
CANADA / JUDGMENT

Bennett v. Leschuk

2020 BCSC 681

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 681 Bennett v. Leschuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bennett v. Leschuk,

2020 BCSC 681

Date: 20200501

Docket: M52929

Registry: Kamloops

Between:

Bejay Thomas Bennett

Plaintiff

And

Shaughn Leschuk

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

D. McNamee

M. Putnam

Counsel for the Defendant:

G. Thomson

R. Schubert

Place and Dates of Trial:

Kamloops, B.C.

October 17, 18, 21-25, 2019

Place and Date of Judgment:

Kamloops, B.C.

May 1, 2020

I. Introduction

- [1] Bejay Bennett was injured in a motor vehicle accident that occurred on June 4, 2015. Liability is admitted, so the trial of this matter proceeded on the issue of damages only.
- [2] Mr. Bennett worked for a number of years as a portable rig welder in Alberta, which was work that paid well. However, in the few years prior to the accident, Mr. Bennett fell into personal difficulties, including substance abuse. Family members encouraged him to move to Kamloops, where his mother lived, to get his life in order. In Kamloops, he stabilized his life and obtained modest employment, though not as a welder. It was then that the subject accident happened.
- [3] The plaintiff says that, but for the accident, he would have returned to Alberta and resumed relatively high-paying work as a welder. He says his injuries now prevent him from doing so.
- [4] The defendant says: (1) the plaintiff is a poor historian and his evidence about his past and present injuries is not reliable; (2) he failed to undergo recommended treatment that offered the prospect of symptom improvement; and (3) there is no real and substantial possibility he would have returned to Alberta to work as a welder.
- [5] Initially, the driver and owner of another vehicle were named as additional defendants, but the plaintiff discontinued this action against those parties in December 2016. At the outset of trial, I made an order removing them from the style of cause (an order that evidently has not yet been entered), thus leaving Shaughn Leschuk as the sole defendant in the style of cause.

II. Plaintiff's Case

A. The Plaintiff

The Accident

- [6] At the time of the accident, Mr. Bennett, who was then 37 years old, was riding as a passenger in Shaughn Leschuk's 1991 Ford Ranger pickup truck. They were travelling eastbound on Highway 1 in the Valleyview area, east of Kamloops. The plaintiff said the speed limit in that area is 70 to 80 km/h and he estimated the Leschuk truck was proceeding at approximately that speed.
- [7] Near Highland Road they approached the scene of a car accident located in the other (westbound) lanes, which was causing eastbound traffic to slow. Mr. Leschuk changed lanes from the right lane to the left lane, doing so in a manner that caused some binders in the truck to fall down. As Mr. Bennett bent down to pick them up, the Leschuk vehicle struck a stopped pickup truck that was in front of them.
- [8] Because Mr. Bennett was leaning forward, trying to retrieve the fallen binders, he had no opportunity to brace himself for the impact. Mr. Bennett believed the Leschuk vehicle was still going about 70 to 80 km/h at the time of impact, he believed Mr. Leschuk did not have much chance to brake, and he did not recall hearing any screech of tires or brakes.
- [9] Mr. Bennett said he was in immediate pain, with pain radiating from his temple down his right arm, and pain in his neck. He lost feeling in his fingers, and he was also in shock. He walked to the centre median and then collapsed.
- [10] Emergency Health Services personnel were already on scene as a result of the other accident, and they put him on a back board and transported him to Royal Inland Hospital, where he stayed for about four days. There, he had x-rays, a CT scan and, eventually, an MRI scan. He was referred to Dr. Jean-Francois Chevalier, a neurosurgeon, because (as Mr. Bennett understood it) he was to be assessed for a possible broken neck.

Post-Accident

- [11] Mr. Bennett said he suffered injuries to his neck and shoulder. He had immediate pain in both areas, together with a loss of sensation and the feeling of "needles" in his abdomen and legs. He did not recall being given any specific medical recommendations on his discharge from hospital, but on his own initiative he took massage, acupuncture and neurotherapy treatment, the latter being a naturopathic treatment which he said involved freezing in his neck area.
- [12] He returned to work in January 2016. He said by that point his "idea of pain changed" and he was no longer expecting to be healed. Instead, he was trying to make the pain more manageable.
- [13] Mr. Bennett said he received some occupational therapy "during work" starting in 2016, although he did not elaborate on this. From December 2018 to April 2019 he attended a program involving a kinesiologist and an occupational therapist. There were 14 one-hour sessions. The occupational therapist did not attempt to get him back to welding, but instead

the sessions involved stretching exercises for his core muscles and neck. The first few sessions caused him severe pain and migraine headaches, so the therapist cut back on the exercises.

- [14] He continued the exercises at home. He did not get any significant benefit from the therapy and exercises, although he did get a little more mobility in his neck. He is now able to manage the pain somewhat by guarding against those things that set it off.
- [15] He said he gets migraine headaches on a regular basis. He never experienced migraine headaches prior to the accident. The headaches have become more frequent. They vary in severity. Sometimes Advil is effective in quelling the headache pain. There are some days when he does not have headaches but these are few and far between.
- [16] Mr. Bennett said he attended a "back to work" specialist approximately six to eight months prior to trial (that would make it approximately the spring of 2019), where he discussed with a consultant a possible return to welding and did a brief welding attempt, but the attempt only lasted about one minute.
- [17] Mr. Bennett underwent two facet blocks in his neck, but they did not result in any pain relief. The injection areas were painful for two weeks. He has also been given a referral for a nerve root block, but he has not followed up with it.
- [18] Mr. Bennett said he has been on a waiting list for a chronic pain clinic for two years.
- [19] He said that if he could afford it, he would undergo more massage, acupuncture and neurotherapy treatment. These therapies "loosen up the tissues". He would consider taking further kinesiology sessions. He is not certain about undergoing corrective surgery because he is not sure it is an option.
- [20] Mr. Bennett said he was prescribed a large variety of medications, including oxycodone, Tylenol 3, cyclobenzaprine (Flexeril) and anti-inflammatory medications. He also took Percocet pills that he acquired illicitly.
- [21] He does not take prescription medications currently, other than, occasionally, muscle relaxants; after the accident, he ended up taking so many medications that he ended up in a rehabilitation facility. He does consume cannabis in various forms, including edibles, topical creams and by smoking it. He said it helps his body relax and "I don't feel pain nearly as much in my neck and shoulder".
- [22] He attended the drug rehab facility about a year after the accident. He said his drug problem was due to using cocaine, barbiturates, painkillers and alcohol. He said the accident "definitely" had an effect on his substance abuse, as he had never taken pills much before the accident. The accident also prompted increased cocaine use as he felt "hopeless again" and felt he was "going backwards". He delved right back into his former substance abuse and not only lost all the gains he had made, it was now worse than before. On one occasion he just about overdosed, and he thought he had had a heart attack.

- [23] Mr. Bennett said he did in fact have a heart attack some years prior, around 2011, when he was working very long hours and drinking excessive quantities of energy drinks to keep going. This was before he started using cocaine. He took a few weeks off after that incident, and then returned to work. He has not had any heart issues since.
- [24] When he was taken to the rehab facility he was in such poor shape that he thought he was going to die. After discharge, he felt better every day, and even to the present he continues to improve. He stopped his cocaine use and stopped taking pills. His alcohol consumption reduced to two or three beers a day. He attended Narcotics Anonymous regularly in the months after he was discharged.
- [25] Mr. Bennett does not consider that substance abuse is a problem for him any more. He said his cannabis use is for pain control. The side effects are that he is tired a lot and does not sleep well. His employer knows about his cannabis use; he is not permitted to smoke it at work, so while at work he uses cannabis pills and creams only. He spends \$600-\$700 each month on cannabis products, though later in his testimony he said it was \$500-\$600 per month. He does not have receipts because he does not buy from a legal outlet. He said the cannabis products at the legal outlets are quite a bit more expensive.

Pre-Accident Employment

- [26] Mr. Bennett left high school after grade 9, although he later completed a grade 10 equivalency in order to qualify for an apprenticeship program. By about 1999 he was working as a labourer in a welding shop, and he began a welding apprenticeship in 2000. By 2003, he was a lead hand in the welding shop, supervising 12 to 15 employees. He continued with that employment until 2005 or early 2006, when he left to do contract welding for a year. He then set up his own business using a welding truck as a "portable rig".
- [27] Mr. Bennett said there was a significant difference in pay between shop welding, where the pay was in the range of \$35 per hour, and welding in the field, which paid in the range of \$45-\$55 per hour. There is, however, a lot more heavy lifting involved in the field than in a shop.
- [28] Mr. Bennett said contract welding required him to be on call at all times. He said it would be typical for him to work six days a week, and a typical day was 12 hours long.
- [29] Mr. Bennett's earnings from 1999 to 2003, as disclosed in his income tax returns (as per the agreed statement of facts entered as Exhibit 1), are as follows:

1999:

\$31,569

2000:

\$34,394

2001:

\$48,133

2002:

\$35,630

2003:

\$42,142

[30] Mr. Bennett said between 2004 and 2014 he was earning between \$120,000 and \$140,000 per year, but he does not have income tax returns or assessments for that period. He said he fell behind in his taxes and was audited in 2004. He then stopped filing income tax returns, although he still paid taxes because they were deducted at source. In cross-examination, he clarified that he paid taxes in 2005 and 2006, but he then became a contractor. From 2007 to 2015 he did not pay taxes, although he put money aside for the purpose. He said his tax situation is a problem that he is currently trying to address.

[31] Mr. Bennett has reconstructed his income from bank records obtained through his counsel. He said other records had been destroyed by his common law spouse. His bank records show total deposits to his account as follows:

2010:

\$124,942

2011:

\$60,172

2012:

\$123,283

2013:

\$69,476

[32] Mr. Bennett continued with his portable rig welding work until the end of 2013 or early 2014.

[33] As I will note in more detail later, Mr. Bennett moved to Kamloops in February or March 2014, where he lived with his mother and her husband, Robin Reeb. Mr. Reeb owns a marine and snowmobile repair shop, Robin's Marine. Mr. Bennett did some odd jobs around their house, and some minor work at Robin's Marine, in order to help pay his way. He was paid in cash. The minor jobs became a little more substantial as he began to demonstrate his reliability, and these included some "nominal" welding and mechanical work. He was formally hired at Robin's Marine just two and a half weeks prior to the accident.

- [34] When asked why he did not return to Alberta at that point, Mr. Bennett said "I felt I should give it a try here first", and "not spend my cheque on party mode". He said that while he had not discontinued drug use completely, his use was minimal and it was not the "binge partying" he had been doing earlier.

