

CANADA / JUDGMENT

Campbell v. Peter Kiewit Infrastructure Co.

2020 BCSC 805

COURT

Supreme Court of British Columbia

DECIDED

29 May 2020

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2020 BCSC 805 Campbell v. Peter Kiewit Infrastructure Co.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Campbell v. Peter Kiewit Infrastructure Co.,

2020 BCSC 805

Date: 20200529

Docket: M144456

Registry: Vancouver

Between:

Jessica Campbell

Plaintiff

And

Peter Kiewit Infrastructure Co. dba Kiewit/Flatiron GP,

ABC Company, John Doe, Dylan Trerise, Steven John Trerise,

Gian Franco Mazzarolo, and Josie Mazzarolo

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:

R.K. Dewar

V.L. Medved

Counsel for Defendants Dylan Trerise, and Steven J. Trerise:

A.W. Watchorn

M. Minhas

Place and Date of Trial:

Vancouver, B.C.

September 3-6, 9-13, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 29, 2020

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I. INTRODUCTION

- [1] The plaintiff, Alexander Campbell, was injured in a July 11, 2012, motor vehicle accident ("the accident"). The accident took place in Burnaby on Highway #1. Mr. Campbell's car was struck from behind and pushed into the concrete centre median.
- [2] Mr. Campbell claims to have suffered various injuries in the accident, including injuries to his neck, shoulders, back, chest and right knee, and associated symptoms including headaches, chronic pain, sleep disturbance and fatigue.

- [3] Liability has been admitted by the defendants Dylan and Steven Trerise ("the defendants"). The claim against the other named parties was discontinued.
- [4] The defendants concede that Mr. Campbell suffered soft tissue injuries to his neck, back and knee in the accident, but dispute the nature, extent, and duration of those injuries, as well as their impact on the plaintiff's ability to work and social life. A central issue in dispute is the impact of the accident on Mr. Campbell's employability and his career path.
- [5] The issues to be determined relate to the injuries suffered and the appropriate damages.

II. THE PLAINTIFF PRE-ACCIDENT

A. General

- [6] Mr. Campbell was born in 1988. He grew up in the Comox area on what he and his parents refer to as "the farm", a small acreage (1.3 acres) with a residence, and a few ducks and chickens. His chores while living or staying at the farm included tasks like mowing the large lawn and chopping firewood.
- [7] By all accounts, Mr. Campbell had a happy and very outdoorsy childhood. He had an interest in theatre and photography that started in his youth. By his early teens, he had decided that he wanted to work in the film and television industry ("film industry"). Although artistic, he did not want to act. His focus was always on the "behind the camera" aspects of the process.
- [8] In 2006, he went directly from high school into the Motion Picture Production Program ("Program") at Capilano University. He obtained a certificate in 2007 and a diploma in 2008.
- [9] To assist his attendance in the Program, Mr. Campbell's parents bought a two-bedroom condominium in North Vancouver, renting one room to Mr. Campbell (and, for some period of time, Mr. Campbell's boyfriend, Liam) and the other to a third party.
- [10] At some point (it is not clear exactly when), Mr. Campbell took an English writing course through Thompson Rivers University in order to improve his grant application writing ability.
- [11] Mr. Campbell was generally healthy before the accident, with two relevant qualifications. First, he twice injured his back while working in the film industry, once in 2011 and again in early 2012. Second, he had an overactive bladder and suffered from nocturia, and had undergone a cystoscopy in this regard around 2009. Both qualifications are further addressed below.

B. Film Industry Work

1. Film Industry Generally

- [12] A basic outline of the technical production side of the film industry is necessary to put Mr. Campbell's work and career path, both before and after the accident, into context.

- [13] By way of introduction, the technical side of the film industry operates on a model somewhat like that used by building trade unions in the construction industry. In particular, work is project-based, the union performs a work dispatch function, and earning union membership is the path to work security and full benefits.
- [14] What follows was put into evidence through Mr. Campbell, Robert Jordan (who has been involved in the film industry since 1993), and documents. The background facts set out here were not contentious.
- [15] The film industry has union and non-union sectors. The same technical positions exist in both sectors and it is not uncommon for a person to do some work in both sectors.
- [16] Union workers are grouped (through locals and/or department) by reference to the area of technical skill (e.g., painting or lighting). It is possible to work on a union project without being a union member by obtaining "permittee" status from the relevant union.
- [17] There are minimum qualifications to apply for union membership, but a qualified applicant is not entitled to become a member. The union can reject individual applicants. It may also resolve not to accept any applicants if the available work does not warrant increased numbers.
- [18] There are various unions in the film industry. The most relevant for the purposes of this decision are:
- IATSE (International Association of Theatrical Stage Employees) Local 891 ("Local 891"), which represents a majority of the technical positions, including those in the props and set decorating departments;
 - IATSE Local 669 ("Local 669"), which represents camera department positions; and
 - Directors Guild of Canada ("DGC"), which represents directors and related positions (e.g., Production Assistant).
- [19] Mr. Campbell has or used to have permittee status with these unions. With respect to Local 891, he has held permittee status for both the props department and the set decorating department.
- [20] Departments have subject matter responsibility, and each department has its own set of positions. Mr. Jordan described all of the technical entry-level positions as general labour "gopher" positions.
- [21] The set decorating department assembles and puts together film sets. Set decorating is responsible for almost everything that forms part of the set, except for objects that will be handled by an actor. Set Dresser is an entry-level position in the department. The Set Dresser position is labour intensive. The core work of a Set Dresser consists of the physical tasks associated with furniture moving and interior decorating (e.g., moving and arranging furniture, hanging pictures and curtains, setting out rugs).

- [22] The props department is responsible for anything an actor may handle on the set. The entry-level position is Props Assistant, followed by Assistant Props Master and then Props Master. (Some projects also have a Prop Buyer.) The core work of a Props Assistant consists of selecting, loading, transporting, and unloading the props required for a shoot to the film site, standing ready to take props in and out of shots as they are required, and then getting the props back to storage.
- [23] Props are kept in large rubber containers known as bins. Bins can be very heavy (up to 50 kg.), although the weight is entirely dependent on the content (e.g., books or feathers). Bins are taken to the film site in trucks and moved about on-site with handcarts. The props department is also responsible for getting the "chair cart" to and around the film site. The chair cart holds the chairs used by technical workers and actors at the site. The chair cart is heavy and hard to manoeuver.
- [24] The props department workday frequently involves 12 hours at the site, plus the time involved in selecting, loading, and unloading, and putting away the bins. Fifteen hour days are common. While the standard workweek is five days, it can be more.
- [25] Production Assistant is an entry-level position in the DGC. A Production Assistant helps control the area in and around the set location, which includes lifting and moving things, delivers things (e.g., scripts), and generally ensures the crew, cast, extras, and public are where they should be during the shoot.
- [26] The camera department is responsible for the camera and camera-related equipment set-up and operation. There are a number of department positions going from Camera Trainee up to Camera Operator.
- [27] The entry-level Camera Trainee position is labour-intensive. It involves pushing and pulling camera carts and battery carts around film sites, lifting camera equipment, and dealing with cables. In addition to camera bodies, the camera carts hold lenses, some of which are very heavy, and accessories (e.g., cables, tripods, filters). Camera batteries are car batteries and one camera may use five or more batteries over the course of a shooting day.
- [28] Local 669 operates a Camera Trainee training program for permittees. The training program is only run when Local 669 concludes there is sufficient work to warrant it. The training program takes approximately 1 - 1.5 years to complete. There is no guarantee of completion. The training program also includes a training course. The training course concludes with a course examination that has both written and practical components.
- [29] Mr. Campbell testified that his "dream" was to be a Camera Operator. He said he had checked with Local 669 regarding the training program several times prior to the accident, but was informed the program was not being run.

2. Mr. Jordan's Props Work

- [30] After spending several years in the film industry, Mr. Jordan focussed on doing props work, eventually becoming a Props Master. On a large union project, the Props Master is primarily an office job, while on smaller and non-union projects, the Props Master does set work as well. Mr. Jordan prefers at least some set work, so he works as Props Master or Assistant Props Master depending on the size of the project.
- [31] Mr. Jordan spent a decade focussed on props work before successfully obtaining a Local 891 membership in 2005. He has had full-time props work for the last several years. He currently makes, doing largely union work and taking very little time off, about \$110,000 per year. He estimated a Props Assistant doing the same could make about \$60-70,000 per year.
- [32] Mr. Jordan testified that there can be "teams" in props work, in that the same group of individuals may work together on multiple projects. This is because a senior person engaged in a project generally has input or influence in staffing junior department positions for the project, even on union projects. Mr. Jordan testified that he had worked props with Mr. Campbell on several projects. He found Mr. Campbell hard-working and able to contribute some useful art skills. Mr. Jordan testified that pre-accident, he was prepared to bring Mr. Campbell on to his projects and had, in fact, gotten Mr. Campbell onto the project he was working on at the time of the accident.
3. Mr. Campbell's Film Industry Work
- [33] From 2007 through to July 11, 2012, Mr. Campbell worked as a Production Assistant, a Set Dresser and a Props Assistant.
- [34] Mr. Campbell suffered two work injuries prior the accident. While working as a Production Assistant in 2011, he strained his back lifting a tent. It was the final day of the project, in any event, so he missed no work due to the 2011 injury. He returned to full-time work on an unrestricted basis on a different project one month later. In 2012, Mr. Campbell strained his back lifting a couch while working as a Set Dresser. That injury resulted in time off from work and a WorkSafe benefits claim.
- [35] Mr. Campbell's first job after returning to work from the 2012 injury was with Mr. Jordan on a non-union project called "The Bouquet". Mr. Jordan testified that had he known Mr. Campbell was returning from an injury, he would not have gotten him to work on The Bouquet. He said he needed someone who could do whatever they were assigned. Mr. Jordan said the work in question consisted almost entirely of lifting and pushing, and he would have had to step in himself if Mr. Campbell could not do assigned tasks.
- [36] Mr. Jordan described Mr. Campbell's work on The Bouquet as standard Props Assistant work. The props for the production were garden-themed and included plants, bags of soil, and wheelbarrows. He did not observe Mr. Campbell to have any restrictions or limitations while working on The Bouquet.

C. Recreational & Domestic Activities

- [37] The evidence from Mr. Campbell, his family, and his friends establishes that prior to the accident, Mr. Campbell engaged in outdoor recreational activities of a somewhat adventurous type. He would rather canoe than motorboat, hike than drive, backpack and camp than stay in a hotel, and sail than sit in a beach chair. His social and family activities were frequently group activities of this same kind.
- [38] Mr. Campbell had no limitations on his ability to perform domestic chores, inside or outside the house, prior to the accident.

III. THE ACCIDENT

- [39] The impact of the accident was significant. Emergency services attended and Mr. Campbell was taken to hospital by ambulance. Examination and x-rays revealed no fractures or dislocations. He was discharged from the hospital with a prescription for Percocet.
- [40] Mr. Campbell testified that he suffered the following injuries and associated symptoms as a result of the accident:

- Neck
- Shoulders
- Mid-back
- Low back
- Legs and knees
- Seatbelt burns to his chest
- Bruising of the collar bone
- Headaches
- Sleep disturbances
- Fatigue
- Driving anxiety and
- Irritability and mood issues.

- [41] Mr. Campbell testified that he never filled his hospital prescription for Percocet due to its addictive qualities, and instead took Naproxen leftover from his couch injury. He also took over-the-counter ibuprofen and smoked marijuana to help him sleep. He subsequently concluded CBD pills were more effective than the marijuana and took those instead.
- [42] His chest, collar, leg, and knee injuries all resolved, with the knee resolving last. Mr. Campbell's headaches subsided over the year following the accident.

[43] Mr. Campbell says his other injuries and symptoms continue to impact him.

IV. THE PLAINTIFF POST-ACCIDENT

A. Treatment History

- [44] Mr. Campbell obtained follow-up care from three general physicians: Dr. Chaboyer in North Vancouver; Dr. Crowe, his long-time family physician, in Comox; and Dr. Friesen in Victoria. The care provided by Dr. Crowe and Dr. Chaboyer overlapped significantly. (At some point in 2013, Mr. Campbell moved from North Vancouver back to the Comox area. In July of 2015, he moved down to Victoria.)
- [45] On July 17, 2012, Mr. Campbell reported pain, aching and stiffness in his neck, upper chest, mid-back and low back, and pain in his right knee to Dr. Chaboyer. Dr. Chaboyer prescribed Naproxen and referred him for physiotherapy and massage therapy. On July 26, 2012, Mr. Campbell saw Dr. Crowe for the first time post-accident. Dr. Crowe advised continued physiotherapy and over-the-counter anti-inflammatories as needed.
- [46] Mr. Campbell had extensive physiotherapy (see below).
- [47] Subsequently, Dr. Chaboyer recommended an active rehabilitation program ("ARP"). Mr. Campbell attended an 18 session program in June-August of 2013, followed by a 10 session extension. After ARP, he attended the same gym his ARP practitioner worked from and continued his approved routine there for a period, and then continued at a gym closer to his home. Mr. Campbell testified that ARP made him feel fit, stronger, and happier, although his low and mid-back and neck pain continued.
- [48] Mr. Campbell testified he presently does a home exercise program, trying to perform it daily and for a minimum of 40 minutes. Mr. Campbell bought a yoga mat for doing floor exercises at home. He says the yoga mat was recommended to him for this purpose by Dr. Crowe and his ARP practitioner.
- [49] He had a round of massage therapy in 2014, and saw a North Vancouver chiropractor at the recommendation of Dr. Chaboyer. At Dr. Friesen's recommendation, he had further massage therapy in 2017 and a second chiropractic treatment. Mr. Campbell said massage therapy helped with relaxation and sleep, but any lessening of pain was short term. Chiropractic treatment did not provide any significant relief.
- [50] In late 2018/ early 2019, Mr. Campbell had some intramuscular stimulation ("IMS") therapy sessions at the recommendation of Dr. Watt, a sports and occupational physician he consulted in 2018 (see expert report below). Mr. Campbell testified the sessions provided some short term pain relief, but cost \$150 per session so he only took four.
- [51] Mr. Campbell has twice attended a specialized posture class ("Alexander Technique") aimed at redressing pain through improved posture. It did not provide significant benefits.

- [52] In 2018, Dr. Watt recommended a 12-week course of supervised yoga, at one to three sessions a week. Mr. Campbell testified that he finds yoga helpful with relaxation and pain. At the time of trial, he was going four times a week (three sessions focussed on his back and one session on his neck and hips).
- [53] Mr. Campbell says his inability to find any lasting relief is both frustrating and depressing. He continues with the home exercise program, administers self-massage, takes Epsom salt baths, and tries to be as active as he can.
- [54] He testified that he wakes two to four times a night due to pain and feels fatigued. Mr. Campbell agrees that he suffers from an overactive bladder and that he can use the bathroom two or three times a night, but also that the condition comes and goes. Asked whether the condition could be contributing to his current sleeping problems, Mr. Campbell said he wakes due to pain and sometimes goes to the bathroom while up, but that it would be rare for him to wake up simply to use the bathroom.
- [55] Mr. Campbell said he has had no pain-free days in 2019 - only "okay" days with less pain and "bad" days with a lot of pain.

