes.

Q So you said he had a 20 percent chance of relapse. A year later you see him again, he's better and you bump the percentage up to 30 percent. Why is that?

A That is me being conservative by only bumping him 10 percent because the disability he faced has not improved over the last year despite his partial remission of his major depression, he is still disabled, non-functional, does not have a job. Yes, he might be futuristic and planning and hoping; however, at that moment in time he still doesn't have a job, is not working. The major depressive episode, despite success, relative success, remains an ongoing issue despite the decrease in his alcohol and opiate use which he has tried to demonstrate. He hasn't got -- his pain remains a problem, he still requires opiates for pain control. Now, what one would hope would improve substantially, major depression for longer than a year tends to have a much worse longer-term statistic. As I stated previously, My Lord, the 20 percent estimate was a low end of the general pattern of assessing and prognosis. I thought, you know, he's a young guy, he had no previous psychiatric history, he has family support, he's actually looking forward to a marriage. Yes, he has major depression, but there are still also some positive elements in what he's doing. I gave him a relatively conservative relapse rate.

Unfortunately a year later he's still, his major depression has not entirely gone away despite the effort now from -- now he is at a normal, average, general relapse rate of major depression which is about 30 percent in five years, so the increase in 10 percent is just bringing him to what an average major depressive episode guy would have and that's strictly from a mental health standpoint.

Now if I were to factor in the fact that he still requires OxyContin, he's still in pain, he doesn't have a job, the risk would have been much higher and I still put it, put him in the average standpoint because he does have some positive attribute.

Q Doctor, he had improved in the year since you had seen him?

A Yes.

Q And at the time you saw him the second time, he still had the potential for additional improvement didn't he?

A Sorry?

Q When you saw Mr. Bains --

A Which time?

Q -- the second time in 2012 --

A Yes.

Q -- he still had the potential for additional improvement; correct?

A Everyone has the potential for additional improvement.

Q So despite the fact that he has improved over a year, has the improvement -- has the potential to improve further in the future, you are trying to tell us that his future is more bleak?

A Absolutely. In this particular case, because of the ongoing disability that Mr. Bains faces, and I'm putting the entire process in a longitudinal setting from 2008 to 2012, which at that point is a four year process and that four year process had to be taken together was a whole rather than in a discrete -- like you said, if I were to come in strictly in May, 2012, yes, my prognosis would be entirely different, but the change in his prognostic indicator is due to taking everything from a longitudinal fashion from day one and seeing that despite all of those improvements, he really is no better off from a personal standpoint in terms of what he can do from a job standpoint.

Q But was he back at work when you saw him the second time?

A No.

Q Well, in fact Mr. Bains himself told you that he felt his depression was better?

A Correct.

Q If you go to the next page of your report, page 7, you even recorded in the last paragraph on page 7 about three quarters of the way down, you say:

Mr. Bains doesn't feel as depressed.

A Correct.

Q Is that what he told you?

A Yes.

Q And that's a positive factor with respect to anyone dealing with depression, that the person themselves feel better; correct?

A There is no doubt that he is better and I clearly recorded that he is better. However, his long term prognosis is worse because he is yet another year of disabled, and in all research in chronic pain and all research in major depression, individuals who have more than two years after disability, the statistical chance of returning back to work is minimal.

Q Right.

A Furthermore, individuals with disability and chronic pain for more than two years have more than a 50 percent chance of getting major depression. The fact that they have a major depressive episode and despite improvement, they continue to have symptoms and have ongoing risk

factors of chronic pain and chronic pain related disability. Another year later he has yet another 10 percent risk of relapse, and you know what, if he continues to have, two years from today, if I were to assess him and he's still disabled, his [chances] of relapse would be 40 percent and that would be just a general longitudinal major depressive episode with chronic pain-related disability.

Q Doctor, the first time you saw Mr. Bains was more than two years after his accident?

A Yes.

Q And so the cutoff line of two years had already passed when you saw him the first time; correct?

A Correct.

Q Okay. Now, Doctor --

A So that's why I was even more conservative because even though he was two years out, you know, people ought to have a chance to see how they are doing.

[37] In cross-examination, Dr. Turnbull was referred to an article in a medical publication called Spine about results from a study dealing with the relationship between chronic pain and major depressive disorder. He said that he understood that there was a high incidence of major depressive disorder associated with chronic low back pain and he agreed that major depressive disorder is the most significant disorder connected with chronic low back pain. Counsel noted the statement in the article that depression rates in the general population ranged from 5 to 26% and that other studies have found the incidence of major depression and chronic pain ranged from 34 to 57%. Dr. Turnbull said that this statement "sounds reasonable".

[38] Thus, when I consider the whole of the evidence on this point, I conclude and find that Dr. Lu's assessment and conclusions should be preferred over those of Dr. O'Shaughnessy with respect to measuring the impact of the plaintiff's condition of major depressive disorder on his claim for damages.

Damages

[39] The parties are far apart on the quantum of all of the heads of damages claimed by the plaintiff. The plaintiff seeks \$150,000-\$200,000 for non-pecuniary damages; \$318,110 for past income loss; \$1,482,000-\$3,248,900 for future income loss; \$327,957 for the cost of future care; and, \$13,401.40 for special damages.

[40] On the other hand, the defendants assert that the appropriate awards should be \$95,000-\$125,000 for non-pecuniary damages; \$150,000-\$200,000 for past income loss; \$300,000-\$350,000 for future income loss; \$64,464 for the cost of future care; and, \$6,728 for special damages.

1. General Damages

- [41] Before the accident the plaintiff was a happy, healthy, socially and physically active person who enjoyed his work as a machinist and looked forward to one day establishing his own machine shop. Following the accident, he was a very different person.
- [42] There is a consensus among all of the medical experts that the plaintiff has suffered serious debilitating injuries as a result of the accident and that the chronic pain from his physical injuries has led to him suffering from a major depressive disorder.
- [43] In his September 18, 2012 report, Dr. Sahjpaul stated that the plaintiff will have ongoing symptoms on a permanent basis and that he did not anticipate any resolution or improvement. He opined that the plaintiff would not return to his pre-accident occupation as a machinist, or be able to work in any vocation that required prolonged sitting, prolonged use of a computer or one that required heavy lifting.
- [44] Dr. L. Caillier, a Physical Medicine and Rehabilitation expert, who saw the plaintiff on November 4, 2010, and in follow-up on January 24, April 8, June 17, August 18, and October 20, 2011, opined in her report dated December 1, 2011, that the plaintiff has chronic pain that is soft tissue in nature, involving the neck, upper back, and lower back regions, as well as his posterior shoulder girdle regions. She also opined that he has mechanical lower back pain. She reported, "Unless there is a significant improvement in his emotional and psychological wellbeing as well as his sleep and improved management of his physical symptoms, I do not see Mr. Bains working in any occupation, let alone his prior occupation as a machinist." She also concluded in her prognosis, "It is my opinion that given the chronicity of his physical symptoms, coupled with his ongoing psychological and emotional symptoms and poor sleep, the likelihood of Mr. Bains achieving a pain-free state is very poor. It is my opinion that he is likely to have ongoing pain now and into the future and beyond that of the next 12 months."
- [45] Dr. Lu, whose opinion I accept, stated in his May 31, 2012 report that the plaintiff's major depressive disorder, though in partial remission, has long term impact on his future risk of relapse and that even with complete relief of pain and return to his previous level of function, the plaintiff has a prolonged episode of major depression. Dr. Lu opined that the plaintiff now has at least a 30% chance of a relapse over the next 5 years with similar functional impairment strictly from a mental health standpoint.
- [46] The plaintiff testified that his body did not strike any part of the inside of his vehicle nor did he sustain cuts, bruises or suffer a loss of consciousness. He was able to exit his vehicle without assistance. His father picked him up at the scene of the accident and later that day he attended a walk-in clinic where he reported feeling shaken up, sore and stiff in his neck and lower back. He was prescribed with painkillers and a muscle relaxant. The day following the accident the plaintiff saw his family doctor who prescribed physiotherapy and recommended that he take time off from work. In fact, at the end of June the plaintiff started physiotherapy and since that time has attended a variety of therapists to treat his condition. The following outlines the treatments received by the plaintiff since the date of

the accident.