Pre-Accident Health and Personal Life

- [35] Mr. Bennett said he broke his ankle in mid-2011 in a workplace accident. He was off work for six months.
- [36] Mr. Bennett said he was in a common law relationship for a number of years. The couple had a daughter together, although he has not seen the child since 2013. There was increasing conflict in the relationship and they separated sometime prior to September 2012. Mr. Bennett said he was using drugs by this point, but not an excessive amount. He acknowledged that by mid-2013 he was spending money on alcohol and cocaine. He said, "I was going through a lot, and doing all the wrong things", although he emphasized that he did not use alcohol or drugs while working. In the latter months of 2013 he was drinking heavily, using drugs more frequently, and not working very much.
- [37] Mr. Bennett moved to British Columbia in February 2014, and by March he was in Kamloops, where his mother lived. He moved to Kamloops at the encouragement of his brother. By that point he was no longer supporting himself. In Kamloops he was supported by his mother and her husband. He said his plan was to get his life in order and get off drugs though, when asked, he said alcohol was also a problem at that time.
- [38] Mr. Bennett said his longer-term plan was to return to Alberta and resume welding work. He and his brother (who is also a welder) had an idea of going into business together. He said that with the exception of his mother, all of his family live in Alberta. This includes his brothers, grandparents, aunts and uncles, and nieces and nephews.
- [39] He left some of his possessions in Alberta, with his brother; in particular, a Harley-Davidson motorcycle. It has since been sold. He said it was an older, "hard mount" motorcycle that had a lot of vibration. The vibration and the weight of the motorcycle helmet made it too difficult for him to ride after the accident.
- [40] When asked what he was doing during his pre-accident time in Kamloops, Mr. Bennett said he was "recovering from a nasty separation" where his ex-spouse would not let him see their child, he was trying to get off drugs - he was still doing drugs, though he was "starting to slow down with it" - and he was drinking too much.

Post-Accident Employment

- [41] Mr. Bennett said he returned to work at Robin's Marine in January 2016. Prior to the subject accident, it had been his intention to do welding and mechanical work there, but this was not his role on his return. Instead, Mr. Reeb set him up in a sales role. He was paid \$19 per hour to start.
- [42] Mr. Reeb accommodated Mr. Bennett's limitations by elevating his work desk and raising the computer screen.
- [43] Mr. Bennett said he did not feel ready to return to work at that point, but his temporary total disability (TTD) benefits were not paid in a timely way and he needed money to live as he had been borrowing money from his parents.
- [44] Mr. Bennett received raises as follows: to \$20 per hour by May 2016; \$21 per hour in June 2016; and to \$23 per hour in January 2018. He does not see much scope for further increases because Mr. Reeb has told him "he's pretty much maxed" in terms of pay rate. The only potential upside is in bonuses that are paid for parts sales.
- [45] Mr. Bennett's post-accident earnings are as follows:

IT Returns or T4 Slips

Pay Stubs

2016

\$43,398

\$42,575

2017

\$38,030

\$35,043

2018

\$50,384

\$44,957

2019*

\$17,290

*January 1 to June 30, 2019

- [46] Mr. Bennett said the amounts differ between income tax assessment and pay stubs (in particular, for 2018) because of the bonus structure system at Robin's Marine, which is something he did not explain. He said his income was lower in 2017 due to the time off needed for medical and fitness testing and assessments. But for that, he expects that his income would have increased.
- [47] He has not looked for work outside the Kamloops area. He felt any employment would not be long-term given his physical limitations. At the same time, he said he does not think he will be continuing in his present employment in the long term, as there are some "family issues" involved in that employment.

Ability to Do Welding Work

- [48] Mr. Bennett has offers of work as a welder. One letter, dated October 5, 2017, is from his brother, Cody Bennett. It confirms an offer of employment was made to the plaintiff and that the plaintiff "had to turn me down due to his physical condition". The pay rate offered was \$45-\$50 per hour. The other letter, dated October 24, 2017, is from Chad Fedorkie of Tig's Fabrication & Welding Ltd. In it, Mr. Fedorkie confirms that he has a welding position for Mr. Bennett "right now" if he were able to perform the duties involved. The offered rate is \$50-\$55 per hour.
- [49] Mr. Bennett acknowledged that these letters were prepared for the litigation, as most employment offers in this industry are made verbally. Mr. Bennett added that he has had job offers from "multiple other people" and said he had a lot of connections in the industry.
- [50] Mr. Bennett said he has tried to do some welding post-accident. He said he built "a few small racks" but he needed help to do so. He found it painful to have a heavy welding helmet on, which caused neck pain, and he was not able to flip the shield up and down, as welders have to do, using a type of snapping motion. He also found it hard to hold things on his left side. He had to have others help him.
- [51] When asked for examples of "big" welding jobs, Mr. Bennett mentioned silos, hoppers and "BOP stacks", which are wellhead controls. He said these are fabricating jobs, not merely welding jobs. The item must be fitted, then tacked together and welded.
- [52] A fabricator is at the top of the hierarchy of welders, and is a tradesman who can plan and carry out a job from start to finish without any assistance. A fabricator is usually a journeyman who has years of experience. Mr. Bennett considers himself to be a fabricator.
- [53] Mr. Bennett said just about every aspect of fabrication "would be impossible now", including lifting heavy materials, crouching, kneeling and tacking objects. Much of that work is done in circumstances where his neck is flexed, and the only position in which his neck is comfortable is straight up and down. For the same reason, overhead work is difficult for him.

- [54] Mr. Bennett described several aspects of welding which indicated the heavy work involved. He said an oxygen bottle weighs 150 pounds when full (135 pounds when empty) and, for him currently, even objects weighing four or five pounds are a problem. Similarly, welding on a oil and gas derrick might require (for arc welding) climbing the derrick while carrying 100 pounds of cable, which runs from a generator on the truck.
- [55] Setting up at a site involves unravelling cables, setting up tools (grinders and oxy-acetylene torches), getting these items to the specific location needed, and then welding, cutting, grinding and, throughout, moving materials.
- [56] He acknowledged that surveillance video shows him carrying what appears to be a metal container, but he said this was an air tank that weighed only 22 pounds.

Other Lifestyle Effects

- [57] Mr. Bennett said that prior to the accident he led an active lifestyle. His most common activities were snowmobiling in winter and dirt biking and water sports in summer. His former snowmobiling activities involved long trips by snowmobile just to get to the mountains, and the activity at the mountain itself involved highly active body movements and occasional heavy work to dig out a stuck snowmobile.
- [58] He sold his snowmobile after the accident, although he has since bought a smaller one so that he can ride it with his nine year old niece. He also sold his dirt bike, along with his motorcycle.
- [59] He used to play hockey with his nieces and nephews, or go skating or skiing. He does not do those things now. He does not roughhouse with his nieces and nephews either. On one occasion after the accident he tried to trampoline with them but he had to stop right away.
- [60] Prior to the accident he enjoyed waterskiing, knee boarding, swimming and diving, but he has not done any of those since the accident.
- [61] He said that he does not engage in recreational activities now.
- [62] When asked about household activities, Mr. Bennett said he finds that pushing a lawn mower and trimming trees aggravate his neck, and so he does not want to live at a place that has a yard he would have to maintain. He is also unable to help his brother collect firewood. Prior to the accident, he always ran the chainsaw when they collected firewood.
- [63] Mr. Bennett said his injuries have affected his ability to drive. He finds shoulder-checking particularly hard. Formerly, he could drive for 14 or 15 hours straight. It is a nine-hour drive to visit his family in Alberta; for that drive he has to take a break every 30 minutes and his neck is sore while he is driving.

Cross-Examination

- [64] In cross-examination, Mr. Bennett said he believed Mr. Leschuk was "on his brakes" only just as they hit. When shown photographs of skid marks at the scene, he said this did not change his evidence, as he was not driving. He agreed it was possible their vehicle was travelling slower than 70-80 km/h, but he said he still estimated it was "full highway speed".
- [65] Mr. Bennett was questioned about treatment he sought for pain in his left shoulder area starting in September 2014. When shown chiropractic records from September 15, 2014, he said "he [the chiropractor] did an adjustment and that was it". When he was shown documents indicating he went to the hospital on September 16, 2014, he agreed it was not a "minor tweak", and he would not have gone to hospital unless it was a "big deal". He agreed he received massage treatment in October 2014 for that same complaint, but when it was suggested to him that the September 2014 injuries had not healed, he said they were well on the way to being fully healed. He explained that while he could not say he was one hundred percent better, the symptoms were not bothering him to the extent of needing painkillers.
- [66] Naturopathic records from December 2014 indicated he hurt his left shoulder after slipping on ice, with a report of severe pain. Further notes from May and June 2015 indicated his left shoulder was better, and that acupuncture had improved his shoulder, which Mr. Bennett said showed that he was in fact getting better.
- [67] Mr. Bennett agreed he told post-accident physicians and therapists that he had no prior history of neck or shoulder pain, but he said he was not thinking of minor pains. He also did not mention the ankle he broke in a workplace accident, or a low back injury he had suffered in 2004.
- [68] He agreed that he had problems with pain in his left shoulder going back to September 2014, and problems with pain in his lower back in both October 2014 and May 2015. He agreed he has had low back problems going back to 2004, which he described as an "annular tear" that healed with scar tissue. He said, "My lower back was always going to give me problems".
- [69] Mr. Bennett also said the following in cross-examination:
- post-accident, he paid for four acupuncture treatments, 10 massage treatments and four neurotherapy treatments;
 - in addition, he had five to seven occupational therapy assessments through ICBC, and he attended a physical rehabilitation program from December 2018 to April 2019;
 - in 2016 he reported to rehabilitation consultants that he had discontinued massage and acupuncture treatments "due to financial reasons". When it was put to him that he had coverage for those treatments, he said, I had financial difficulties then; cocaine use was a damper on finances";

