
CANADA / JUDGMENT

Chevez-Babcock v. Peerens

2020 BCSC 863

COURT

Supreme Court of British Columbia

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2020 BCSC 863 Chevez-Babcock v. Peerens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chevez-Babcock v. Peerens,

2020 BCSC 863

Date: 20200609

Docket: M169364

Registry: Vancouver

Between:

Mikeas Chevez-Babcock

Plaintiff

And

Colleen Linda Peerens

Defendant

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:

Timothy J. Maledy

James D. Maledy

Counsel for Defendant:

Milos Jeftic

Masa Jeftic

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 18 - 21, 24 - 26 2020

Place and Date of Judgment:

Vancouver, B.C.

June 9, 2020

Introduction

- [1] The plaintiff, Mikeas Chevez-Babcock, and the defendant, Colleen Peerens, were involved in a motor vehicle accident on December 1, 2014, in Ladysmith, British Columbia. Ms. Peerens admits liability.
- [2] After the December 1, 2014 accident Mr. Chevez-Babcock, then 22 years old, experienced pain in his neck and back. The neck pain resolved. However, Mr. Chevez-Babcock asserts that the back pain has persisted and is now chronic, interfering with his love of physical activity, his physical work as a pro-loader at Home Depot and his current job as a Home Depot cashier. He submits that in addition to pain, suffering and loss of enjoyment of life, he has suffered past and future loss of earning capacity, is entitled to an award for cost of future care and has incurred special damages.
- [3] Ms. Peerens' position is that the back pain was not caused by the December 1, 2014 accident, rather it is due to pre-existing back problems, subsequent workplace injuries and a subsequent motor vehicle accident for which Mr. Chevez-Babcock was at fault. Ms. Peerens argues that whatever the source of the back pain, it resolved within six months of the December 1, 2014 accident and has not caused any losses beyond some modest time off work and modest pain and suffering. She also submits that Mr. Chevez-Babcock's evidence is full of inconsistencies and cannot be relied upon.
- [4] The issues are:
- a) credibility;
 - b) whether Mr. Chevez-Babcock has a low back injury, and if so, the nature of it;
 - c) whether his low back pain is due to an injury caused by the December 1, 2014 accident;
 - d) the damages that flow from the findings about his back and neck for:
 - i. pain, suffering and loss of enjoyment of life;

- ii. past and future loss of earning capacity;
- iii. cost of future care; and
- iv. special damages.

Credibility and Objective Evidence

- [5] Ms. Peerens submits that inconsistencies in Mr. Chevez-Babcock's evidence undermine its reliability. Mr. Chevez-Babcock submits that the extensive cross examination by counsel for Ms. Peerens did not create any inroads into his credibility.
- [6] Credibility includes both the accuracy of the evidence of a witness and its truthfulness. Although a witness who is not truthful is also not reliable, a witness who is giving truthful evidence may not be giving reliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526 (C.A.); *Mather v. MacDonald*, 2016 BCSC 948 at para. 18.
- [7] Evaluating credibility involves examining the witness's evidence for the ability and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, whether the witness changes evidence during direct examination and cross examination, any motive to lie and demeanour. If the trier of fact accepts the witness's evidence as being generally credible, then the trier of fact should compare it with the other evidence to determine whether it fits within the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296. The preponderance of probabilities is a key consideration: *Jin v. Cheng*, 2018 BCSC 763 at para. 19.
- [8] It is not necessary to accept the entirety of the evidence of any witness. It is reasonable for a trier of fact to accept parts of a witness's evidence and apply different weight to different parts of a witness's evidence: *R. v. R.(D.)*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).
- [9] Ms. Peerens asserts Mr. Chevez-Babcock described his symptoms differently at trial compared to what he said to doctors from time to time; he was not consistent in whether he had injuries from a second accident for which he was at fault; he minimized the severity of the second accident; his evidence and that of his supervisor were not consistent about his post-December 1, 2014 accident work; there are inconsistencies in the responses he made when he completed pain and activity questionnaires at the request of experts; and he has not been consistent in what he has said to experts and non-experts about his post-December 1, 2014 recreational activities.
- [10] Insofar as the inconsistencies related to the trajectory of his symptoms at a particular moment in time between the December 1, 2014 accident and trial, I will address the specific inconsistencies alleged in due course. At this juncture, I observe that given the pre-trial