B. Life Events

1. Dox Program

- [56] Shortly after the July 11, 2012, accident, Mr. Campbell began a full-time, eight-month (Sept 2012 - April 2013) documentary film program ("Dox Program") at Capilano University. He said he took the program because he assumed he would recover and wanted to use his recovery time productively. He said sitting in class was uncomfortable and caused him back pain, but that he took a wedge pillow to support his back. The program involved fieldwork, including setting up and operating filming equipment on location. Mr. Campbell testified the other students enabled him to do minimal lifting aside from that required for actual camera operation, but that it was still hard on his injuries.

2. Relationship with Liam

- [57] At some point during the winter of 2012 or spring of 2013, Mr. Campbell's relationship with Liam came to an end. Mr. Campbell testified that Liam was already under stress and found looking after Mr. Campbell after the accident to be more responsibility than what he had bargained for in terms of their relationship.
- [58] Neither of Mr. Campbell's parents nor any of his friends described the break up as particularly difficult for Mr. Campbell. None of Mr. Campbell's health care providers indicated the break-up had a negative impact on his health. Mr. Campbell testified that the break up made him sad, but that he also found it somewhat liberating.
- [59] On the evidence before me, I am unable to conclude that the end of the relationship had any cognizable impact on Mr. Campbell's injuries or his recovery.

3. Transition

[60] In 2015, Mr. Campbell disclosed to his family and friends that he identified as male and intended to transition. By all accounts his family was very supportive, as were the vast majority of his friends. He started hormone replacement therapy in 2015 and had gender affirming surgery in June of 2017. He had a "touch up" surgery on February 14, 2018. He described his post-transition life experience as very positive.

[61] The relationship between gender dysphoria and mood disorders was raised by the defence. There is no psychiatric expert evidence before me on the topic. The interrelationship between these matters is almost certainly complex, nuanced and fact-dependant. On the evidence before me, it would be entirely speculative to posit any relationship between Mr. Campbell's gender dysphoria or transition and his injuries or recovery.

4. Documentary Project

[62] In or about August 2017, Mr. Campbell embarked on a solo coast-to-coast car trip across Canada. The trip was two months in duration and was spent making what he described as a "photographic documentary". He testified that he hoped a photographic portfolio might help advance his career in the film industry.

[63] Mr. Campbell's father helped outfit the intended car (a Toyota Matrix), installing a cooler and fitting a mattress into the back so Mr. Campbell could sleep in the car. Mr. Campbell testified the car mattress was comfortable, but that he continued to wake three to four times a night due to pain. Mr. Campbell described the trip as an amazing experience. He agreed that he did not have trouble driving during the trip.

C. Work

[64] Dr. Crowe cleared Mr. Campbell to return to work in April 2014, when Mr. Campbell was offered employment as a cave tour guide at Horn Lake Caves, a Vancouver Island attraction run by a family friend. Mr. Campbell led one and three-hour walking tours of the caves. The tours involved crouching, crawling, and some low rock climbing. The age limit for participating on the one and three-hour tours is five and seven years respectively. Mr. Campbell did not guide on any tours that go into the deeper caves and require rappelling. While guiding, he was required to carry a light-weight pack (estimated by Mr. Campbell as less than 10 lbs) containing flashlights and first aid supplies. He started guide work in April of 2014 and ended in July of 2015, with an interruption during the winter season.

[65] From mid-November 2014, through February 2015, Mr. Campbell was employed at Mount Washington by a different family friend. His job there involved driving a snowmobile to mark out snowshoeing trails and leading snowshoe tours on the trails. In light of his injuries, Mr. Campbell was only given modest snow shovelling duties, with another person generally assigned to assist with serious shovelling. His evidence is that aspects of the work involved aggravated his injuries somewhat, but that he was able to do it.

- [66] In July of 2015, Mr. Campbell returned to work in the film industry through an industry contact he met while working at the caves. He worked in Victoria on a non-union project, "1491", as a Production Assistant and a Props Assistant. (He also briefly filled in at the First Assistant Director position.) Mr. Campbell says he suffered pain daily while working on 1491 but persisted due to his desire to return to industry work. He testified that he would sneak breaks to sit down or stretch, and used ibuprofen for his pain and CBD pills for his sleep.
- [67] After 1491, Mr. Campbell worked on parts one and two of another Vancouver Island-based production, "The Bridge", as a Props Assistant and Set Dresser on a day call basis. "Day call" is the term for being engaged on a day to day basis (as opposed to being engaged for a project). He testified that his attempts to avoid heavier tasks while working as a Set Dresser were noticed by others during part two and that he was not called to work any days after that. Mr. Campbell testified that this experience was humiliating and caused him to accept that Set Dresser work was beyond his capabilities.
- [68] He was then briefly employed for a period as a berry picker on a strawberry farm, but found that the work was too hard on his neck and back.
- [69] Mr. Campbell returned to props department work. In 2016, he earned \$60,680 working in props, by a considerable amount the most he had ever earned in a year. He testified that it was a difficult year for him, as he had to hide his injuries and surreptitiously avoid as many of the heavier tasks as he could. One substantial project was a studio project, which is less challenging than an outdoor site in many respects. However, Mr. Campbell found working on the studio's concrete surface also hard on his back and neck. He said the work he did in 2016 aggravated his injuries, even though he had breaks between projects and some was studio work, and that his pain and fatigue worsened over the course of the year. He described his 2016 efforts and hours as unsustainable.
- [70] Mr. Campbell did further film industry work in April and May of 2017. He obtained permittee status with Local 669 and enrolled in the camera training program. He worked as a Camera Trainee on season two of "Chesapeake Shores" while also doing the training program course. He testified doing both at the same time was very hard on his injuries and caused him great pain.
- [71] After his 2017 cross-Canada trip, Mr. Campbell returned to work as a Props Assistant and Camera Trainee, but found the work difficult because of his injuries.
- [72] In 2018, Mr. Campbell started leading "Paint Night" events at Victoria venues. Paint Night is a social activity where the art supplies are provided and each attendee makes a painting they can take home. Mr. Campbell said he might have three or four Paint Night engagements a week, but occasionally as little as one. He is paid a base amount of about \$150 per event. If more than the minimum required number of people attend, he can be paid up to \$200. He is occasionally tipped. If a large number of people sign-up, he may be assigned an assistant.

- [73] Mr. Campbell testified that a Paint Night event involves about eight hours of work on his part: six hours setting up for and running the event, and two hours beforehand to do a model painting for the class to copy. The event supplies include paint, brushes, and canvasses. Mr. Campbell described the supply kit as weighing 20 to 30 lbs, and said he generally uses a trolley or handcart to transport it. He describes himself as tired and sore on the day following a Paint Night, in particular, because transporting the kit aggravates his injuries.
- [74] In 2019, Mr. Campbell worked two days as a Camera Trainee, but testified that he found it difficult and painful. He testified that this was the point in time when he accepted that he could not continue in the film industry. For the remainder of 2019 through to trial, Mr. Campbell did Paint Nights.
- [75] At the time of the trial, Mr. Campbell remained a Local 891 permittee for props department work and a Local 669 permittee as a Camera Trainee.

D. Recreational & Domestic Activities

- [76] Mr. Campbell testified that he cannot do recreational activities in the same way or to the same degree that he used to, but only toned-down versions. He can do light hiking and back-packing, light caving and snowshoeing, but finds cycling painful due to the back angles involved. He tried returning to downhill skiing but found it aggravated his injuries.
- [77] Mr. Campbell says he has drifted away from many friends post-accident, as they socialize around active and adventurous things he can no longer do without aggravating his injuries and suffering increased pain for days. He said he concluded on a cost-benefit basis it is not worth it for him to continue to participate in the group activities.
- [78] Mr. Campbell said he was unable to keep up with cleaning the North Vancouver condominium after Ms. McConnell moved out, noting that his new roommate was not inclined to help much.
- [79] He currently lives alone in a rented bachelor suite where his cleaning responsibilities involve vacuuming, cleaning the bathroom, cleaning the patio doors, sweeping the balcony, and doing dishes and laundry. He testified that vacuuming and sweeping are difficult for him and that he is unable to fully make his bed. He testified that his inability to clean causes him to feel depressed and frustrated, as he is clean by nature.

V. LAY WITNESSES

A. Gerry Campbell

- [80] The plaintiff's father, Gerry Campbell ("Gerry"), confirmed the family's adventurous ways, Mr. Campbell's life-long interest in film and theatre, and that Mr. Campbell was happy, outgoing and had no physical limitations prior to the accident.

[81] Gerry testified that he and Mr. Campbell have always spent time together doing physical activities, that while they continue to do some of the same activities together, it is not the same. When they go hiking, there will always be a point where Mr. Campbell will need to stop and rest. They no longer mountain bike together. He said that on a family trip to Belize in 2014, Mr. Campbell participated in snorkelling and sailing, but was unable to do much hiking and declined to river tube because it involved holding the same position for a long period of time.

B. Kathy Jones

[82] The plaintiff's mother, Kathy Jones, is a biologist. She continues to have the farm, but also runs a mussel farm on Lasqueti Island. She is, among other things, a volunteer director of the Vancouver Island North Film Commission ("VINFC").

[83] Her evidence was generally confirmatory of Gerry's. She testified that on post-accident family trips, Mr. Campbell forewent a number of family vacation activities, such as hiking a volcano in Panama.

[84] Her evidence is that when Mr. Campbell comes to the mussel farm, he works but does only lighter duties. She says Mr. Campbell is paid for his work on occasion, but is normally just given food, gas or items of clothing.

[85] Her description of the film industry growth pattern regarding Vancouver Island mirrored Mr. Jordan's evidence about the Province more generally: i.e., that project investment was "very flat" between 2008 and 2012, but grew exponentially between 2012 and 2018.

C. Rebekah Herron

[86] Ms. Herron took the Program from 2006 to 2009. She wanted to be a producer, which required a third year of classes focussed on "off set" areas of the industry. She currently works as a line producer, a position that involves tracking budget expenditures as a project goes along. She works at a desk.

[87] She saw Mr. Campbell frequently while she was in the Program. She started working in British Columbia immediately after school, and because she could influence some staffing decisions, helped get Mr. Campbell work on a few projects. She described him as committed to advancing his career.

[88] She went on a trip to Las Vegas with Mr. Campbell and Liam in late 2012. She confirmed Mr. Campbell had difficulty, especially with walking, during that trip and said they curtailed their activities accordingly.

[89] Ms. Herron subsequently moved to Toronto.

[90] Ms. Herron always intended to go into producing. She testified that she has injuries from an accident and cannot do on set industry work because of the amount of standing required.

D. Taylor McConnell

- [91] Ms. McConnell went to high school with Mr. Campbell. She describes him as having always been intelligent, well-spoken and hard-working.
- [92] Ms. McConnell also enrolled in the Program, starting in 2011. Ms. McConnell took "Motion Picture Arts", which involves the film industry broadly. She rented the second bedroom in the North Vancouver condominium at some point during the summer of 2012.
- [93] She testified that in June and July 2012, she worked along with Mr. Campbell as a Props Assistant, and she found the workdays physically demanding, overwhelming, and long. Ms. McConnell found the Program itself very challenging, and quit in November of 2012.
- [94] She now lives in Victoria and sees Mr. Campbell on most weekends. She says that whereas before the accident they used to go out for long walks, dancing and to concerts together, they are more likely now to stay in or engage in activities where they are seated.

E. Cheryl McNeight - Physiotherapist

- [95] Cheryl McNeight is a physiotherapist with the Kinetic Rehabilitation Centre ("KRC") in North Vancouver. She was called as a lay witness. She testified about Mr. Campbell's treatments and her personal interactions with Mr. Campbell.
- [96] Mr. Campbell first attended KRC on July 30, 2012, and had 22 sessions with a different physiotherapist before working with Ms. McNeight. Ms. McNeight is a senior therapist. She last treated Mr. Campbell on November 12, 2013.
- [97] She testified that the file notes indicate Mr. Campbell had 72 treatments at KRC and that a treatment session is generally between 0.5 and 1.0 hour in length. She found Mr. Campbell diligent and compliant with her instructions and recommendations. She did not discharge Mr. Campbell from treatment. Treatment stopped because Mr. Campbell's insurer declined to cover further treatment.
- [98] Ms. McNeight's evidence strayed into expert opinion at various points. No criticism of Ms. McNeight is intended. A professional called as a lay witness in relation to the provision of professional services is put in a challenging position, especially when faced with broad counsel questions. I have disregarded her testimony where it veered into opinion evidence.

VI. EXPERT EVIDENCE - MEDICAL AND FUNCTIONAL

- [99] The plaintiff tendered expert reports from: Dr. D. Wayne Crowe (family physician); Dr. Christopher Watt (sports and occupational medicine); Dr. Catherine Ho (physiatrist); Ms. Claudia Walker (occupational therapist); Ms. Darla Walsh (functional capacity evaluator).

- [100] For the sake of completeness, I note that Ms. Walker also provided a cost of care report in her capacity as a certified life planner, and the plaintiff also called an economist to provide expert evidence, Mr. Sergiy Pivnenko. These two reports are referenced later in these reasons.
- [101] The defendants tendered an expert report from Dr. Marc Boyle (orthopaedic surgeon).
- A. Dr. D. Wayne Crowe, Family Physician
- [102] Mr. Campbell began seeing Dr. Crowe as a family physician in 1995.
- [103] Dr. Crowe provided a written report dated June 27, 2014. He first saw Mr. Campbell after the accident on July 26, 2012. At that time, he reported persistent neck, mid and low back pain. He displayed muscle tenderness. He had some limitations on flexion and rotation, but a full lumbar range of motion. Dr. Crowe advised continued physiotherapy, massage therapy, and over-the-counter pain medication as needed. On August 15, 2012, he recommended continuing the current treatments. He deemed Mr. Campbell totally unable to work.
- [104] At a follow up on October 19, 2012, improvement was noted and continued physiotherapy was advised as was increasing activity as tolerated. Mr. Campbell was cleared for light-duty work.
- [105] On December 24, 2012, Mr. Campbell saw one of Dr. Crowe's colleagues, Dr. Daws, reporting right knee pain following a holiday trip to Las Vegas with friends, during which Mr. Campbell had done a lot of walking. Tenderness and swelling were noted, but no treatment was noted as recommended.
- [106] On February 21, 2013, Mr. Campbell reported persistent mid and low back pain and recurrent neck pain, but increased range of motion. Continued physiotherapy was recommended along with a core exercise program.
- [107] On December 30, 2013, Mr. Campbell reported generally feeling improved, with minimal neck discomfort but still some persistent back pain. He had a full spinal range of motion, although there was some muscular tenderness. Dr. Crowe advised he continue to increase activity as tolerated.
- [108] On April 14, 2014, Mr. Campbell reported that he was doing regular gym work-outs, but had some persistent discomfort in the right flank area. He had a full spinal range of motion. He was advised to continue with his strengthening program and deemed fit to do more physical work. A clearance to work was sought by Mr. Campbell as he had an opportunity, through a family friend, to work as a cave guide at Horn Lake Caves.
- [109] Dr. Crowe provided a written report to the plaintiff's counsel on April 14, 2014. (As the report predates Mr. Campbell's transition, I have taken the liberty of adjusting the references accordingly.) As adjusted, Dr. Crowe's report states:

[Mr. Campbell] was seen again in follow up on October 19, 2012. [he] was deemed fit for light duty only at that time. [He] was not fit to return to [his] previous employment, which involved quite heavy physical work as a production assistant.