- d) he acknowledged lengthy breaks between his medical attendances. There was a nine-month break (October 6, 2015 to August 3, 2016) from seeing his regular practitioner, and another break from September 8, 2016 to March 28, 2018, a period just short of 18 months;
- e) there were also lengthy breaks with his treatments. He said he had no treatments at all in 2017, even ones available on his benefit plan. He said, "I'd given up trying". In re-examination, he was directed to documents showing he had been referred to a vocational rehabilitation specialist in 2017, and he received the facet joint blocks in January 2017;
- f) he said he read "the first couple" of occupational therapy reports. He acknowledged that a report dated September 8, 2015 said he "needs to engage [in] a program of activation in order to maintain his underlying strength and range of motion", but he said he did not do any program like that because he was not in a position to pay. The insurer only agreed to pay "years later";
- g) he acknowledged the recommendations made in a September 2018 functional capacity evaluation (FCE) report by Sheila Branscombe for further rehabilitation services that would likely benefit him, but said he had not pursued any of the recommended programs despite the fact that they were being paid for by the insurer;
- h) he acknowledged that his own kinesiology self-assessments done in late 2018 and early 2019 showed improvements in his disability scores, but said he had good days and bad days, and those scores simply reflected how he was feeling that particular day;
- i) he acknowledged that his neck is the major problem; his shoulder is also a problem, but is a lesser one;
- j) he said he still gets outdoors, as he has a boat, and he tries to get out on his boat as much as possible;
- k) he agreed that the only thing that had changed between the Branscombe FCE report (September 2018) and the FCE report by Christine Weston (July 2019) was his kinesiology treatment;
- l) he agreed that in the FCE testing his perception of his abilities was lower than his actual performance;
- m) he acknowledged that in May 2019 physiatrist Dr. le Nobel recommended "exercise-based rehabilitation several times monthly", but said he did not pursue this because there was no funding for it;
- n) when he moved to Kamloops, he moved into an RV (loaned to him by Mr. Reeb and his mother) that was parked on their property. He did not pay rent. He was receiving TTD benefits during this time. He said his expenses were his vehicle, food and marihuana. Nonetheless, he said he had no money for treatment;

- o) he agreed he has "vast experience" as a welder, including as a welding shop supervisor, he can read blueprints and design things, and he has a good reputation in the industry. He agreed he is still able to use that knowledge but said he would not be able to be a welding instructor because he is unable to demonstrate;
- p) he agreed that on discovery he denied working for Robin's Marine prior to his formal hire there. He also agreed that on discovery, which was conducted on November 20, 2017, he testified he had returned to work at Robin's Marine "probably eight months [ago]";
- q) he acknowledged he accepted TTD benefits even after he returned to work at Robin's Marine in January 2016. He said he had an issue with the insurer because the TTD payments were not paid regularly and were therefore unreliable. He said, "I did what I felt I needed to do to keep my head above water";
- r) he feels he is doing well at Robin's Marine;
- s) post-accident, he has tried to do some welding several times: (1) a test weld with "the job search guy"; (2) a year later, fixing some shelves at Robin's Marine; (3) 18 months prior to trial, an attempt to repair a muffler, which he said did not work out because he could not get into position under the vehicle; and (4) about a year prior to trial, he installed a brace for an awning at Robin's Marine;
- t) he acknowledged that he has smoked marihuana since age 14. Prior to the accident he used it recreationally, three to four times a week. He was also drinking 24 beers a day, and even more than that after the accident;
- u) he said he was admitted to hospital in October 2015 in order to detox from excessive cocaine use. He agreed he has a history of cocaine abuse. He said he stayed 10 or 14 days (although I note the records appear to indicate he was discharged at six days);
- v) he still consumes alcohol, although much less than before. He agrees he has to think about "control" every day, and he does this through the Narcotics Anonymous "bible";
- w) he does not have a prescription for medical marihuana use. He agreed that no experts or doctors have told him to smoke marihuana for symptom relief, although Dr. Chevalier "thought it was okay";
- x) he agrees he has a good support network in Kamloops, but said "I never planned to stay here";
- y) he agreed there is a downturn in the energy industry at present, "but it's turning around"; and
- z) when it was suggested to him that he has made no attempt to return to Alberta, he said "I was just starting out again". When asked if he has looked into any potential jobs, he said "as far as I know, there are no suitable jobs available" and "I don't feel I can do the work". His belief is that he will never heal, and so he believes he will never weld again.

B. Cody Bennett

- [70] Cody Bennett is the plaintiff's brother. He lives in Leduc County, Alberta, which is just south of Edmonton. He is 38 years old and he has been a welder for about 20 years. Because he shares the same surname as the plaintiff, I will not refer to him as "Mr. Bennett" and will occasionally refer to him by his first name.
- [71] Cody Bennett began work in a welding shop, where his father was the foreman. The plaintiff worked at the same shop. The two of them worked together for years, both in shops and on rigs. Both specialized in drilling rigs, but they would work on anything. He that even when each were running their own trucks, his brother always had work. He said the quality of his brother's work was "second to none", and he was a timely, hard worker.
- [72] Cody Bennett said 40 hours per week would be a short week for a welder. He said 58 hours (five 10-hour days plus one 8-hour day) would be standard.
- [73] Cody has offered work to his brother. The rates in effect today are not really different from those he quoted in his offer letter of October 2017.
- [74] Cody Bennett said welders using portable rigs have to work outside, in the elements, with heavy pieces and in confined spaces. He said you have to contort yourself, do overhead work and do work in awkward positions. He said he would require a welder to pass a 50-pound lift test before hiring the person because the work involves heavy lifting of such things as steel and other fabrication material, along with equipment like a MIG welder unit (which I gathered was a type of arc welder), which weighs 45 kg.
- [75] His own income has varied, but over the last ten years it has not been less than "six figures". Portable rig welders get paid more than shop welders because the work is more physically demanding.
- [76] When asked why the plaintiff left Alberta, Cody said his brother was having trouble with a nasty separation from his wife, and his brother started drinking too much and doing cocaine. He had many conversations with their mother, and the decision was made to get him to Kamloops and get him straightened out. The plaintiff left some of his goods at Cody's place.
- [77] Cody Bennett said he had and has a good relationship with the plaintiff. They used to wrestle one another, ride their motorcycles and snowmobiles and cut firewood together. His brother cannot do those things now.
- [78] When asked if the plaintiff could work with him, Cody said "he couldn't be on the floor, on the tools". It is not just his brother's physical limitations, but it is mental as well because "he stresses easily". He said, "He's just not the same guy".

- [79] In cross-examination, Cody Bennett agreed that there are other types of welding jobs, some of which are less strenuous, but even in those positions you can have hard days and easy days.
- [80] He acknowledged that he made the job offer to his brother knowing that his brother could not do the work.
- [81] He was aware his brother had problems with alcohol, cocaine and marihuana, but he did not know if those problems continued after he moved to Kamloops. So far as Cody knew, his brother enjoyed his living situation in Kamloops. He said, however, "for sure I knew he was coming back [to Alberta]".

C. Chad Fedorkie

- [82] Mr. Fedorkie is a portable rig welder. He is 40 years old, and he has been a welder since age 17. He has been a portable rig welder since 2005 and obtained his Red Seal journeyman ticket in 2008. He said he obtained his Red Seal qualification in order to work on high pressure pipe, but otherwise it is not a necessary qualification for welding.
- [83] Mr. Fedorkie described a portable rig as being a "shop on wheels". He said he has been everywhere with his rig - servicing oil rigs, mining equipment and agricultural equipment, as examples - and is on call "24/7". He manages his own company and does not have any employees; instead, he hires contractors.
- [84] Mr. Fedorkie said working spaces vary a lot, but with equipment repairs it is often necessary to contort oneself in order to carry out an inspection and repair. He gave as examples a repair to the undercarriage of a bulldozer, the repairs of pieces of equipment in the bush and the repair of a "bell hole" tool (used for pilings), which required him to work overhead while lying on his back. He said it is heavy work that is physically demanding. Also, it is not work that allows for breaks as it is important to maintain the temperature of the materials while welding.
- [85] He said a welder working as an employee would earn income in the range of \$110,000 to \$180,000-\$200,000 per annum, and a welder working as a contractor would earn between \$100,000 and \$500,000. Current rates are \$50-\$60 per hour for a "hand welder", who is a welder with no equipment, and \$85 to \$125-\$140 for a portable rig welder (that is, a welder with his or her own equipment).
- [86] When asked what he looks for in a welder, Mr. Fedorkie said "skill set" (including fabrication skills), dependability, reliability, training and reputation, the latter because the industry tends to rely on word of mouth.
- [87] A welding helmet is mandatory, and some jobs (those in Fort McMurray in particular) also require the use of respirators.

- [88] Mr. Fedorkie has known Mr. Bennett since 2005. The two of them were part of a group of welders who were able to work with minimal supervision. He worked with Mr. Bennett for about five or six years. Most of their work was fabricating drilling rigs. He worked well with Mr. Bennett because he could trust him and rely on him to do quality work.
- [89] Mr. Fedorkie said he still has a good relationship with Mr. Bennett and "has a truck waiting for him" if he wanted to do welding work. He made that offer to Mr. Bennett, but the offer was declined because Mr. Bennett said he had been in an accident and "his body is screwed".
- [90] In cross-examination, Mr. Fedorkie said there are "endless" options for welding work, including jobs that are not as physically demanding. He agreed that welding in a shop was an employment option, although "you could be hanging in the air there too", which I took to mean that there could be awkward working conditions for even a shop welder. He agreed that shop work was not as strenuous.

D. Georgina (Gina) Anderson

- [91] Ms. Anderson is the plaintiff's mother and is the common law spouse of Robin Reeb, the owner of Robin's Marine. She is the office administrator at Robin's Marine.
- [92] Ms. Anderson said she lived the majority of her life in Edmonton. She moved to Kamloops in 2012.
- [93] Ms. Anderson was not sure when the plaintiff started work at Robin's Marine. She gathered all his pay stubs and determined there were none from 2015.
- [94] When the plaintiff moved to Kamloops he did jobs to cover his room and board. He was not paid for this work, other than "pocket money". He moved to Kamloops due to a marital breakdown, which he did not handle well. He began to drink heavily and he got involved in drugs. She and Mr. Reeb convinced him to come to Kamloops to get away from the situation and to heal. When he finally agreed they rushed there to pick him up before he changed his mind. She thought her son was suicidal. He brought little more than his clothes and left such things as his vehicles, his motorcycle and all his furniture.
- [95] To her knowledge, her son did not have drug or alcohol problems prior to the breakup.
- [96] In the time prior to the accident there was no change in the plaintiff's role at Robin's Marine, although his status changed such that he was "officially" working there. When asked about the type of work he was doing, Ms. Anderson said "quite a bit of welding and manufacturing", as he build racks for parts to hang on, and he built Ms. Anderson's office. In cross-examination, Ms. Anderson said she was not sure if the plaintiff build that office before or after the accident.

