

CANADA / JUDGMENT

Burdeniuk v. Christie

2020 BCSC 217

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 217 Burdeniuk v. Christie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burdeniuk v. Christie,

2020 BCSC 217

Date: 20200219

Docket: M187087

Registry: New Westminster

Between:

Kurtis Ryan Burdeniuk

Plaintiff

And

Sydney Christie

Defendant

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

A. Capadouca

J. Skands

Counsel for the Defendant:

P. Mazzone

J. Johal

Place and Dates of Trial:

New Westminster, B.C.

December 9-13, 16, 18-20, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 19, 2020

Introduction

- [1] The plaintiff, Mr. Burdeniuk, seeks damages for injuries sustained in an accident that occurred in the Surrey Costco parking lot on February 29, 2016 (the "February accident"). His injuries are both physical and psychological. He has lost time from his employment as an outside worker at Costco and is currently working less than full time hours.
- [2] Liability for the February accident is admitted by the defendant.
- [3] The principal issue in this litigation is the extent to which the February accident caused Mr. Burdeniuk's current medical situation and its impact upon his past and future earning capacity.
- [4] A complicating factor is a second accident that occurred on March 19, 2016 (the "March accident"). The plaintiff was the lone occupant of a vehicle which was T-boned in an intersection as the plaintiff attempted to turn left. The plaintiff was apparently at fault for the March accident, but argues that he sustained no aggravation of the injuries, neither physical nor psychological, he suffered in the February accident that is the subject of these proceedings.
- [5] The defendant, Ms. Christie, argues that the March accident was a major contributing factor to the plaintiff's physical and psychological symptoms. She also takes issue with the extent of the plaintiff's injuries and their impact on his future ability to earn income and the need for future care. The plaintiff's wage loss to the date of trial is admitted, subject to the defendant's claim for apportionment between the two accidents and the defendant's assertion that the plaintiff's damages ought to be reduced for his failure to mitigate.

The Plaintiff Pre-Accident

- [6] The plaintiff was 22 years old at the time of the February accident. He had graduated from high school and, after an attempt to gain credits at Kwantlen Polytechnic, he began working part-time at Costco. By the time of the February accident, he was employed full-time. His primary job duty was the retrieval and organization of shopping carts in the Surrey Costco parking lot.
- [7] The plaintiff graduated from Langley Secondary and described himself as a "pretty good student". It is apparent from the plaintiff's school records that he was diverted from the full academic program early on and was mainly taking non-academic courses during high school. When he was enrolled in a 'core subject', such as mathematics, the curriculum was specifically designed for students who had earlier demonstrated an inability to keep up with mainstream curriculum expectations.
- [8] The plaintiff described himself as outgoing and active. He enjoyed tae kwon do and attended tournaments, achieving some distinction as an instructor.
- [9] Upon graduating from high school, prior to applying at the Surrey Costco, he worked briefly for his uncle in a fabricating shop. His employment there lasted only a month or so. He admittedly showed no aptitude for the work. He also attempted to work in a hands-on occupation with his father but did not enjoy that either.
- [10] He enrolled at Kwantlen at age 18 and took three courses directed towards business management; accounting, marketing and economics. He failed all three. After those experiences, he applied at Costco where he has been steadily employed since approximately age 18 or 19.
- [11] He held a variety of jobs with Costco, some of which required physical stamina and heavy work. He worked a season in the garden centre where he routinely helped customers lift purchases of up to 80 pounds into their vehicles.
- [12] He stated his favourite job was working in the parking lot because of the freedom, working outside and working steadily with one partner.
- [13] Prior to the February accident, he could perform all of his job duties without any problems. In 2015, he was involved in another accident in the Costco parking lot. While he was standing in front of a machine that pushes carts, he was struck by a driver who was backing out. He tried to engage the driver in conversation without success. The driver drove off. The plaintiff attended first aid and eventually began to experience pain in his low back. He took approximately a week off work, then returned to full-time duties without experiencing ongoing symptoms.

[14] Prior to the February accident, the plaintiff was active socially with friends. He had a girlfriend, Taylor Noniewicz, whom he saw regularly and lived with for some time at Ms. Noniewicz's mother's residence. He enjoyed snowboarding, hiking, camping and other outdoor activities. He was also keen on keeping physically fit.

[15] All of that changed, according to the plaintiff, as a result of the February accident.

The February 29, 2016 Accident

[16] The plaintiff was working at Costco at the time of the February accident, retrieving shopping carts from the parking lot and returning them to storage areas or to the front of the store.

[17] In the early evening of February 29, 2016, the plaintiff testified he was moving carts that were "spilling into the lot" utilizing a buggy machine, a device designed to move a number of carts at the same time under power. He testified there were 15 carts or so in a row and while he was moving them through the parking lot, he was struck from behind by the trunk of the defendant's vehicle which pinned him between either the carts or the cart machine and the trunk of the vehicle. He hit the vehicle's trunk once, or more, and the driver then moved forward. He stated he was able to exchange information with her and then went to the store to make a report to first aid.

[18] Ms. Christie described her vehicle being parked in the forward position of Costco's stall with cars on each side. She had completed her shopping and was moving her car out of the stall in reverse. She testified she had shoulder checked and looked behind her. Upon seeing nothing, she began reversing her car while looking forward so she could manoeuvre without hitting either of the cars beside her. She felt a thump, which she described sounding like somebody hitting the trunk of her car and immediately braked then moved forward.

[19] When she exited the car to see what had happened, she observed the plaintiff and the shopping carts. She had no explanation as to why she had not seen him or the carts earlier but, in any event, asked him whether he was okay to which he replied "no, not really" or words to that effect.

[20] Ms. Christie testified there was a customer in the parking lot who said words to the effect "I saw the whole thing" to the plaintiff. Ms. Christie then exchanged her driver's information with him and obtained his name and left. She did not get the particulars of the customer who apparently observed what happened, nor does she recall seeing whether the customer accompanied Mr. Burdeniuk back into the Costco store.

[21] Mr. Burdeniuk described the point of contact between the vehicle and himself as being his left hip and low back. He stated the trunk of the car was up against his lower rib cage and a buggy handle on the right side of him was pressing into his right rib cage. He said he felt squashed and "trapped". He could not describe the force of the contact but says he felt he was getting squished and that he was in a vulnerable position "forever". He said following the release of pressure when Ms. Christie moved her car forward his heart was racing and

he felt an adrenaline rush.

- [22] After exchanging information with Ms. Christie, the plaintiff walked inside with the person who observed what had happened. He spoke with a first-aid attendant at Costco and described the accident. He described a burning sensation in his low back and hip which led ultimately to him going to hospital to be checked out. Ms. Noniewicz came to pick him up and took him to hospital and then back to her house. He described feeling very vulnerable and "down".
- [23] The following day he went to see Dr. Jay at the Cedar Hills Clinic and reported the accident and reported pain in his lower left side and left hip. He was prescribed anti-inflammatory medications and told to take two weeks off of work. Additionally Dr. Jay recommended physiotherapy and massage treatment.
- [24] The plaintiff re-attended at the clinic but stated the next visit was delayed because 'Dr. Jay called in sick a lot'. When he did re-attend, his previous prescription was refilled. He felt depressed as well as soreness in his left side. He stated he did not tell the doctor about his mood; he had not felt that way before and did not want to make a big deal of it so he kept it to himself.
- [25] During the weeks he was not working at the beginning of March he reported feeling "really down" and would occasionally have fits of anger or burst out crying. He tried light exercise but could not do much.
- [26] He did not follow up with Dr. Jay, stating she somehow disappeared from the clinic. Instead he began seeing Dr. Bhatt. He reported low back pain in his left side to Dr. Bhatt.
- [27] Some 19 days following the February accident at Costco, Mr. Burdeniuk was involved in a second accident.

The March 19, 2016 Accident

- [28] On March 19, 2016, Mr. Burdeniuk had borrowed his girlfriend's father's car to go pick his girlfriend up from work. He planned on turning left on 133A Street onto 96th Avenue and proceeding eastbound. He stated that he checked both ways and entered into traffic. Once in the westbound lanes of the intersection, he saw a car skidding towards him and he stopped. He says the vehicle, driven by Mr. Costain, slid into him and hit the left side of the vehicle. When the collision occurred, his vehicle shook.
- [29] Both vehicles were family sedans. The plaintiff said that the other driver was almost stopped when the vehicles collided. He could not estimate the speed of the other driver. His vehicle was fully stopped at the time of the collision.
- [30] The vehicle the plaintiff was driving sustained over \$7,000 of damage. Mr. Costain's vehicle, a 2002 sedan, was written off, although the estimated repairs were only about \$2,400.

- [31] The plaintiff testified he was not injured in the March accident and that he did not feel scared when he realized a collision was imminent. He acknowledged he was nervous about the reaction of his girlfriend's father given the damage to the father's car.
- [32] He testified that he exchanged information with the other driver before police and fire trucks showed up at the scene. Statements were taken and, according to the plaintiff, everyone was "fine". Mr. Costain reported that he was injured and placed in a neck collar.
- [33] The vehicle the plaintiff had been driving was still drivable and Ms. Noniewicz's father drove it back to Ms. Noniewicz's home. The accident was reported to ICBC. The plaintiff did not attend for medical aid that night but did continue to see Dr. Bhatt for follow-up for his low back pain.
- [34] Prior to the March accident, the plaintiff made no report to his medical advisors of anxiety, despite his testimony that he was anxious immediately following the February accident. The first such report occurred within weeks following the March accident.