- [47] The plaintiff started physiotherapy on June 26, 2008 at Surrey Sports & Rehabilitation Corporation. Between June 26th and April 27, 2009, the plaintiff received 47 treatments from Mr. F. Moffat of that firm.
- [48] Mr. Moffat treated the plaintiff from June 2008 until the fall of 2011. In November 2009, following the plaintiff's surgery, he found that the plaintiff's range of motion was still quite restricted in deflection and he was still experiencing pain through his lumbar spine centrally and away from the spine. He had bilateral hip pain, but his symptoms in his left lower leg, calf and ankle were minimal and he was not complaining of any numbness, tingling or pain, which in Mr. Moffat's view was a "substantial improvement".
- [49] Mr. Moffat also testified that his goal for the plaintiff to return to work was long term and he was not 100% sure he would get him there, but given that it was right after the plaintiff's operation he was not too concerned with long term goals at that stage. He said that most of the time the goal was to reduce his pain so that the plaintiff could participate a little more comfortably in core exercises aimed at reducing pain.
- [50] Mr. Moffat said that right up to the fall of 2011 the plaintiff was always cooperative and willing to participate. He said he was aware that in 2010 the plaintiff was involved with Community Therapists ("CT") and he was supportive because he felt that the pool was a good medium for the plaintiff to do exercises. However, the plaintiff expressed that sometimes he felt he was being pushed too hard. He said that overall he did not think there was a huge benefit to the pool program with CT. When asked if he made any progress with the plaintiff during his last treatment sessions from June to October 2011, he said "[n]othing significant". He said he believed he had made progress with the plaintiff following his surgery. He believed that overall the plaintiff's function did improve as far as capability of walking but he was still having difficulties with sitting, and being more active. He testified, "So I think there was some benefit in the long run, but, again, it wasn't substantial in retrospect." He said that right up until the end the plaintiff was very cooperative.
- [51] In cross-examination, Mr. Moffat testified that post-surgery the plaintiff was still being aggravated by walking, sit to stand movements, lying and sitting and still having to change positions reasonably frequently. He said that in his opinion, the plaintiff was still very high in irritability. The main subjective improvement was the lack of tingling and numbness and pain. He said that "[F]unctionally, I don't think there were - there was much improvement post-surgery immediately after when I had first assessed him."
- [52] As earlier mentioned, at the same time as being treated by Mr. Moffat, the plaintiff commenced a rehabilitation program in 2010 with CT during which time he received treatment from Ms. F. Fleming, an occupational therapist, Ms. E. Banez, a physiotherapist, and Ms. J. Forde, a rehabilitation assistant.

- [53] Ms. Fleming testified that what CT tries to do is address function essentially and help a person to increase independence with activities of daily living. She had the plaintiff fill out a reintegration to normal life questionnaire ("RNL"). This process looks at a person's function for different things like moving around the home and around the community, completing self-care and how a person feels they perform with those items compared to before their injury. The plaintiff scored 29%. She determined that he was under more of an activation program. She said that his level of function was not in keeping with a vocational employment setting.
- [54] Ms. Fleming testified that the plaintiff wanted to have an increased conditioning level and to be able to lift up to 20 lbs. He also wanted an improved relationship with his girlfriend and to finish a truck project with a friend and to be able to walk for more than 15 minutes.
- [55] Ms. Fleming said that by the time of her August 2010 report she was not closer to putting in a return-to-work goal so she decided to give the program another 3 months. She said that at that point, the occupational therapy was not translating into any sort of functional recovery or significant progress for Mr. Bains. She had done a repeat test and found that his RNL score had increased to 44%, but, as she testified, she would not normally begin a return to work program until a client scored at least 75%. Other factors that would be considered in assessing readiness for a return to work program would include activity tolerance (i.e. the type of activities he was engaging in and the rest breaks he required) and implementation of pain management strategies. Ultimately, Ms. Fleming decided that Mr. Bains should spend his time with the physical therapy team and she would step out of the picture.
- [56] In cross-examination, Ms. Fleming said that the plaintiff was able to walk, lift a little bit of weight and to sit for at least two hours and to engage in his own grocery shopping and to help out with some lighter housekeeping. She also said that her assessment in relation to whether he could do a return to work program was geared towards his pre-accident occupation. She said at the time he was spending most of his day being sedentary and her initial goal was to progress him to light activity. However, she did not meet that goal.
- [57] Ms. Banez of CT performed a physiotherapy assessment of the plaintiff on May 17 and 19, 2010. As a result, she recommended a firm mattress, a home physiotherapy program leading eventually to a full program, and a gym program, with the goals being to increase his activity tolerance and range of motion and manage his chronic pain. She said that initially he was reluctant to participate in the pool program because he "didn't want to have a setback." Ms. Banez convinced him to participate starting in September, beginning at a frequency of once per week and gradually increasing to twice per week. As the program increased in frequency, Mr. Bains complained of more pain. The program ended in December, after Ms. Banez consulted with Dr. Caillier, due to the increase in pain. Ms. Banez said that some of the program goals were achieved; for example, Mr. Bains had some increased tolerances in sitting and standing. In cross-examination, Ms. Banez said that during the course of her program she observed that Mr. Bains was capable of light or sedentary level activity.

- [58] Between February and April 2011, the plaintiff received treatments called cognitive behavioural therapy ("CBT") from Dr. D. Aboussafy, a psychologist with Chuck Jung Associates. The treatments were discontinued for funding reasons but in October 2011 the plaintiff attended further sessions with Dr. T. Young of the same office. Dr. O'Shaughnessy testified that he did not consider these latter sessions to be strictly CBT. However, Dr. Young testified that he did in fact treat the plaintiff with CBT.
- [59] In April 2011, Mr. P. Dhoot of Mountainview Kinesiology assessed the plaintiff and recommended a supervised program which started in May of that year and continued until October 2011 when funding was discontinued.
- [60] Mr. Dhoot testified that he had the plaintiff do some questionnaires. He said that in the case of one questionnaire that assesses pain intensity, personal care, lifting, walking, sitting, standing, sleeping, social life, and travelling, the plaintiff's score was equivalent to "severe". In the case of a separate questionnaire dealing with neck disability, the plaintiff's score was equivalent to being "crippled". Mr. Dhoot said that, according to another test he performed, the plaintiff was not exaggerating his pain levels. He said the plaintiff did display the motivation and effort to get better, as the plaintiff was very compliant and never showed up late.
- [61] Mr. Dhoot recommended 16 sessions with a goal of increasing the plaintiff's flexibility in his neck, shoulder, and lower back as well as his strength in his lower back. Asked if there had been any improvement by the end of the 16 sessions, Mr. Dhoot said, "Very little, if any." He then got 12 more sessions approved for funding because the plaintiff felt that the program was helping decrease the pain in his lower back and improve his flexibility. The sessions were held in the gym and the pool. Mr. Dhoot said that, by the end of the 12 additional sessions, the plaintiff had not made any progress.
- [62] In cross-examination, Mr. Dhoot said that one of his goals was to increase the plaintiff's functioning so that he could either return to work as a machinist or in any capacity, but throughout the program he saw no increase in functioning.
- [63] The plaintiff was referred to Orion in January 2012. Ms. Douglas testified that when the plaintiff came into the program she knew that he did not have a job to which he could return. She met with the plaintiff, along with a team consisting of a kinesiologist, physiotherapist, and psychologist, to set goals with the plaintiff and set up a functional program for him. The goal was to reduce his medications and help him become as active and physically healthy as they could. The program started at the end of February 2012, initially consisting of a six-hour day repeated five days per week, but later decreased to three days per week.