- [97] Ms. Anderson did not recall how long the plaintiff was off work after the accident. She was also not sure how much progress he had made with his drug and alcohol issues up to the date of the accident. She noticed a change in his drug use after the accident because he had various prescriptions and was "eating those like candy". He was also drinking a considerable amount, although she conceded he was drinking a lot prior to the accident as well. His alcohol had not been a problem insofar as his work was concerned.
- [98] She acknowledged she was in denial about her son's substance abuse problems, but eventually she took him to a detox centre, where he stayed a week. After that, he "got off all the pills" and drugs were no longer a "huge problem". He would still drink alcohol, but not as excessively. There was no follow-up by the clinic, but the plaintiff attended Narcotics Anonymous meetings quite frequently at first.
- [99] She was aware the plaintiff consumed cannabis prior to the accident, but his use increased a lot after the accident.
- [100] They created a new position for him, a sales position, at Robin's Marine. Mr. Reeb had done sales prior to that. Ms. Anderson said the plaintiff "got rather good at it". They also hired a person to be a "parts picker", whose role it was to take the used parts off old equipment.
- [101] In cross-examination, Ms. Anderson said that prior to the plaintiff's formal hiring at Robin's Marine, he worked there whenever Mr. Reeb asked. She said the plaintiff worked there "a lot of days but not every day".

E. Devan Wyka

- [102] Mr. Wyka is a small motor technician at Robin's Marine and is a friend of the plaintiff. He has been an employee there since 2013, and has worked with the plaintiff. When asked what the plaintiff did at work prior to the accident, he said he did any welding that was needed, fabricated racks, river-tested boats and helped customers. Some of the boat testing was heavier work as it involves winching a boat onto a trailer, carrying jerry cans and tools and lifting motor hoods. In cross-examination, he added that the plaintiff was working at Robin's Marine steadily.
- [103] Prior to the accident, Mr. Wyka socialized with the plaintiff outside work. They went snowmobiling, boating and fishing together.
- [104] After the accident, the plaintiff's work role changed. He was now on the desk. He used to work in the yard and would "pull parts" off old equipment, but now someone else has to pull the parts. He has seen the plaintiff try to weld, but it only lasted a couple of minutes. The plaintiff could not keep the helmet on. He also does not lay underneath vehicles anymore.
- [105] They tried snowmobiling after the accident, but the plaintiff lasted only 20 minutes. He is also limited when boating as he is unable to unload the boat.

[106] In cross-examination, Mr. Wyka said the plaintiff is a good worker, although he has had to take time off for appointments. He said the plaintiff tried to help him weld the muffler on his car but could not finish the job.

F. Robert Fox

[107] Mr. Fox is a mechanic and the shop foreman at Robin's Marine. He described the plaintiff's post-accident role as "partsman". The plaintiff organizes parts sales, organizes the yard, and does a bit of welding and fabricating.

G. Dr. Jean-Francois Chevalier - Neurosurgeon

[108] Dr. Chevalier is a neurosurgeon who has a sub-speciality in spinal surgery. He testified that 80-85% of his work is spine-related. He prepared a report dated September 7, 2017.

[109] In his report, Dr. Chevalier noted he saw Mr. Bennett in the hospital emergency room on the day of the accident. Mr. Bennett reported pain on the left side of his neck, radiating to his left shoulder and his left arm, with "pins-and-needles" sensations in his left thorax and abdomen. Dr. Chevalier performed a physical examination, noting in particular apparent dysfunction at the C6 nerve root. A CT scan revealed a left-sided disc herniation at C5-C6 that appeared to be displacing the spinal cord. He also noted a small bulging of the disc at C6-C7. A subsequent MRI revealed the C5-C6 disc herniation to be smaller than was suggested by the CT scan, and it was not compressing the spinal cord. He said Mr. Bennett was discharged with analgesics and a recommendation to resume his activities and work as tolerated.

[110] Dr. Chevalier saw Mr. Bennett again a year later, on a referral from another physician. Mr. Bennett reported that essentially the same issues persisted. Dr. Chevalier recommended facet blocks. These were carried out in January 2017, but they did not result in any symptom relief. Dr. Chevalier recommended a further block be done around the left C5 nerve root. At the time of writing his report in September 2017 that nerve root block had not been performed.

[111] In his report, Dr. Chevalier concluded that the disc herniation at C5-C6 was "quite unlikely" to be the source of Mr. Bennett's pain, though he said the results of the nerve root block might change his opinion. He gave various reasons why he was of that opinion. He said the bulging C6-C7 disc was "even less likely to be responsible for his symptoms". Dr. Chevalier's working diagnosis was "essentially a soft tissue injury to the cervical spine".

[112] In his report, Dr. Chevalier said Mr. Bennett is very significantly disabled by the pain to his neck and the associated paresthesias he experiences on the left side. He concluded:

More likely than not, he has suffered some significant degree of soft tissue injury to his neck during the accident of June 4th, 2015, and this is remaining painful. Unfortunately, surgery has no quick and easy solution for this type of pain.

- [113] In his testimony at trial, Dr. Chevalier said the utility of nerve and facet blocks is mostly diagnostic, meaning that they can help pinpoint the source of symptoms.
- [114] In cross-examination, chiropractic and naturopathic records from September 2014, indicating complaints of left-side neck pain, were put to Dr. Chevalier, and he agreed the reported complaints were similar to those Mr. Bennett reported to him. Dr. Chevalier also agreed that without a pre-accident CT scan of the cervical spine, it was not possible to say that the C5-C6 abnormalities shown in post-accident scans were present prior to the accident. He added that 15 to 20 percent of adults have a disc herniation that is asymptomatic.
- [115] Dr. Chevalier said that, to his knowledge, the nerve root block he had recommended had not been done. He said he would still recommend that it be done. If pain were to subside as a result of the nerve root block, then this would be indicative of pressure on the nerve root, and in such a case it might be possible to relieve the pain through surgery.
- [116] Dr. Chevalier was asked about a comment noted in Dr. le Nobel's report, where Mr. Bennett reportedly said he had been told by Dr. Chevalier that physiotherapy would not help and might do more damage than good. Dr. Chevalier said he would not have said that. He said getting back into shape is recommended.

H. Dr. John le Nobel - Physiatrist

Report

- [117] Dr. le Nobel prepared a report dated May 2, 2019. In his report he reported the plaintiff's complaints as being headache and neck pain, left shoulder pain, sensory symptoms in his left arm, low back pain and left leg pain. Dr. le Nobel diagnosed the headache, cervical and lumbar spinal and paraspinal pain as chronic pain, given the length of time symptoms had persisted since the accident. He went through these areas as follows:
- a) headache: he diagnosed this as chronic post traumatic headache, possibly cervicogenic in nature (meaning generated from the cervical spine), at least in part;
 - b) neck pain: he diagnosed this as being due to myofascial tissue injuries in association with cervical spine intervertebral disc injury;
 - c) left arm numbness: he said these were consistent with irritation or injury to the nerves supplying this area, most in keeping with nerve root irritation caused by a C5-C6 nerve root;
 - d) lumbar spine pain: he diagnosed this as a myofascial tissue injury. He noted that the plaintiff himself did not attribute this injury to the subject accident; and
 - e) left leg sensory symptoms: he described as being consistent with irritation of the nerves supplying the area.

[118] Dr. le Nobel concluded the plaintiff is less capable with work, recreation and household tasks since the accident.

[119] As for causation, Dr. le Nobel said that since the plaintiff did not have pre-accident pain or symptoms in the areas in question, his limitations are "multi-factorial" and are causally related to the musculoskeletal injuries he suffered in the accident.

[120] Dr. le Nobel made several recommendations:

- a) attendance at a multidisciplinary centre for exercise based rehabilitation;
- b) pain modulators to deal with the increased pain that likely will be caused by the recommended rehabilitation, including manual therapy, physiotherapy, analgesics and transcutaneous nerve stimulation; and
- c) guidance from a kinesiologist several times monthly, with liberal access to an exercise facility, over eight to 10 months.

[121] Dr. le Nobel said the plaintiff's prognosis is guarded:

Absent some as yet unachieved improvement, I anticipate him remaining symptomatic and remaining limited for the foreseeable future most likely for the next several years and possibly longer. Some benefit is anticipated through these [previously described] measures.

There are no treatments which will, with certainty, return Bejay Bennett to his pre-collision state. It is possible with increased activity his symptoms will worsen, such that the exercise rehabilitation cannot be tolerated even with use of the analgesic measures. Most likely he will improve to the point where at least some pre-collision avocational activities and pastimes are within reach, although possibly at a reduced level. He may or may not improve to the point he feels comfortable attempting heavy welding to the degree he felt possible before the motor vehicle collision. In these respects his prognosis is guarded.

Testimony

[122] In cross-examination, Dr. le Nobel confirmed that in his interview of the plaintiff, the plaintiff "disavowed" any pre-accident neck, shoulder or upper limb symptoms, and similarly disavowed getting treatment for any such symptoms.

[123] Dr. le Nobel said he was not given either of the functional capacity evaluation reports in this case (one of which was only written after the date of his report) and these would have been important in formulating his opinion. He agreed that the plaintiff's pain self-reports generated during his December 2018 - March 2019 rehabilitation program indicated that the plaintiff had improved with this treatment.

[124] When asked if that rehabilitation program addressed the types of things he recommended in a rehabilitation program, Dr. le Nobel said "I don't see this as a great match".

I. Christine Weston - Functional Capacity Evaluator

[125] Ms. Weston conducted a two-day functional evaluation of Mr. Bennett in July 2019, and prepared a report dated July 15, 2019. In her report, she detailed her findings for 17 different activities or physical tests and compared her findings to those of Sheila Branscombe, who performed a similar FCE in September 2018.

[126] Ms. Weston's principal findings were as follows:

- a) Mr. Bennett had decreased tolerance for neck flexion, neck extension and positions which place his head or neck in awkward positioning;
- b) he demonstrated decreased tolerance for working or reaching through his left arm for prolonged periods due to pain in his neck and left upper trapezius, and he was especially impacted when working overhead with his left arm;
- c) he exhibited some difficulty at times with his ability to pick up, handle and/or manipulate objects with his left hand due to trembling;
- d) he had a high score on a test of kinesiophobia (excessive or irrational fear of physical movement due to feelings of vulnerability to re-injury), but Ms. Weston concluded he nonetheless demonstrated an overall full and consistent effort during testing; and
- e) Mr. Bennett demonstrated improved scores from those in the Branscombe FCE in the following tests: bilateral carry, bilateral lift, dynamic pull and standing tolerance. He showed decreased scores in the neck position test and tolerance for mild low back flexion or stooping.