[Mr. Campbell] was last seen in my office on April 14, 2014. [He] was doing regular gym work-outs at that time. [He] was having some persistent discomfort in the right flank area. Exam did show some tenderness over the left upper lumbar paravertebral area. [He] had a full spinal range of motion. Trigger point injection was used into the area of spasm with relief. [He] was advised to continue with a strengthening program. On that visit, [he] was deemed fit to do more physical work. At this stage [he] was fit to return to [his] previous employment as a production assistant.

[He] sustained a contusion of [his] right knee, abrasion of [his] left shin, grade 2 whiplash and mid and low back strain. [His] treatment involved pain medication, icing, physiotherapy and massage. [He] was also involved in an active home exercise and gym rehabilitation program. [Mr. Campbell] was totally disabled from any employment due to [his] injuries from the date of the accident of July 11, 2012 until October 19, 2012. As of October 19, 2012, [he] was fit for light duty positions only. [Mr. Campbell] showed gradual improvement of [his] symptoms. As of April 14, 2014 [he] had made substantial recovery. [He] was having some persistent symptoms of low back pain. [He] was deemed to be fully employable at that time.

[Mr. Campbell] was last seen April 14, 2014. [He] was still having some low grade symptoms related to [his] back pain, but [he] was not felt to be disabled due to these symptoms. [He] continued with a strengthening exercise program. In my opinion, [he] will make a full recovery from [his] injuries and have no long term disability related to [his] injuries suffered in the motor vehicle accident of July 11, 2012.

[Emphasis added.]

[110] In court, Dr. Crowe provided additional testimony by reference to his clinical notes:

- On September 10, 2015, Mr. Campbell reported ongoing upper, mid and lower back pain as well as pain over the "posterior shoulder" girdles. Examination showed tenderness between the shoulder blades and both sides of the mid and low back. Spinal range of motion was normal. Dr. Crowe recommended continued stretching and strengthening exercises and developing a fitness plan.
- On November 8, 2016, Mr. Campbell reported continuing tenderness.
- On March 24, 2017, Mr. Campbell reported persistent neck pain on the left side and headaches and low back pain. Dr. Crowe noted "fairly good" cervical and lumbar motion and recommended continued active treatment and exercise.

[111] Dr. Crowe confirmed both that no report of shoulder pain was made by Mr. Campbell immediately following the accident, and that he had never diagnosed Mr. Campbell with an injury to his shoulder.

B. Dr. Christopher Watt, Sports and Occupational Medicine

- [112] Dr. Watt is a physician working in sports and occupational medicine. He has a clinical practice doing sports medicine three to four days a week, and spends the remainder doing independent medical examinations. He does pre-employment exams, functional impairment exams and return-to-work exams. He also performs functional impairment and permanent disability assessments for WorkSafe, as an external physician, on a regular basis.
- [113] Dr. Watt conducted an in-person assessment on August 28, 2018, and provided a report dated October 28, 2018.
- [114] With regard to the neck, Dr. Watt found a near-normal range of motion in all planes, with some reported pain at the end range of motion at each plane. There was no other functional limitation. The movements performed were smooth and fluid. Palpitation revealed only some mild left-sided suboccipital tenderness.
- [115] He observed full and normal range of motion in both shoulders at all planes. Palpitation of the shoulder girdle muscles demonstrated only mild tenderness in the upper trapezius and rhomboid muscles on the left side. The shoulders themselves were stable. There was no tenderness to palpitation on any shoulder joints. Dr. Watt agreed that shoulder pain was raised as an issue too long after the accident for the pain to be a direct result of the accident, but said myofascial injuries will often eventually result in stress to the contiguous muscles groups that are being called upon to compensate. He described this muscular pain as secondary to the myofascial injury.
- [116] He found mildly reduced low back extension and "widespread tenderness down the left paraspinal muscles from the upper mid-back portion down to the lumbar spine". He observed Mr. Campbell's ability to do a straight leg raise while laying down to be "moderately restricted" secondary to tight hamstrings.
- [117] He noted poor core strength. The examination's results were otherwise normal.
- [118] Dr. Watt offered the following opinion:
47. Based on this assessment it is my opinion that [Mr. Campbell] has the following medical/pathological conditions:
- Post-traumatic Myofascial Pain Syndrome (defined as a regional soft tissue pain syndrome associated with the presence of a trigger point in the involved muscle)
 - Mechanical low back pain
 - Deconditioning syndrome (defined as a reduction in functional capacity of the musculoskeletal and other body systems arising from inactivity).
 - Major depressive episode - mild, partial remission

- Post-traumatic stress disorder
- Social anxiety disorder
- Generalized anxiety disorder
- Possible alcohol use disorder
- Right knee - tibial contusion (resolved)

[119] In his opinion, Mr. Campbell had likely reached maximal medical improvement.

[120] With regard to sleep issues, Dr. Watt had no recollection of Mr. Campbell bringing any bladder-related issues to his attention.

[121] Based on Mr. Campbell's description of his Props Assistant work, Dr. Watt applied more demanding physical requirements for the position than indicated under the Canadian National Occupational Classification ("NOC")'s standard rating. Nonetheless, he concluded Mr. Campbell could return to work as a Props Assistant, subject to certain limitations:

55. It is my opinion that he is fit to return to work to his pre-accident job as a film industry labourer (props assistant) with some limitations as a result of his permanent impairments. Based on the functional capacity evaluation performed July 18, 2018 he demonstrated the following limitations:

- Lifting floor to waist height limited to 40 lbs on an occasional basis
- Lifting waist to shoulder limited to 50 lbs on an occasional basis
- Carrying limited to 50 lbs on an occasional basis;
- Pushing and pulling in the light medium category and limited to the occasional basis;
- Sitting limited to a frequent basis;
- Standing limited to a frequent basis;
- Walking limited to a frequent basis;
- Stair climbing limited to an occasional basis;
- Stooping/bending and kneeling limited to an occasional basis;
- Crouching limited to a frequent basis.

56. An additional challenge is the prolonged work day that is typical of the film industry - generally 12-15 hours and sometimes more. While he can do this job within the limitations described, this is nevertheless a job that will exacerbate his back pain. Further, these limitations may diminish his attractiveness to a prospective employer.

- [122] To improve Mr. Campbell's symptoms, Dr. Watt recommended: a 16-week supervised exercise program, followed by gym workouts three-five times a week; a trial of five IMS treatments; managing expected episodic neck and back pain flare-ups with brief courses of treatment (one to five sessions) of a passive modality (e.g., IMS, physiotherapy, massage therapy, chiropractic treatment); a 12-week course of supervised yoga, one-three times a week; postural training (Alexander Technique); monitoring for increased depression; referral to a mindfulness-based stress reduction course available through the Medical Services Plan; and a defensive driving course.
- [123] On cross-examination, Dr. Watt testified that there is some literature supporting the view that yoga can be helpful to people with injuries like Mr. Campbell's.
- [124] On cross-examination with regard to IMS, Dr. Watt said that even though Mr. Campbell had already taken four treatments and obtained no lasting benefit, he would still recommend further treatments.
- [125] With regard to posture and the "Alexander Technique", Dr. Watt testified that there was a "slim" body of literature indicating it may help with chronic low back pain. He agreed that it was not a common treatment recommendation, but said that its low cost made it reasonable to try. With regard to a defensive driving course, Dr. Watt said his recommendation was based on Mr. Campbell's description of himself as an anxious driver.

C. Dr. Catherine Ho - Physical Medicine and Rehabilitation

- [126] Dr. Ho is a physiatrist with impressive qualifications and experience with musculo-skeletal injuries and chronic pain. She spends about 80% of her time on her clinical practice and the remainder doing independent medical consulting. She did a two hour assessment interview (of which about 30 minutes was a physical examination) with Mr. Campbell on November 3, 2018. Her report is of the same date.
- [127] She says Mr. Campbell reported that he was depressed during the year following the accident due to the impact on his career aspirations but "also had other life stressors." She notes that he said he tries to avoid city driving.
- [128] Dr. Ho's report indicates that almost all of the results on her physical examination were "unremarkable", "normal" or "neutral". With regard to the cervical spine, Mr. Campbell was noted to have tenderness and trigger points in: the muscles from the neck to the top of the shoulder; the muscles from the inner shoulder blades to the back of the neck; and the muscles between the inner shoulder blades. With regard to the lumbosacral spine, she found tenderness to palpitation bilaterally and trigger points at the sides of the low back. She found normal ability to do straight leg raises while supine. She found no neurological involvement.
- [129] Her diagnostic conclusion was:

1. Lumbar strain with chronic myofascial pain syndrome;
2. Thoracic strain with chronic myofascial pain syndrome;
3. Cervical strain with chronic myofascial pain syndrome;
4. Sleep disturbance;
5. Left chest wall abrasion - resolved; and
6. Right leg knee and leg abrasion - resolved.

[130] In testimony, she explained myofascial pain syndrome as a pain condition related to muscle and soft tissue injury and characterized by hyper-irritable spots. She clarified that all of the strains referenced in her diagnosis are grade 2 strains (stretches and possible partial tears of muscle fibers, but no rupture).

[131] In her opinion, palpitation disclosed "myofascial trigger points" - which she described as taut bands within the muscles - that were consistent with Mr. Campbell's documented complaints as well as the mechanism of injury. She confirmed there was no injury to the shoulder itself. She explained that the passive straight leg raise test she used is a check for nerve root pain (of which she detected none).

[132] Dr. Ho agreed her sleep disturbance diagnosis was based solely on Mr. Campbell's reported waking due to pain, and confirmed that Mr. Campbell had not mentioned any bladder-related issues.

[133] Dr. Ho's report indicates that the plaintiff advised her that, as of her November 3, 2018, assessment, he was in training to be a camera operator and performing duties that are "very demanding and the heavy-lifting, carrying, twisting and prolonged standing results in aggravation of his symptoms" while hiding his injuries. She concludes that his symptoms would impact his work efficiency at that position.

[134] In Dr. Ho's opinion, Mr. Campbell has not attained maximum medical improvement and his symptoms can likely be improved by following her recommendations, but a complete resolution of his symptoms is unlikely:

After attaining maximum medical improvement with the treatments discussed, I still anticipate some degree of functional limitations and that he will experience recurrent flares in his symptoms.

Mr. Campbell will likely continue to be limited in activities requiring sustained or repetitive movements of the neck or back, prolonged sitting and standing, bending, twisting, carrying and heavy lifting. I anticipate that he will experience occasional flares in his symptoms when he is required to complete one of these aggravating activities. During these flares, he will need additional physiotherapy, IMS and massage therapy to settle his increased symptoms.

As the resolution of his chronic pain is unlikely, I expect that he will continue to have sleep difficulties.

[135] As appropriate treatment, Dr. Ho recommended:

- 10-12 IMS treatments in regular succession as part of a course of exercise-based therapy and massage therapy;
- if the IMS physiotherapy sessions do not sufficiently address the symptoms, to see a physiatrist for trigger point injections followed by active release physiotherapy.

[136] She also recommended, for expected symptom flare-ups, the use of a trans-electrical nerve stimulation (TENS) machine for home use alongside Mr. Campbell's home exercise program.

[137] For sleep issues, she recommended cognitive behavioural therapy for insomnia and training in mindfulness meditation and a cervical support pillow. Noting that Mr. Campbell is self-medicating with marijuana, she indicated tricyclic anti-depressants and other drugs are commonly used for chronic musculoskeletal pain, and could help with mood and sleep disturbance and, she added in her oral testimony, nocturia as well. She noted that while a patient may report that marijuana helps them fall asleep, it does not necessarily provide assistance with staying asleep, whereas a tricyclic anti-depressant does.

D. Darla Walsh, Kinesiologist

[138] Ms. Walsh is a kinesiologist and a trained functional evaluator. She has done over 500 medical-legal functional capacity evaluations and 1600 permanent functional impairment evaluations for individuals, employers, disability insurers, and WorkSafe BC.

[139] Ms. Walsh provided a functional capacity evaluation ("FCE") report dated July 18, 2018, based on an assessment done July 18, 2018. She did not perform a job site analysis as she was confident she understood the relevant job requirements. Her assessment involved reviewing medical records and documents and five hours of functional testing.

[140] Ms. Walsh also concluded that Mr. Campbell was capable of continuing to work as a Props Assistant, subject to certain limitations:

Based on Mr. Campbell's performance during the Functional Capacity Evaluation on July 18, 2018, and provided there are no medical contraindications, it is my opinion that Mr. Campbell meets the physical demands to perform a job, household tasks or recreational activities that are within the light-medium category. Therefore, it is my opinion that Mr. Campbell is able to return to his pre-disability position as a Props Assistant, as long as the following limitations can be accommodated. This may be difficult to accommodate as working in the Film Industry generally required 12-15 hour shifts or longer due to the nature of the business. Mr. Campbell has the following limitations currently:

- Lifting floor to waist height limited to 40 lbs on an occasional basis;
- Lifting waist to shoulder height limited to 50 lbs on an occasional basis;
- Carrying limited to 50 lbs on an occasional basis;
- Pushing and pulling in the light-medium category and limited to an occasional basis;
- Sitting limited to a frequent basis;
- Standing limited to a frequent basis;
- Walking limited to a frequent basis;
- Stair climbing limited to an occasional basis;
- Stooping/bending and kneeling limited to an occasional basis;
- Crouching limited to an occasional basis;
- Reaching above or below shoulder height limited to an occasional basis.

[141] Like Dr. Watt, Ms. Walsh opined that the requirement to do 12-15 hour shifts would also have to give way to accommodation.