The Plaintiff Post-Accident

- [35] Later in 2016, the plaintiff changed family doctor's from Dr. Bhatt to Dr. Ademiluyi. From March 2016 onward, the plaintiff's symptoms, both physical and psychological, continued to worsen from what they were immediately after the February accident. Pain spread into his left gluteal region and, eventually, up his left side.
- [36] It is unclear from the evidence whether the plaintiff ever returned to work as a 'cart man' after his initial return to active duty with Costco, but he reacted with anxiety when in the parking lot and began to experience significant emotional effects later in 2016.
- [37] His feelings of anxiety were originally reported to Dr. Bhatt in March and April 2016 following the March accident. As a result, he obtained a medical letter advising that he was not to return to work in the Costco parking lot but was medically cleared for other duties inside the store.
- [38] Although the plaintiff initially returned to full time duties doing a variety of jobs indoors, he began to take time off owing to what he describes as low back and left hip pain as well as low mood. His anxiety heightened to the point where he began counselling with a psychologist, Dr. David Klaassen.
- [39] The plaintiff expressed an aversion to any further work in the Costco parking lot claiming such made him extremely anxious and that he felt highly vulnerable in the parking lot. He also expressed the same vulnerability while driving cars, regardless of location. He reported to Dr. Anderson, the psychiatrist who assessed the plaintiff at the behest of plaintiff's counsel, that he was so nervous following the February accident that he felt "like a moving target walking or driving but it's worse in parking lots and absolutely worst in the Costco parking lot. I couldn't drive for a couple of months because of anxiety."

- [40] Such was obviously an overstatement given he was driving alone less than three weeks following the February accident.
- [41] He returned to work at Costco in April 2016 on a graduated program. He could not recall the specific hours, but apparently he gradually worked up the tolerance to resume work on a full time (forty hours weekly) basis. However, his return was subject to some limitations. He was restricted from lifting more than 50 pounds and from working in the parking lot.
- [42] Much of his time at work was spent as a cashier's assistant, cashier, or checking receipts and Costco cards at the door. He attempted working in the tire shop but found that too physically challenging. He then did some work at the sales desk. He says his enjoyment of work diminished because of the difficulty he had doing tasks.
- [43] While doing sales in the tire department, which is considered light work, he had to go into the parking lot to occasionally retrieve vehicles. He testified that if he told anybody that he was not comfortable in the parking lot, they thought less of him for shirking part of his job description.
- [44] His hip and low back pain caused him problems while performing the duties of a cashier. After standing for 15 minutes, he testified that he would be sore. The same applied when working at the door. He described his low back and hip as becoming inflamed upon standing for any length of time. This is at odds with the later report of the occupational therapist, who observed that the plaintiff stood for 90 minutes before demonstrating fidgety behaviour or obvious pain behaviour.
- [45] Similarly, the plaintiff stated that acting as the cashier's assistant caused pain because he would have to lift and turn to take groceries that had been checked through by the cashier and put them into carts or boxes for the customer.
- [46] He found working at the door more stressful than previously because it occasionally involved unpleasant interaction with customers. He angered more easily than before the February accident.
- [47] The plaintiff reported calling in sick frequently because of pain and anxiety but was not specific as to the dates or duration of his absences.
- [48] At the time of both accidents, the plaintiff was living in his girlfriend's home with his girlfriend and her mother, Wanda Keep. He said he previously performed many housekeeping chores while living with Ms. Keep and Ms. Noniewicz, but was unable to perform any of them after the February accident. He had previously mowed the lawn, done dishes and washed bathrooms. After the February accident, he said he was unable to do much. He would vacuum occasionally but said after finishing he was very sore. He has not performed any outside yard work since the February accident. The plaintiff now lives in rental accommodation and there was no evidence that he or his co-tenant are expected to maintain the outside of the residence in which they occupy a suite.

- [49] The plaintiff testified to suicidal ideation owing to his depressed mood. He became socially isolated and his relationship with Ms. Noniewicz suffered as a result. He attended at the emergency wards of both Surrey and White Rock hospitals in an effort to see a psychiatrist. His family doctor was prescribing anti-depressants for his mood, but these seemed to have little effect.
- [50] Most of the plaintiff's previous forms of social enjoyment - snowboarding, hiking, camping and interaction with friends were curtailed, if not completely stopped. His mood worsened and his family doctor, by now Dr. Ademiluyi, began to prescribe drugs to elevate his mood and abate his physical symptoms.
- [51] In the summer of 2016, he began seeing Dr. Klaassen regularly to deal with the emotional aspects of the February accident. He found the visits helped. Dr. Klaassen gave the plaintiff 'exercises' designed to alleviate his feelings of helplessness and anxiousness in Costco's parking lot. The plaintiff would go into the parking lot after the majority of customers had left and acclimatize himself in an effort to reduce his anxiety. He acknowledges he began to feel more comfortable being in the parking lot during non-busy hours, but continued to experience anxiety in situations where he was in a car where there was heavy traffic or lots of speed.
- [52] His emotional symptoms, and their impact on his overall well-being, began to overtake his physical symptoms. He began self-harming when having suicidal thoughts. Although the plaintiff has never attempted to commit suicide, he has cut himself, both on the arms and thighs, and, when frustrated, has struck himself in the head. Pain and depressed mood have also affected his sleep.
- [53] The plaintiff began to overuse marihuana as a form of self-medicating, although there is evidence he was a heavy user before. He began smoking 6-7 joints a day and, as a result, started to experience stomach issues and frequent vomiting.
- [54] Over a three to four month period, he lost 30 pounds as a result of being unable to keep food down. He was eventually diagnosed as having Cannabinoid Hyperemesis Syndrome ("CHS"), a diagnosis directly attributable to his overuse of marihuana.
- [55] The plaintiff described his social life as being sharply curtailed by his symptoms. He, and other witnesses who testified on his behalf, consistently testified to his previous demeanour as a friendly and happy young man who engaged in a number of recreational and social activities with others.
- [56] Socially, he would go out with friends, and in particular Ms. Noniewicz. They would go shopping together at the local mall, go to movies or meet friends to dine out or have drinks.
- [57] He, as well as Ms. Noniewicz, described a significant reduction in any form of exercise or social interaction. His world became smaller and he did not like to go out. He increasingly felt down or anxious.

- [58] In 2017, he did not work much. When he did, it was mainly at the door. He acknowledged that Costco has a variety of job positions such as cashier, forklift driver, cutter, and various clerk positions in receiving and returns as well as separate shops such as the tire department and the pharmacy. Each of those positions have varying physical requirements.
- [59] By 2017, the plaintiff reported having suicidal thoughts and says that his anxiety and depression had increased significantly. His mood affected his ability to deal with people at work. He reported incidents where coworkers would, at least in his perception, glare at him or think less of him because there were tasks he could not do by virtue of his condition.
- [60] He described people yelling at him at the door over issues of failing to have their Costco card with them or other altercations.
- [61] By 2017, the plaintiff says he was seeing Dr. Klaassen about once a week or every second week. Dr. Klaassen provided the plaintiff with a number of calming exercises and homework to try to get over or at least control the anxiety that had begun to rule his life.
- [62] The plaintiff began attending at emergency wards, generally in Surrey, over his suicidal ideation. On one of those visits, he saw a psychiatrist who instructed him on a safety plan when overcome by suicidal thoughts. One part of that was to reach out to Dr. Klaassen if needed and, as a last resort, call 9-1-1.
- [63] He conceded that part of the reason he attended the Emergency ward was to try to have his medications adjusted. He did not feel the medications being prescribed to him were dealing with his anxiety. He was taking a course of medications including Lorazepam, Gabapentin and Citalopram, Wellbutrin, Busiprone and others.
- [64] According to both the plaintiff and Ms. Noniewicz, his mood and limitations severely interfered with their relationship. In 2017, they separated as a couple and the plaintiff was obliged to find another place to live. He briefly lived with his father but had an unfortunate interaction with his father and father's partner the first night he was there. He left and eventually ended up living with his brother in a basement suite.
- [65] The plaintiff reported that just as at the residence of Ms. Keep, he is unable to perform household tasks at his current residence. He can do some chores with an exacerbation of pain, but things such as cleaning the bathtub are beyond him because it requires stooping that significantly increases his pain.
- [66] In 2017, chiropractic treatment was introduced as a modality of treatment. 20 sessions were approved for him. He attended briefly but found it provided him no relief, so he stopped. Massages to his back and hip provided minimal periodic relief but do not ultimately provide any lasting benefit.