[127] Ms. Weston concluded that Mr. Bennett does not meet the strength or positional demands for a welder as defined by the National Occupational Classification (NOC).

[128] In cross-examination, Ms. Weston said Mr. Bennett was reliable in his subjective pain reports. As an example, when he discontinued a lifting test from a squatting position due to his report of having reached his tolerable limit, his neck positioning during those lifts indicated pain behaviour.

[129] Ms. Weston agreed there were differences between the Dictionary of Occupational Titles (DOT), which is an American occupational classification, and the NOC, which is the Canadian reference. Ms. Weston was aware that Ms. Branscombe used the DOT, but she concluded it was preferable to use the Canadian reference for a Canadian employment context. In the NOC, welding is rated as "heavy" work.

[130] Ms. Weston noted that Mr. Bennett had a high score on a "fear of movement" screening test, but this score surprised her because she noted no reluctance or guarded movements on Mr. Bennett's part during the testing.

J. Lindsay Burkatsky - Vocational Rehabilitation Consultant

[131] Ms. Burkatsky prepared a report dated July 17, 2019. This was a second report in this case as she had also prepared a report in September 2017.

[132] Ms. Burkatsky relied on various sources of information, including her own earlier report, Ms. Weston's FCE report, Ms. Branscombe's FCE report dated September 30, 2018, Dr. le Nobel's report of May 2, 2019, and a rehabilitation program discharge report completed by other professionals in Ms. Burkatsky's firm. The latter report included a note of some test welding, where Mr. Bennett was observed at his current workplace and he welded for one to two minutes, three times. The report said:

He clearly has no difficulty welding, but reported he was experiencing increased neck pain in that time. He reports he will continue to do a bit of welding at work, completing small jobs as they are needed, over approximately 1-2 hours total per week to start.

[133] Ms. Burkatsky relied on her 2017 report for employment history, other background information, testing results and current employment. I noted the following matters from her 2017 report (as quoted in her 2019 report):

- a) the plaintiff's typical work schedule at Robin's Marine was six days a week; eight hours from Monday to Friday and four hours on Saturday; and
- b) Mr. Bennett reported that he was no longer open to shift work out of town and would like to remain employed in Kamloops or closely surrounding communities.

[134] Ms. Burkatsky concluded as follows:

Based on Mr. Bennett's functional abilities it would be highly improbable for him to find an employer willing to accommodate him in an employment setting for the occupation of Welder.

[135] Ms. Burkatsky concluded the following were "suitable and realistic" occupations for the plaintiff: (1) power engineers and power systems operators (median pay of \$32.00 per hour); (2) retail/wholesale trade manager (median pay of \$28.85 per hour); and (3) couriers, messengers and door-to-door distributors (median pay of \$13.75 per hour). Ms. Burkatsky noted the power engineer occupation required a completed college training program. Ms. Burkatsky said the plaintiff's achievement test results may be indicative of a learning disability, and if this was shown (by diagnosis or otherwise) he might be able to benefit from accommodations offered through a program. In cross-examination, she said power engineering was "somewhat above his demonstrated aptitude".

[136] Ms. Burkatsky also noted Mr. Bennett's current position was a combination of two occupational categories, Retail Salespersons and Storekeepers and Partspersons. Ms. Burkatsky noted that Mr. Bennett's current position may be the best employment for him, at this time, within those two categories.

- [137] Finally, Ms. Burkatsky said Mr. Bennett would benefit from individualized job placement services.
- [138] In cross-examination, Ms. Burkatsky acknowledged that she had "filtered" for jobs available in the Thompson-Okanagan area only. She also acknowledged the DOT may well list varying strength requirements for welders (for example, the strength requirement for a welding supervisor is "light"), but she said "strength" is not the only reason Mr. Bennett cannot be a welder, it is also the positioning required. All occupation subsets within the NOC category of Welder require sustained neck flexion and positioning.
- [139] Ms. Burkatsky was asked about a note in her 2017 report that the plaintiff was looking into a "sideline" occupation as a marine surveyor. She said marine surveying was not a suitable occupation for Mr. Bennett because it involved bending and crouching, and it also fell outside his demonstrated aptitude.

K. Mark Szekely - Economist

- [140] Mr. Szekely prepared estimates of past and future average earnings, as well as multipliers for use in projections of the plaintiff's lost income.

III. Defendant's Case

A. Shaughn Leschuk

- [141] Mr. Leschuk is the defendant. He was the driver of the truck in which the plaintiff was a passenger.
- [142] Mr. Leschuk used to work at Robin's Marine and met the plaintiff there. They were friends then and are still friends.
- [143] On the day of the accident, they finished work at 4:30-5:00 pm and were on their way to the Reeb residence to have dinner. He said he was in the left lane, coming up to an intersection with a green light in his favour, when a vehicle in front swerved to avoid a vehicle stopped in front. Mr. Leschuk slammed on the brakes but he could not stop the vehicle. He estimated his speed was 80 km/h, and the speed at impact as 15-20 km/h, although he said it was hard to say. He identified a photo taken at the scene, which shows the skid marks made by his truck.
- [144] The plaintiff exited the truck on his own, and Mr. Leschuk checked to see if he was okay. The plaintiff was taken from the scene by ambulance.
- [145] Mr. Leschuk visited the plaintiff in hospital.

[146] Mr. Leschuk recalled that the plaintiff started at Robin's Marine six to 12 months prior to the accident, although he was not there full-time. He recalled that the plaintiff was there every day, but he was not sure whether he was working eight hours a day. The plaintiff sold parts, picked parts from the yard, and did a few small jobs. He did not do "a whole lot" of welding, just odds and ends.

[147] Mr. Leschuk said the plaintiff bought a boat from him in 2016. He has been boating with the plaintiff just one time.

[148] The plaintiff mentioned to Mr. Leschuk a possible return to Alberta, "but he didn't seem keen". He understood from the plaintiff that the accident had made a prior injury worse.

[149] In cross-examination, Mr. Leschuk agreed that the plaintiff was in good physical shape on the day of the accident. He agreed that any welding the plaintiff did post-accident was minor work, and he did a lot more delegating rather than doing the work himself.

B. Dr. Bernard Tessler - Neurologist

[150] Dr. Tessler provided his opinion by way of a report dated July 5, 2017.

[151] In Dr. Tessler's review of history and symptoms, he notes Mr. Bennett said he is unable to work. In the plaintiff's cross-examination, he denied saying this to Dr. Tessler.

[152] Dr. Tessler said the plaintiff's complaints of left-sided neck and shoulder pain are consistent with a C5-C6 nerve root irritation, but that does not explain the numbness he reports down the left side of his body. Dr. Tessler said:

Anatomically for sensory symptoms to occur over the left side of the body the lesion has to be in the right side of the spinal cord and there is no evidence of spinal cord injury on MRI Scan to substantiate this. His weakness appears to be related to pain.

His neurological examination is normal with full range of cervical movements, yet he has a tenderness of the cervical muscles and is complaining of pain at very high levels.

His pain has become chronic. There is no indication of spinal cord bruising. He could have sustained a spinal cord concussion without any structural changes noted. This would not likely result in persistent symptoms.

His pain symptoms are out of proportion to the findings but pain is subjective.

He presents as an enigma but the presented symptoms are post-traumatic and there is no prior history of similar symptoms.

C. Sheila Branscombe - Functional Capacity Evaluator

[153] Ms. Branscombe prepared a functional capacity evaluation and cost of future care report dated September 30, 2018. She tested Mr. Bennett over two days.

[154] Ms. Branscombe reported that during eight hours of distraction-based testing, Mr. Bennett was consistent in his functional presentation. She noted, however, that the majority of his reports of functionally limiting pain were inconsistent with his functional presentation, and he showed an elevated fear of movement or re-injury and heightened sense of disability.

[155] Ms. Branscombe characterized the job of Welder as a Medium capacity occupation based on the DOT.

[156] Ms. Branscombe said her most significant findings were as follows:

- a) Mr. Bennett is capable of lifting within the Light to Sedentary capacity level;
- b) he is capable of pushing at the Medium - Heavy capacity level and pulling at the Light to Medium capacity level. His grip strength is at the Medium - Heavy capacity level;
- c) he reports functionally limiting headache pain but does not demonstrate any apparent related functional limitations;
- d) he reports "functionally limited" [sic] neck and shoulder pain as well as left side body pain;
- e) he has elevated levels in perception of pain, disability and fear of movement; and
- f) he reported symptoms consistent with moderate depression.

[157] Based on test results, Ms. Branscombe concluded that Mr. Bennett is not able to meet all of the demands of his pre-accident occupation as a welder. She added:

Specifically, he has physical strength limitations that prevent him from participating in a medium capacity job. He has pain limitations that prevent him from participating in tasks at higher frequency levels. He is deconditioned from managing the demands of medium capacity jobs and disabled by his pain perceptions, catastrophic thinking as well as symptoms of depression. Mr. Bennett is able to manage the demands of a sedentary job and could be expected to manage the demands of a light capacity job from a strength perspective.

At present, the primary issue for Mr. Bennett is pain and as such he may benefit from participating in a pain management program . If he was able to participate in work conditioning then a work hardening program, he may be able to return to Medium capacity work in the future.

IV. Positions of the Parties

A. Plaintiff

[158] The plaintiff urges the Court to consider the substantial and ongoing impact the accident injuries have had on him, which includes developing an addiction to painkillers and the aggravation of his substance abuse issues. The plaintiff was injured near his physical prime at age 37, and he has been reduced in capacity to that of a much older person.

[159] While acknowledging the absence of income tax records for a number of years, the plaintiff says this is merely an evidentiary issue, and there is a reliable body of other evidence from which income for the relevant years can be estimated.

[160] The plaintiff submits that although he was not strong on dates, he was a credible witness and he was unshaken in his testimony about his inability to perform the necessary duties of a welder. Despite 60 hours of defence surveillance, the most the investigators came up with was an instance where the plaintiff carried a 22 pound tank with his left hand over a short distance.

[161] The plaintiff submits that but for the accident he would have returned to welding work in Alberta within about two years from the accident date. This means that he is not claiming a loss based on a welder's income until that point, but his loss from that point is the difference between his current income and the income he would have earned as a welder. He submits the evidence is clear he can no longer work as a welder or in any other heavy trade.