[142] Ms. Walsh recommended 18-24 sessions with a kinesiologist to improve conditioning, strength and tolerance.

E. Claudia Walker, Occupational Therapist

[143] Ms. Walker provided a functional performance assessment report as an occupational therapist and a cost of future care report as a certified life planner. Only her assessment report is addressed here.

[144] The report is dated March 13, 2019, and is based on a three hour home based assessment conducted on February 25, 2019, and a review of clinical records, IME reports (including Dr. Watt's report) and the Walsh FCE report.

[145] The assessment indicates that Mr. Campbell is able to vacuum but finds it causes increased back pain. It notes that Mr. Campbell reported that he found cleaning the oven and fridge difficult due to the amount of forward-reaching required. Mr. Campbell reported doing very little heavy seasonal cleaning (e.g., window washing) "due to a general reluctance to exacerbate his pain levels with heavier work". It notes that Mr. Campbell reported he can no longer walk home carrying heavy grocery bags, so he either drives or uses a pull cart if he is getting more than he can carry. It also notes that Mr. Campbell reported that he used to do maintenance such as shovelling snow, rototilling the garden and removing dead trees at the farm, but now has difficulty with such chores. With regard to "Home Maintenance", it is noted that Mr. Campbell reports that he "responds to emergency maintenance problems" but now uses paid services as "he finds most of this work too difficult and painful now".

F. Dr. Marc Boyle - Orthopaedic Surgeon

[146] Dr. Boyle provided an expert report as a witness for the defence.

[147] Dr. Boyle is a highly qualified orthopaedic surgeon. He retired from active practice in 2009, and his practice is now limited to providing independent medical assessments and reports. He prepared a report dated May 1, 2017, based on a review of clinical and treatment records provided by defendants' counsel and an interview and physical examination that he conducted on April 26, 2017.

[148] Dr. Boyle's report concludes as follows:

Lumbar Spine

The patient suffered a myofascial strain. [he] will not require surgery. Medical management would be in the form of stretching and strengthening exercises, core stabilization, weight control and anti-inflammatory medication. Positive prognostic factors include [his] age, free range of motion, absence of neuritic lower extremity complaints, normal neurological examination. The patient had two prior strains of the lumbar spine at work. [He] was asymptomatic prior to the MVA and was working full-time. It is unlikely this history is a negative prognostic factor. Negative prognostic factors include the persistence of [his] symptoms. It is this writer's opinion that, more likely than not, the plaintiff would undergo resolution of [his] symptoms over time. It is also this writer's opinion that, more likely than not, if resolution was incomplete and some residual symptoms persisted, they would not be disabling.

Cervical Spine

It is this writer's opinion that, more likely than not, the plaintiff would undergo resolution of [his] symptoms over time (greater than 66%). If resolution was incomplete, it is this writer's opinion that more likely than not (greater than 85%) these would not be inhibiting. There are no objective physical barriers identified that would obviate this expectation.

[149] In his opinion, neither further physiotherapy nor passive treatments like chiropractic, massage and acupuncture are appropriate.

VII. Credibility

[150] There are many cases that deal with credibility in the context of subjective complaints and self-reported symptoms in particular. In *Afework v. Correa*, 2019 BCSC 1672, Justice Giaschi provided a listing of the relevant cases:

[10] The defendants refer me to *Karim v Li*, 2015 BCSC 498 at paras. 86-89; *Dhaliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147 at paras. 280-282, varied on other grounds at 2017 BCCA 260, *Edmonson v. Payer*, 2011 BCSC 118 at paras. 36-37, *aff'd* 2012 BCCA 114, and various other cases for the principles applicable to an assessment of credibility where there is little objective evidence of a plaintiff's self-reported symptoms. I have considered those

cases and accept that the plaintiff's evidence must be carefully scrutinized, in particular, her injuries of subjective complaints. However, as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, aff'd 2012 BCCA 296, the overriding consideration is whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [151] I agree that these are the relevant cases and principles for the assessment of credibility in this matter. The medical and functional impairment expert evidence provided in this case is based on Mr. Campbell's reporting. There is extremely little in the way of objective evidence. In this context, much depends on an assessment of Mr. Campbell's credibility.
- [152] The following outline of principles provided by Justice Abrioux (as he then was) in *Karim v Li*, 2015 BCSC 498, is also of assistance:
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;

- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

See also *Buttar v. Brennan*, 2012 BCSC 531 at paras. 23-25.

- [90] Where injuries contain a psychological component -- which is often the case in situations of chronic pain -- the principles set out in *Maslen v. Rubinstein* (1993), 83 B.C.L.R. (2d) 131 at 133-135 (C.A.), should also be considered. These will be dealt with below in the analysis of the causation of a psychological injury.
- [153] The defendants assert that the plaintiff's claims about his symptoms and limitations should not be taken at face value. They say Mr. Campbell is capable of continuing his former work and that he has overstated his injuries and their impact on him to his own experts and to the Court.
- [154] I share many of the defendants' misgivings. I find the following aspects of the plaintiff's evidence particularly uninspiring of confidence.

A. The Camera Trainee Program Examination

- [155] As noted, the Camera Trainee program includes a trainee course. The course is followed by an examination with written and practical components.
- [156] Mr. Campbell obtained 82/100 on the written component, a marked copy of which is in evidence. The practical component involves camera set up work (e.g., putting out and readying equipment, including camera stands, tripods, batteries, and lenses). Mr. Campbell testified that he failed the practical component because his injuries prevented him from going quickly enough. He also told Dr. Ho that he had attempted and failed a union examination, which I am satisfied was a reference to the trainee course examination.
- [157] A marked copy of Mr. Campbell's practical component scoresheet is in evidence. It shows his score as 29.5/50. In the "pass/fail" space on the scoresheet, the examiners wrote in "Questionable". Of the scored tasks, only two tasks had an available mark for efficiency. Mr. Campbell was awarded the efficiency mark on both.

- [158] At the end of the scoresheet there is a box for "Additional Comments", and a series of seven checkboxes and printed comments such as "listened to you", "good attitude" and "stayed focussed". One of the checkbox comments is "efficient". All of the "Additional Comment" checkboxes were checked on Mr. Campbell's scoresheet except the one for "efficient". Nothing suggests the "Additional Comments" section counts towards the mark obtained as opposed to being exactly what its name and positioning on the scoresheet implies. Even if the checkboxes there are relevant to an exercise of discretion, Mr. Campbell obtained six out of the available seven.
- [159] The sheet has an "Overall Comments" section that can be filled in by hand. There are three handwritten comments on Mr. Campbell's sheet: "talks out too much", "positive attitude" and "needs more practice on tape tearing for marking". There is no comment suggesting inefficiency or difficulty with heavier tasks.
- [160] Mr. Campbell testified that he "thought" 29.5/50 was not a passing mark. He also testified that he: doesn't know what the "Questionable" comment means; has no idea what marks others in the same course received; and that he has never inquired about the grading system for the course examination.
- [161] Mr. Campbell testified that becoming a Camera Operator was his childhood dream. He has three years of college education and is not new to the concept of pass versus fail. It is inconceivable that he would make no effort to determine what "Questionable" meant if it was unclear to him, or that he would think he had failed but not bother to inquire about the marking system or ask whether he had actually passed or not.
- [162] The trainee program materials include the following statement: "Once the course is complete, applicants must also pass both practical and written exams in order to be officially accepted as an ICG / 669 camera trainee." When that was read to Mr. Campbell on cross-examination, he asserted that he was not "officially" accepted, but somehow unofficially accepted as a trainee.
- [163] While continuing to assert that he had not "officially" passed the examination, Mr. Campbell agreed that he would not be required to take the examination again, that he was already a trainee for Local 669 purposes, and that he could become a Camera Operator without retaking the examination. I note that his 2018 payroll records show him listed and paid as a Camera Trainee: e.g., for "Puppy Prep Academy".

B. Set Dresser Work

- [164] Mr. Campbell testified that being discovered avoiding Set Dresser duties was a humiliating experience, that to him not being called back to The Bridge was like being fired, and that the experience forced him to come to terms with the fact that Set Dresser work was simply beyond his capabilities.

[165] However, on March 12, 2019, he emailed Local 891 advising that he was "available for props and set dec work on Vancouver Island." On March 13, 2019, the local emailed in response and advised that his permittee status with the set decorating department had timed out, and that he would have to re-write the dressing examination if he wanted to become a department member. Mr. Campbell's email response of the same date back included the following:

Oh wow, what a dramatic knock backwards in my career. I wish I had known that information last year when I could have done something about it. I don't have the money to reapply or come to Vancouver. I have applied to be in the set dec department 4 times now since 2009 . I can't keep paying into this and getting dead-ended. As far as I remember my application was complete, was it never reviewed? Can I work as a permittee or am I kicked out?

C. Nocturia

[166] Mr. Campbell had bladder and nocturia issues long before the accident. He did not tell Dr. Watt or Dr. Ho about these when he reported that he suffered from broken sleep as a result of pain from the accident.

[167] Mr. Campbell testified that his nocturia is a problem that comes and goes, and that he had been waking because of pain since the accident. However, the evidence includes a May 14, 2019, consultation report (sent to Dr. Friesen) by Dr. Nathan Hoag, MD, a urology specialist. Dr. Hoag's report includes the following statements:

Alexander was seen today in consultation for their overactive bladder symptoms. This is a transgender patient who is male and has significant urgency, frequency and suspected overactive bladder.

They report that they are getting up about twice at night to void.

What we will do is plan to do the pelvic examination at the time of the upcoming cystoscopy. They had a cystoscopy about 10 years prior. This problem has really been going on for quite some time.

D. Depression

[168] Dr. Watt conducted an in-person assessment on August 28, 2018, and delivered to counsel a report dated October 28, 2018. That report included Dr. Watt's diagnoses of depression, anxiety and post-traumatic stress disorder. It is unclear when Dr. Watt's report was provided to the plaintiff for review, however it is only after the date of delivery that Mr. Campbell began to make express reports of ongoing bouts of depression.

- [169] Ms. Walker's report, which is based on an assessment conducted on February 25, 2019, indicates Mr. Campbell reported to Ms. Walker - an occupational therapist - that he experiences periods of deep depression that last one week to one month and during which he finds it difficult to get out of bed and "often feels hopeless".
- [170] Interestingly, on November 3, 2018 (which is after the date shown on Dr. Watt's report, but only by a few days), Mr. Campbell told Dr. Ho - a psychiatrist who expressly addressed mood issues with him in the context of providing a medical report for purposes of this litigation - that he had been depressed "the year after the accident" without reporting any ongoing issues.

E. Conclusion on Credibility

- [171] Mr. Campbell's insistence that he had failed the training course examination was inconsistent with documents in evidence and also with common sense. I find that he did pass the examination, and did so "officially". I further conclude that his claim of failure was intended to back up his claim that he is not capable of working as a Camera Trainee.
- [172] His express and detailed claims of depression to Ms. Walker are very concerning. She is not an appropriate expert for those claims; she is, however, the only expert he spoke with well after Dr. Watt's report, with its depression diagnosis, had been delivered to counsel. I draw the conclusion that Mr. Campbell was prepared to embellish once he saw the open door and that Ms. Walker was his last opportunity.
- [173] In his direct evidence, Mr. Campbell emphasized how Set Dresser duties are extremely heavy and how humiliated he was by his experience on The Bridge. That evidence is extremely difficult to reconcile with his March 13, 2019, email to Local 891 regarding his availability for Set Dresser work and continuing desire to obtain membership in the set decorating department.
- [174] I find the plaintiff's failure to disclose his long-standing bladder and nocturia problems to Drs. Ho and Watt while claiming sleep issues due to pain was a material and deliberate non-disclosure of information obviously relevant to his claim.
- [175] I do not conclude that Mr. Campbell is entirely lacking in credibility. Credibility is rarely a black and white proposition. However, I find that he has failed to resist burnishing and bolstering his claim when the opportunity presented itself and, in particular, as of 2018 when the matter appeared destined for court. In that respect, I find that Mr. Campbell's evidence regarding his ability to conduct Paint Nights, his current pain levels, and his reports to and participation in Ms. Walker's 2019 assessment, particularly suspect.
- [176] In the end, I have accepted some of Mr. Campbell's evidence, particularly where corroborated. I am satisfied, however, that his statements and evidence should generally be viewed warily.

VIII. CAUSATION & INJURY

A. Legal Principles

- [177] It is for the plaintiff to establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause, so long as it is beyond de minimus. Causation does not require scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [178] The primary inquiry is whether, but for the defendant's negligence, the plaintiff would have suffered injury. The "but for" test recognizes that compensation for negligent conduct requires a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [179] If causation is established on a balance of probabilities, then the court will go on to assess damages. Justice McLachlin, as she was then, stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway

B. Injuries

- [180] I accept that Mr. Campbell was almost fully recovered from his 2012 couch-lifting injury at the time of the accident. While the fact that he was not entirely recovered may have made him more vulnerable to the injuries suffered in the accident, I am satisfied that but for the accident he would have recovered from his 2012 couch-lifting injury without any functional limitations.
1. Physical Diagnoses
- [181] I find there was no shoulder injury. I accept that the muscles of the "shoulder girdle" may at times be impacted by virtue of being contiguous with injured muscles. As noted by Dr. Watt, for purposes of treatment, addressing this secondary impact is subsumed in the treatment for the myofascial injuries.
- [182] I do not accept Dr. Watt's conclusion that there is a mechanical source of pain with respect to Mr. Campbell's lower back. His report offers no convincing evidence in support of that conclusion, and neither Dr. Ho nor Dr. Boyle found any indication of mechanical involvement.

- [183] I accept the diagnosis of chronic myofascial pain syndrome made by both Dr. Ho and Dr. Watt. With regard to the diagnosis and treatment of chronic myofascial pain syndrome, I am satisfied that Dr. Ho's expertise is the most authoritative. She spends 80% of her time as a practicing physiatrist, assessing and treating patients, many with musculo-skeletal injuries and chronic pain. Her evidence was that palpitation of a myofascial trigger point not only causes a particular pain reaction, but discloses the presence of taut bands at that point in the muscle. She described them as "hard" and "ropey" to the touch. In the context of her specific expertise and personal experience, I am satisfied her confirmation of the presence of notable bands provides at least some degree of objective basis for her conclusions. Dr. Ho also specifically observed that, in her opinion, the diagnosis was consistent with the particular mechanism of biomechanical strain caused by the accident (i.e., a first impact from the rear, then a second impact from the front upon hitting the median).
- [184] I found Dr. Ho to be a candid and compelling witness. Her evidence, in her written report and her testimony, was entirely in keeping with her obligation to provide neutral assistance to the court.
- [185] For the reasons set out above, I also accept Dr. Ho's opinion that Mr. Campbell has not, in fact, reached maximal medical recovery, but does have some symptoms that are unlikely to ever fully resolve. Correspondingly, I reject Dr. Boyle's opinion that a complete resolution of symptoms is likely, as well as Dr. Watt's opinion that maximum medical recovery has already been achieved. The appropriate treatment and the gains that may be made thereby in relation to a condition involving chronic pain are at the core of Dr. Ho's specific expertise.
- [186] Accordingly, I find that Mr. Campbell sustained the following injuries in the accident:
- a) Lumbar grade 2 strain with chronic myofascial pain syndrome;
 - b) Thoracic grade 2 strain with chronic myofascial pain syndrome;
 - c) Cervical grade 2 strain with chronic myofascial pain syndrome;
 - d) Headaches (resolved)
 - e) Left chest wall abrasion (resolved);
 - f) Right leg knee and leg abrasion (resolved).
2. Mental Diagnoses
- [187] As indicated above, Dr. Watt's opinion included a number of psychiatric diagnoses. None of these are accepted.