- [67] At the end of 2017, the plaintiff entered into an active rehab program overseen by an occupational therapist designed to strengthen the affected areas. The plaintiff acknowledged feeling better with the program and that he has since returned to using weights at home, although far less than he was using or lifting prior to the February accident.
- [68] The separation from Ms. Noniewicz had a negative effect on the plaintiff's mood and pain. He notes that when he is sore his depression gets worse and is accompanied by thoughts of suicide or desire to cut himself. The plaintiff describes himself as becoming increasingly socially withdrawn, although he acknowledges that in 2018 he met and began a relationship with a young woman named Nafisha. That relationship ended in the summer of 2018.
- [69] Following active rehabilitation, the plaintiff returned to work at Costco on a graduated return. By February 2018, he had increased his work back to full-time but, again, was subject to restrictions. He was limited in the amount he could lift, and he was still not going into the parking lot. He acknowledges that through the exercises provided by Dr. Klaassen he was feeling less anxiety and actually attending in the parking lot late at night when most cars had left.
- [70] Most of his work was as a front-end cashier or cashier's assistant. He occasionally experienced problems if his assistant would leave when the store was busy because he then became responsible for not only cashiering, a job he can apparently do if he is provided rest periods occasionally, but also the twisting and turning associated with loading carts. He found that work extremely difficult and says he obtained relief after a day of work by soaking in a hot bath or applying heating pads.
- [71] Throughout 2018 until February 2019, the plaintiff tried his best to maintain 40 hours of work per week, but still took occasional sick days related to mood or pain. By 2018, he said his pain was radiating up from the left side of his low back to the mid and low back and he still experienced pain in his gluteal region. Muscle relaxants made him sleepy. The best relief was obtained through heat.
- [72] His pain was aggravated according to the physicality of the tasks he was performing. Some days were better than others. He regularly attended his family doctor to renew prescriptions for medications designed to control his panic attacks, depression pain and to assist in sleeping.
- [73] In September 2019, the plaintiff came under the care of Dr. Butterfield, a psychiatrist. Only two visits had occurred between Dr. Butterfield and plaintiff prior to trial, but the plaintiff described the visits as helpful. He is happy to be under the care of a psychiatric specialist and hopeful to finally have somebody who will oversee the adjustment of his medications in the hope of finding a formula that will provide some lasting relief.
- [74] He is currently taking lorazepam for relief of anxiety and anger. However, he still describes incidents where he has self-harmed.

- [75] The plaintiff acknowledged a number of stressors in his life other than the anxiety he relates to the February accident. Prior to the breakup with Ms. Noniewicz, she developed a benign tumor in her pituitary gland which, until diagnosed, and even thereafter, was a source of great worry to him. She attended hospital with some frequency. She, too, became suicidal at some point during their relationship. Their unhappy breakup appears to have been initiated by Ms. Noniewicz because, in her words, the plaintiff was "no longer the man she had fallen in love with".
- [76] Other stressors continue. Living with his brother, who the plaintiff described as "an angry alcoholic", is an ongoing stressor. The plaintiff acknowledges it is hard to be around his brother because "he is hammered all the time". He further acknowledges the stressor of Nafisha's pregnancy and its termination resulting, it would seem, in the breakup of their relationship.
- [77] The plaintiff's relationship with his mother and father is also not ideal. He managed to stay only one day in the home of his father before being directed to leave. Neither his father nor mother seem involved in the oversight of his symptoms. Ms. Keep has remained a friend of his and on occasion he has phoned her and she has taken him to the emergency ward.
- [78] On a more positive note, the plaintiff has a girlfriend, Michaela Haynes. They had been seeing one another for approximately one year prior to the trial's commencement.
- [79] In February 2019, the plaintiff went off work until July 5, 2019, but since returning found the effect of five consecutive eight-hour days to exceed his capacity. He has recently received permission from his employer to revert to part-time status of five days a week five hours a day rather than the 40-hour week required of a regular Costco employee. Ideally, from the plaintiff's perspective, he will work two or three days then have a day off so the shifts are not continuous. He is still in discussion with his employer as to the feasibility of that work pace.
- [80] Costco sees the plaintiff as a valued employee. His work evaluations are, overall, positive. The employer's representative, Mr. Jared McMillan, conveyed a commitment to work with the plaintiff to accommodate him as best was possible.
- [81] The plaintiff believes his reduced workweek will be approved long-term, and feels that he will be able to manage a 25-hour work week in his current situation. When asked in cross examination how the new schedule was going, he replied: "great".
- [82] The plaintiff contemplated a return to school, but has taken no active steps to make such more than a consideration at the back of his mind. Following his graduation from high school where his courses were heavily directed towards non-academic studies, he attended Kwantlen College for a semester, taking three courses directed at a business career. He failed all of them and acknowledged he had no interest in the coursework. His high school records indicate he had some difficulties with learning and had an individualized education plan which focused more on non-academic subjects than core curriculum that might lead to university entrance. That said, the plaintiff received very good marks in both mathematics

and English.

- [83] Currently, the plaintiff is mostly doing cashiering with "go backs" (returning items left at the checkout stand back into inventory). Apparently Costco is more amenable to the accommodations both in terms of the plaintiff's restrictions and hours owing to the fact that they are "hiring off the street" and have high demand for employees.
- [84] He has good seniority in his position, having started Costco right out of high school, but advancement to less physical jobs is difficult because there are many in front of him with more seniority. Further, some of the less strenuous tasks at Costco require educational qualifications that the plaintiff does not possess.
- [85] Psychologically, the plaintiff reports ongoing suffering throughout 2019. He continues to have panic attacks. He reported, anecdotally, an incident of driving where his GPS failed and he became extremely frustrated because he became lost while trying to find Dr. Butterfield on the way to his first visit. He described himself as "my heart was racing and my hands shaking".
- [86] That said, the plaintiff was driving his girlfriend's car and his girlfriend was with him. It is hard to understand, given his stated aversion to driving, why he would not ask his girlfriend to drive.
- [87] Further, Ms. Sharan described a trip the two took together where the plaintiff drove the 10 or 11 hours to Banff in one day, and a few days later drove back in one day.
- [88] The plaintiff still reports nightmares, but they are less frequent than early on after the February accident. He reports waking up terrified and has difficulty going back to sleep. He has difficulty sleeping because of pain; his hip and a glute are sore when lying down.
- [89] He continues to use marihuana in far lesser quantities and no longer experiences CHS.
- [90] Since the February accident, he has not been able to do much physical activity outdoors. He is able to walk but not hike on uneven terrain. He has tried hiking but no longer enjoys it. He was an ardent physical fitness buff. He used to be able to dead lift 200 pounds. He has returned to doing weights but the most he can deadlift now is 115 pounds. He can do chin-ups, push-ups and sit-ups after having been instructed on proper form through active rehabilitation.
- [91] He reports a far different social life and that he stays in more and does not socialize as much with friends, although there are several incidents where he was seemingly admitted to hospital for overuse of alcohol when partying with friends. He says he is anxious when outside but is able to go downtown with Michaela, take his dog for a walk and watch movies with her at one of their homes. He reports being fine prior to the February accident despite a similar accident in 2015 in the Costco parking lot. He remains short with customers and is generally pessimistic about his future.

The Medical Evidence

- [92] None of the plaintiff's treating physicians nor his psychologist gave evidence or provided reports. Instead, the medical evidence respecting the plaintiff's past and future condition came from a variety of independent medical assessors.
- [93] The plaintiff was assessed, at the instance of his counsel, by Dr. Anderson, a psychiatrist; Dr. Koo, a physiatrist; Alex Jackson, a vocational assessor; and Gary Worthington White, an occupational therapist.
- [94] The defendant had the plaintiff assessed by Dr. Boyle, an orthopedic specialist; Dr. Miller, a psychiatrist; and Dr. Quee Newell, a vocational rehabilitation consultant.
- [95] No report was produced from Dr. Miller, the defendant's psychiatric assessor.

Dr. Anderson

- [96] Dr. Stephen Anderson saw the plaintiff in May 2018.
- [97] Dr. Anderson's credentials are well set out in his curriculum vitae but include a professorship at UBC Faculty of Medicine, Department of Psychiatry where he teaches and supervises residents in neurology and psychiatry. He also consults at Vancouver General Hospital in respect of patients demonstrating a psychiatric and physical medicine overlay.
- [98] He notes in his credentials that he acts as a consultation-liaison psychiatrist involved in the assessment and treatment of patients who have developed emotional difficulties following physical trauma and commonly assesses and treats patients with chronic pain, post-traumatic stress disorder, and major depressive disorders which have resulted from motor vehicle accidents.
- [99] An objection was raised by counsel for the defendant as to the extent of Dr. Anderson's opinion regarding the contribution of the diagnosed psychiatric conditions as it relates to the plaintiff's past and future capacity.
- [100] The defendant's counsel argued that Dr. Anderson's opinion exceeded the scope of his qualifications when he opined:

Mr. Burdeniuk would like to further his education and become an ultrasound technician. It is unclear whether Mr. Burdeniuk would be able to function adequately in a school setting because of his ongoing cognitive difficulties. Mr. Burdeniuk would likely require assistance from the disability resource centre at the college he attends and/or tutor support.

- [101] With respect, I disagree. The assessment of the plaintiff's ability to cognitively achieve specific educational goals falls, in my opinion, within the scope of the doctor's field of expertise. That said, Dr. Anderson performed no cognitive testing on the plaintiff other than a screening cognitive assessment on which the plaintiff scored marginally below the normal range.

[102] The lack of further testing, the evidence of other assessors who, anecdotally, described the plaintiff as cognitively intact and the impact of what I will refer to as to the plaintiff's demonstrated learning curve through the public school system affect the weight of the opinion expressed; not its admissibility.

[103] The plaintiff relies on the diagnosis contained in Dr. Anderson's report as supportive of the submission that the February accident is the singular cause of the plaintiff's psychological symptomology.

[104] The plaintiff relies on the following passages as demonstrative of the causal relationship between the February accident and the plaintiff's current emotional state, as well as the bleak prognosis for the plaintiff's future. Dr. Anderson first noted in his report:

Mr. Kurtis Burdeniuk is a 24-year-old man who was injured in an MVA in a pedestrian/motor vehicle accident on February 29, 2016. As a result of the MVA Mr. Burdeniuk developed physical, cognitive and emotional difficulties.