[162] The plaintiff seeks damages as follows:

Non-pecuniary damages:

\$125,000 to \$150,000

Past income loss:

117,500

Loss of future earning capacity:

855,107

Loss of handyman capacity:

15,000 to 25,000

Cost of future care:

50,000

Special damages:

1,250

Total:

\$1,163,857 to \$1,198,857

[163] The cases cited by the plaintiff on non-pecuniary damages are: *De La Garza v. Carson*, 2018 BCSC 1858; *Kanters v. Galasinao*, 2015 BCSC 1532; *Mattson v. Spady*, 2019 BCSC 1144; *Wang v. McNaught*, 2017 BCSC 454; and *Cumpf v. Barbuta*, 2014 BCSC 1898.

B. Defendant

- [164] The defendant challenged the credibility and reliability of the plaintiff's testimony. He submits the plaintiff is an unreliable historian, which has important consequences for the assessment of damages. The defendant referred to the following examples, among others: (1) how long he had worked at Robin's Marine prior to the accident; (2) the date on which he returned to work after the accident; (3) his report to Dr. Tessler (in 2017) that he was unable to work; (4) claiming for and receiving TTD benefits despite being employed at Robin's Marine; (5) his failure to mention important pre-accident injuries; and (6) the fact that he views himself as more disabled than he actually is.
- [165] The defendant says that with further treatment the plaintiff will continue to improve and will ultimately return to his pre-accident state. On this point he noted that Dr. le Nobel said the rehabilitation program the plaintiff took from December 2018 to March 2019 was not a "great match" in terms of the program Dr. le Nobel had in mind, and even with that program the plaintiff showed improvement. On a related point, the defendant says the plaintiff has failed to seek or continue proper treatment, in circumstances where it has been shown treatment has improved his capabilities.
- [166] As for past income loss, the defendant says this should be limited to the actual time off work, plus time off work that the plaintiff took for treatments and rehabilitation, calculated on the basis of his pay rate at Robin's Marine.
- [167] As for loss of future earning capacity, the defendant agrees that this should be assessed using the capital asset approach. Although the defendant concedes the plaintiff is now less marketable, the amounts used in Mr. Szekely's report should not be the basis for an award. The defendant says the plaintiff will improve to the point of being able to engage in welding as he did prior to the accident, but there is no real and substantial possibility he would have returned to Alberta. Even if he has to find other work, his income-earning capacity is greater than that of his current position, given that employment as a power engineer has been found suitable, and given the fact that, according to Mr. Szekely, he has artificially limited his income-earning potential by considering work only in the Thompson-Okanagan area.
- [168] The defendant says damages should be assessed as follows:
- Non-pecuniary damages:
- \$70,000
- Past income loss:
- 25,358
- Loss of future earning capacity:
- 75,000

Cost of future care:

14,500

Special damages:

1,250

Total:

\$186,108

[169] The defendant cited the following cases on non-pecuniary damages: *Baxter v. Morrison*, 2012 BCSC 1214; *Blackman v. Dha*, 2015 BCSC 698; and *Dennstedt v. Lepine*, 2018 BCSC 220.

V. Discussion

A. Credibility and Reliability

[170] I agree with the defendant that the plaintiff was and is an unreliable historian. Some instances of inaccuracy in his testimony seemed to be due to a general sloppiness about dates and events, while others were more serious. Examples of the latter were: (1) his misleading and inaccurate testimony on discovery about the start date for his work at Robin's Marine; (2) his apparent willingness to make false representations to the insurer in order to get TTD benefits (justifying it by saying "I did what I felt I needed to do to keep my head above water"); (3) "disavowing" to Dr. le Nobel any pre-accident neck, shoulder or upper limb symptoms and associated treatment; and (4) at trial, denying any prior injuries other than a broken ankle, then ultimately admitting a 2004 low back injury serious enough that he said it was "always going to give me problems" and which, in fact, had given him problems in both October 2014 and May 2015, just before the accident.

[171] The plaintiff's explanation for his failure to mention other injuries - that he was not thinking of "minor pains" - is hard to accept given the severity of both the 2004 back injury and the two 2014 incidents involving his left shoulder.

[172] However, I also agree that the plaintiff readily conceded matters against his interest, was frank about such things as his substance abuse problems, and some of his misstatements were actually against his interest. These matters lead me to conclude that, with one exception (the TTD benefits), the plaintiff's credibility issues were not the result of deliberate attempts to be untruthful but were instead due to marked carelessness on the plaintiff's part.

[173] Nonetheless, these matters prompt me to be cautious about accepting the evidence of the plaintiff without testing it against other evidence, including medical records and reports.

B. Mitigation

- [174] The plaintiff was not the most diligent of plaintiffs in following recommended investigations or treatments that might help him to get better. He acknowledged that in September 2015 an occupational therapist said he "needs to engage [in] a program of activation in order to maintain his underlying strength and range of motion", but he said he did not follow the recommendation because he could not afford it. I note that his financial distress was caused in part by his cocaine use, at least for some of the relevant time, so it was self-inflicted to some extent.
- [175] The plaintiff had a fair number of passive treatments, but even these were discontinued at times because, as the plaintiff said, he had "given up trying".
- [176] Most notably, he never followed up on the recommendation of Dr. Chevalier (made, it would appear, around January 2017) that he undergo a nerve root block. Although in his report Dr. Chevalier was clear in stating that a nerve root block was more of a diagnostic procedure than a treatment, he said if pain were to subside as a result, then this would be indicative of pressure on the nerve root, and it might then be possible to relieve the pain through surgery. Given Dr. Chevalier's testimony, it is somewhat puzzling that the plaintiff did not take steps to have this procedure.
- [177] I digress momentarily to note the evidence of the plaintiff's various treatments and programs was presented in a somewhat haphazard fashion. Only some of the treatments were listed as part of the claim for special damages; others came out in re-examination of the plaintiff. Ideally, all treatments and rehabilitation programs would have been set out in a list or chronology. With one exception, the record is not complete enough to determine exactly what treatment was recommended, when any recommendations were made, and to what extent those recommendations were or were not followed. The exception is the "program of activation" which was recommended in September 2015 and which the plaintiff eventually proceeded with in December 2018.
- [178] In any event, despite what appears to be the plaintiff's less than diligent approach to at least some of his treatment and physical rehabilitation, the onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss: *Chiu v. Chiu*, 2002 BCCA 618, at para. 57. In brief, the defendant has failed to establish that the plaintiff would have reduced his loss had followed recommended treatments or investigations in a timely way.
- [179] Accordingly, I conclude the defendant has failed to establish a failure to mitigate on the plaintiff's part.

C. Findings

Injuries

- [180] I am satisfied that, as a result of the accident, the plaintiff suffered "a significant degree of soft tissue injury" (as per Dr. Chevalier) to his neck area, which appears to also affect his left shoulder. He has also suffered from numbness and tingling in his left arm and abdomen, as well as headaches. As the plaintiff said, his neck is the major problem. I agree with Dr. Chevalier's conclusion that the plaintiff is significantly disabled by the pain in his neck.
- [181] Post-accident medical investigations revealed a disc herniation at the C5-C6 spine level, but it is not clear whether this was caused by the accident. It is also not clear whether this disc herniation is the cause of the plaintiff's symptoms given that Dr. Chevalier thought it was "quite unlikely" it was the source of the plaintiff's symptoms. Dr. Chevalier also said 15 to 20 percent of the general population have a disc herniation that is asymptomatic.
- [182] Dr. le Nobel concluded that the plaintiff's neck pain and left arm numbness were attributable to the disc herniation although, notably, he did not address Dr. Chevalier's opinion on that issue. Dr. Chevalier provided a very full basis for that conclusion, based on what appears to have been his close reading of the imaging, yet Dr. le Nobel did not explain why he came to a different conclusion.
- [183] Given the conflicting medical evidence, I conclude that the plaintiff has not shown the disc herniation was caused by the accident, although it is clear the plaintiff's symptoms were caused by the accident. In the event the plaintiff had a pre-existing but asymptomatic disc herniation, and if in fact the disc herniation is the cause of his symptoms, then the accident caused his previously asymptomatic condition to become symptomatic.
- [184] I accept Dr. le Nobel's general opinion on prognosis which, in its briefest terms, is "guarded".

Ability to Work as a Welder

- [185] I conclude there is no realistic possibility the plaintiff can or will return to his previous occupation as a welder. I reach that conclusion for the following reasons:
- a) based on the evidence of Cody Bennett and Chad Fedorkie, as well as the evidence of the plaintiff himself, I am satisfied that welding is very physically demanding and heavy work, in the lay sense of that latter term;
 - b) from the same testimony I am also satisfied that welding work, even welding in a shop setting, requires the ability to work in cramped or awkward spaces, with the welder having to hold positions, and awkward neck positions (including overhead work) in particular, for lengthy intervals. Due to the need to keep the metal hot, it is not a job that can accommodate breaks at regular intervals;

- c) from the plaintiff's description of the manner in which welders snap their heads forward to get welding shields into place, I accept that this movement would be particularly hard on the plaintiff;
- d) Mr. Bennett's post-accident welding has been minimal. He did some "test welding" in the presence of a rehab consultant, but it only lasted minutes and still caused discomfort; he tried, unsuccessfully, to weld a muffler on Mr. Wyka's vehicle but could not complete the job; and he did some light fabrication work at Robin's Marine which, I conclude, did nothing to show that he is able to work long days doing the typically heavy work of a welder;
- e) after the accident, his role at Robin's Marine changed such that he no longer removed parts from old machines, which I surmise is work that would similarly require him to be in awkward positions. This is at least some objective confirmation of his subjective reports;
- f) in Ms. Weston's testing of the plaintiff, she found he had difficulties managing any work that required him to have his neck in an awkward position;
- g) Ms. Weston said the plaintiff demonstrated "an overall full and consistent effort during positional strength based testing", which addresses to some extent concerns about the reliability of his subjective reports;
- h) Ms. Weston concluded the plaintiff does not meet the strength or positional demands of a Welder as defined by the NOC;
- i) based on the plaintiff's functional abilities, Ms. Burkatsky concluded "it would be highly improbable for him to find an employer willing to accommodate him" in the occupation of welder; and
- j) Ms. Branscombe, who used the less stringent DOT classification (which shows Welder as a medium capacity occupation) rather than the NOC (which shows Welder as a heavy capacity occupation), said "Mr. Bennett is not able to meet all of the demands of his pre-accident occupation as a welder". In fact, Ms. Branscombe concluded the plaintiff has limitations that prevent him from participating in even medium capacity work. Her FCE findings showed the plaintiff was only "capable of working at Light capacity jobs".