- [64] Ms. Douglas did functional testing of the plaintiff three times and testified that there was no significant functional improvement. She said she felt he did make progress overall with the pain clinic, as he came out of the program better able to manage his pain and his symptoms of frustration and irritability at home as well as around people in the clinic. However, he did not make significant functional gains.
- [65] Regarding his readiness to return to work at the end of the program, Ms. Douglas said that the plaintiff was not ready to attend back to his pre-accident position on a full time basis at the end of the program, but he was ready to look into continuing to progress physically while beginning a search for work or courses to train him to do a different kind of employment.
- [66] In cross-examination, Ms. Douglas confirmed that the plaintiff attended Orion's pain management program from February to April 2012. She said the plaintiff told her that he thought he would be able to do the majority of the supervisory work that he had been doing at Hammer. He felt that his decreased tolerance for sitting limited his ability to operate a computer.
- [67] Ms. Douglas confirmed that the program was able to reduce the plaintiff's medications and to help the plaintiff understand the nature of his pain. In terms of functioning, the gains made by the plaintiff during the program related to his "durability to function", that is, his ability to durably do the activities on a daily or regular basis instead of only one time. She also testified that when the plaintiff entered the program, she rated him as being in the "limited" ability category of the National Occupation Classification (NOC) system, but when he finished the program, she rated him as being in the "light" ability category. The "light" category of the NOC system allows persons to work with weights up to 22 lbs. Ms. Douglas said that the plaintiff did not make any gains with his sitting tolerance and still had difficulties with sitting for longer than 30 minutes to an hour. However, he found walking around to be the best kind of solution for him, which she said was fairly typical.
- [68] Ms. Douglas said that at the end of the program she thought the plaintiff was more confident, knowing his limitations and capabilities and what he could durably do day by day. She said the plaintiff had it in his mind to pursue becoming a mechanical engineer. She recommended that he look for work in the limited ability category, even though he demonstrated some function in the light category, because he was only managing weights at the lower end of the category. She said the limited ability category included supervisory work, computer programming, and sales, although his difficulty with sitting tolerance might prevent him from doing supervisory or computer work. She agreed that it was not unusual for persons with low sitting tolerance to take micro breaks. She agreed that he was capable of taking courses with the understanding that he would need to get up and down throughout the day. She agreed this would not be an unusual situation in a classroom setting.

- [69] Dr. Turnbull, who examined the plaintiff on October 19, 2010, noted in his report dated December 16, 2010, that the plaintiff's difficulty putting in a full day of activity without going home to rest made him unemployable.
- [70] Dr. C.P. Quee-Newell, whose credentials include that of vocational consultant, in her report to defence counsel dated December 21, 2011, recognized that the plaintiff's chronic pain was a most significant vocational barrier at the time. She noted that it was unclear whether the plaintiff could tolerate the demands of full-time employment. She concluded that without further training the plaintiff would be limited to direct-entry employment compatible with his physical abilities and limitations and that such positions could be expected to provide lower remuneration, limited opportunity for advancement, and would be less likely to offer him job satisfaction.
- [71] Mr. G. Worthington-White, a consultant occupational therapist, in his report to defence counsel dated November 30, 2011, noted that during his assessment of the plaintiff on November 17, 2011, the plaintiff presented with chronic pain behavior and pain-limited function and that jobs requiring full-time standing demands would not be recommended at that time.
- [72] The plaintiff has experienced some improvements in both his physical and emotional well-being. The plaintiff and his wife have a circle of friends that they socialize with on occasion by going out with them to restaurants or by hosting them for dinner at their home. The plaintiff does socialize during the week with friends by going out with them for food and drink and he is part of a group of friends who regularly get together to watch football games on television during which they eat and drink. These events start in the morning and go on until the early evening. At times, these events take place at the plaintiff's home. In addition, the plaintiff frequently visits with his parents during the week and spends time with his sister and brother-in-law and their children when they visit from Toronto. He has travelled to Toronto to visit them.
- [73] The plaintiff and his wife testified about the stresses and strain in their marriage brought on by the plaintiff's physical and emotional challenges. His condition has no doubt taken a toll on their relationship, but it appears that they are both working on taking steps to make the relationship work. The plaintiff does help with certain daily domestic chores, including preparing meals and shopping for the household needs. Unfortunately, the plaintiff's condition made it very difficult for him to comfortably manage their wedding ceremony and this placed somewhat of a damper on the joy of this important event in their lives. As well, his condition has impacted the intimacy of their relationship, and he is attempting to address this circumstance as best he can.
- [74] When the above evidence is placed in the context of the plaintiff's age, his condition pre-accident when compared with his condition post-accident, and the impact that his physical and emotional injuries have had on his enjoyment of life, I am satisfied that he is entitled to receive a substantial award for non-pecuniary damages.

- [75] The plaintiff cited *Scoates v. Dermott*, 2012 BCSC 485 (non-pecuniary damages of \$250,000); *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 (non-pecuniary damages of \$160,000) (this award was later varied: non-pecuniary damages were reduced 20%. See para 23 of *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2012 BCCA 331); *Alden v. Spooner*, 2002 BCCA 592 (non-pecuniary damages of \$200,000); *Morrow v. Outerbridge*, 2009 BCSC 433 (non-pecuniary damages of \$200,000); *Fox v. Danis*, 2005 BCSC 102 (non-pecuniary damages of \$100,000); *Shapiro v. Dailey*, 2010 BCSC 770 (non-pecuniary damages of \$110,000) (the total award made in this case was also later varied but non-pecuniary damages were not at issue on the appeal. See *Shapiro v. Dailey* 2012 BCCA 128).
- [76] The defendants cited *Ng v. Sarkaria*, 2011 BCSC 1643 (non-pecuniary damages of \$95,000; *Gill v. Probert*, [1999] B.C.J. No. 2436 (non-pecuniary damages of \$110,000); *Kosugi v. Krueger* (Litigation Guardian), 2007 BCSC 278 (non-pecuniary damages of \$110,000).
- [77] When I consider the nature and extent of the injuries suffered by the plaintiffs in the cited authorities, when compared to those suffered by the plaintiff in the case at bar, I find that a reasonable and fair award to the plaintiff for non-pecuniary damages is \$130,000.