[105] Dr. Anderson went on to note:

Cognitively, Mr. Burdeniuk has had increased concentration and memory difficulties since the 2016 MVA occurred. Mr. Burdeniuk has a mild learning disorder. Mr. Burdeniuk's increased cognitive difficulties following the MVA are likely due to a number of factors including pain, insomnia, fatigue, anxiety and depression.

[106] The plaintiff argues causation between the February accident and Mr. Burdeniuk's current symptomology has been established.

[107] As to the diagnosis, Dr. Anderson describes the following:

Emotionally, in addition to developing a persistent somatic symptom disorder with predominant pain (i.e. chronic pain disorder), Mr. Burdeniuk was emotionally traumatized at the accident scene and developed a posttraumatic stress disorder (PTSD). Mr. Burdeniuk has had a decrease in his PTSD symptoms over time but he continues to have mild to moderate PTSD.

Mr. Burdeniuk has become generally anxious since the 2016 MVA occurred and he presently has moderate to severe generalized anxiety disorder (GAD). Mr. Burdeniuk became increasingly depressed over time since the MVA occurred and he presently has a major depressive disorder (MDD) of mild to moderate severity

Mr. Burdeniuk would not have likely developed his present constellation of physical, cognitive and emotional difficulties if he had not been injured in the February 29, 2016 MVA. Prior to the MVA occurring, Mr. Burdeniuk had mild social anxiety but he did not have psychiatric illness. Mr. Burdeniuk has had a number of unrelated stressors since the MVA occurred, including relationship difficulties and gastrointestinal symptoms.

At times Mr. Burdeniuk has drank excessive alcohol and used excessive marijuana. Mr. Burdeniuk does not presently drink alcohol and he uses minimal marijuana. Mr. Burdeniuk would have likely coped better with unrelated stressors if he did not already have chronic pain and significant anxiety/depression following the February 29, 2016 MVA. Mr. Burdeniuk was involved in a car accident in March 2016 but that accident did not cause an increase in his physical or emotional symptoms.

- [108] Dr. Anderson was cross-examined by the defendant's counsel as to the issue of cognitive diminishment as a result of the February accident and Dr. Anderson's opinion that the March accident has not impacted his symptoms.
- [109] As to the cognitive difficulties, as previously noted, a variety of assessors interacted with the plaintiff throughout the post-accident period. None, save Dr. Anderson, opined there were cognitive difficulties stemming from the February accident. Dr. Anderson performed no test beyond the Montréal Cognitive Assessment, where the plaintiff scored just below the normal range, leading Dr. Anderson to his conclusion. Dr. Anderson nor did not review the plaintiff's schooling records with the detail afforded them by Dr. Quee Newell. She opined the plaintiff's cognitive limitations pre-dated the February accident.
- [110] Further, nothing in the plaintiff's presentation either to Dr. Anderson or any of the other assessors who testified gives credence to the likelihood that Mr. Burdeniuk has suffered cognitively (other than perhaps occasionally as a result of concentration lapses or fatigue) as a result of the February accident.
- [111] Dr. Anderson was aware of Dr. Klaassen's involvement. At the time of Dr. Anderson's assessment, the plaintiff had not received any psychiatric treatment, with the exception of brief consultations in the "psych ward" of Surrey Memorial Hospital.
- [112] Dr. Anderson noted the self-harm referenced in the testimony of Mr. Burdeniuk but noted, as at the 2018 visit, "He no longer cuts himself. He said 'I now have zero tolerance for hurting myself'."
- [113] As early as 2018, Dr. Anderson noted the improvement reported by Mr. Burdeniuk as a result of the sessions with Dr. Klaassen. Dr. Anderson notes a number of ongoing difficulties experienced by Mr. Burdeniuk related to the February accident which likely exacerbated the effect of the accident symptoms. Those include living with his brother; the breakup of his relationship with Ms. Noniewicz and the discovery of Ms. Noniewicz with a new suitor shortly following that breakup; an unwanted pregnancy with his next girlfriend, Nafisha, in the summer of 2018; and a relationship of estrangement between the plaintiff and his parents.

[114] As to the suggestion by counsel for the defendant that the March accident would have undoubtedly affected the plaintiff, Dr. Anderson disagreed. He noted that in his interview with Mr. Burdeniuk, Mr. Burdeniuk became visibly upset and distressed when describing the February 2016 incident. He described the March accident matter-of-factly and denied any effect, either physically or emotionally.

[115] Dr. Anderson was unshaken in his view that the March accident and the symptoms with which Mr. Burdeniuk presented in May 2018 are not causally related.

[116] As to future capacity, Dr. Anderson opined:

As a result of his symptoms Mr. Burdeniuk has had difficulty doing vocational tasks. Mr. Burdeniuk has not been able to return to work as a parking lot attendant at Costco because of his pain and functional limitations in addition to his PTSD symptoms. Mr. Burdeniuk's vocational options have likely narrowed as a result of a number of factors including the fluctuating nature of his symptoms, his pain and functional limitations, his fatigue, his cognitive difficulties, his irritability and his emotional stability. Mr. Burdeniuk has pushed himself to continue working despite his ongoing physical, cognitive and emotional difficulties.

[117] Dr. Anderson expressed the opinion that Mr. Burdeniuk will benefit from ongoing treatment for a registered psychologist such as Dr. Klaassen, and suggested that Mr. Burdeniuk continue with those sessions for a further 15 to 20 sessions of cognitive behavioural therapy to learn pain coping strategies, anger management strategies, exposure assignments and strategies for reducing his ongoing anxiety and depressive symptoms. He opined that the plaintiff may require long-term supportive therapy, for example 10 to 12 sessions per year.

[118] Finally, Dr. Anderson noted that the plaintiff should be followed by a treating psychiatrist and happily, this is now in effect. Dr. Anderson noted that the proper use of pharmacotherapy would ideally be monitored by his treating psychiatrist, not his general practitioner.

Dr. Koo

[119] Dr. Koo, a physiatrist, saw the plaintiff in August 2018. He physically examined the plaintiff but found little, other than self-report, out of the norm, with the exception of a notable 2cm variation in the plaintiff's left and right thigh circumference. He also noted the plaintiff did not demonstrate behaviours suggestive of undue pain focus or pain avoidance.

[120] Dr. Koo diagnosed the plaintiff with soft tissue injuries to the lower back and left hip girdle coupled with chronic sleep disruption, post-traumatic stress disorder, generalized anxiety disorder and major depression. He opined that there are restrictions on the plaintiff's ability to deal with heavier tasks such as working in the tire centre at Costco and noted that his continued severe symptoms of anxiety, driving anxiety, depression and PTSD are problematic in terms of his complete recovery.

[121] Dr. Koo described a cycle where decreasing mood and anxiety increase pain or, at least, the perception of pain. That pain then increases depression and anxiety.

[122] Dr. Koo was of the opinion that further recovery to the plaintiff's soft tissue injury is unlikely given the length of time since the February accident and his participation in all prescribed therapies to date.

[123] He further noted:

The persistence and recent worsening of his psychological conditions, with severe scores and his depression, anxiety and PTSD inventories, are also negative prognostic factors as they relate to his experience of his underlying soft tissue injuries and his perceived resilience and ability to participate in restorative therapies.

[124] Dr. Koo recommended an occupational therapist to review his work setting and a series of exercises and stretching coupled with mild to moderate painkillers.

[125] He suggested supervision by a personal trainer or kinesiologist might be helpful to allow the plaintiff to return to a low impact graduated progression of activity. He expressed doubt that the plaintiff would ever return to recreational pursuits such as snowboarding but encouraged the plaintiff to continue less strenuous activities such as swimming, tai chi, and yoga, cycling and aqua therapy.

[126] As to his long-term employment, Dr. Koo noted:

Ultimately, his longevity in manual, low skilled work is likely foreshortened on the basis of his physical and psychological conditions. He currently calls in sick once or twice a month but this appears to be more psychological than physical.

He continues to apply desensitization techniques for his PTSD symptoms when he must work in the parking lot and restricts to this to when it is generally empty and late at night.

He continues to be avoidant of unnecessary driving and is an anxious and nervous driver. He generally prefers to walk or take transit as a result and this likely impedes the spontaneity with which he can move freely in his local community.

[127] The latter finding, also commented on by Dr. Anderson, is overstated in my view given the evidence of the plaintiff of his driving others' cars when the owner is available to drive (the trip to see Dr. Butterfield) and the evidence of his workmate, Ms. Sharan, who testified the plaintiff drove with her to and from Banff.

Dr. Boyle

[128] Dr. Boyle is an orthopedic surgeon who saw the plaintiff at the instance of the defendant.

[129] Properly, Dr. Boyle deferred to those better qualified than him to speak to the plaintiff's emotional state and the impact of his emotions upon his physical capacity.