[186] In arguing that the plaintiff may yet return to welding, the defendant focuses on the plaintiff's self-reports of physical improvement as a result of the December 2018 - March 2019 rehab program, Dr. le Nobel's opinion that "some benefit is anticipated" through further rehabilitation, and Ms. Branscombe's comment that the plaintiff "may be able to return to Medium capacity work in the future" after completing certain programs. However, despite Dr. le Nobel's expectation of some improvement through rehabilitation, his prognosis was still "guarded".

[187] Although there are references to potential improvement, from the evidence generally I conclude the prospect of the plaintiff returning to welding work seems more rooted in hope than in likelihood, or even in reasonable prospect.

The Plaintiff's Residual Capacity

- [188] Based largely on the same evidence, I conclude that employment as a partsman, or equivalent occupation, is likely the best employment for the plaintiff. I accept Ms. Burkatsky's conclusion in this regard.
- [189] I also accept that the plaintiff is unlikely to complete the education and training necessary to become qualified as a power engineer (the highest-paying employment alternative), at least without substantial accommodation. I pause to note that there was no evidence he would qualify for the accommodation Ms. Burkatsky mentioned. Although the plaintiff's skills and good reputation as a welder and metal fabricator show that he can achieve at a high level at his particular industrial trade, his academic achievement test results (from Ms. Burkatsky's testing) were quite poor and even his general learning ability was below average.
- [190] I conclude the plaintiff is earning at or near his residual earning capacity in his present position.

The Prospect of Return to Alberta to Work as a Welder

- [191] Another key issue in this case is whether, but for the accident, the plaintiff would have returned to Alberta and resumed work as a welder. This is the primary issue on the claim for loss of future earning capacity, but it is also an issue on the plaintiff's claim for past income loss because the plaintiff submits he would have returned to welding work in Alberta in mid-2017.
- [192] The plaintiff said it was his longer-term plan to return to Alberta and resume welding work. Given my concerns with his credibility, and in light of the evidence generally, this evidence requires careful scrutiny.
- [193] The plaintiff points to several matters that he says support his contention: (1) except for a brief period as a child, he had always lived in Alberta; (2) he and his brother had the idea they might work together; (3) all of his relatives, except his mother, live in Alberta; and (4) he left some substantial possessions there.
- [194] There are several factors that suggest otherwise: (1) he did not return, or attempt to return, to either Alberta or to welding once he stabilized his life in Kamloops; (2) he testified this was because "I felt I should give it a try here [in Kamloops] first" and "not spend my cheque on party mode"; (3) the evidence of Gina Anderson, who said they rushed to Alberta to pick up the plaintiff "before he changed his mind", at least neutralizes the evidence about goods left behind as there would have been little or no opportunity to sell them; (4) there was no concrete plan to join his brother in welding work and instead it was merely a vague "idea"; and (5) in 2017, the plaintiff told Ms. Burkatsky he was "no longer open to shift work out of town". I appreciate that the plaintiff's statement to Ms. Burkatsky was made post-accident and so his circumstances had changed in other respects by that point, but still it indicates a

disinterest in some of the working conditions he had pre-accident.

- [195] A return to Alberta would also mean a return to the scene of the intense family conflict he had with his former spouse, which had caused him near-catastrophic psychological distress, and a return to the milieu he had avoided because he did not want to "spend [his] cheque on party mode".
- [196] Given these competing considerations, I am unable to accept that, but for the accident, he would certainly have returned to Alberta to resume welding work. I conclude there is a prospect he would have returned to Alberta as he said, but there is also a reasonable prospect that he would have stayed in Kamloops or the surrounding area. After weighing all of the evidence, I consider there is a 25 percent chance he would have returned to welding work in Alberta two years prior to trial (or, put another way, a 50 percent chance in the year prior to trial), and a 50 percent chance of that happening by the time of trial.

VI. Damages

A. Non-Pecuniary Damages

- [197] I will not repeat my findings about the plaintiff's injuries, discussed under the previous heading, but I will mention some other matters and summarize the non-work effects of his injuries.
- [198] The plaintiff's chronic neck and shoulder pain limits not only the work he can do, as discussed earlier, but it affects and limits other aspects of his life, including driving (shoulder checking is difficult, stamina has been reduced to 30 minutes without a break), yard work and recreational activities. His former recreational activities were active and vigorous in nature (snowmobiling, dirt biking, water sports, etc.) and now he is reduced to sedate activities, at most. He was unable to withstand even the weight of a motorcycle helmet and the vibration of his older motorcycle, as these bothered his neck too much.
- [199] As noted earlier, although there is a prospect for some improvement in his symptoms, Dr. le Nobel says the general prognosis is guarded and the plaintiff is likely to remain symptomatic and limited in his abilities "for the foreseeable future".
- [200] The plaintiff was off work completely for about seven months. On his return to work, his role was changed to that of partsman, a less physical job, and accommodations were made to his work area to help ease the strain on his neck.
- [201] The plaintiff has undergone various forms of therapy, primarily passive therapy (acupuncture, massage and neurotherapy), for which there were, by my count, about 35 attendances. That figure was derived from a combination of the attendances listed in the claim for special damages plus the additional dates verified by the plaintiff in his re-examination. He also underwent two facet joint blocks, which he said were very painful, he attended some form of occupational therapy in, it would appear, 2015 and 2016, and he engaged in a more comprehensive physical rehabilitation program from December 2018 to

March 2019.

[202] In assessing an appropriate sum for non-pecuniary damages, I have taken into account the factors set out in *Stapley v. Hejslet*, 2006, BCCA 34, and I have reviewed the authorities cited by the parties. Perhaps unsurprisingly, as a general observation I consider the cases cited by the plaintiff to involve more serious consequences than those in the present case, and those cited by the defendant to involve less serious consequences. The cases closest on point were *De La Garza v. Carson* and *Kanters v. Galasinao*.

[203] I assess non-pecuniary damages at \$100,000.

B. Past Loss of Income

[204] There are two main aspects to this claim. The first is based on income the plaintiff lost from his work at Robin's Marine. The second is based on the plaintiff's argument that he would have returned to Alberta by June 2017, two years after the accident. I will deal with these in turn.

Loss of Income from Robin's Marine

[205] There are three components to this part of the claim: (1) income lost during the time the plaintiff was off work from Robin's Marine; (2) income lost due to delayed pay increases; and (3) income lost due to medical treatments and his physical rehabilitation program.

[206] The parties are substantially in agreement on the core figure for past income loss associated with his job at Robin's Marine, with the respective figures of the parties only being a few hundred dollars apart. I was unable to recreate the defendant's figure as the details of that calculation were not set out. Instead, I will use the plaintiff's formula (which is based on 50 weeks' pay in a year), modified in one respect - the hourly rate.

[207] In his calculation the plaintiff used a pay rate of \$20 per hour, yet his pay rate at the time of the accident was \$19 per hour. In his written submissions, the plaintiff argues that but for the accident his pay increases would have occurred seven months earlier than they did, with seven months being the duration of his accident-caused time off work. However, even on that theory the first pay increase would not have occurred until November 2015, and yet the plaintiff appears to have calculated past income loss as if the pay increase would have occurred by the date of the accident in June 2015.

[208] At the time of the accident, the plaintiff had only been officially working at Robin's Marine for a couple of weeks. I conclude it is unlikely he would have received a raise until the end of 2015 or beginning of 2016. This means this aspect of his past income loss must be calculated on the basis of a pay rate of \$19 per hour. Using that pay rate and applying the plaintiff's calculation format, the resulting figure is \$24,383.

- [209] The plaintiff also argues that the accident delayed each of his subsequent pay increases by seven months. That may be so, and I acknowledge the argument has a certain superficial appeal, but there was no evidence on the point. There may have been other factors at play in the employer's consideration of pay increases, or that would have been at play if the accident had not happened. Without evidence from the employer on this issue, I conclude it is too speculative to conclude the timing of the plaintiff's pay increases was delayed by the same amount of time the plaintiff was off work due to the accident, or at all for that matter.
- [210] I am, however, satisfied the plaintiff lost income due to attendance at medical treatments and a rehabilitation program. The defendant concedes there is a further loss in this respect. Neither party attempted a quantification of this loss.
- [211] Utilizing the earlier figure of 35 treatments, an average hourly rate of \$20 (it was both more and less than that during his various treatments), and assuming each treatment caused a loss of 90 minutes' work, the resulting sum is \$1,050. The plaintiff said the rehabilitation program involved 14 one-hour sessions, so using the same approach, but using his then-current rate of \$23 per hour, results in an income loss figure of \$483. He had two two-day FCEs, for 32 hours in total, which at \$23 per hour results in a loss of \$736. The total of those losses is \$2,269. I would round that to \$2,500 to reflect losses due to sundry other medical appointments.
- [212] I acknowledge the physical rehabilitation program and FCEs fall past the time the plaintiff says he would have been back in Alberta and working as a welder, but the amounts involved are relatively small and I conclude this possibility is best accounted for in the assessment of the next component of past income loss.
- [213] When the latter sum (\$2,500) is added to the earlier sum (\$24,383) the resulting figure is \$26,883 for these components of past income loss.

Loss Based on a Return to Welding in 2017

- [214] As noted above, I conclude there is a 25 percent chance the plaintiff would have returned to welding work in Alberta by, perhaps, a point two years prior to trial. In saying this I am not purporting to make an actual prediction; instead, I am making an assumption that I consider reasonable in making an assessment of damages for this aspect of the plaintiff's past loss of income.
- [215] Although this is a past loss, because of the uncertain nature of the loss it is to be assessed in the same way as a loss of future earning capacity: *Falati v. Smith*, 2010 BCSC 465, *aff'd* 2011 BCCA 45 [Falati].
- [216] In *Falati*, Saunders J. said:

- [38] The plaintiff is entitled to be restored to the position he or she would have been in but for the defendant's negligence, so far as that can be done with a monetary award. This 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" - *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8.
- [39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. "past loss of income" or "past wage loss", it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity - *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative "real possibility" and "capital asset" approaches to assessment are reviewed and discussed.
- [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies - what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" - Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable - Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,

"What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

- [41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically - *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;
- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood - *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;

· Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong - *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.);

· Any assessment is to be evaluated in view of its overall fairness and reasonableness - *Rosvold*, at para. 11.

[Emphasis added.]