period has spanned five years and three months, it is not surprising that Mr. Chevez-Babcock may have thought he was improving or his symptoms resolving at certain times but in retrospect, now describes his symptoms as unresolved and relatively static over time even though the day to day reality is some days he experienced more pain than others. My observations in this regard are not conclusions about his injuries, but that his descriptions about his symptoms at certain points in time that are different from his evidence at trial about his symptoms over the whole of the pre-trial period are not necessarily inconsistencies.

- [11] In my view, varying reports of pain over time are related to the assertion that filling out pain questionnaires inconsistently is a marker of unreliable evidence. However, in this case, Mr. Chevez-Babcock's evidence, in particular the small magnitude of the differences and the evidence that his pain did vary from time to time and within any given day, is such that I conclude that the differences likely relate to actual differences in how he was feeling when he filled out the different questionnaires.
- [12] With regard to the differences between Mr. Chevez-Babcock's evidence about what he experienced at various times and what is recorded in his family doctor's clinical notes, it is trite to say that what a doctor records in a clinical note is not evidence of what the patient did or did not say to the doctor during the visit unless it is admitted for that purpose. Ms. Peerens places emphasis on a doctor's note made by Mr. Chevez-Babcock's family doctor, Dr. Derek Poteryko, in April 2015, which reads as follows: "Sx's [Symptoms] have resolved - pt [patient] has had no problems with low back while doing lighter duties - ready to return to full duties". Mr. Chevez-Babcock testified that he did not use those words when he saw Dr. Poteryko but that he probably said that he was having a good day and feeling better and that he felt ready to return to his previous duties. I find that Mr. Chevez-Babcock did not use the words that Dr. Poteryko wrote because the language is consistent with a physician's interpretation of what a patient has said. In addition, the fact that he was not having problems with his low back doing lighter duties does not equate to a full return to his pre-December 1, 2014 form given that before the December 1, 2014 accident, Mr. Chevez-Babcock's job frequently required him to lift construction materials including bags of cement, lumber and sheets of plywood.
- [13] Ms. Peerens also asserts that Mr. Chevez-Babcock has not reported all of his income accurately which taints the credibility of his evidence as a whole. In 2018, Mr. Chevez-Babcock sought financial help from his father who offered financial support if Mr. Chevez-Babcock helped out in his stucco application business. The evidence shows that Mr. Chevez-Babcock has done that on a few occasions. His father paid him \$15 per hour or \$100 per day, regardless of what he did as long as he showed up. Mr. Chevez-Babcock did not report those earnings on his 2018 income tax return. Ms. Peerens argues this affects the overall reliability of his evidence and the court should not accept his evidence about his loss of earning capacity.

- [14] In *McLatchie v. Guineau*, 2017 BCSC 1950, the plaintiff worked as a server for minimum wage plus tips. He did not report any tip income to Revenue Canada over a period of at least 10 years. His true income was 3-4 times what he reported. He acknowledged in his evidence that by under reporting his income, he received benefits he would not otherwise be entitled to such as employment insurance, the child tax credit and Pharmacare coverage. Mr. Justice Masuhara stressed the magnitude and duration of the under reporting when he concluded it affected the reliability of the plaintiff's evidence (at para. 21). This case is quantitatively different in that Mr. Chevez-Babcock did not report about \$2,500 of funds that his father paid him to "show up" over two years. Based on the evidence of both father and son, Mr. Chevez-Babcock was unable to do the real work of stucco application and was embarrassed about that, but he showed up and did what he could so that they could save face given the family culture of working for what you get. Nonetheless, the under reporting of income affects the integrity of his evidence and causes me to scrutinize it closely. It does not cause me to reject it entirely as unreliable or not truthful.
- [15] When he testified, Mr. Chevez-Babcock was not deliberately exaggerating or falsifying his evidence. He did not appear to be overstating his injuries. He conceded matters that did not help his case. He could not remember matters and said so, instead of making up an answer that would help his case. However, his memory was not good for the whole period between the accident and trial. His level of impaired functioning seems pronounced compared to his ongoing recreational activities. These are additional reasons to carefully scrutinize his evidence.
- [16] With those caveats, I conclude that his evidence is generally reliable and the problematic features should be addressed by sorting out what is consistent with the evidence as a whole and preponderance of probabilities.