- [130] As to the physical injuries, Dr. Boyle expressed the opinion that the plaintiff suffered contusions and possible myofascial strains in both the Costco parking lot accidents of May 24, 2015 and February 29, 2016. Dr. Boyle did not suggest any lingering symptoms from 2015 had impacted the plaintiff's abilities as at February 2016.
- [131] There was no evidence of bone issues. The plaintiff demonstrated a free range of motion (as found by all other assessors) and x-rays showed no abnormalities. Dr. Boyle suggested that medical management of his physical injuries would be in the particular form of stretching and strengthening exercises, core strengthening exercises and mild over-the-counter anti-inflammatory medication.
- [132] Dr. Boyle opined that because he seemed to experience a complete recovery from the May 24, 2015 incident, the same ought to be expected following the February accident. He notes in neither case was their objective evidence of pathology which would act as a barrier to this expectation.
- [133] Dr. Boyle reported that statistically, most people recover from the injuries described by the plaintiff in under three months.
- [134] Dr. Boyle did note that the plaintiff had a minor complaint related to his left hip, but did not see that as limiting in terms of function.
- [135] Finally, he noted that in his opinion "there are no physical limitations to his ability to work in any position at Costco, either cashier, parking lot attendant, front door attendant or tire shop installation".
- [136] He noted that the non-physical aspects of any ongoing symptomology are outside the scope of his expertise.
- [137] In short, Dr. Boyle would recommend no investigation or treatment and suggests the plaintiff should be fully active in work, leisure and household activities.
- [138] The difficulty with that diagnosis is that it is statistically based, ignores all of his complaints and the observations of those around him as well as Dr. Koo and Dr. Anderson.

Gary Worthington White

- [139] Mr. Worthington White is an occupational therapist and a certified work capacity evaluator. When he saw the plaintiff in May 2019, he took a history from him and reviewed the various reports then in existence, including those of Dr. Anderson and Dr. Koo.

[140] He subjected the plaintiff to a series of formal effort tests in combination with clinical observations. Mr. Worthington White concluded that the plaintiff participated in the work capacity testing with near full physical effort. While there were occasional signs of guarding, Mr. Worthington White was of the opinion that the plaintiff had fully devoted himself to trying his best to perform the tasks assigned. Again, there were no non-organic findings or functional or physical inconsistencies noted in the testing.

[141] The summary of Mr. Worthington White's opinion as to work capacity is that the plaintiff presents as capable of limited and light strength work as well as occasional medium strength work provided he receives periods of short rest and some work accommodations to minimize stooping and bending.

[142] In summary, he noted:

With appropriate supports both physically and psycho-emotionally, as well as successful completion of a pain program it is my opinion that Mr. Burdeniuk, would be able to participate in a gradual return to physically suitable work and with ongoing supports and eventual successful self-management a durable return to suitable full-time work in the future is not unreasonable. He is not suitable for medium to heavy full-time work.

[143] Mr. Worthington White opined the plaintiff was not well-suited for all the physical and postural demands required to work as a grocery clerk and exposure to such work will likely result in varying degrees of symptom aggravation and accompanying pain or discomfort.

Mr. Jackson

[144] Mr. Jackson, a rehabilitation consultant, reviewed the various reports in existence at the time of his assessment in the summer of 2019. Mr. Jackson opined, based on testing of aptitude and capacity, that the plaintiff had the ability to perform work requiring average motor coordination and manual dexterity and low average general learning abilities.

[145] Historically, the plaintiff demonstrated the ability to perform heavy physical activity with the ability to perform body positioning for bending, stooping, crouching and kneeling along with work requiring prolonged standing, sitting, and walking and multiple-limb coordination.

[146] According to Mr. Jackson, his aptitude suggested compatibility with a number of occupational fields in science skilled, technology or skilled professional fields. Notable amongst those were accounting clerk, administrative clerk, graphic arts technician or denturist. He concluded that based on the medical reports, his interview and vocational testing, there are a number of barriers affecting the plaintiff's future employment prospects, including his career trajectory and the occupational choices still available to him. Mr. Jackson opined that the plaintiff would have difficulty in work environments requiring physical exertion or prolonged standing or walking.

- [147] It was the view of Mr. Jackson that the plaintiff is unable to return to his pre-injury work as a parking lot attendant at Costco because the work is beyond his physical tolerances. The alternate positions that he has performed at Costco, including cashier's helper and card and receipt checker, have flared up his back pain.
- [148] Such should be contrasted with the plaintiff's description of his new hours and the pledge of an assistant when he is assigned cashier duties as "great".
- [149] Mr. Jackson noted that his best choice for work would be sedentary to light occupations with occasional medium physical activities performed primarily from a seated position, with opportunities to alternate his sitting position to standing along with breaks for stretching. Given his poor psychological adjustment and cognitive inefficiencies, Mr. Jackson opined he would be better in a low-stress working environment with a lower premium on speed of work or level of production.
- [150] He suggested suitable occupations which would be those allowing him to sit, such as a hotel clerk, gas station attendant, or facility attendant. However, he noted that Mr. Burdeniuk would be at a competitive disadvantage in comparison to other able-bodied job applicants. As for jobs in the field of scientific or medical technician, Mr. Jackson viewed him as unsuitable for these occupations based on their job requirements and the requirement for their education, specifically Mathematics 12, Biology 12 and Physics 11.
- [151] Absent his injuries, Mr. Jackson opined that the plaintiff could suitably have trained to become a heavy-duty mechanic or plumber.

Dr. Quee Newell

- [152] Dr. Quee Newell had reference, which other experts did not, to the complete school records of the plaintiff. In her opinion, the plaintiff was not educationally suited to many of the jobs mentioned by Mr. Jackson. Dr. Newell cited the learning difficulties Mr. Burdeniuk experienced at an early age which took him out of a mainstream educational program as the reason he did not have an appropriate educational basis for these jobs, not the February accident.
- [153] She noted that his general intellectual function was indicative of low average verbal intelligence and average performance intelligence. His results were similar to individuals who work and direct entry-level occupations where one's job duties can be learned through demonstration and repetition.
- [154] She noted:

Assuming Mr. Burdeniuk's level of psychiatric functioning improves with ongoing psychiatric and psychological treatment and this translates into a higher level of overall functioning, his employment strengths and interest as measured by vocational testing, indicate he would be suited to employment as a healthcare assistant.

- [155] She then went on to review a number of programs which would pay the plaintiff within 20 percent of what he is currently earning at Costco.
- [156] However, it is clear entering those occupations was premised on recovery that, according to the medical experts, should not be relied upon.

Issues

- [157] The plaintiff argues that the entirety of the plaintiff's symptoms, both physical and emotional, are a result of the defendant's negligence. The defendant argues that the March accident exacerbated the injuries the plaintiff suffered in the February accident and that both his physical and emotional symptoms are attributable to both accidents. Given there is no way of delineating as to the extent to which each incident caused the plaintiff's injuries, the defendant argues the plaintiff's damages should be apportioned equally between the at-fault accident involving Ms. Christie and the March accident.
- [158] The defendant concedes that the plaintiff is entitled to non-pecuniary damages, damages for past loss of economic opportunity, damages for future loss of capacity, special damages, and costs of future care.
- [159] The parties disagree on the extent of the injuries the plaintiff has suffered, his requirements for future care, and the degree to which his injuries will impair his future earning capacity.
- [160] Finally, the defendant argues that the plaintiff has failed to mitigate his loss. Underpinning that submission is the plaintiff's consumption of marihuana in amounts sufficient to cause independent symptoms that were disabling and his continued use of alcohol, a depressant, in the face of the medical opinion from Dr. Anderson that such will counteract the positive effects of some of the medications that are designed to reduce the plaintiff's constellation of psychological symptoms.

Discussion

- [161] Firstly, dealing with the evidence of Dr. Boyle, I am not satisfied that Dr. Boyle has offered anything but statistical information as to the rate of recovery of like persons in the plaintiff's situation.
- [162] Dr. Boyle opined that the majority, perhaps as much as nine of 10 patients, go on to full recovery after soft tissue strain such as was suffered by the plaintiff in each of the two accidents (according to Dr. Boyle).
- [163] As proof of that hypothesis, Dr. Boyle notes the plaintiff's full recovery from the incident that occurred in the Costco parking lot in May 2015. He further opined that the plaintiff was on his way to recovery but for the March accident and, to the extent the plaintiff remains injured, both accidents must share responsibility for his current symptomology.

- [164] With respect, I conclude that the opinion of Dr. Boyle is of limited assistance. However, I accept Dr. Boyle's opinion that the plaintiff's physical injuries are not a result of any underlying orthopedic pathology, nor do they severely restrict his range of motion.
- [165] Implicit in the opinion of Dr. Boyle is that if nine patients of 10 go on to full recovery, one patient does not. Mr. Burdeniuk appears to be such a patient.
- [166] As to Dr. Boyle's opinion as to the causal connection between the March accident and Mr. Burdeniuk's current symptomology, he offered nothing other than the temporal connection between the two events and the similarity of the potential for myofascial strain as underlying that opinion.
- [167] Additionally, he refers to the physician's records indicating that after the March accident, the plaintiff presented with "pain and tenderness". However, it is my view that the subsequent Costco reporting letters make clear that the family doctor was merely reviewing physical symptoms that had been complained of following the Costco parking lot incident. There is nothing specific in the doctor's note that gives rise to the conclusion that the plaintiff's injuries, those to his left hip and left low back, were exacerbated by the March accident.
- [168] Dr. Koo opined that given the March 2016 collision occurred on the plaintiff's left-hand side, the more likely damage, from a soft tissue standpoint, would have occurred to the plaintiff's right-hand side as a result of the mechanics of his right-hand side stretching. The plaintiff complained of no additional symptoms on his right side.
- [169] Dr. Boyle conceded he has no expertise in the field of emotional or psychological state and offered no opinion as to what effect, if any, either action would have contributed to the plaintiff's current psychological deficit.
- [170] The psychiatric opinion offered by Dr. Anderson makes clear, at least to its author, Dr. Anderson, that the plaintiff's constellation of emotional symptoms, including post-traumatic stress disorder, generalized anxiety disorder, major depressive disorder and somatic chronic pain, are all causally linked to the February accident. In short, but for that accident, the plaintiff would not be experiencing his current psychiatric symptoms.
- [171] Dr. Anderson dealt with the March accident, relying mainly on the complete history given by the plaintiff, by dismissing any connection between it and the plaintiff's current symptomology.
- [172] He was cross-examined on that opinion and it was suggested to him that the force of impact coupled with the trauma of seeing the approaching vehicle of Mr. Costain would, inevitably, result in symptoms similar to those experienced in the February accident.