- [188] Dr. Watt's evidence is that these diagnoses were made based on a screening questionnaire completed by Mr. Campbell. Dr. Watt asserted that the questionnaire in question had been validated. I accept that. Nonetheless, a screening questionnaire is over-inclusive by design; its very purpose is to rule out only those who do not warrant further assessment. A screening questionnaire is valid if it accurately groups individuals on either side of the further assessment requirement.
- [189] Dr. Watt's report sets out the following qualification prior to the conclusions set out in the report:
36. Note: the PSDQ is a screening questionnaire only; formal psychiatric/ psychological evaluation is required for diagnostic confirmation.
- [190] Dr. Watt testified that he included this paragraph because he believes that it is required because of the nature of the test. I agree. That is the point.
- [191] In his testimony, Dr. Watt said that he is, as a primary care physician, capable of making psychiatric diagnoses. I agree that primary care providers are capable of making general psychiatric diagnosis regarding depression and anxiety disorders. I am not satisfied that capability extends to post-traumatic stress disorder. However, Dr. Watt's report provides little basis for his diagnoses aside from the questionnaire results. He confirmed in testimony that he was not relying on any of the clinical records provided by Dr. Crowe, Dr. Chaboyer, or Dr. Friesen in support of his conclusions.
- [192] Further, accepting as I do that a primary care physician is capable of making such diagnoses, a family physician with an ongoing relationship with a patient is particularly well-placed to do so. Here, Mr. Campbell saw three different family physicians, at three separate clinics, with some regularity following the accident. One of those was his childhood family physician. Yet, none of them made any of the psychiatric diagnoses made by Dr. Watt.
- [193] To the extent that a psychiatric diagnosis might be made by a non-psychiatrist in the context of an independent medical examination, and to the extent that depression has a correlation with chronic pain, one would expect a diagnosis to have been made by Dr. Ho. She was specifically asked by plaintiff's counsel to comment on any "cognitive, emotional or psychological effects". Her report with regard to mood indicates she addressed depression with Mr. Campbell and that he reported feeling depressed (and stressed over other matters) over the first year post-accident, reported avoiding elective urban driving since the accident, and felt anxiety driving near the site of the accident.
- [194] Dr. Ho even recommended a tricyclic antidepressant for Mr. Campbell's chronic musculoskeletal pain, noting as a side benefit that it could also help with mood and sleep. Even in that context, she made no diagnosis of depression or anxiety disorders.

[195] To the extent that Mr. Campbell made specific reports to Ms. Walker, as already noted, the timing and context of those reports raise questions, rather than answer them. Finally, to the extent that Ms. Walker testified that, as an occupational therapist, she has the experience and expertise required to assess mental health needs, that proposition is unsupported and rejected.

[196] With regard to driving anxiety, Mr. Campbell agreed in testimony that a driving course is unwarranted.

3. Sleep Issues

[197] Mr. Campbell's claim that his broken sleep is attributable to pain from the accident cannot be accepted given his reports to Dr. Hoag. The relevant question is whether but for the accident, Mr. Campbell would have broken sleep anyway. The broken sleep pattern is a long-established health issue. Given my reservations about Mr. Campbell's credibility, I am unable to conclude the accident made any meaningful contribution to the existing problem.

IX. PARTIES' POSITIONS ON HEADS OF DAMAGE

[198] Mr. Campbell seeks damages under the following heads:

Pain, suffering and loss of enjoyment of life:

\$130,000

Past loss of earning capacity:

\$121,972

Future loss of earning capacity:

\$900,000

Future care costs:

\$161,238

Loss of housekeeping capacity:

\$35,000

Total:

\$1,348,210

[199] The defendants' position is as follows:

Pain, suffering and loss of enjoyment of life:

\$60,000

Past loss of earning capacity:

\$21,458

Future loss of earning capacity:

none proven on a balance of probabilities

Future care costs:

none reasonably necessary and/or likely to be used

Loss of housekeeping capacity:

None warranted

Total:

\$81,458

[200] Special damages, with the exception of a minor disputed expenditure are agreed upon at \$8,930.61 (i.e., that base amount plus anything awarded for the disputed expenditure).

X. DAMAGES

A. Loss of Earning Capacity - Legal Principles

[201] An overview of the legal principles regarding loss of earning capacity was recently set out by Justice Brundrett in *Martin v. First Truck Centre Vancouver Inc.*, 2020 BCSC 240:

[163] In *Grewal v. Naumann*, 2017 BCCA 158, Goepel J.A. writing in dissent (with the majority agreeing with his analysis) summarized the proper analysis of past and future diminished earning capacity at paras. 44-50:

[44] With respect, I cannot agree. The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458:

[27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra, *Cooper-Stephenson*, supra, at pp. 67--81.

[29] This point was expressed by Lord Diplock in *Mallett v. McMonagle*, supra, at p. 176:

The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).

[46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

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

[47] I note that neither *Reynolds* nor *Ostrihoff* referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be

taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[Emphasis original.]

B. Career Path - "but for" the accident

- [202] Mr. Campbell did well in the Program and was motivated to get ahead in his chosen areas of the film industry. Still, it is a hard industry to get established in. Mr. Jordan's evidence was that even though he had the advantage of being teamed with a senior person, it took him 10 years focussed on props work to become a Local 891 member. Further, as Mr. Jordan stressed, service does not entitle an applicant to union membership - membership is ultimately a matter within the relevant local's discretion.
- [203] While Mr. Jordan said he listed Mr. Campbell as an Assistant Props Master on *The Bouquet*, he said he did so because it made no practical difference in work duties in the context of a small, non-union project, and it would be beneficial to let Mr. Campbell list it on his resume. That is some indication that Mr. Jordan considered it plausible that Mr. Campbell might seek Assistant Prop Master work at some point in the not so distant future. Based on Mr. Jordan's ability to get project work, his positive assessment of Mr. Campbell's props work and, in particular, his willingness to assist Mr. Campbell in getting work on his projects, there was a real and substantial possibility Mr. Campbell would have been a successful Props Assistant and might have done some Assistant Props Master work, if he continued with Mr. Jordan in the props department.
- [204] However, Mr. Campbell's position is that, but for the accident, he would have applied to the camera department by 2015. As Mr. Campbell obtained permittee and Camera Trainee status on his initial application to the program in 2017, I am satisfied he would have similarly succeeded in 2015. The relevant question, then, is how Mr. Campbell would, but for the accident, have fared in the camera department (and with Local 669) had he become a Camera Trainee in 2015.

- [205] There is no evidence before me regarding the number of Camera Operators or Camera Operator positions there are - not in the Province, not on a typical project basis, not even as a relative proportion of camera department members. There is no evidence about how steep the climb up the department hierarchy is nor of the amount of room at the top. On cross-examination, Mr. Campbell conceded that most projects do not require many Camera Operators.
- [206] Mr. Campbell also testified that progressing through the camera department positions between Camera Trainee and Camera Operator would involve at least one year's work experience at each position. The evidence did not establish what it takes to move up in position or the percentage of people who successfully do. The evidence did not comprehensively address the hierarchy in department positions beyond Mr. Campbell's posited ideal direct ascent to Camera Operator. However, on cross-examination, Mr. Campbell agreed that it might have taken 10 to 20 years for him to become a Camera Operator and that a lot of factors would impact whether he did or not.
- [207] While Mr. Campbell passed the 2017 course examination, he did not excel on the practical component, and I find the evidence does not support the assertion that his performance was attributable to his injuries. Unlike Mr. Jordan with regard to the props department, no knowledgeable witness spoke to Mr. Campbell's potential for camera work.
- [208] There is no objective evidence that Mr. Campbell has any particular aptitude for camera work. There is no evidence, for example, of achievement or demonstrated promise in the form of awards, grades, or reviews relating to his pre-Program efforts, the Program, the Dox Program, or the end product of his cross-Canada 2017 trip. While desire is a singular source of motivation, reach commonly exceeds grasp. A finding of real and substantial possibility of achievement must rest on more than proof of aspiration.
- [209] I am unable to conclude on the evidence that there is a reasonable and substantial possibility that Mr. Campbell would have advanced from Camera Trainee to any senior camera department position, let alone to Camera Operator. The supposition that he would have is speculative.
- [210] Mr. Campbell's evidence was not of a general desire to work in the camera department, but specifically about becoming a Camera Operator. It is unclear whether or how long Mr. Campbell would have continued in the camera department if it became apparent the dream was unlikely to be realized.
- [211] The evidence also does not permit me to make any informed estimate of how long a permittee enrolling as a Camera Trainee in 2015 might take to become a Local 669 member. There is evidence that Local 669 does not always run its training course. That suggests it is, if anything, more difficult to become a Local 669 member than a Local 891 member, and it took Mr. Jordan 10 years of props experience to gain his Local 891 membership.

- [212] I am unable to conclude on the evidence that there was a real and substantial possibility that Mr. Campbell would have become a Local 669 member. That supposition, too, is speculative.
- [213] However, I am satisfied that had Mr. Campbell obtained Camera Trainee status in 2015, he would still have continued to perform some props work. That is what happened when he did become a Camera Trainee in 2017, and the evidence indicates it is common in the industry for junior technical people to work in multiple departments to maximize hours and income. If Mr. Campbell became a Camera Trainee in 2015, there was a real and substantial possibility that he would have continued doing props work as well for several years. However, I find he would have had to commit to working in the camera department by 2018 at the latest in order to work towards a Local 669 membership.
- [214] Assuming he completed the Camera Trainee program within 1.5 years, there is a real and substantial chance he would have then obtained work in a junior camera department position. The next lowest positions on the 2018 Local 669 rate chart appears to be Film Loader and Camera Utility Person. There is no evidence for concluding that Mr. Campbell would not have had to advance through at least one of these two positions, both of which are listed as having "negotiable" rates. Neither their placement on the chart nor the names of these positions suggest their rates would be much above Camera Trainee (which is also negotiable). I conclude they would not meaningfully exceed the Camera Trainee rate.
- [215] In assessing what would have happened but-for the accident, I have kept in mind that real and substantial possibilities of hypothetical events are not to be treated as a certain, but, rather, are to be given weight according to their relative likelihood. There are also some negative contingencies that must be taken into account. Mr. Campbell was twice injured at work pre-accident and I conclude there is a real and substantial possibility his work would have been interrupted by minor injuries but-for the accident; however, as set out below, the adjustment is not large.

C. Career Path - with accident

- [216] The defendants assert that, since April of 2014, Mr. Campbell, has been and remains able to continue on his planned career path. Their position is far from frivolous.
- [217] Both Dr. Watt and Ms. Walsh relied on Mr. Campbell's reports to adopt more demanding work requirements for a Props Assistant than assigned under the NOC. Notwithstanding, both concluded he was capable of performing the core work, and quite close to being capable of performing the full scope of duties, of that position. In short, Mr. Campbell's capabilities, as measured against standards based on his own reporting, are only slightly less than that required, in circumstances where Mr. Campbell's reporting is open to question.

- [218] However, there are two external factors that persuade me to the conclusion that Mr. Campbell cannot continue in the Props Assistant or Camera Trainee positions.
- [219] First, Mr. Campbell did work full-time during the year 2016. While the defendants submit this is proof of his ability, I accept the evidence of Mr. Campbell and his parents that the effort aggravated his injuries and had a cumulative wearing impact over the year. I find this was the case notwithstanding that he was, in fact, surreptitiously granting himself a degree of accommodation by ducking tasks and sneaking breaks. Thus, I am satisfied that the work required in these positions is not work that Mr. Campbell can sustain on a long-term basis.
- [220] In the film industry, opportunities, work assignments, and positions are given to optimal performers, and not to adequate performers. There is little practical chance of career advancement based on sub-optimal performance, in which case the sub-optimal performer stagnates in a physically demanding entry-level position. The idea of working one's way up into a less demanding department position presents a Catch-22 for a person in Mr. Campbell's position.
- [221] Second, I am satisfied that Mr. Campbell was genuinely motivated to return to his former film industry work. His historical enthusiasm and college education were industry-specific. I am satisfied that if continuing was genuinely feasible, Mr. Campbell would have continued.
- [222] I accept that Mr. Campbell cannot perform the full duties of a Props Assistant or Camera Trainee without accommodation. While the medical evidence indicates he can do the core work of a Props Assistant, he cannot perform the full range of potential duties or do the required work for 15-hour workdays. I accept on the basis of the expert evidence regarding the Props Assistant position and the description of the Camera Trainee position (which is supported by Local 669 documentation), that Mr. Campbell cannot do the full range of the duties of the position for 15-hour workdays either. I also accept that the Set Dresser position is even more demanding than the Props Assistant position.
- [223] I am also satisfied that it is unrealistic to hope to obtain permittee Props Assistant or Camera Trainee work subject to a number of work limitations (i.e., to obtain work with accommodations). The expectation for these positions is that the person will immediately undertake whatever tasks are required to keep the department apace with the collective project. The means by which permittees obtain work enables projects to be selective in terms of bringing on people who can fulfill that expectation.
- [224] The defendants' assertion that Mr. Campbell can and should continue in his former film industry positions is rejected. He cannot do that without some degree of accommodation; as a practical matter, that accommodation will not be forthcoming.

[225] That said, the evidence equally establishes that Mr. Campbell is almost capable of performing Props Assistant work notwithstanding its very demanding and physical nature. As I drew to the attention of the parties during the argument, there is a very sizeable gap between being just barely unable to work as a Props Assistant, and being unable to do much at all. I will come back to this under my discussion of future earning capacity.

D. Assessment of Past Loss

[226] Mr. Campbell advances no claim with respect to the periods of time he spent in the Dox Program, in surgery or recovery, or on his cross-Canada trip. Excluding those periods, the plaintiff posits three "but-for" work scenarios and three related claims for damages: 1) Mr. Campbell works in props until 2015, applies for the Local 669 program and thereafter works in the camera department; 2) Mr. Campbell is unable to get into the Local 669 program and remains in the props department; 3) Mr. Campbell gets into Local 669 program in 2015, and then performs a combination of props and camera department work for several years.