Accident Injuries

- [17] On December 1, 2014, Mr. Chevez-Babcock was driving his father's vehicle in Ladysmith, British Columbia. He had two passengers, one in the front passenger seat and one in the back seat. Mr. Chevez-Babcock was driving east on Timberland Road and entered the intersection with Highway 1. Ms. Peerens was driving south on Highway 1 and struck his vehicle. The airbags in both vehicles deployed and the vehicles suffered significant damage.
- [18] Ambulances attended the scene. The front seat passenger in Mr. Chevez-Babcock's vehicle was airlifted to a hospital. Mr. Chevez-Babcock testified that his neck started to stiffen up at the scene. The ambulance attendants applied a neck brace and took him to Nanaimo Regional Hospital. The records there report that Mr. Chevez-Babcock reported neck pain and the attending physician noted a contusion on his head and swelling of his head. He did not report back pain. The notes indicate that he reported he had back pain before the December 1, 2014 accident but Mr. Chevez-Babcock does not recall saying that. He does recall that from time to time he had a sore back after a shift at work but he never missed any work due to a sore back nor did he seek medical attention for his back before the December

1, 2014 accident.

- [19] Mr. Chevez-Babcock saw his family doctor, Dr. Poteryko, on December 4, 2014, at which time he complained of pain and stiffness in his neck. Mr. Chevez-Babcock testified that he stayed off work for 10 days after the December 1, 2014 accident. He testified that his neck was the source of most of his pain during this time but he also began to feel pain in his chest, upper arms and lower back. On December 11, 2014, he filled out a CL-22 form (an ICBC form) in which he listed injuries to his neck, left and right shoulders, left and right triceps, lower back, right pectorals, and a lump on top of his head on the left side.
- [20] Mr. Chevez-Babcock asserts that the injury caused soft tissue injuries to his neck and low back. His ongoing pain is on the right side of the lower back.
- [21] Mr. Chevez-Babcock testified about his work history prior to the December 1, 2014 accident. He worked for his father's stucco application company while he was in high school, for a turf company moving turf, for a fish plant palletizing canned fish and for Toys R Us. He testified that in March 2013, he started working for Home Depot as a lot associate earning approximately \$12 per hour. His job as a lot associate was to load customers' purchases into their vehicles if they needed help, collect carts from the lots, keep the lot clean, and help on cash if required. He testified that about a year before the December 1, 2014 accident, he became a pro-loader. A pro-loader is a lot associate who is dedicated to the contractor desk. A pro-loader takes the orders that contractors make and retrieves the various items in the orders and has them ready for the contractors when they come into the store. That job involved lifting heavy items such as bags of concrete, lumber and plywood. Mr. Chevez-Babcock testified that he would complete up to 10 such orders in a shift and about two hours of a typical shift involved heavy lifting. This evidence was not challenged and I accept it.
- [22] Mr. Chevez-Babcock testified that in addition to the physical nature of his work, he did intense weight lifting sessions at the gym where he regularly did one hundred pound leg squats. Mr. Chevez-Babcock testified that prior to the December 1, 2014 accident, he worked out up to five days per week and he played drop-in basketball.
- [23] Mr. Chevez-Babcock testified that prior to the December 1, 2014 accident, sometimes his back or neck would be a little sore or stiff after a shift at work. He testified that such incidents did not keep him off work and he had never seen a doctor about it. I accept that most of the jobs Mr. Chevez-Babcock had were physical labourer jobs that involved some heavy work. I accept his evidence that his occasional neck or back pain had never interfered with his work or exercise regime. I also accept that he never reported this occasional neck or back pain to a doctor until he attended the hospital after the December 1, 2014 accident when he was asked about whether he ever had any lower back or neck pain, at which time he reported the back pain I have described.