- [173] Dr. Anderson responded by noting the distinction in the plaintiff's re-telling of the circumstances of the two accidents. When speaking of the Costco accident, the plaintiff was emotive and visibly distressed. He related the circumstances of the March accident in a detached manner and did not exhibit the same level of emotional upset when recounting the events.
- [174] Ms. Noniewicz, to the extent one can corroborate an immediate feeling of anxiety and distress, noted the agitation of the plaintiff on the night of the February accident and in days following. She described him as anxious. He described being on high alert following the February accident. None of the witnesses called testified to any observations of heightened anxiety following the March accident.
- [175] Finally, of some note, the defendant had Mr. Burdeniuk assessed independently by Dr. Miller, a psychiatrist from Victoria. Dr. Miller offered no opinion as to the extent of the plaintiff's current psychiatric conditions nor as to the etiology of those symptoms. However, the plaintiff has not asked me to draw an adverse inference from the failure of the defendant to tender a report from Dr. Miller.
- [176] In the result, I am satisfied, on the balance of probabilities, that the plaintiff's current physical and emotional symptoms are a result of the February accident and that the defendant, Ms. Christie, is solely responsible for his current condition as a result of her negligence in striking him. On the totality of the evidence before me, I conclude the March accident did not contribute in any material way to those ongoing symptoms.
- [177] The next issue is the extent of the plaintiff's injuries and how they will impact him in the future. Past wage loss and special damages have been agreed to with the exception of interest charged on one of the accounts.
- [178] While I accept the diagnosis of Dr. Anderson in the main, there are portions of it that do not hold up under scrutiny. I am not satisfied on the totality of the evidence that the plaintiff has suffered any cognitive deficit as a result of the February accident. It is conceded he did not suffer a brain injury.
- [179] While it is true he scored marginally lower than the normal range on the Montréal cognitive assessment, his interaction with all professionals uniformly resulted in descriptions of him being engaging, articulate for his level of education, and pleasant.
- [180] His treating occupational therapist, Ms. Gverzdys, specifically asked the plaintiff whether he was experiencing cognitive deficit and he denied such. Recognizing that someone experiencing such a deficit might not be the best person to report, I had the benefit of observing Mr. Burdeniuk on the stand for a day and a half and I conclude his self-assessment made to Ms. Gverzdys is correct. He suffered no cognitive impairment as a result of the February accident.

- [181] Similarly, I conclude that the plaintiff, not necessarily intentionally, has overstated some of his symptomology. It is hard to conclude that he has driving anxiety given the evidence that he was driving his girlfriend's father's car three weeks following the February accident when such was totally unnecessary. She was blocks away and there was no need for her to be picked up. More compelling is the evidence of Ms. Sharan, who described a trip to Banff where the plaintiff drove each way, some 10 to 11 hours. Admittedly, there were breaks, but such belies any serious disorder associated with driving and undermines, to some extent, my confidence in the reliability of some of the plaintiff's subjective complaints.
- [182] If driving anxiety exists, it is not as a result of the February accident.
- [183] In my view, based on the evidence of Drs. Koo and Anderson, it is clear that the majority of the plaintiff's current complaints and resultant disability stem from his psychological injuries, not his physical injuries.
- [184] Dr. Koo described the vicious cycle of pain feeding the psychological symptoms and psychological symptoms driving the pain upward. I accept that the plaintiff continues to experience pain that goes far beyond what would otherwise be expected after having reviewed the physical examinations of him.
- [185] I further accept that he experiences emotional upset and occasional flashbacks to the circumstances of the February accident. He reported that both his nightmares and his ability to go in the parking lot have abated in some measure since his involvement with Dr. Klaassen. Hopefully, that improvement will continue with further sessions with Dr. Klaassen and a proper balancing of medications now that he is under the care of Dr. Butterworth.
- [186] Nonetheless, as has been accepted by the defendant, the plaintiff's impairment is ongoing, significant and, in my view, will have a negative effect on his future economic prospects. I shall discuss those later, but accept, generally, the opinion from the plaintiff's assessors that he is less durable, less capable of performing in jobs suited to him and will, as a result, experience interference with his ability to earn income for the foreseeable future.

Non-Pecuniary Damages

- [187] The leading decision in BC respecting the assessment of non-pecuniary damages remains *Stapley v. Hejslet*, 2006 BCCA 34. It sets out the non-exhaustive factors to be considered in making a determination with respect to an award for pain and suffering. Those factors include:
- a) age of the plaintiff;
 - b) nature of the injury;
 - c) severity and duration of pain;

- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism.

[188] I agree with plaintiff's counsel that the injuries suffered by Mr. Burdeniuk are pervasive and, if not permanent, will be present for a significant duration. Mr. Burdeniuk is young and faces a lifetime of challenges if further treatment does not assist him in gaining more physical ability and lessening emotional issues that have plagued him since the February accident.

[189] The physical injury, while not severe, has resulted in a constellation of psychological symptoms which have caused him a significant degree of social isolation (although not as much as complained of by the plaintiff) and interfered with his social relationships, specifically with Ms. Noniewicz.

[190] The February accident's psychological impact has resulted in the plaintiff self-harming and having suicidal ideations, although he admitted these have improved, if not fully resolved.

[191] While I remain more optimistic than the plaintiff or his counsel as to the extent to which he will suffer pain and psychological impairments in the long-term, there is no certainty that future admission into a pain clinic, continued treatment by Dr. Klaassen and the addition of psychiatric care overseen by Dr. Butterfield will alleviate, let alone extinguish, the plaintiff's ongoing difficulties. I recognize that both Dr. Koo and Dr. Anderson believe the plaintiff's prognosis is guarded given the duration from the February accident to trial. That said, the plaintiff, by virtue of these reasons, will continue to see Dr. Klaassen, receive treatment to cope with his symptoms via his admission into a pain clinic, and presumably achieve better oversight of his medications with treatment from Dr. Butterfield. That treatment was unavailable until the fall of 2019.

[192] I accept that he has undergone a significant degree of emotional suffering as a result of the February accident and that his recreational activities, notably snowboarding, hiking, and to a lesser extent walking, socializing, and keeping in physical shape, have all been impacted by his symptomology.

- [193] The plaintiff suggests an award of \$150,000. In doing so, I have been referred to a number of cases. Some of them, notably *Shongu v. Jing*, 2016 BCSC 901 and *Gill v. Apeldoorn*, 2019 BCSC 798, resulted in permanent disability. The other authorities referred to me, including *Verjee v. Dunbrak*, 2019 BCSC 1696 [Verjee], seemed more apt, although the plaintiff in *Verjee* was 69 years old.
- [194] In *Kim v. Khaw*, 2014 BCSC 2221 [Kim], the plaintiff was diagnosed with a major depressive disorder and post-traumatic stress disorder. After three months, his soft tissue injuries were not impacting his ability to work, and his pain was not interfering with his activities of daily living. The plaintiff in *Kim* had pre-existing mental health issues, which is not the case here. The result in *Kim* was an award of \$131,000.
- [195] In *Morena v. Dhillon*, 2014 BCSC 141, Madam Justice Arnold-Bailey awarded \$130,000 to a 47-year-old plaintiff who suffered similar injuries to Mr. Burdeniuk.
- [196] The defendant has referred me to cases ranging from a low of \$70,000 to a high of \$140,000.
- [197] Some of the decisions I was referred to are dated, although the defendant "grossed them up" to account for inflation to 2019 dollars.
- [198] In *Mullens v. Toor*, 2016 BCSC 1645, the plaintiff was a 30-year-old bank executive suffering from symptoms not dissimilar to those of the plaintiff here. She was off work for four years following the accident, became socially isolated and her marriage suffered as a result of the injuries. The award was \$140,000 before deduction for failure to mitigate. The decision was affirmed on appeal.
- [199] In *Sharma v. Kandola*, 2019 BCSC 349 [Sharma], a 21-year-old university student suffered ongoing soft tissue pain in her neck and shoulder, post-concussive syndrome, chronic headaches and chronic pain together with moderate depression and anxiety. Similar to the circumstances here, the prognosis for full recovery was guarded. In *Sharma*, the plaintiff was awarded \$75,000.
- [200] A similar award of \$75,000 (\$87,265 in 2019 dollars) was made in *Smith v. Williams*, 2011 BCSC 1806 [Smith]. The plaintiff was 33 years of age and suffered soft tissue injuries to her neck, back, shoulder, arm, and hand. Those injuries healed within six months, but the plaintiff was also diagnosed with PTSD and anxiety, which persisted two years post-accident. A similar guarded prognosis was offered.
- [201] In *Resendiz v. D'Alessandro*, 2017 BCSC 1274, the 37-year-old plaintiff suffered soft tissue injuries together with PTSD, anxiety, chronic pain, sleep disturbance as well as low back pain. Although the conditions were found to be improving, they had not resolved by trial. The plaintiff was awarded \$100,000 for non-pecuniary damages.
- [202] Finally, in *Parhar v. Clarke*, 2017 BCSC 550, a 36-year-old plaintiff employed as a bank teller suffered soft tissue injuries to her neck, shoulder and low back. She had thoracic outlet syndrome and persistent headaches together with TMJ pain and injuries to her knees and

right hip. She also sustained chronic pain disorder, a major depressive disorder and generalized anxiety disorder and PTSD. Her prognosis, once again, was guarded, and she was awarded \$110,000 in non-pecuniary damages prior to applying a reduction for failure to mitigate.