[227] The defendants agree that Mr. Campbell should be given 14 months' wages for work time lost between the accident and Dr. Crowe's April 2014 clearance.

[228] Beyond the clearance date, the defendants submit Mr. Campbell has no claim: he could and should have returned to the film industry full-time following the April 2014 clearance.

1. The Defendants' Averaging Approach

[229] The defendants' approach to loss of earning capacity involves calculating a pre-accident average annual salary (based on Mr. Campbell's actual earnings between 2008 and the July 2012 accident), and a post-accident average annual salary (based on his actual earnings from the accident through trial). The former is \$18,393 per year, and the latter is \$20,930 per year.

[230] With regard to past lost earning capacity, the defendants submit that wages for the 14 months lost prior to April 2014, should be calculated using Mr. Campbell's pre-accident average annual salary.

[231] The defendants' averaging approach is not appropriate. Prior to the accident, Mr. Campbell was endeavouring to get a foothold in the industry. He received Employment Benefits between projects, but that appears a common starting practice while building a reputation and connections. Mr. Campbell spent time networking and time working unpaid to earn industry goodwill. These are non-remunerative investments in getting future work. As evidenced by Mr. Jordan's testimony that he brought Mr. Campbell onto The Bouquet, Mr. Campbell's self-promotion efforts were starting to bear fruit by the time of the accident.

[232] The fluctuations in income pre-accident reflect the nature of the industry. Mr. Campbell's work was increasing at the time of the accident. He had already done some projects with Mr. Jordan. His income but for the accident is to be determined by reference to the real and substantial possibilities, based on the evidence, with respect to specific period in question (see below).

2. Efforts to Return to Former Work: Accident to 2018

[233] Mr. Campbell did not immediately return to full-time work in the film industry following the 2014 clearance, but he did eventually for several periods of time. The defendants say in failing to return both immediately and full-time, Mr. Campbell conducted himself unreasonably. Thus, the question is whether what Mr. Campbell actually did do following the clearance was reasonable in the circumstances. I am satisfied that, for the most part, it was.

[234] Dr. Crowe testified that the April 2014, clearance was given in the context of Mr. Campbell having an offer to work in the caves. Dr. Crowe agreed the clearance he gave was in general terms and that he had deemed Mr. Campbell "fully employable". However, he also testified that he would have been concerned about granting the clearance if the proposed work had involved going in the deeper caves and thus more turning, twisting, crawling, as well as rappelling. Problematically, the report does specifically say Mr. Campbell "was fit to return to [his] previous employment as a production assistant" (emphasis added). It is not clear on the evidence why Dr. Crowe used that particular term or what he understood by it, although it is clear he regarded it as quite physical employment. However, as between Set Dresser, Props Assistant and Production Assistant, the latter is the least physically demanding position.

[235] Dr. Crowe's report noted that strengthening was still required and stated that Mr. Campbell was "fit to do more physical work" (emphasis added). His previous clearance was restricted to light duties. Considering the report in its entirety, along with Dr. Crowe's testimony regarding his concerns about the nature of caving work involved, I conclude that, at the very least, it was not unreasonable for Mr. Campbell to have considered it a qualified clearance.

[236] Further, while Dr. Crowe's view in 2014 was that Mr. Campbell's injuries were close to, and soon would be, fully resolved, Dr. Ho and Dr. Watt disagree. They both say there are still unresolved injuries and some permanent limitations, and I have accepted their opinions. Thus, if Mr. Campbell conducted himself as if he had some limitations in 2014 notwithstanding Dr. Crowe's general clearance, in hindsight Mr. Campbell was correct.

- [237] I find the decisions to work at Horn Lake Caves and Mt. Washington were reasonable. The work generated income, kept him active, and was minimally aggravating to his injuries. Neither position paid well, but they were both available with an assurance that he would not have to perform heavy duties. Practically speaking, these positions fulfilled the function of a work-hardening program, which, again with hindsight, was a prudent step.
- [238] In 2015, Mr. Campbell sought to return to work in the film industry. He experienced difficulty due to the long hours and heavier duties. He also had been out of the industry picture for several years, and the evidence indicates contacts and goodwill are significant in obtaining work. He was fortunate to make the contact that led to his work on 1491. Mr. Campbell's sporadic work following his return in 2015 is consistent with the nature of the industry, rather than a negative reflection on the quality of his effort to return.
- [239] In 2016, Mr. Campbell worked full-time, on a dense project schedule, mostly as a Props Assistant. As emphasized by the defendants, Mr. Campbell made as much income as he could reasonably have hoped to in 2016.
- [240] While Mr. Campbell did not work much during the winter of 2016 and spring of 2017, it appears common in the industry for junior people in particular to have periods of intense work interspersed with gaps between projects.
- [241] In April and May of 2017, Mr. Campbell began doing the Camera Trainee program and performing Camera Trainee work on "Chesapeake Shores". I find Mr. Campbell's decision to start in the camera department reasonable even though it was lower paying. Aside from his personal aspiration to be a Camera Operator, it was reasonable to ascertain whether camera department work was less demanding than work as a Props Assistant. The bulk of the remainder of 2017 was spent in surgery recovery or on the cross-Canada trip and is outside the scope of the claim.
- [242] In 2018, Mr. Campbell performed a moderate amount of film industry work. He earned \$32,731, notwithstanding the lower rate for Camera Trainee work.
- [243] On the whole, from the accident through to the end of 2018, I am satisfied that he was making reasonable efforts to eventually return to full-time work in the film industry. There were periods of time when he was working outside the film industry, but that was a reasonable choice in the context of a longer-term effort to eventually return. There were periods of time where Mr. Campbell was working in the film industry, but nonetheless not working full-time. Those periods are also reasonable as in keeping with how junior technical people build-up film industry work hours.
- [244] I find that, at or around the end of 2018, Mr. Campbell ceased making sincere efforts to return to his former positions in the film industry. His conduct and efforts up to that time were reasonable.

3. January - September 2019 to Trial

[245] Mr. Campbell's work efforts from 2019 up to the date of the trial consisted almost exclusively of Paint Night events. The reasonableness of Mr. Campbell's 2019 conduct is addressed in more detail below with regard to mitigation.

4. Damages

[246] I begin with the observation that damages are assessed, not calculated: Lee (Guardian ad litem of) v. Richmond Hospital Society, 2003 BCCA 678. Assessment involves the exercise of judgment and concept of fairness; calculations are merely guidelines in terms of providing a factual anchor for the exercise of discretion. After the calculations, I will take into account other factors going to relative likelihood in reaching a determination.

[247] As noted, Mr. Campbell makes no claim for lost income: in 2012 as he was in the Dox Program from September-December 2012; in 2013 with regard to the Dox Program months of January-April 2013; with regard to his surgery and recovery time periods; or the time spent on his cross-Canada road trip.

[248] All of the calculations below are gross and all income figures are inclusive of Employment Insurance benefits.

[249] Mr. Campbell submits that if he had worked the entire year in 2013, he would have made \$30,000 working as a Props Assistant. I accept that. He was only available for work for eight months due to the Dox Program. His actual income was \$190. The amount of \$19,810 is the difference for 2013.

[250] In 2014, Mr. Campbell submits that he would have been able to obtain props work on more projects and his earnings would have increased to \$35,000. That is also accepted. His actual income was \$8,720. The amount of \$26,280 is the difference for 2014.

[251] As found above, in 2015, 2016, and 2017, Mr. Campbell would have done a combination of Props Assistant and Camera Trainee work. The proportions would likely have fluctuated considerably given the project-based nature of the work, as well as over the three years. For purposes of damages, I find it reasonable to assume a 50/50 split over each year.

[252] I conclude that had he worked all of 2015 as a Props Assistant, he would have made \$47,500. (That amount is the halfway point between the \$35,000 I accepted for 2014, and Mr. Campbell's actual 2016 earnings of \$60,680.) A Camera Trainee's earnings are essentially minimum wage with significant overtime, but also with periods of unemployment. For assessment purposes, I estimate the annual earnings of a Camera Trainee at \$25,000 per year.

[253] Applying the 50/50 split, I find Mr. Campbell would have earned \$36,250 in 2015. His actual gross income was \$21,254. The amount of \$14,996 is the difference for 2015.

- [254] In 2016, Mr. Campbell's actual income was \$60,680. But for the accident, he would have spent half that year working in the camera department at about \$25,000 per year. Applying the 50/50 split, he would have earned \$42,840 in 2016. Thus, but for the accident, Mr. Campbell would have earned \$17,840 less than he actually did in 2016 (-\$17,840).
- [255] Mr. Campbell claims for seven months of 2017. As in 2016, I find Mr. Campbell would have made \$42,840 had he worked all of 2017. Had he worked seven months, he would have earned \$24,990. His actual income was \$19,604. The amount of \$5,386 is the difference for 2017.
- [256] There are numerous "assistant" positions on Local 669 camera department rate chart. Of those, the more general positions are: Second Assistant, Motion Picture Video Assistant 1, Motion Picture Video Assistant 2, and Electronic Camera Assistant. The average of their hourly rates is about \$32. Using that average wage, I find Mr. Campbell would have made \$40,000 in 2018. His actual income was \$32,732. The amount of \$7,268 is the difference for 2018.
- [257] With regard to 2019, eight months of the year pre-date the trial. Continuing with \$40,000 gross per year as per 2018, eight months of 2019 represents earnings of \$26,667. Mr. Campbell's actual income over that period was \$11,000, resulting in a loss of \$15,667 (subject to findings on the duty to mitigate below).

5. Failure to Mitigate

- [258] The defendants did not expressly argue a failure to mitigate aside from their assertion regarding Mr. Campbell's failure to return to his prior film industry work. However, that position implicitly asserts there is no past loss because Mr. Campbell was, in fact, capable of remunerative work.
- [259] The onus is on the defendant to establish that Mr. Campbell failed to act reasonably to reduce his loss: *Just v. British Columbia*, 60 B.C.L.R. (2d) 209, [1991] B.C.W.L.D. 2672 (S.C.) [Just]. In *Debou v. Besemer*, 2014 BCSC 1766, the court accepted (para. 203) that the onus involves proof of three elements:
- [185] Relying on paras. 20-21 of *Branco*, the plaintiff says the defence must bring forward "reasoned, factually based evidence" to illustrate that the plaintiff failed to mitigate, addressing three elements:
- (1) the steps which the plaintiff might have pursued to avert loss;
 - (2) the reasonableness of pursuing those steps; and
 - (3) the extent to which loss would thereby have been averted (in effect, the amount by which the damages should be reduced).

- [260] In *Just*, the duty to mitigate in wrongful dismissal cases was held to apply equally to personal injury cases: namely, the defendant must show that, following the accident, the plaintiff "by exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities" (quote from *Williston on Contracts*, 3rd ed. (1968), vol. 11, at p. 312, cited with approval in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at p. 332).
- [261] I find the defendants have failed to meet their burden with respect to the work that Mr. Campbell performed from April 2014 through to the end of 2018. It was not unreasonable for the plaintiff to work at Horn Lake Caves and Mt. Washington as an interim step in attempting to return to the film industry. It was not unreasonable for the plaintiff to attempt a return to the film industry even though a return to the industry resulted in periods of under-employment, nor to attempt to see if he was able to continue in the industry as a Camera Trainee.
- [262] However, after 2018, it was no longer reasonable for the plaintiff to take the position he was working towards a film industry career.
- [263] I am unable to accept that it was reasonable to limit his efforts to Paint Nights in 2019. At a minimum, the evidence demonstrates Mr. Campbell could have worked some minimum wage position and I am satisfied it would have been reasonable for him to do so. I am of the view that basic fairness requires that some deduction be made from the amount awarded for 2019. In the absence of more specific evidence, however, that reduction should be minimal.
- [264] Mr. Campbell's actual Paint Night income was approximately \$11,000. The amount of \$2,000 is deducted from the award otherwise made with respect to 2019. Accordingly, the 2019 award for past loss of earning capacity is reduced to \$13,667.

6. Conclusion on Past Loss

[265] The overall difference based on the above calculations is as follows:

2013:

\$19,810

2014:

\$26,280

2015:

\$14,996

2016:

(-\$17,840)

2017:

\$5,386

2018:

\$7,268

2019:

\$13,667

Total:

\$69,567 (gross)

(- 10%)

\$62,610 (gross)

However, the real and substantial possibility of past events must be given weight according to relative likelihood. I am satisfied a 10% deduction should be made to the above total to reflect the possibility that Mr. Campbell's work may have been interrupted by further injuries or similar adverse events. I do not consider any further adjustment required in the circumstances. As noted, the final amount of \$62,610 is gross and inclusive of Employment Insurance benefits. If counsel are unable to agree on the net amount of the award for past loss of earning capacity after deductions, they are at liberty to make further submissions.

E. Loss of Future Earning Capacity

1. Legal Principles

[266] In *Hoy v. Williams*, 2014 BCSC 234, Justice Kent summarized the two approaches that are used to assess damages for loss of future earning capacity:

[156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Gola* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53& 56.

[159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[160] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

[267] More recently, in *Knapp v. O'Neill*, 2017 YKCA 10 [Knapp], the Yukon Court of Appeal commented on the two approaches:

[17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity: *Perren v. Lalari* at paras. 12, 32. However, in my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.

- [18] It can be helpful under either approach for the judge to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case, as was recently considered by this Court in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 70-73 (majority per D. Smith J.A.) and paras. 56-58 (Goepel J.A., dissenting).
- [19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities: *Jurczak v. Mauro* at paras. 35-37; *Lampkin v. Walls*, 2016 BCSC 1003 at paras. 181-184, 192-210; *Carey v. Richert* at paras. 14-19; *Summers v. Boneham* (1994), 45 B.C.A.C. 306. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors: *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 at paras. 11-13, 1 C.P.C. (2d) 301 (C.A.).
- [Emphasis added.]
- [268] The following passage from the Court of Appeal's decision in *Rosvold v. Dunlop*, 2001 BCCA 1, provides guidance in terms of what is to be considered in making an award:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Parypa v. Wickware* (1999), 1999 BCCA 88, 65 B.C.L.R. (3d) 155 (C.A.). Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.