2. Past Wage Loss

- [78] I turn next to set out the plaintiff's employment history leading up to the accident.
- [79] The plaintiff's interest in pursuing a career as a machinist started while he was still in high school. He applied to the machinist program at the BC Institute of Technology (BCIT) before he graduated in the year 2000. He started in the program in 2001, and, in 2003, he received his Diploma of Trades Training in Machinist Computer Numerical Control ("CNC").
- [80] After his graduation from BCIT in 2003, the plaintiff went to work for Pacific Mako Metal Casting and Machining ("Pacific Mako"). In 2004, the plaintiff went to work as an apprentice for Canadian Die and Mould, where he worked for one year, after which he went to work for Ecco Heating Products Ltd. ("Ecco") to continue his apprenticeship. He was let go by Ecco. He immediately found other work and continued his apprenticeship with ADP, a firm manufacturing turbochargers. The plaintiff's primary duty was to set up and program machines.
- [81] The plaintiff left ADP and, in the fall of 2005, went to school for five weeks as part of his training to become a journeyman machinist. Following this, he went to work at NTL Manufacturing, and then joined Advance Integration Technology Inc. ("AIT"), a firm building machines for the aerospace industry. The plaintiff worked at AIT until May 2006, after which he completed his final five weeks of classroom training and obtained his journeyman status. In June 2006, he went back to work for AIT, where he remained until August 2007 and received an income of \$31 per hour.

- [82] In August 2007, the plaintiff went to work at Hammer as a CNC machinist. Initially, he received an income of \$28 per hour. After a short time, the plaintiff became the lead hand and his income was raised to \$30 per hour. His duties included training two apprentice machinists, programming CNC machines, supervising other machinists, and taking responsibility for quality control. From January 2008 to the date of the accident in June 2008, the plaintiff had earned \$31,464.46.
- [83] During his training and employment, the plaintiff had in the back of his mind a desire to start his own machine shop business. In the spring of 2008, the plaintiff had a friend working at another machine shop whose owner had passed away. The plaintiff and his friend formed a partnership with the objective of purchasing the business and prepared a business plan to secure a loan. However, their loan application was rejected.
- [84] The position of the defendants is that, prior to the accident, the plaintiff had not become established in his career as a machinist. They note the fact that in the approximately five years before the accident the plaintiff had worked for seven different employers. They also note that the plaintiff planned to eventually leave his position at Hammer, and, in any event, he would not have been able to continue his employment with that firm given that it went out of business in 2009 or 2010.
- [85] Canada Revenue Agency summaries of the plaintiff's income tax returns and copies of T4 statements provide the following information about the plaintiff's earnings history:

Year

T4 Employment Income

Sources of Employment Income

Employment Insurance benefits

2003

\$7,518

\$158.24 Calypso Enterprises Ltd.

\$7,360.00 Pacific Bronze Ltd.

Nil

2004

\$21,207

\$21,207.00 Canadian Die & Mould Ltd.

Nil

2005

\$22,571

\$1,522.00 Canadian Die & Mould Ltd.

\$6,170.11 Ecco Heating Products Ltd.

\$6,168.24 ADP Distributors Inc.

\$3,138.00 NTL Manufacturing Ltd.

\$5,572.50 Advanced Integration Technology Canada Inc.

\$5,552

2006

\$54,642

\$54,642.69 Advanced Integration Technology Canada Inc.

\$1,389

2007

\$59,156

\$40,793.31 Advanced Integration Technology Canada Inc.

\$18,363.00 Hammer Mechanical Inc.

Nil

2008

\$31,464

\$31,464.46 Hammer Mechanical Inc.

\$6,513

2009

Nil

Nil

[86] In his report to defence counsel dated February 12, 2013, consulting economist Mr. M. Szekely included a table which indicates that, in the year 2008, the gross income for an average BC male working full-time for a full year as a machinist was \$53,510.

[87] The defendants submitted that it is apparent that, in five of the seven jobs held by the plaintiff, he was paid below the above-mentioned rate of pay, noting that it was only at AIT and Hammer where he received above average income.

- [88] The defendants also submitted that the plaintiff worked substantial overtime at Hammer in 2008 and there is no evidence to support a conclusion that he would have been able to work the same amount of extra hours for the remainder of that year.
- [89] The defendants also contended that the plaintiff's position that he was on track to earn \$71,000 in 2008 is an inappropriate assumption because this amount of annual income is significantly higher than the plaintiff's demonstrated earnings history. The defendants also contest the plaintiff's position that his past income loss should be assessed on the basis that his income would have increased at the rate of 5% per annum.
- [90] Mr. Szekely calculated the cumulative adjusted past net income loss for an average BC male working full time, full year, as a machinist from the date of the accident to the date of trial at \$283,581. The defendants submitted that the plaintiff's past income loss claim should be assessed at a lower amount in the range of \$220,000 to \$250,000 for three reasons: the plaintiff would very likely have had a period of unemployment had the accident not occurred given that Hammer went out of business; in five of the seven positions he held, he earned income below the average; and he may have chosen to start his own business, which could have resulted in below average income for a period of time.
- [91] The defendants argued that by early 2012 it was absolutely clear that the plaintiff knew that he would not be able to return to work as a machinist and had to look for another type of employment. The defendants noted that the plaintiff attended the pain program at Orion from February 15 to April 13, 2012. They point to the evidence of Ms. Douglas, who testified that when the plaintiff entered the program he felt certain he would not be able to return to his previous employment as a machinist. The defendants also point to Ms. Douglas' evidence that, at the end of the program, she recommended that the plaintiff look for employment in the "limited" category, although he demonstrated some function in the "light" category, and that work in the "limited" category could include supervisory work, computer programming work, and sales, subject to any issues the plaintiff might experience because of sitting tolerances.
- [92] I accept neither the defendants' position on the manner of assessing the plaintiff's past income loss, nor their submission on the plaintiff's duty to mitigate.
- [93] First, I disagree with the defendants' characterization of the plaintiff's work history as being one of not becoming established in his chosen career. I also disagree with Dr. Quee-Newell's description of the plaintiff's pre-accident work history as "sporadic". In my view, the plaintiff's movement between jobs was part of him fulfilling his objective to secure a personally rewarding and remunerative position within his intended career as a machinist. For example, the plaintiff testified that he quit his job at Pacific Mako because he believed that he had a limited chance to learn at that firm. He said that he quit his job at Canadian Die and Mould "not necessarily to make money" though money was a factor. He quit his job at ADP because the person in charge of the shop had a different vision than he did on how to manage the shop. He left NTL to take a job at AIT. He left AIT because he did not like the

new owners and did not wish to make the long commute as a result of the shop moving to a location in Aldergrove.