[217] The next question on this issue is the amount of income the plaintiff would have earned had he returned to welding work in Alberta. There are several difficulties with this assessment: (1) proof of the plaintiff's income in the 11 years prior to his move to Kamloops is problematic because he did not file income tax returns; (2) the record of deposits he made from 2010 to 2013 is at least some evidence of the revenues received but it does not reveal anything about his expenses; (3) that list of revenues itself shows a wide variance (from a high of about \$125,000 in 2010 to a low of \$60,000 in 2011); and (4) his earnings in 2003, when he was working as a lead hand in a welding shop, were just \$42,000. These matters do not support his testimony that he earned from \$120,000 to \$140,000 per year between 2004 and 2014.

[218] I accept the plaintiff may well have had the potential to earn the income he claimed and there may be other matters that interfered with his ability to earn income at times (including a heart attack and broken ankle which the plaintiff thought had occurred sometime around 2011 and, possibly, substance abuse and marital difficulties in 2013), but this still means there is a substantial gap between the plaintiff's testimony about his income and some of the objective evidence.

[219] The plaintiff himself, in his submissions, simply relies on Statistics Canada average earnings of an Alberta welder, as set out in Mr. Szekely's report. In 2018, that average income was \$91,337. That figure does not include adjustments for labour market contingencies. I consider those adjustments inappropriate here because this is a past loss and I have taken contingencies into account already. The addition of non-wage benefits at 10 percent (the figure used by Mr. Szekely) brings 2018 average total income to \$100,470.

[220] I accept that this figure is a reasonable sum to use in an assessment of this aspect of past income loss. I come to this conclusion based on an examination of the plaintiff's revenues for the last four years he worked as a welder in Alberta (2010 to 2013) which, even with his 2011 and 2013 difficulties, averaged about \$94,500 per year, but also taking into account expenses that would have to be deducted to get a net income figure. After taking those matters into account I conclude that the average earnings figure identified by Mr. Szekely, with the addition of non-wage benefits, is an appropriate basis for the assessment of this particular loss.

- [221] The plaintiff actually earned \$50,384 in 2018. He had (and has) employment benefits at work, so using Mr. Szekely's 10 percent figure for non-wage benefits brings about a total income of \$55,422. The difference between the income I conclude the plaintiff would have earned in Alberta and the income he actually earned is \$45,048 (\$100,470 - \$55,422).
- [222] Assuming two years of this lost differential, and applying the 25 percent prospect of the plaintiff moving back to Alberta (as determined earlier), results in the sum of \$22,524. I would round that to \$22,800 to reflect income loss due to attendance at FCEs, referred to earlier.
- [223] In summary, I assess this aspect of past income loss at \$22,800. The total past income loss is therefore assessed at \$49,683 (\$26,883 + \$22,800).
- [224] The amounts I have determined for past income loss are subject to adjustment for income taxes, which I leave to the parties. In the event of disagreement, the parties have leave to speak to this issue.

C. Loss of Future Earning Capacity

- [225] The law in this area was summarized by the Court of Appeal in *Villing v. Husseni*, 2016 BCCA 422:
- [17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [Perren]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.
- [18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:
- [56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award .
- [19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:
- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;

- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) 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) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[226] As noted earlier, both parties agree that damages for loss of future earning capacity ought to be assessed on a "loss of capital asset" basis. I agree that this is the preferable approach here, though the assessment of damages will be guided by the actuarial and income evidence provided by Mr. Szekely.

[227] The defendant did not expressly concede the constituent elements of a loss under this head of damages, although his position suggests it is in dispute only as to amount. For completeness, I will say that I am satisfied there is a real and substantial possibility the plaintiff's earning capacity has been impaired, and I also conclude the plaintiff meets all four of the *Brown v. Gola* factors. The real question is in the amount of damages for that loss.

[228] In the earlier "Findings" section of these reasons I concluded there was a 50 percent prospect that, but for the accident, the plaintiff would have resumed welding in Alberta by the time of trial. The income difference between what the plaintiff could have reasonably earned as a welder in Alberta and what he is currently earning is \$45,048. Half of that sum is \$22,524.

[229] There are other factors and contingencies to take into account, the most important of which is the plaintiff's pre-accident lower back injury, which the plaintiff described as an annular tear that had healed with scar tissue. This back injury had given the plaintiff problems in both October 2014 and May 2015, not that long before the accident, and according to the plaintiff himself, it is a back injury that "was always going to give me problems". The wide fluctuation in the plaintiff's revenues in the four years prior to the accident also suggests the labour market contingencies applicable to the plaintiff ought to be greater than those for the population generally. Accordingly, I conclude that even if the accident had not happened there were factors specific to the plaintiff that might have limited his future earnings. These matters are also factors I take into account in concluding the appropriate retirement age to use is 65 instead of 70, as the plaintiff submitted.

[230] Utilizing the economic multipliers provided by Mr. Szekely brings about a future loss figure of \$362,411 ($\$22,524 \div 1,000 \times 16,090$). I would reduce that sum to \$325,000 to reflect the additional factors and contingencies discussed above.

[231] I assess damages for loss of future earning capacity at \$325,000.

D. Cost of Future Care

- [232] The plaintiff claims \$50,000 for the cost of future care. He acknowledges there is no expert report on the individual amounts of the claim, but he asks the Court to assess these damages "based on common-sense assessments of the likely cost of recommended treatments", including the expected cost of the plaintiff's cannabis consumption.
- [233] The defendant accepts there should be an award to enable the plaintiff to undergo a physical rehabilitation program (\$4,000), massage therapy (\$3,000), for prescription pain medication (\$500), physiotherapy (\$6,000) and a gym membership (\$1,000), but submits the claim for cannabis cost is not reasonable.
- [234] Dr. le Nobel recommended treatment at a multidisciplinary centre for exercise-based rehabilitation, together with "pain modulators" such as manual therapy (which I took to mean massage), physiotherapy and analgesic medication. Although Dr. le Nobel was aware of the plaintiff's cannabis use, he did not include cannabis in his list of recommended treatments.
- [235] I accept Dr. le Nobel's recommendations. Evidence concerning the costs of the recommended items was not provided, but I am able to resolve the quantum issue here because the defendant concedes certain sums (totalling \$14,500) and those amounts appear to be reasonable. I award \$14,500 for those items.
- [236] This brings me to the claim for the cost of cannabis. Before I turn to that topic specifically, I will refer to the general principles applicable to the assessment of claims for cost of future care, which were summarized as follows in *Dzumhur v. Davoody*, 2015 BCSC 2316:
- [244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:
- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
 - the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
 - the test for determining the appropriate award is an objective one based on medical evidence;
 - there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
 - the concept of "medical justification" is not the same or as narrow as "medically necessary";
 - admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
 - however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;

- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[237] Each party cited different cases in support of their respective positions, with the plaintiff citing *Erickson v. Saifi*, 2019 BCSC 1120 [Erickson], and the defendant citing *Murphy v. Hofer*, 2018 BCSC 869 [Murphy].

[238] In *Erickson*, the plaintiff claimed that medical cannabis helped relieve her migraine headache symptoms. Her neurologist, who was treating her for headaches, did not think cannabis was useful, but the plaintiff's HIV specialist recommended it. The court allowed a sum for cannabis use and, in doing so, likened the plaintiff's cannabis use to that of over-the-counter painkillers and noted one physician had recommended it.

[239] In *Murphy*, the plaintiff said cannabis oil helped with pain relief and sleep. The court noted: (1) cannabis possession was not (then) legal without a prescription; (2) no evidence had been led of any clinical trials showing that cannabis use was beneficial for pain relief; (3) although the plaintiff's physician supported the plaintiff's cannabis use, she had not prescribed it for him because it was prohibitively expensive; and (4) the plaintiff had not shown that the beneficial effects of cannabis could not be achieved through other medications.

[240] Here, the plaintiff has not led any evidence, medical or otherwise, that any treating professional has recommended he use cannabis to relieve his symptoms. I appreciate there is some ambiguity in the authorities as to the necessity for some sort of professional recommendation, but in this case there is no evidence the plaintiff has sought professional advice about cannabis use as compared to the use of more conventional and less expensive alternatives. The plaintiff's cannabis use is very expensive, being in the range of \$500 to \$700 each month, and his choice of cannabis as an analgesic seems to have largely been his alone. The situation might be different if the evidence was clear there were no other alternatives, but there was no evidence of that sort here.

[241] I must also state my concern, arising from the plaintiff's serious past substance abuse issues (alcohol, cocaine and "pills"), that he may have merely replaced one dependency with another. This heightens my concern about lack of medical or other professional input into the plaintiff's cannabis use.

[242] For these reasons, I decline to make any award for the future cost of cannabis use.

[243] I recognize, however, that the plaintiff needs analgesic relief of some sort, and if it is not cannabis then it has to be something else. I expect that the cost of analgesic and related medication might be in the range of a few hundred dollars each year at most, and on that basis I would award \$4,000 for that lifetime cost. This amount is in addition to the earlier amount that was conceded by the defendant.

[244] The total amount awarded for cost of future care is \$18,500.

E. Loss of Handyman/Housekeeping Capacity

[245] For this claim, the plaintiff relies on the evidence of his difficulties doing work in the yard at his mother's house, his inability to contribute to the collecting of firewood, and Dr. le Nobel's somewhat generalized mention of the plaintiff's lessened capability in household tasks.

[246] The law relating to loss of housekeeping capacity (which the plaintiff has described as a loss of "handyman" capacity, which I accept is similar in principle) has been addressed by the Court of Appeal in both *O'Connell v. Yung*, 2012 BCCA 57 [O'Connell] and *Kim v. Lin*, 2018 BCCA 77 [Kim].

[247] In *O'Connell*, the court said:

[67] As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required .

[248] In *Kim*, the court said:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[249] In this case, the evidence on which this claim was based was fairly thin. However, I accept that in the plaintiff's case there is both an element of loss of capacity to do repairs or upkeep around a residence or property and an element of loss of amenities and increased pain. The latter has been dealt with by the award of non-pecuniary damages made earlier. I conclude the former element of loss would be adequately compensated by an award of \$7,500.

F. Special Damages

[250] The parties agree on special damages at \$1,250.

VII. Conclusion

[251] I assess damages in this matter as follows:

Non-pecuniary damages:

\$100,000

Past income loss (gross):

49,683

Loss of future earning capacity:

325,000

Cost of future care:

18,500

Loss of handyman capacity:

7,500

Special damages:

1,250

Total:

\$501,933

[252] As noted earlier, the parties have leave to address any adjustments that may have to be made to the award.

[253] Unless there are matters the parties wish to bring to my attention, the plaintiff will have his costs.

"Blok J."

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