- [12] The capital asset Mr. Rosvold has lost is his ability to perform physically demanding work. Before the accident he had earned a reasonable income without any periods of physical disability. His ability to earn income has been impaired because those occupations in which Mr. Rosvold has always earned a living were closed to him by the accident. Even if Mr. Rosvold were able to earn the same amount of income from alternative employment, he would still be entitled to compensation for that loss: *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (C.A.). However, in the three years after the accident before the trial, Mr. Rosvold had not been able to find any alternative employment.
- [13] Earlier in these reasons, I summarized the factors the trial judge took into consideration. The evidence also reveals that Mr. Rosvold has a Grade 9 education. He appears not to have the aptitude for retraining in a more sedentary occupation. In an effort to find alternative employment, Mr. Rosvold underwent vocational counselling and assessment. The vocational consultant concluded the range of vocational options that remain open to him is "quite narrow." His exploration of the recommended occupations, of home inspector and building inspector, was unsuccessful. Vocational testing indicated that Mr. Rosvold is in the low average category in both verbal aptitude and numerical aptitude, both of which are important for most types of work to which he is now physically suited. Moreover, he is susceptible to degenerative changes to his knees that are likely to shorten his working life, whatever occupation he chooses.
- [14] Consequently, at the time of the trial, Mr. Rosvold was looking at starting up a business he believed he could handle. He expected the start-up costs to be \$50,000.00 to \$65,000.00. He expected it would take him a year to build up enough inventory to start marketing his products. Obviously, his earning capacity in the first few years after trial would be diminished by more than the \$12,000.00 found by the trial judge. The trial judge did not take account of this factor, nor did he take into account the possibility the proposed business would not meet Mr. Rosvold's expectations and that Mr. Rosvold will not be able to find a suitable new vocation as he ages.
- [15] Mr. Rosvold had earlier been equally optimistic about a career in financial planning. The evidence of Mr. Rosvold's business experience does not support much business acumen, perhaps because he finds math and reading comprehension challenging. His strengths were his wisdom in seeking partnerships with those with more business ability, his willingness and ability to do physically demanding labour, his non-verbal problem solving abilities, and his psychomotor skills.

[Emphasis added.]

2. Analysis & Determination

- [269] Neither party entered vocational evidence about what, aside from his prior work and Paint Night events, the plaintiff is capable of doing. As noted, I raised this gap with counsel during closing submissions. There is also no evidence of Mr. Campbell attempting or seeking work other than Paint Night events in 2019.
- [270] To the extent the plaintiff's case implicitly asserts that the only remunerative work now reasonably available to the plaintiff is conducting Paint Night events, the assertion is flatly rejected.
- [271] I have found that Mr. Campbell suffered injuries that will likely continue to cause him some pain. However, there is no basis in the evidence for concluding that Mr. Campbell is unlikely to find and perform alternative work for the same or better income than he might have earned but for the accident. On the contrary, the expert evidence accepted indicates many vocational options remain open to Mr. Campbell. Many areas of work fit within the physical limitations outlined by Dr. Watt and Ms. Walsh. Indeed, Ms. Herron works in a film industry area at a position that allows her to work at a desk.
- [272] There is no evidentiary basis before me to support an earnings based approach to future loss.
- [273] As observed by Justice Garson in *Perren v. Lalari*, 2010 BCCA 140, where "the loss, though proven, is not measurable in a pecuniary way," the capital asset approach is more appropriate. Paraphrasing Garson J.A.'s description of appropriate circumstances, this is a case in which the plaintiff is young and his career path is uncertain.
- [274] The decision of Chief Justice Hinkson in *Walker v. Leung*, 2014 BCSC 1623 [Walker], provides an example of an assessment applying the capital asset approach:
- [138] The evidence thus invites an assessment of this loss on the capital asset approach. That approach was described by Mr. Justice Finch, as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8, [1985] B.C.J. No. 31 (S.C.):

8 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.

- [139] The first criterion does not fully apply to the plaintiff. I think it likely that she will complete medical school within the same time frame as those with admitted with her.
- [140] As a physician, the plaintiff will need to consider obtaining hospital privileges, but I do not see that she is less marketable to those who grant such privileges, nor to patients who require a physician.
- [141] The work life of a physician was described by Dr. Menzies as irregular. He said that it requires attentiveness, punctuality, establishing rapport, having confidence, sitting, reading, communicating, walking, standing and working at a computer.
- [142] The plaintiff feels that she may not be able to pursue more physically demanding medical specialties involving surgery or emergentology. In my view this is a realistic assessment. However, given her family responsibilities, I find that it is unlikely that she would have been inclined to such specialties had she not been in the motor vehicle accident, and, like her work as a massage therapist, I think it likely that she would not have chosen to work five days per week had she not been involved in the motor vehicle accident. In my opinion, she will not now choose to work five days a week. Even though she would have worked at less than five days per week at any rate, the plaintiff has lost the ability to take advantage of work opportunities as a physician which might otherwise have been open to her, had she not been injured.
- [143] While I do not consider that the plaintiff is the type of person who will be overwhelmed by the challenges she will face, she is, nonetheless, less valuable to herself as a person capable of earning income in a competitive labour market.
- [144] In *Brown, Finch J.* awarded damages for loss of earning capacity at the rough equivalent of one year's income to the 28 year old plaintiff based upon the vocation that he would return to following his accident.
- [145] I consider that the same broad brush approach would do justice between the parties in this case. Given the plaintiff's intended profession, as compared to the more physically demanding vocation of Mr. Brown, together with the probability that the plaintiff will be unable to pursue a medical specialty, I have concluded that her income stream from the practice of medicine will not begin until at least 2021, which is 6 years after the year when she can complete her first year of medical school.
- [146] I therefore assess the plaintiff's loss of future earning capacity at \$189,000, which is the present value, net of expenses, of full time, full year earnings for a general practitioner of medicine in British Columbia, commencing in 2021, which I will round up to \$190,000.
- [275] There are some occupations that are now closed to Mr. Campbell as options. I do not conclude the plaintiff is less capable of earning income, but he is less capable of doing so in heavy physical labour positions.

- [276] However, that is tempered by the fact that the plaintiff is not limited to heavy physical work by virtue of education, training or aptitude. Mr. Campbell has three years of college education and a post-secondary course in practical writing. The evidence is that the Program is a difficult one and that the plaintiff did generally well. The plaintiff was uniformly described by his own witnesses as bright, articulate, and hard-working. While the positions of Set Dresser, Props Assistant and Camera Trainee were all, at base, general labourer positions, the plaintiff was not working in them because he was limited to or particularly suited by skill and aptitude to general labour positions, but rather because these positions were the price of entry to technical positions.
- [277] The plaintiff's limitations may nonetheless render him a somewhat less attractive employee to some potential employers. He is less valuable to himself as an earner in a competitive job market as a result of his injuries. However, given his capabilities, education and aptitude, I find his restrictions impact his capital asset value relatively mildly. These limitations have, unfortunately, excluded him from working his way into the technical film industry in particular, but that is a matter for non-pecuniary damages in the circumstances of this case.
- [278] The plaintiff's written argument submits, as suggested by the Court of Appeal in Knapp, that the Pivnenko report should inform the Court's reasoning with regard to loss of future earning capacity. While I agree that Knapp indicates the capital asset approach should be grounded in factual and mathematical anchors as far as possible, I have rejected the bulk of the pre-accident and post-accident factual assumptions the Pivnenko report is based on.
- [279] I find that this case, like Brown and Walker, calls for an award on a broad brush basis by reference to income years. In Brown, Justice Finch used a pre-injury income year for reference. In Walker, Hinkson C.J., used a future income year, specifically in order to redress a delay in realizing a future income stream. The latter is not appropriate on the facts of this case, however, the delay noted by Hinkson C.J., is relevant here.
- [280] Mr. Campbell's 2016 income most closely reflects what he was able to earn working full-time as a Props Assistant with an established foothold in the industry. I am also satisfied I should use his highest income year in order to fairly address delay of the kind considered in Walker. Using that as an income reference and making an award for one year at that income, I fix \$60,000 as the amount of the plaintiff's loss of future earning capacity.

F. Future Care

- [281] The applicable principles concerning cost of future care are summarized in Dzumhur v. Davoody, 2015 BCSC 2316:
- [244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[282] The plaintiff seeks \$161,238 as future care costs.

[283] Consistent with their position on recovery, the defendants submit that no future care costs are warranted. They also note that Mr. Campbell has only sought treatment sporadically in 2016 and 2017, and then he resumed seeking treatments in 2018 and the beginning of 2019 (i.e., in anticipation of trial), and confirmed that he is only taking treatment occasionally at the time of trial. While that observation is not without merit, and I agree that Mr. Campbell's conduct approaching the trial is a factor to be considered, it is a fact that Mr. Campbell has never had the financial means to attempt a multi-disciplinary, co-ordinated treatment program of the sort recommended by Dr. Ho.

[284] The defendants' alternative submission is an award of \$5,354, largely for physiotherapy, massage therapy, and active rehabilitation.

[285] I have already noted my reservations regarding those parts of Ms. Walker's report that are based on Mr. Campbell's self-reporting. However, I am generally reluctant to place much weight on her recommendations in any event. In my view, her report is not so much a list of recommendations compiled to assist the Court, as it is one compiled to assist the claim. For example, Dr. Watt's report recommended Mr. Campbell "would probably benefit from

an ICBC-sponsored defensive driving course". Ms. Walker has recommended a "Disabled driver rehabilitation program" of up to 20 sessions at a cost of \$2,600. Mr. Campbell readily agreed in evidence that he does not need a driving course of any kind.

- [286] Ms. Walker's testimony also veered into advocacy. This was particularly the case regarding her mental health-related assessments and recommendations. As a related example from her written report, her "Summary of Assessment Findings" states: "This assessment indicates that Mr. Campbell has been interrupted from transitioning to adulthood " I find this a remarkable observation from an occupational therapist.
- [287] I place little reliance on the recommendations in the Walker report except where Dr. Ho has made or endorsed a similar recommendation. I generally accept the recommendations made or endorsed by Dr. Ho, with the exception of her recommendations regarding sleep issues. The latter recommendation needs to be assessed in light of my finding that the sleep issues were pre-existing.
- [288] With regard to Dr. Watt's recommendations, as noted, I prefer Dr. Ho's expertise on treatment and I have also disagreed with a number of Dr. Watt's diagnoses. I also question the degree to which Dr. Watt's report contains recommendations that appear to justify Mr. Campbell's past and intended expenditures (e.g., posture classes and yoga), as opposed to providing expert recommendations.
- [289] Based on Dr. Ho's report and testimony, I am satisfied the following future care is appropriate:
- a) 12 IMS treatments in regular succession in conjunction with active exercise-based physiotherapy and massage therapy;
 - b) if the IMS physiotherapy sessions do not sufficiently address the symptoms, trigger point injections (which are covered by MSP);
 - c) 10-12 further massage therapy treatments in conjunction with active release physiotherapy for his trigger points;
 - d) home exercise equipment consisting of TENS machine, heat pack, ice pack, stability ball, and resistance bands; and
 - e) treatments for episodic flare-ups.
- [290] Mr. Campbell has already had the benefit of an extended ARP program that included core strengthening exercises and was taught a home exercise regime that he says he continues to use. However, Dr. Ho stated in her oral testimony that a strengthening program would be an appropriate addition to the program of treatment she has set out. Ms. Walsh recommended 18-24 sessions with a kinesiologist to improve strength, conditions, and tolerance. That is also allowed.
- [291] As noted above, I find that Mr. Campbell's sleep issues were a pre-existing issue.

- [292] Dr. Ho and Dr. Watt both express the view that episodic flare-ups can be expected. Dr. Watt provided more detail, describing the required treatment as one-five passive modality treatments per flare-up, and a flare-up as an "acute" reaction resulting in discomfort for a period of time, as opposed to a mere aggravation.
- [293] From Ms. Walker's additional recommendations, the claim for vocational rehabilitation is allowed.
- [294] The economist Mr. Pivnenko provided an expert report setting out future cost of care present-value multipliers, and applying these to Ms. Walker's recommendations to create charts with present values. No challenge was made to his present value calculations.
- [295] Mr. Pivnenko provided two charts, one at the lower end of Ms. Walker's cost ranges, and one at the higher. I have adopted the lower range figures as appropriate, but have, in turn, made no discount for the possibility that Mr. Campbell's long-term condition may be improved by the intensive treatment period recommended by Dr. Ho. Given the relative amounts in question, I find this approach is fair to both parties.
- [296] The following are allowed. The numbers have been rounded up to account for taxes for those amounts that are taxable:

Intensive Program

- a) IMS - \$370
- b) Remedial massage therapy - \$2600
- c) Physiotherapy - \$445
- d) Kinesiologist - \$1700
- e) Gym and pool membership - \$500
- f) TENS machine (and replacements) - \$2130
- g) Other exercise equipment (and replacements) - \$6300
- h) Vocational rehabilitation - \$2300

Ongoing maintenance program

- i) Physiotherapy (up to age 65) - \$6800
- j) Kinesiology (for five years) - \$1500.

[297] I note that the physiotherapy allowance in the ongoing maintenance program represents four physiotherapy treatments at \$75 per treatment, resulting in four treatments a year up to age 65, with four being at the higher end of the range for episodic treatment recommended by Dr. Watt.

[298] The total present value is: \$24,645.

G. Loss of Domestic Capacity

[299] In assessing Mr. Campbell's claim for loss of housekeeping capacity, I have referred to the Court of Appeal's comments in *Kim v. Lin*, 2018 BCCA 77:

[27] This case requires the Court to again consider the proper approach to the somewhat vexing issue of valuing loss of housekeeping capacity. The difficulty with these types of cases arises from the challenge of understanding the true nature of the loss a plaintiff suffers when they are unable to perform household tasks.

[28] In *McTavish v. McGillivray*, 2000 BCCA 164, this Court observed that loss of housekeeping capacity could be compensated by a pecuniary or non-pecuniary award: at para. 73. The types of circumstances which may determine whether a loss is more properly considered pecuniary or non-pecuniary were recently discussed by this Court in *Liu*:

[26] 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. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.

...

[30] Professors Cassels and Adjin-Tetty in *Remedies: The Law of Damages*, 3d ed (Toronto: Irwin Law Inc., 2014) at 187-188, draw a distinction between cases of pecuniary and non-pecuniary loss on the basis of whether a plaintiff has actually lost the capacity to perform housework:

Where the plaintiff continues to perform the tasks but with difficulty, requires more time to complete tasks, or manages to get by without doing or intending to do these tasks, the loss may be compensated for as part of non-pecuniary damages for pain and suffering and loss of amenity. Specifically, compensation is intended for the plaintiff's pain in persevering with housework, loss of satisfaction in not contributing to the upkeep of one's home, and/or for having to live with a disordered and perhaps not a well-functioning home. There may be a fine line between situations of diminished capacity to perform tasks and when the plaintiff completes tasks with difficulty. Care needs to be taken in making these distinctions to ensure fairness to both plaintiff and defendant. A pecuniary award may be appropriate where the evidence indicates that a reasonable person in the plaintiff's circumstances should not be expected to continue to perform the tasks in question due to their injuries. Such a position avoids prejudicing plaintiffs who are stoic, or are unable to benefit from gratuitous services or afford to hire replacement services prior to trial.