- [94] The defence submitted that Mr. Bains' pre-accident earnings at all but two of his employers were below the average earnings for machinists. The defence asserted that it was only at his last two jobs that he made more than the average.
- [95] However, the plaintiff was an apprentice until June 2006, and it is only for his last two employments that he held a trade certification. There was no evidence on the average wages for apprentice machinists. As plaintiff's counsel pointed out, if Mr. Szekely's figures include apprentices, then his figures for average earnings would significantly understate the potential earnings of a journeyman machinist.
- [96] Plaintiff's counsel submitted that the defence would limit the plaintiff's earning capacity to that of the average machinist despite the evidence that he was earning 30% above average before the accident.
- [97] The plaintiff's job trajectory was coming together for him during his employment at Hammer. He was 26 years old and was given a level of responsibility at the shop despite his young age, was moving forward in his career, and earning a good living as a machinist. I accept the plaintiff's position that he was on track to earn an annual income greater than the average. I also agree with the plaintiff's position that if he had still been at Hammer when it went out of business, he would have had no difficulty finding another position given his past record of finding employment.
- [98] The approach taken by the plaintiff is to project the plaintiff's income for the remaining 29 weeks of 2008 (\$1,368/week x 29 weeks) to claim that he was on track to earn \$71,000 in 2008, and that, after subtracting his actual earnings, his gross past income loss is at least \$39,000 for that year. The plaintiff also submitted that in the two years prior to the accident, his earnings demonstrated a positive growth pattern. The plaintiff contended that the court should assume that the plaintiff would have been able to continue to grow his income and that, assuming a conservative estimate of 5% growth annually, his gross past income loss would have been \$74,655 for 2009; \$78,398 for 2010; \$82,318 for 2011; \$82,434 for 2012; and $\$87,605/52 \times 14 = \$23,859$ to April 15, 2013. The total amount claimed for gross past income loss is \$385,310.
- [99] The plaintiff submitted that in addition, and according to Mr. Szekely, the plaintiff would have earned non-wage benefits of 10% for an additional loss of \$38,500, making his past income loss \$423,810. The plaintiff asserted that, using the same rate of tax as that used by Mr. Szekely (20.2%), would reduce the claim to \$338,200.
- [100] In setting the plaintiff's past income loss, I note the defendants' position that I should take into account the fact that the plaintiff may not have continued to experience a continuation of the same level of overtime hours at Hammer as he did prior to the accident. I also note the defendants' position that there is no evidence to establish a growth in the plaintiff's

income of 5% per year, but it is correct to note as well that, in the two years prior to the accident, his income was growing. I accept that the plaintiff was gaining valuable experience at Hammer in all aspects of operating a machine shop and there is no indication that he had any intention of leaving his employment, although he was very determined and had an ambition to establish his own machine shop. If the plaintiff had done so either before or after Hammer went out of business, this may have, at least initially, stalled the growth pattern in his income. When I take all of the positive and negative contingencies into account I find that the plaintiff should be awarded \$300,000 for past net income loss.

[101] I turn next to my reasons for not making a reduction from the above amount on the ground of failure to mitigate.

[102] The defendants argued that there should be a substantial reduction from the amount awarded for past income loss due to the plaintiff's failure to mitigate. I turn next to the defendants' argument on this point.

[103] The defendants cited the decision in *Parypa v. Wickware*, 1999 BCCA 88, where at para. 67 the court set out the test for a plaintiff's duty to mitigate:

[67] These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence. However, in calculating such likelihoods, the plaintiff is not entitled to compensation based solely on the type of work she was performing at the time of the accident. There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work. If the plaintiff claims she is not able to mitigate by pursuing other lines of work or by retraining, she must prove this on a balance of probabilities. The requirement for mitigation is addressed by this court in *Palmer*, supra, at 59:

A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job".

What the respondent proved in this case was that he had lost his capacity to follow the sort of occupation he was pursuing at the time of the accident. But that did not prove, on a balance of probabilities, that he could not earn by pursuing some other sort of occupation, as much as before.

[104] In the case at bar, the thrust of the defence argument is that on the evidence of the witnesses, by the time the programs the plaintiff was taking at CT ended in late 2010, the plaintiff knew or should have known that he would not be able to return to work as a machinist. He then had a duty to pursue education or retraining that would have enabled

him to work within the limits of his abilities. The defendants also submitted that the plaintiff's refusal to investigate or pursue any employment options constitutes a failure by him to mitigate.

- [105] The defendants referred to the plaintiff's evidence, in cross-examination, that for the first couple of years post-accident he was focused on returning to work as a CNC machinist as his main hope. He also hoped that the discectomy would address his back condition so that he could return to work in this capacity. However, the plaintiff admitted that by the end of 2010, he realized that he very likely would not be able to return to work as a CNC machinist. Even then, he added, he was not letting go of his hope to return to his pre-accident occupation.
- [106] The defendants submitted that by the time the CT programs concluded the plaintiff knew, or should have known, that he would not be able to return to work as a machinist, and that he then had duty to pursue education or training that would enable him to work within the limits of his abilities.
- [107] The defendants point to the plaintiff's cross-examination where he acknowledged that at his June 7, 2011 examination for discovery, he indicated that he had realized that he needed to look for a job other than a CNC machinist. He was waiting for his doctor to tell him what he was capable of doing. However, he added that when he saw Dr. Quee-Newell on October 12, 2011, he did "let go" of the hope of returning to work as a machinist.
- [108] Dr. Quee-Newell indicated that during her October 12, 2011 examination, the plaintiff stated that he had been approached with an employment offer to work as a sales representative for a machine shop. Dr. Quee-Newell believed that, from a physical standpoint, work of this nature would be suitable for the plaintiff, offering significant opportunity for postural flexibility and pacing. She noted that while employment as a sales representative was not the plaintiff's primary area of interest, work of this nature would allow him to apply his existing training and knowledge within the manufacturing field.
- [109] The plaintiff denied that he had been approached with an employment offer to work as a sales representative for a machine shop and does not recall whether he told Dr. Quee-Newell about such an employment opportunity. The defendants submitted that Dr. Quee-Newell's evidence about this discussion should be preferred over the plaintiff's evidence. Dr. Quee-Newell testified that asking about potential employment opportunities was part of her interview process when conducting vocational assessments. At the time of the interview, she made notes of the plaintiff's comments. Defence counsel said that it is simply not credible that Dr. Quee-Newell would make up a comment of this nature.
- [110] The defendants submitted that even if the plaintiff only came to realize that there was a possibility that he might be able to obtain work as a sales representative of a machine shop, this was a reasonable employment opportunity that he should have investigated and pursued to mitigate his damages.

- [111] The defendants also point to the assessment by Mr. Worthington-White and the fact that the plaintiff indicated to him in November 2011 that he had an interest in mechanical design and engineering and stated that pursuing more of an office-based position might be better suited for him. The defendants argued that this is another indication that certainly by 2011, the plaintiff realized that he would no longer be able to work as a machinist and that he had to consider alternate job options.
- [112] With respect, I reject the defence argument on mitigation. Rather, I agree with the plaintiff's argument that the medical evidence does not support a conclusion that the plaintiff was capable of returning to gainful employment as of the date of trial. In this regard, I note the evidence of Drs. Sahjpaul and Caillier on the plaintiff's physical and emotional condition. I place less weight on the views of Dr. Quee-Newell and Mr. Worthington-White given the fact that, in forming their opinions, they did not have or take into account the reports pertaining to the plaintiff's condition of major depressive disorder. Moreover, in his cross-examination, Mr. Worthington-White said he would defer to the medical diagnosis of the plaintiff's condition and agreed that the plaintiff is disabled and that the plaintiff was going to experience permanent problems. He had no reason to disagree with Dr. Sahjpaul's opinion set out in the September 18, 2012 report.
- [113] I also note that Dr. Turnbull confirmed in his cross-examination that when he examined the plaintiff in October 2010, he did not think the plaintiff was employable. With respect to the views of the therapists, at the time the plaintiff had concluded his programs with CT in late 2010, Ms. Fleming did not feel that he was ready for a vocational back to work program. Mr. Moffat felt that the plaintiff's improvement at the conclusion of his treatments was not substantial and that there was no functional improvement in his physical state. Similarly, Mr. Dhoot felt that the plaintiff had experienced very little, if any, improvement in functioning, although the sessions were helpful in decreasing the pain levels in the plaintiff's lower back and improving his flexibility. Ms. Douglas said that during the course of the Orion program, the plaintiff did not make any gains with his sitting tolerance and that he still had difficulties with sitting for longer than 30 minutes to an hour.
- [114] Finally, Mr. Carlin, who assessed the plaintiff in November 2012, opined that the plaintiff likely does not meet the physical demands of his pre-injury occupation and that the plaintiff's physical limitations precluded him from participating in 70% of jobs. Of the 30% for which the plaintiff may be physically suited, many of the jobs required education or skills that the plaintiff did not have. Mr. Carlin also opined that the plaintiff is not competitively employable because of the combined impairments of physical and emotional injuries he sustained as a result of the accident.
- [115] The defendants contended that the plaintiff's past income loss claim, based solely on his inability to work as a machinist was tantamount to him saying, at the cost to the defendant, that the only work he liked was as a CNC machinist and that because he could not return to this work the defendants had to give him sufficient capital to replace the income he had lost as a machinist. They submitted that the authorities (e.g. *Zawadzki v. Calimoso*, 2011 BCSC