[203] No two cases are alike. In my view, the cases presented inform me that the range of general non-pecuniary damages for the injuries suffered by the plaintiff, in 2019 dollars, range from a low of \$87,000 (Smith), to a high of \$150,000 (Verjee).

[204] The plaintiff's injuries, in my view, are nearer the severe end of the range given it is now almost four years post-accident and, although the plaintiff reports some modest improvement and there is room for hope, there is no certainty of further improvement. The result is that his overall enjoyment of life has and will continue to be impacted by his physical limitations and his mental well-being.

[205] Accordingly, I award the sum of \$140,000 in non-pecuniary damages.

Past Wage Loss

[206] The parties are agreed that past wage loss is \$46,500.

[207] I leave counsel to calculate the court ordered interest which would accrue on that amount based on the dates by which the loss was incrementally incurred. If they are unable to do so by agreement, there will be limited liberty to apply.

Special Damages

[208] The parties are also agreed on special damages, save for the \$6,923.08 interest component contained in the costs of the Karp Rehabilitation charge.

[209] I agree that interest outside of court ordered interest is not properly chargeable on special damages. As above, the parties should attempt to calculate the applicable court ordered interest in respect of the special damages agreed to. Those consist of the accounts from Shoppers Drug Mart, Costco Pharmacy, Total Care Chiropractic and Rehab Inc., Dr. Klaassen, Seva Wellness and Karp Rehabilitation.

[210] By agreement, the total amount of special damages awarded is \$26,413.

Future Loss of Earning Capacity

[211] Counsel for the defendant referred me to Dhaliwal v. Greyhound Canada Transportation Inc., 2015 BCSC 2147, varied on other grounds in 2017 BCCA 260, where the principles applicable to the assessment of damages for future loss of earning capacity are set out:

[336] In Parker v. Lemmon, 2012 BCSC 27 (B.C.S.C.), Savage J. gave a useful summary of the principals involved for the Court to consider an award for loss of earning capacity:

[42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32, which I summarize as follows:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss of income is more easily measurable;
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

[337] The plaintiff bears the onus of establishing a real and substantial possibility that he will suffer a loss of income-earning capacity in the future as a result of the injuries sustained in the Accident. A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss.

Perren v. Lalari, 2010 BCCA 140

[338] If the plaintiff is unable to prove a real and substantial possibility of a future event leading to an income loss, the inquiry ends. If established, the plaintiff may prove the quantification of such loss either on an "earnings approach" or a "capital assets approach".

Morgan v. Galbraith, 2013 BCCA 305

[339] An award for future loss of income-earning capacity should not be based on the plaintiff's own perceptions of loss, but must show a realistic possibility that he is less able to compete in the marketplace, with real economic consequences.

Kim v. Morier, 2014 BCCA 63

[340] There must be evidence and an analysis of the earnings the plaintiff would have realistically achieved but for the Accident.

Schenker v. Scott, 2014 BCCA 203

[341] Ongoing symptoms alone do not mandate an award for loss of earning capacity. There must be some cogent evidence to trigger any of the four considerations set out in *Brown v. Golaiy*, [1985] B.C.J. No. 31. Paragraph 8 of that case states the following:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include 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.

[212] The defendant concedes that the plaintiff has established a real and substantial possibility of a future loss of income as a result of his injuries from the February accident.

[213] The plaintiff suggests those damages are to be assessed on the earnings approach and that I should consider the plaintiff's earning potential as either a plumber or heavy duty mechanic as opposed to assessing his future loss on the basis that he will remain in the employ of Costco for the remainder of his working life.

[214] Peter Sheldon, an economist, prepared a report containing estimates of past and future earnings. The defendant accepts the past lost calculations but challenges Mr. Sheldon's assumptions regarding any future loss. Perhaps more importantly, the defendant says the approach suggested by the plaintiff is far too pessimistic in terms of the residual ability of the plaintiff to earn income.

[215] Mr. Sheldon provided a number of scenarios as to the wage rates available to the plaintiff had he (1) continued to work full-time for Costco (2) changed careers to work as a letter carrier (3) retrained as a plumber in the fall of 2019 and secured work as a plumber following the completion of his apprenticeship in 2025, and (4) continued to work full-time for Costco until the fall of 2019 when he would have enrolled in a course to accredit himself as a heavy duty mechanic where after he would commence such work about the year 2025.

[216] Mr. Sheldon also envisioned other scenarios where the plaintiff would continue to work for Costco part-time, 20 to 25 hours per week, and where he would change careers to work full-time as a hotel clerk, receptionist or office assistant.

- [217] Mr. Sheldon provided a series of income multipliers to allow me, if appropriate, to assess in dollar terms the annual loss that the plaintiff will continue to experience as a result of the February accident and then to pick a point in time when that loss will terminate, whether retirement or before, and determine the appropriate multiplier by which to multiply his annual anticipated loss.
- [218] For example, were the plaintiff to suffer a reduction in earnings of \$10,000 annually for the remainder of his working life and retire at age 65, the appropriate actuarial multiplier would be 28.534, resulting in a loss of \$285,340. Such allows for the contingency of survival but no other positive or negative contingencies.
- [219] The other approach outlined by Mr. Sheldon was entitled summary of projections of future earnings.
- [220] Mr. Sheldon projected the present value of full-year employment incomes for the various occupational models described in his report.
- [221] The vocational rehabilitation consultant, Mr. Jackson, opined that, but for the February accident, the plaintiff had the intellectual acumen and aptitude to become either a plumber or heavy-duty mechanic. These are the high water marks of assessing his future gross earnings. If employed as a plumber commencing in the year 2025, the plaintiff's future earnings, dependent upon contingencies, range from \$1,518,700 to \$1,686,700. If a heavy-duty mechanic, those figures rise to \$2,309,200 to \$2,556,600.
- [222] Mr. Sheldon notes that based on working 22.5 hours per week at Costco until retirement at age 65, again dependent upon contingencies, the range of earnings varies from \$666,000 to \$762,800.
- [223] Plaintiff's counsel suggests that future loss of earning capacity should be assessed at \$600,000, an amount slightly more than the difference between Mr. Burdeniuk's anticipated earnings if employed full-time at Costco to age 65 (\$1,340,300) as opposed to part-time income based on 22.5 hours weekly (\$762,800). I note he presently works 25 hours a week and confirmed such was "great".
- [224] Both the above numbers are based on a risk-only contingency model, meaning no allowance has been made for voluntary exit from the workforce or working part-time.
- [225] The defendant argued the plaintiff's loss should be assessed on the capital asset approach. The defendant argues that the plaintiff's loss is not easily measurable because of the unknowns of when and if he will return to full-time employment.
- [226] The defendant points to the report of Dr. Quee Newell in dismissing any suggestion that the contingencies affecting the assessment lean more to the positive than the negative because of the option of the plaintiff to become a plumber or heavy-duty mechanic, vocations which would pay him significantly more than his earnings from Costco.

- [227] Firstly, in considering the hypothetical earnings model to choose for the plaintiff's future, I accept the opinion of Dr. Quee Newell that based on the historical educational records of the plaintiff, he was unlikely, even absent the circumstances of the February accident, to have ever successfully completed the academic requirements for either trade.
- [228] The plaintiff's educational prospects, in my view, are closely aligned with the career path he chose and his likely career course would have been to continue at Costco. Potential for advancement within Costco is limited by seniority and the requirement of certain educational baselines to move into managerial positions.
- [229] In short, I conclude the most likely scenario is that, but for the February accident, the plaintiff would have continued on with his work at Costco. Some opportunity for advancement existed but, by virtue of the limited number of jobs and the requirements for them, it is a contingency, not a likelihood that he would have progressed through to management at Costco.
- [230] In any event, no information was provided to me as to salary differentials which would inform the weight to afford such a contingency in the assessment of the plaintiff's loss of loss of future income capacity.
- [231] In the circumstances, I conclude an earnings approach is most appropriate for assessing the plaintiff's future income loss. I stress, as informed by the authorities, an award for the loss of future capacity to earn income is an assessment and not a mathematical calculation. While the earnings approach provides mathematical precision, there is no precision in forecasting the plaintiff's future employability. He is not totally disabled and his current workload of 25 hours weekly cannot be accurately assessed as the high water mark of what he will achieve in the future.
- [232] I accept from the medical evidence that in the short term 25 hours weekly is appropriate. The plaintiff acknowledges that is appropriate at his current level of disability. There is no foundation for concluding or even speculating such will worsen.
- [233] Owing to issues of durability, it may be appropriate that the plaintiff, in the longer term, will work four days out of five, a 32-hour as opposed to 40-hour workweek, allowing him a day off in between two workdays to recover.
- [234] I am satisfied from the evidence of what has transpired at Costco and from the evidence of its current manager that Costco will accommodate the plaintiff where possible. The plaintiff's performance reviews encourage me to believe that he is a valued employee at Costco.
- [235] His future course of recovery, while unknown and, in the words of both Drs. Koo and Anderson, guarded, does not mean his function will not improve with ongoing treatment as described above.