[Footnotes omitted.]

[Emphasis added.]

[300] Under reported "Impact on Function", Dr. Watt's report reads:

· Instrumental activities of daily living - He denies any specific difficulties with instrumental activities of daily living (cleaning, laundry, bed-making, food preparation and clean-up, walking, grocery shopping) although he does now carry lighter grocery bags as lifting and carrying exacerbate his neck and back pain.

[301] On cross-examination, Dr. Watt explained this category, describing it as including all of the basic things required in order to run a household, inside and outside, such as cleaning, sweeping, vacuuming, gardening, lawn care, shopping, and driving. He confirmed that other than the adjustment to lighter grocery bags, Mr. Campbell reported no difficulty with these things. Dr. Watt, having conducted a functional assessment examination of Mr. Campbell, did not find this level of capability inconsistent with that actually demonstrated by Mr. Campbell.

[302] Dr. Ho opined that Mr. Campbell might find certain household responsibilities, including tasks on the farm, would take longer to perform and might result in some pain. She was of the view that he might remain "somewhat limited" in his ability to perform heavy cleaning, yard care, snow removal, and heavy exterior home maintenance.

[303] Again, I place no reliance on Ms. Walker's evidence with regard to this head of damages for reasons already set out.

[304] I find that Mr. Campbell can perform domestic duties. Some duties may take somewhat longer than they otherwise would have, or may need to be done with pacing, but in my opinion that is appropriately dealt with as an aspect of non-pecuniary damages in this case. There is no separate award under this head.

H. Special Damages

[305] The parties are agreed on the amount of the award for special damages, except for a disputed \$56 yoga mat.

[306] The evidence is that Mr. Campbell's ARP therapist recommended the yoga mat for use in his home exercise program and that he used it accordingly. I find the cost of the yoga mat was reasonably incurred.

[307] I award a total of \$8,986.61 (\$8,930.61 + \$56) as special damages.

I. Non-pecuniary Damages

1. Legal Principles

[308] Non-pecuniary damages are awarded to compensate for pain, suffering, loss of enjoyment of life, and loss of amenities. The award should be fair to all parties. Fairness is assessed as against comparable cases, but keeping in mind that every case necessarily presents a unique combination of facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[309] The proper approach and a non-exhaustive list of factors for consideration were set out in *Stapley v. Hejslet*, 2006 BCCA 34:

[44] Thus, we are left to apply the so-called "horizontal" comparative approach outlined in *Boyd* at para. 41:

[41] Our first task is to determine whether the decisions cited by the appellant are reasonably comparable to this case and whether they suggest a range of acceptable awards. Then, we must determine whether this award is within that range and, if not, whether it falls so substantially outside the range that it must be adjusted.

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis original.]

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (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 (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

2. Cases Cited by the Parties

- [310] The plaintiff cites: *Cumpf v. Barbuta*, 2014 BCSC 1898 [Cumpf]; *Clayton v. Barefoot*, 2018 BCSC 239 [Clayton]; *Scelsa v. Taylor*, 2016 BCSC 1122 [Scelsa]; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 [Bouchard]; and *Stare v. Whitehouse*, 2019 BCSC 1445 [Stare]; which range between \$120-\$183,000. The plaintiff asserts that an award of \$130,000 is appropriate.
- [311] In *Cumpf*, the plaintiff suffered a widespread chronic pain condition with psychological and cognitive comorbidities. She was found to be disabled from all but the lightest of tasks at work and around the home. Her condition significantly affected her ability to do things for her family, as well as her marital and her social relationships. Her condition was not likely to improve. The court awarded her \$150,000 in non-pecuniary damages (\$163,000 in 2019).
- [312] In *Clayton*, the 26-year-old plaintiff had soft tissue injuries to her neck, shoulders, and lower back. While she had substantially recovered, she was left with chronic lower back pain that would likely remain for the rest of her life, along with flare-ups. She could only sit or stand for about an hour and rarely left her home without her heating pad. She had been very active before and had not been able to return to any recreational activities except for walking. She was awarded \$130,000 (\$132,613 in 2019).
- [313] In *Scelsa*, the 39-year-old plaintiff had been in good health, fit, recreationally active, sociable, and happy prior to the accident. She continued to suffer due to cervical facet arthroplasty, myofascial neck and back pain, the effects of a herniated disc, and myofascial injury to the structures of the low back. She had sleep disturbance, mood changes, depression, and had developed chronic pain syndrome. The court found her symptoms could likely be improved, but were permanent. Her symptoms were severe and pervasive enough to have thwarted her career plans and to interfere with all aspects of her life. When on holiday with her family, she could not participate in activities as before, and she could no longer play physical games with her children. She had significantly cut back on her usual recreational pursuits and given other recreational activities up. She was awarded \$125,000 (\$132,824 in 2019).
- [314] In *Bouchard*, the 31-year-old plaintiff worked in the film industry as a special effects technician. His injuries were far more severe than Mr. Campbell's and had required several surgeries. He was left reliant on a cane and only able to walk short distances. The court noted that he was not left functionally impaired, but rather disabled. His pain warranted the routine use of narcotic and non-narcotic painkillers. His injuries had contributed substantially to the end of his marriage. He was not found to suffer depression, but was frustrated at not being able to pursue his former career. The court awarded \$160,000

(\$182,666 in 2019 dollars). (Note: the court reduced the total damage award in Bouchard by 40% to reflect the possibility that the plaintiff would have experienced some of the injuries regardless of the accident- the award of \$160,000 was the pre-reduction amount; this reduction was subsequently varied from 40% to 20% on appeal: indexed at 2012 BCCA 331).

- [315] In *Stare*, the 20-year-old plaintiff was just starting a career as an electrician. He suffered neck, shoulder, and mid-to-low-back pain as a result of the accident. He had also bruised his chest and developed a swollen right knee. Over time, all were resolved except for the lower back pain. He found walking difficult, but eventually successfully returned to work, with his co-workers accommodating him by taking certain tasks. His lower lumbar facet joints were found to have been injured in the accident, resulting in permanent pain and making further degeneration likely. He had developed somatic symptom disorder and a major depressive disorder; both had improved with treatment, but were likely chronic. The court awarded \$120,000.
- [316] The defendants cite: *Smith v. Evashkevich*, 2016 BCSC 1228 [Smith]; *Thorson v. Vandop*, 2016 BCSC 221 [Thorson]; *MacDonald v. Kemp*, 2014 BCSC 1079 [MacDonald]; *Peterson v. Verma*, 2014 BCSC 2622 [Peterson]; and *Dhaliwal v. Randhawa*, 2016 BCSC 2005 [Dhaliwal]; which range between \$53-67,000. They submit \$60,000 is an appropriate award.
- [317] In *Smith*, the plaintiff was a 30-year-old man. He was not off work for any significant time following the accident and went significant periods of time without seeking any treatment. The court accepted that he continued to suffer from soft tissue injuries in the neck, shoulder, and back. While he had occasional flare-ups of his symptoms, he did not miss work in those instances either. It was found that he was able to manage his symptoms well. He does not golf or snowboard as he did before the accident, and he was more withdrawn in his relationships. He suffered some general anxiety as a result of the chronic nature of his symptoms. He was awarded \$50,000 (\$53,000 in 2019).
- [318] In *Thorson*, the 38-year-old plaintiff had been in excellent health with a demanding fitness regime at the time of the accident and a very active lifestyle. She suffered neck, shoulder, lower back, and hip pain, as well as headaches following the accident. As of the date of trial, she had discomfort in her neck and shoulders every day and occasionally in her lower back. Her headaches have become less frequent, but continued and could last the whole day. She had missed only one day of work following the accident, but now took breaks and did stretches at work. She now does less intense, low impact versions of the recreational activities she used to do, saying that when she pushes to do more, it aggravates her injuries. She found her household chores difficult due to discomfort. The pain impacted both her marital relationship and her relationship with her daughter. She took over-the-counter medication three to four times a week for her pain. She was awarded \$50,000 (\$53,000 in 2019).

- [319] In MacDonald, the plaintiff, who was 25 at the time of the accident, suffered continuing pain from soft tissue injuries to her lower back, neck, and shoulders. She had developed bursitis in her left shoulder. She had consistent dull pain throughout the day and flare-ups following strenuous physical activity, for which she would take non-prescription pain medication. She has suffered occasionally from headaches and tingling in her arms, and sometimes experienced anxiety on a busy highway. She was unable to engage in her previous recreational activities, including boating, hiking, camping, running, yoga, and going to the gym, in the same manner as before the accident. She was able to continue her former work with some minor accommodations to her work station set up. An award of \$55,000 (\$59,744 in 2019) was made.
- [320] In Peterson, the plaintiff, who was 23 at the time of the accident, was left with neck and shoulder pain on a regular basis, as well as periodic flare-ups in her back triggered by prolonged sitting. She also had occasional related headaches. Her ongoing pain was not significantly functionally disabling, although it limited the period of time she could sit comfortably and curtailed some of her activities. Her pain would likely continue for the foreseeable future. Despite the discomfort, the plaintiff had continued to work and to study. An award of \$60,000 was made (\$65,175 in 2019).
- [321] In Dhaliwal, the plaintiff was 19 at the time of the accident. He was unable to work for six to eight weeks. He had continued pain causing "modest discomfort" in his neck, shoulder, and upper back, but the pain was manageable and not disabling. The discomfort did prevent him from working at jobs requiring a moderate level of physical activity, but had not significantly impaired his lifestyle and recreational activities. The condition was chronic and likely to persist. He was awarded \$65,000 (\$67,000 in 2019).

3. Analysis and Determination

- [322] Mr. Campbell sustained injuries in the accident, some of which, including his headaches and knee injury, quickly resolved. Most significantly, the accident caused him to develop chronic myofascial pain syndrome in his neck and back. His neck and back pain are relatively mild, but unlikely to ever fully resolve. The plaintiff is likely to experience low-level pain with occasional aggravation and episodic flare-ups for the rest of his life.
- [323] I have accepted Dr. Ho's opinion that Mr. Campbell's condition can likely be improved by following her recommendations. Further, the consensus of opinion is that Mr. Campbell is presently deconditioned and a conditioning program will be of considerable benefit to him. That is consistent with Mr. Campbell's own evidence that he felt stronger and more positive after his earlier ARP sessions notwithstanding his pain.
- [324] While Mr. Campbell is still able to perform household activities, he may have to do certain tasks more slowly or in pieces. Dr. Ho described him as likely to be somewhat limited in his ability to perform heavy cleaning, yard care, snow removal, and heavy exterior home maintenance, but not as incapable.

- [325] Mr. Campbell does have some functional limitations as a result of his injuries. However, as reflected in the reports of Dr. Watt and Ms. Walsh, those limitations become relevant when frequent and repeated heavy physical labour is required. I find Mr. Campbell's testimony as to the general impact of his injuries on his day-to-day activities and relationships to be considerably overstated, and I have accepted his testimony regarding his limitations only where expressly indicated in these reasons.
- [326] Dr. Ho's report indicates post-accident Mr. Campbell reported that he had "limited his ability to mountain bike, canoe and go back-packing" and concludes that he will be "somewhat restricted in his ability to fully participate in his previously active recreational lifestyle." This is consistent with the evidence. For example, Mr. Campbell tried downhill skiing and found that it aggravated his back, however, the very fact that he found it reasonable to consider downhill skiing is significant for purposes of identifying his line of limitation. Similarly, his evidence was not that he was flatly unable to continue to participate in previous group recreational activities, but rather that having participated several times he concluded, on a cost/benefit analysis, that it was not worth it to continue. Again, this is relevant to his line of limitation.
- [327] The evidence indicates Mr. Campbell is restricted in engaging in recreational activities only at the demanding end of the spectrum. That said, the evidence also indicates that was Mr. Campbell's preferred end of the spectrum pre-accident and that he regularly engaged in such activities, thus his deprivation is significant.
- [328] Engaging in these activities also bonded him with his friends and his father. The fact that he can no longer participate in these activities in the same way has impacted those relationships. However, Mr. Campbell is not socially isolated. Ms. McConnell testified that they see one another almost every weekend and engage in social activities. His father testified they still go on outings together. His parents' testimony disclosed that he is still able to significantly participate in family activities on vacations.
- [329] The most dramatic impact of the accident has been on Mr. Campbell's chosen career field. Due to the unique characteristics of that industry, Mr. Campbell is unable to continue his career there, at least in the "on set" manner he had intended. While he has other options available to him, the loss of his chosen path is significant. It was what he had wanted to do since he was very young.
- [330] In his reasons in *Scelsa*, Justice Brown, commented as follows:
- [234] It is not possible to fully reconcile the awards, which are not precedential, but rather, give some guidance. They are distinguishable to some extent based on how pervasive and chronic are the effects of the injuries, on how many facets of life are significantly impacted, and on the extent to which the plaintiff is able to continue with former activities and occupations. The higher range of cases exhibit more intense iterations of depression such as social isolation or significant loss of social contact and an impact on significant other persons in the plaintiff's life, such as children and spouses. Chronic myofascial pain,

permanent or significant loss of work previously highly valued by the plaintiff and/or significant loss of earning capacity also mark cases in the range of \$100,000 or more.

- [331] Like Brown J., I agree that while past awards are not precedential, they do serve to identify some significant factors, such as chronic myofascial pain and loss of the ability to perform work highly valued by the individual.
- [332] Here, the plaintiff's injuries are physical and relatively mild, but also chronic. They are of limited impact in terms of the overall spectrum of activity, but have impacted two aspects of life the plaintiff personally placed high value on: technical film industry work and high intensity outdoor activities. The plaintiff is employable, but not in the industry he wanted to be in. He can engage in recreational activities, but not in the same way at the same level.
- [333] Much remains open to him, but that does not mean the loss of his preferred path is not a real and compensable deprivation. In the circumstances, I am of the view that an award of \$90,000 is appropriate. That amount reflects the comparability of the cases such as Peterson and Dhaliwal, combined with the frustration and distress at the loss of matters of great personal value that was recognized in Bouchard.

XI. Summary

[334] In summary, I make the following awards:

Past Loss of Earning Capacity:

\$62,610

Future Loss of Earning Capacity:

\$60,000

Future Care:

\$24,645

Loss of Domestic Capacity:

No award warranted

Special Damages:

\$8,986.61

Non-Pecuniary Damages:

\$90,000

Total:

\$246,241.61

[335] Absent any further submissions from the parties respecting costs, costs will follow the event and be awarded to the plaintiff to be assessed under Scale B of Appendix B to the Supreme Court Civil Rules, B.C. Reg. 168/2009. Should either party seek a different disposition of costs, that party is at liberty to contact the Registry regarding further submissions.

"Tucker J."

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Prepared on 28 October 2026 · Esheria