45; *Moussa v. Awwad*, 2010 BCSC 512) clearly state that a plaintiff cannot succeed on this kind of stance and that the plaintiff in the instant case had a duty to mitigate his past income loss and that by refusing to apply for or attempt alternate employment he has failed to mitigate his loss. The defendants argued that the plaintiff's claim for past income loss for the period after the year 2010 should be significantly reduced.

- [116] I think the cases relied upon by the defence are distinguishable from the facts in the case at bar.
- [117] In *Zawadzki*, supra, at para. 190, when dealing with the amount the court should reduce the plaintiff's past wage loss claim for the year 2010, Voith J. noted that a very significant portion of the plaintiff's loss by not working in that year was a function of the fact that he had sought no assistance for his various psychological and alcohol related difficulties and that his failure to work was significantly influenced by the severity of his drinking condition, the effect of his drinking on his other symptoms and his failure to seek any help to address his problems.
- [118] In *Moussa*, supra, a central issue to the question of the plaintiff's loss of income was whether the plaintiff left his job because of a religious conviction rather than because he was unable to continue due to pain in his left shoulder. Russell J. found that the plaintiff's passions for graphic design work, video work and volunteer work with Christian ministries that were not being fulfilled by his work in conjunction with the lack of flexibility in his work schedule and a long commute were the reasons that the plaintiff left his employment. Her Ladyship also found that the plaintiff did nothing to try to accommodate his injuries within his employment and that he had not pursued any other lines of work that were compatible with his injuries, and as such had failed to mitigate his loss of income.
- [119] Finally, in *Schweighardt v. Palamara*, 2003 BCSC 1149, the plaintiff was advised to try wearing a wrist splint and to attempt a return to work and to try to find some more sedentary work but the plaintiff did not follow this advice. There was no evidence that the plaintiff's employer would not have permitted her to attempt a return to work. Nor was there evidence that the plaintiff was prevented by her physical injuries from taking some form of sedentary employment. Smith J. held, inter alia, that the plaintiff should have attempted a return to her employment after the completion of a functional capacity evaluation and that if she had done so she may have found that she was able to cope with the demands of her job as a correctional officer.
- [120] In the case at bar, the evidence is compelling that the plaintiff was very diligent in undertaking the requirements of his rehabilitation programs following the advice of his doctors and therapists. His desire throughout was to place himself in a position to return to some form of employment suitable to his post-accident condition. There is absolutely no evidence to indicate that at any time post-accident he was malingering, or not fully applying himself to the programs of exercise and other treatments recommended by his therapists.

- [121] The evidence establishes that the plaintiff has been disabled since the date of the accident and despite the many rehabilitation programs he has attended he has made little progress in improving his functional state. The Orion program did improve his emotional status, but did not improve his level of physical capacity.
- [122] On the other hand, I am mindful that the plaintiff clung to the hope that he could return to his pre-accident occupation past the time that it would have been obvious to him that this was no longer a realistic expectation. But I am also mindful that he was passionate about pursuing a career in this field from before his graduation from high school and having to accept that he could no longer follow this career path was challenging for him to accept.
- [123] With respect to the evidence of Dr. Quee-Newell that the plaintiff had been approached with an employment offer to work as a sales representative for a machine shop, the plaintiff did not recall such an offer. Even accepting the doctor's evidence on this point, I also note that in her report, she stated that the plaintiff would likely benefit from first participating in a work hardening program should he choose to pursue employment as a sales representative. The fact is that at the time frame within which the plaintiff would have received such an offer, he was devoted to a rehabilitation program for the very purpose of placing himself in position where he could re-enter the workforce in a job that would match his capacity and endurance. I do not interpret this circumstance as the plaintiff stating that there were only certain kinds of jobs he would entertain and that he was not fit for such jobs.
- [124] Upon the whole of the evidence, I am satisfied that the plaintiff has proven on a balance of probabilities that he was not able to mitigate his income loss by pursuing other lines of work between the time of the accident and at the very earliest after his discharge from the Orion program in the spring of 2012. In this regard, I note that following the Orion program the plaintiff took two entry-level courses at BCIT in AutoCAD. He commenced AutoCAD 1 in September 2012 and AutoCAD 2 in February 2013. He enrolled in about 1/5th of what would be a full course load and received exceedingly good marks in both courses.
- [125] In my view, the plaintiff's conduct is not that of a plaintiff whose claim for past income loss should be reduced for failure to mitigate his loss.

3. Future Income Loss

- [126] In *Rosvold v. Dunlop*, 2001 BCCA 1, the Court set out the principles for assessing future loss of earning capacity:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income

earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.

- [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.
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware*, *supra*, at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:
1. whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. whether the plaintiff is less marketable or attractive as an employee to potential employers;
 3. whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
- [127] At the time of trial the plaintiff was 31 years old. Plaintiff's counsel referred to the present value table contained in CIVJI: Civil Jury Instructions which has multipliers to age 67 of 23.5563; to age 70 of 24.7303; and to age 72 of 25.4661. Counsel submitted that using these figures is neutral and allows the court to apply the evidence to determine any positive or

negative contingencies rather than blindly following statistics. Counsel submitted that assuming the plaintiff would have earned \$80,000 per annum, the following are the present value figures for the income he would have earned without the accident:

To age 67: \$1,884,504; To age 70: \$1,978,424; To age 72: \$2,037,288

- [128] Counsel also said that there is no reason to conclude that the plaintiff's earnings would have peaked while still in his twenties. He was hard working and ambitious and aspired to own and operate his own shop. If his earnings were in the range of \$100,000 per year, the present value to age 67 is \$2.35 million.
- [129] The plaintiff was employed by Mr. Charanjit Sandhu at Canadian Die and Mould during his apprenticeship. Mr. Sandhu testified that the plaintiff was a good student of his trade and a hard worker. His company is now called Cimtech and he employs 11 machinists who earn \$80,000 per annum. His business has a gross income of \$1.5 million with a profit margin of 30%. He testified that if the plaintiff was a fit person he would hire him. He explained there were no light duties in his shop and that all persons at the shop, including him, work with heavy equipment. Counsel argued that the court can rely on this evidence to determine a benchmark earning power for the plaintiff if he owned his own machine shop. Counsel chose to use \$150,000 as a fair number, factoring all positive and negative contingencies. At \$150,000 per year the present value is about \$3.5 million.
- [130] Mr. Szekely projected the lifetime earnings of a machinist to be \$1,339,302. Plaintiff's counsel submitted that there are several problems with relying on this number. First, it represents the average of all machinists, including those without journeyman status who, according to Mr. Szekely, earn less. Plaintiff's counsel argued that given the plaintiff was earning 30% more than the average pre-accident, then Mr. Szekely's figure should be adjusted upward by this amount to total \$1,741,093. In addition, counsel said that Mr. Szekely used labour market contingencies to significantly reduce the figure by assuming early retirement, reduced participation rates, and part-time work on occasion. However, counsel said that he did not factor in that the figure for the plaintiff's without-accident earnings (had he remained a machinist employed by others) needed to be adjusted upwards to accord with the evidence, and that once this is done, the result is similar to the figures above done strictly with the prescribed discount rate. Counsel also said that this does not take into account the plaintiff's potential earnings as a shop owner.
- [131] The plaintiff contended that given the extent of the plaintiff's limitations, his occupational opportunities are now restricted to entry level positions which offer an income of \$10.25 to \$12 per hour. Counsel argued that if the plaintiff is able to work part-time, his annual income would be in the range of \$10,660 to \$12,480, with the range of lifetime earnings being \$251,100 to \$317,800 present value.