- [236] Further, there is some merit in the defendant's suggestion that the numbers chosen by the plaintiff's expert as to his expected future earnings from Costco are the most favourable given that they recognize risk-only contingencies and are premised on 22.5 hours worked weekly as opposed to the 25 he is working.
- [237] However, the non-wage benefits the plaintiff was receiving must also be considered. Specifically, Costco contributed to his pension plan at a rate of four percent of gross salary. That could rise to as high as six percent if the plaintiff made voluntary contributions.
- [238] In my view, the positive and negative factors, including non-wage benefits not included in the economist's analysis substantially offset one another.
- [239] Recalling again that the loss of future income earning capacity is an assessment and not a mathematical calculation, my assessment of the plaintiff's future loss is from 20% to 25% of the higher end of his capacity assuming a continued career at Costco; \$1,340,300. In the result, I assess the plaintiff's future loss of earning capacity at \$300,000.

Loss of Housekeeping Capacity

- [240] The law relating to loss of housekeeping capacity has been recently revisited in *Kim v. Lin*, 2018 BCCA 77. After a review of previous case law, the court stated:
- [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*, "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.
- [34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.
- [241] In *Carson v. Ehman*, 2019 BCSC 2120, the plaintiff was 22 years old at the time of the accident and married after the accident. The plaintiff alleged neck, shoulder, and upper back pain, headaches, loss of sleep, and driving anxiety. The court awarded \$10,000 for what it considered a relatively modest loss of housekeeping capacity. The court noted the plaintiff had not had to hire outside help because her husband and other family members stepped up to assist with household chores.

[242] The plaintiff here has not hired help to assist him with any of the duties he asserts he is no longer capable of.

[243] He lives in rental accommodation and there was no evidence that he or his brother were responsible for outside maintenance. I note, however, that the plaintiff's living situation with his brother is not permanent, and he may move to a location that requires some outside maintenance in the future.

[244] The evidence discloses that the plaintiff is capable of doing most, if not all, the tasks described in the plaintiff's submissions, but with an increase in discomfort in his left hip and lower back.

[245] Accordingly, I award \$10,000 for the loss of housekeeping capacity.

Cost of Future Care

[246] The test for cost of future care awards was recently discussed in *Paur v. Providence Health Care*, 2017 BCCA 161:

[109] The law is clear that in order to be included in an award of damages, an item of future care must be medically necessary. In *Tsalamandris v. McLeod* 2012 BCCA 239, this court reviewed the applicable principles:

The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. [At paras. 62-3.]

While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Gregory v. Insurance Corporation of British Columbia* 2011 BCCA 144 at para. 39; *Aberdeen v. Zanatta* 2008 BCCA 420 at paras. 43, 63.

[247] An assessment of damages for cost of future care is not a precise mathematical calculation: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.

- [248] Here, the plaintiff relies upon recommendations contained in the report of Mr. Worthington-White as costed by Mr. Sheldon. He seeks an award of \$250,000, inclusive of housekeeping costs.
- [249] The defendant concedes future care costs of \$28,000 (rounded) are warranted, consisting of the cost of the pain clinic; a pain management intervention assessment; a further year of psychological counselling with Dr. Klaassen; involvement of an occupational therapist; a two-year fitness pass; kinesiology services (12 sessions); adaptive equipment; and prescriptions and over-the-counter medications.
- [250] The difference in the parties' suggested awards, having eliminated housekeeping from the cost of future care, is roughly \$164,000. Such results from differences in the following areas: \$63,000 for psychological counselling if counselling is to extend beyond one year into the future; \$1760 for occupational therapy; \$33,000 for treatment management including massage therapy; equipment, estimated by Mr. Sheldon to cost \$7,000; \$4,000 for vocational consulting; and medications costing \$62,500 over the plaintiff's lifetime.
- [251] Dealing firstly with psychological counselling, Dr. Anderson advocated for 15-20 sessions with Dr. Klaassen and continued "Mr. Burdeniuk may require long term supportive therapy (e.g. 10-12 sessions per year)".
- [252] In my view, the sessions beyond those actually recommended are an unknown to be provided for by way of contingency. Hence, under the heading 'psychological counselling', I award the sum of \$15,000.
- [253] The difference in occupational therapy costs appears to arise from a misunderstanding between the parties. The defendant accepts the travel and other costs associated with occupational therapy in his written submissions, but not the costs of the occupational therapy itself. I accept that these sessions are necessary, and award the amount of \$2,640 for occupational therapy.
- [254] While the plaintiff suggested he found occasional, temporary relief through massage therapy, neither Dr. Koo nor Dr. Boyle saw such as medically required. Accordingly, I make no award under this sub-heading.
- [255] The difference in equipment costs was not delineated by the defendant. The allowance contained in the report of Mr. Worthington-White, as costed by Mr. Sheldon, seems partially ill-suited to the plaintiff's present requirements.
- [256] For example, much of the projected cost comes from items suitable for a home office or workstation. There was no evidence from the plaintiff sustaining such a need. I adopt the defendant's suggested figure of \$2,000 under this heading.
- [257] I accept that vocational consulting will benefit the plaintiff in determining whether better employment options exist other than that upon which I predicated his future loss of capacity. I allow \$4,000 under this heading.

- [258] The defendant suggests a two-year fitness pass. The evidence shows the plaintiff previously attended and presumable paid for a gym membership prior to the February accident. I allow the \$1,000 suggested by the defendant.
- [259] As to the suggested allowance for a personal trainer or kinesiologist, the plaintiff has received instruction throughout his attendance upon physiotherapist and occupational therapist in exercise regimes and the benefits of adherence to them. The defendant agrees to \$1,292 to cover the costs of 12 further visits plus travel costs and I agree such is sufficient. I award the suggested \$1,292 for kinesiology services.
- [260] As to the future costs of medications, the plaintiff's submission presumes a lifetime of usage of all the presently prescribed drugs at current rates, without deduction for any benefit the plaintiff might receive through PharmaCare. Mr. Sheldon offered nothing more than the bare assertion that PharmaCare will not reimburse the plaintiff if another entity is paying the cost.
- [261] The defendant's suggestion of \$5,000 seems overly optimistic based on the evidence, but the plaintiff's submission of \$62,000 is premised on a worst-case scenario. I allow \$20,000 for the cost of future prescriptions and over-the-counter medications.

[262] In summary then, I allow the following costs of future care:

Pain management assessment:

\$2,500

Pain management clinic:

\$12,000

Psychological counselling:

\$15,000

Occupational therapy:

\$2,640

Equipment:

\$2,000

Vocational consulting:

\$4,000

Two-year fitness pass:

\$1,000

Personal trainer/kinesiologist:

\$1,292

Medication:

\$20,000

Total:

\$60,432

Mitigation

[263] The defendant argues that the plaintiff's damages should be reduced by virtue of his failure to mitigate. To succeed, the defendant has the burden of establishing on a balance of probabilities: a) that there were steps the claimant could have taken to mitigate; b) that those steps were reasonable; and c) the extent to which the loss would have been avoided by taking those steps: *Wright v. Mistry*, 2017 BCSC 239, at para. 103.

[264] Here, the defendant submits the plaintiff's continued consumption of marihuana and alcohol when he ought to have known this would hamper his recovery constitutes a failure to mitigate.

[265] With respect, the evidence does not support the conclusion that abstention from both would have aided the plaintiff's recovery. At best, Dr. Anderson agreed with defence's suggestion that alcohol is a depressant and is to be avoided. He was not asked the extent to which continued intermittent use of either would interfere with the plaintiff's recovery.

[266] Outside of the brief period when the plaintiff self-medicated and overused marihuana, there is no evidence of his occasional use of marihuana having a deleterious effect on his health. To the contrary, Dr. Anderson suggested that occasional marihuana use might assist the plaintiff's sleep issues. He did not suggest the plaintiff's recovery was delayed or impaired by ongoing usage. Nor was there any suggestion that the plaintiff's long-term recovery was hampered by the development of CHS.

[267] Lastly, there is no evidence to suggest that the plaintiff knew or ought to have known either substance was inhibiting recovery (even had I found such). There is no evidence that the plaintiff was advised, before he saw Dr. Anderson, that alcohol or marihuana were contraindicated for his symptoms.

[268] Accordingly, I find the defendant has not discharged the burden of proof and decline to reduce the damages awarded for failure to mitigate.

Summary of Award

[269] In summary, I award the following:

Non-pecuniary damages:

\$140,000

Past wage loss:

\$46,500

Special damages:

\$26,413

Future loss of earning capacity:

\$300,000

Loss of housekeeping capacity:

\$10,000

Cost of future care:

\$60,432

Total:

\$583,345

[270] The plaintiff is also entitled to interest on the past wage loss and special damages portions of the award pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79. There will be limited liberty to apply should the parties not be able to agree on the amount of interest owed.

Costs

[271] Unless there have been offers to settle which affect the issue of costs, the plaintiff is entitled to costs of the action at Scale B. If either party wishes to make submissions on the matter of costs, arrangements should be made through Trial Scheduling to set the matter down before me.

"Harvey J."

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