- [132] Counsel submitted that if the range of the plaintiff's income earning capacity before the accident is \$1.8 million to \$3.5 million, and the plaintiff's residual capacity is \$251,100 to \$317,800, then the range of the plaintiff's future income loss is \$1,482,000 to \$3,248,900.
- [133] The defendants argued that the assumptions upon which the plaintiff's claim for future income loss is based are flawed for several reasons. As the defendants submitted in connection with the plaintiff's past income loss, the plaintiff was not firmly launched into his career path as a machinist at the time of the accident. They also asserted that there is no evidence to support a conclusion that he would have succeeded in his own business, let alone the fact that Hammer went out of business within a short time span which they said indicates that the long term success of operating a machine shop is difficult to predict. In addition, they said that if the plaintiff continued his pattern of changing jobs, then it is reasonable to anticipate that he would experience periods of unemployment, especially given the evidence of Dr. Quee-Newell that there will be an over-supply of machinists in the lower mainland.
- [134] The defendants point to the evidence that prior to the accident the plaintiff had an interest in becoming a mechanical engineering technologist, and submitted that if he had pursued this goal, he would have had a period of unemployment while attending studies at BCIT and a period of retraining to become established in a new career. They point to the evidence of Dr. O'Shaughnessy who mentioned in his March 19, 2012 report that that the plaintiff told him he was thinking about entering a program at BCIT for this occupation, and that in fact he was thinking about taking this course in any event before the accident occurred.
- [135] The defendants submitted that when comparing the plaintiff's likely future career path had the accident not happened to the future he now faces, it is possible that he may still end up becoming a mechanical engineering technologist. Defence counsel noted that the plaintiff has demonstrated an ability to succeed at BCIT courses and noted the testimony of Dr. Quee-Newell that training institutions such as BCIT take steps to accommodate students with disabilities.
- [136] According to defence counsel, the evidence indicates that the plaintiff has employment options that would provide him similar or greater income than he would have earned if he continued to work as a machinist. Counsel noted that in *Barnes v. Richardson*, 2010 BCCA 116, the court clearly directed that substantial potential future earnings must be considered when damages are assessed for reduction of future earning capacity. At para. 16, the court stated:

If it is correct, however, that Mr. Barnes may earn substantially more as a result of the accident, it is difficult to justify an award of substantial damages for loss of capacity. As noted by Cooper-Stephenson, *supra*, in commenting on Resendes, Cavanaugh and Mathers, all *supra*:

In many of these cases, loss of earnings having been awarded during a period of retraining, no further award under that head was made since the level of earnings would now match what the plaintiff might have expected absent the accident. A conceptual difficulty arises if (happily) it can

be shown that the plaintiff's long term post-accident prognosis is for a higher income level than he or she would have achieved if the previous employment path had been followed. It seems right that this possibility should be accounted for if there is a residual net income loss under this head of damages. This was done in *Houle v. Calgary (City)* [(1985) 38 Alta. L.R. (2d) 331 at 341-42 (C.A.)], where the consequence was a 20% reduction of the actuarial projection for a 12-year-old boy. However, [McDermid] J.A. commented that he "would rather err on the side of taking too low a percentage than too high a percentage" on this count. And the factor of possible increased earnings was noted in the overall computation in both *Dobbin v. Alexander Enterprises Ltd.* [(1987) 63 Nfld. & P.E.I.R. 1 at 12 (Nfld. C.A.)] and *Ilic v. [Fleetwood]* [(1993) 36 B.C.A.C. 248 at 250 (C.A.)]. Whether a potential lifetime "net" gain under this head of damages should ever be set off against other heads of damages is problematic ... [At 239.]

[137] According to his counsel, the plaintiff does not claim that he is totally disabled from becoming gainfully employed for the rest of his potential working life. The evidence is that the plaintiff wishes to find suitable employment, and from the perspective of a strengthening of his personal relationships and continued improvement of his mental health, re-entering the workforce would be strongly in the plaintiff's best interests. However, he does claim that not only is he unable to return to his pre-accident occupation, but that most jobs, other than entry level ones, are now unavailable to him due to his serious injuries and that he should be compensated for future income loss on the basis of his pre-accident actual and potential earnings record in the amount set out in his submissions.

[138] Although I accept that the plaintiff's pre-accident actual and potential earnings are factors that can be considered in setting future income loss, I do not entirely agree with his position or approach on assessing his loss under this head of damage. Rather, I think my assessment of his future income loss in the context of the evidence should reflect a more likely view of his potential future employment opportunities and earnings.

[139] I recognize the plaintiff's ongoing physical impairment and the chance that he may experience a relapse of his major depressive disorder. Nevertheless, I am satisfied and find that the more viable option and approach to assessing the plaintiff's future income loss is to base my assessment on his employment options following a period of retraining. In this regard, I agree with the defendants that there is a substantial possibility that with retraining the plaintiff will be able to find suitable employment in, for example, his preferred area of mechanical engineering technician, or perhaps in one of several other occupations identified by Dr. Quee-Newell. In her report dated December 21, 2011, she provided an assessment of the plaintiff's vocational potential based upon his reported physical capabilities, aptitudes and interests. She identified career options that the plaintiff currently is, or can reasonably become suited for, and Mr. Szekely calculated the future earnings for these options as set out in the below table:

Occupation

Start of earnings

Present value of future earnings

Technical Sales Representative

January 1, 2014

\$1,549,657

Mechanical Engineering Technologist

January 1, 2016

\$1,234,194

Drafting Technologist

January 1, 2015

\$1,069,418

Dental Technologist

January 1, 2015

\$988,056

Recreational Facility Attendant

April 15, 2013

\$768,794

Retail Salesperson

April 15, 2013

\$989,557

Security Officer

April 15, 2013

\$729,130

Inventory Clerk

April 15, 2013

\$942,934

Insurance Agent

April 15, 2013

\$1,229,214

- [140] Defence counsel submitted that based upon Mr. Szekely's calculations, projected earnings for average BC males in some of the above occupations compare to the present value of cumulative earnings for an average BC male working full-time, full year as a machinist or machine shop owner. Counsel argued that while some of the occupations listed are ones that the plaintiff might not have pursued if he had not been injured, nevertheless the law places a duty upon him to seek out vocational alternatives in order to mitigate his income loss, and that if he does not then his future income loss should be adjusted downward: see *Kosugi v. Krueger*, *supra*.
- [141] The plaintiff clearly has a passion for working around machines and using his creative skills to enhance his personal satisfaction and employment prospects. He has certainly shown that he has the motivation and capacity to succeed in the classroom as evidenced by his success in the BCIT AutoCad 1 and 2 technical courses where he attained grades well over 90% in the case of AutoCad1, and at the time of trial he was intending to take another technical course at BCIT.
- [142] I accept the defendants' reasonable submission that with retraining for a new occupation the plaintiff may match, or even exceed, the income he would have earned had he not been injured in the accident and worked to retirement as a machinist or machine shop owner. However, I am also mindful that the pace at which the plaintiff can attend retraining courses is dictated by his serious physical limitations, and I accept the plaintiff's position that retraining could take him in the range of at least five to six years to complete, a period much longer than that accounted for in Mr. Szekely's tables. Moreover, upon graduation from a retraining program, the plaintiff may experience a period of underemployment or unemployment during his search for a position that will not only be well suited to his physical limitations, but with an employer willing to accommodate his challenges with sitting for any length of time. On the latter point, I do accept the defence position that the plaintiff's limitations can be accommodated with equipment such as a sit/stand desk, or by him taking frequent short breaks. However, even with accommodation for his limitations, at least initially, he may only be able to handle part-time employment, or part-time on an intermittent basis until he is able to develop a tolerance level for full time employment. In addition, while the plaintiff has not proven that he will have to undergo more back surgery, this factor remains a possibility, along with a 30% chance that he will suffer a relapse of his major depressive disorder.
- [143] When I take into account all of the above factors, I find, on the whole of the evidence, and weighing the parties submissions on this issue, that a fair and reasonable award to the plaintiff for future income loss is \$750,000.

4. Future Care Costs

[144] In *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), McLachlin J. (as she then was) at pp. 83-84 set out the principles for an award of damages for cost of future care:

If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [1982] 3 W.W.R. 385, 20 C.C.L.T. 64, 14 M.V.R. 212, 15 Man. R. (2d) 35 (C.A.), leave to appeal to the Supreme Court of Canada refused [17 Man. R. (2d) 180n, 45 N.R. 180]. In that case it was suggested [p. 419] that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of "autonomy, privacy, financial stability and pride of ownership and greater opportunities for gardening, owning a pet, and more space for hobbies". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

An award must be moderate, and fair to both parties But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

This then must be the basis upon which damages for costs of future care are assessed.

It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[145] Future care costs must be justified as reasonable both in the sense of being medically justified and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur. In *Izony v. Weidlich*, 2006 BCSC 1315, the court stated (at paras. 73-74):

[73] The defendant cites *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) for the proposition that future care costs must be objectively based on medical justification and reasonableness.

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at para. 35), or for items or services that it is unlikely he will use in the future.

- [146] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, the court provided a reminder that a little common sense should inform awards of costs of future care, however much they be recommended by experts in the field. At para. 13, the court said:
- [13] Ms. Katalinic drew our attention to the Court's comments in *Travis v. Kwon*, 2009 BCSC 63, where Johnston J. said this about claims for damages for future care costs:
- [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
- [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
- [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

This is a reminder that a little common sense should inform claims under this head, however much they may be recommended by experts in the field.

- [147] The particulars of the plaintiff's claim for cost of future care are set out in the report of Ms. H. Thériault, an occupational therapist, dated January 18, 2013. The future cost of care multipliers and the corresponding present value of future care expenses applicable to the plaintiff are contained in the report of Mr. G.F. Taunton of PETA Consultants Ltd., dated January 21, 2013.
- [148] The future cost of care items claimed by the plaintiff are set out in a table prepared by the defendants, as follows:

Item

Medical caregiver or expert witness who recommended expense

Claim by plaintiff

Defendant's Submission

Physiotherapy (and travel)

H. Thériault, O.T.,

Jan. 18, 2013, p.8, 17

\$18,151

(\$800/yr. + \$240/yr. for travel to age 59)

\$5,000

Rehabilitation Assistant / Kinesiologist (and travel)

H. Thériault, O.T.,

Jan. 18, 2013, p.18

\$29,778

(\$1,313/yr. + \$394/yr. for travel to age 59)

\$8,535

Vocational counselling

R. Carlin,

Dec. 27, 2012

\$2,250

(3 times \$1,050 each, every 10 yrs)

\$1,050

Occupational therapy; ergonomic assessment (and travel)

H. Thériault, O.T.,

Jan. 18, 2013, p.8

\$1,736

(2 times at \$800+ \$240 travel, every 10 yrs)

Nil

Psychological counselling

Dr. Lu; Dr. Caillier

\$5,163

(12 sessions every 10 yrs, 4 times)

\$5,163

Meal preparation; cleaning; shopping

H. Thériault, O.T.

\$124,729

Nil

Home/yard maintenance

H. Thériault, O.T.

\$38,307

Nil

Fitness centre pass

H. Thériault, O.T.

\$10,543

(\$462/yr.)

Nil

Yoga

H. Thériault, O.T., Dr. Caillier

\$14,376

(\$630/yr.)

Nil

Medication

H. Thériault, O.T.

\$69,554

\$40,000

Assistive devices

H. Thériault, O.T.

\$11,368

\$4,716

TOTAL

\$325,957

\$64,464

Contingency for expenses if plaintiff has surgery for recurrent L4-5 disc herniation

\$13,419

Nil

- [149] I agree with the defendants that in the case of physiotherapy treatments, rehabilitation assistance, vocational counseling and occupational therapy, the recommendations of Ms. Thériault are not supported by the evidence. In the case of physiotherapy treatments and rehabilitation assistance/kinesiologist services, the medical evidence does not justify 28 years of such treatments. Mr. Carlin recommended only one allotment of counseling, 10 hours at \$100 per hour. I agree with the defendants that the item for occupational therapy assistance for the plaintiff to undergo ergonomic assessment for a work station in his home is not medically justified on the evidence. As the defendants pointed out, this item is based on the plaintiff working from his home, a contingency that may never arise. However, I disagree with the defendants' position on the quantum of the awards for these items. Rather, I find that the appropriate award for these items is an amount of \$30,000.
- [150] I find that the items for meal preparation, home and yard maintenance, a fitness center pass, yoga sessions and assistive devices (i.e. change of bed mattress every five to seven years) should be disallowed. In my opinion, the plaintiff has failed to prove that these items are either reasonable or medically justified.
- [151] I find that the plaintiff's claim for the item of medication in the amount of \$69,554 should be allowed, but that the item for costs associated with more surgery should be disallowed given my earlier finding on this issue.
- [152] Accordingly, I find that the plaintiff is entitled to the amount of \$100,000 for future care costs.

Special Damages

- [153] The plaintiff's claims for special damages are set out in the Schedule of Special Damages at Tab 9 of Exhibit 4. The expenses for the MRI scans are, by agreement, to be removed from the special damage claims and will be dealt with as disbursements. The plaintiff also abandoned his claim for running shoe expenses (\$195.99). The plaintiff's special damage claims therefore total \$6,728. The defendants agree that special damages can be assessed at \$6,728.

Conclusion

- [154] The plaintiff is entitled to judgment for:

Non-pecuniary damages

\$130,000

Past Income Loss

\$300,000

Future Income Loss

\$750,000

Cost of future care

\$100,000

Special damages

\$6,728

TOTAL:

\$1,286,728

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen

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Prepared on 29 October 2026 · Esheria