Neck Strain

- [24] Ms. Peerens concedes that Mr. Chevez-Babcock suffered a soft tissue injury to his neck that was caused by the December 1, 2014 accident. Ms. Peerens asserts that Mr. Chevez-Babcock had steady improvement over several months and full resolution of this injury within one year of the accident. I conclude this injury was as a result of the December 1, 2014 accident and resolved by one year after the December 1, 2014 accident.

Low Back

- [25] Mr. Chevez-Babcock asserts that after the December 1, 2014 accident he developed back pain due to soft tissue injuries in his low back that have progressed to chronic low back pain. He testified that when he does work that involves lifting, his pain flares up. When he does less strenuous work involving standing or sitting for prolonged periods, he has less severe but still debilitating pain.
- [26] Mr. Chevez-Babcock testified that he did not return to weight lifting until about a year after the December 1, 2014 accident. There are some weight lifting exercises that he cannot do due to low back pain, such as squats with a barbell or free weights. He has commenced playing soccer seven-a-side, which he describes as no contact and not competitive. He plays 21 and shoots hoops on a basketball court, but no longer plays team basketball. He has curtailed these activities because of his low back pain. He says his ability to throw a baseball and swing a baseball bat is limited by a shoulder injury not related to the December 1, 2014 accident but also by his back pain.
- [27] Ms. Peerens argues that Mr. Chevez-Babcock does not have a soft tissue injury to his low back or chronic low back pain. Rather, she argues he had pre-existing mechanical back pain that continued post accident when it was aggravated by workplace lifting incidents. Ms. Peerens argues that Mr. Chevez-Babcock did not report any low back problems after the December 1, 2014 accident until he had workplace lifting incidents, the first of which was on January 2, 2015. Ms. Peerens argues that I should not accept that the injuries recorded on the CL-22 form were caused by the December 1, 2014 accident because Mr. Chevez-Babcock did not report the low back injury and the injuries to his shoulders and triceps to Dr. Poteryko.
- [28] I do not accept that argument. The CL-22 includes injuries to his neck and back that became significant enough from Mr. Chevez-Babcock's perspective that he has made claims for them. It also reports other injuries that are not part of this claim, including the bump on the head that was also noted in the emergency records right after the December 1, 2014 accident. Mr. Chevez-Babcock testified that he thinks he did report the shoulder, triceps and pectoral issues to his doctor or his physiotherapist but would have described soreness in his upper arms and chest. These types of complaints do appear in a few places in his medical records but quickly disappear. Although Dr. Stephen Maloon focusses on a more recent problem with Mr. Chevez-Babcock's right shoulder, Mr. Chevez-Babcock's claims in this litigation do not include a shoulder injury.

- [29] With regard to the suggestion that the back pain reported on the CL-22 was fabricated, it is not possible that on December 11, 2014, Mr. Chevez-Babcock foresaw the January 2015 workplace incident and fabricated low back pain on the CL-22 in order to claim the workplace low back injury as part of his motor vehicle December 1, 2014 accident injuries. The report of pain on the CL-22 is not explained by the type of neck and back stiffness that Mr. Chevez-Babcock described having prior to the December 1, 2014 accident because those came on after work shifts and resolved quickly and at the time he filled out the CL-22, Mr. Chevez-Babcock had not worked for ten days, ie: since the December 1, 2014 accident.
- [30] Mr. Chevez-Babcock testified that when he went back to work, he was assigned light duties initially. He testified that in early January 2015, he was assisting a customer with loading an approximately 20-pound carpet into her car he described that when he did this, his back hurt.
- [31] This incident is one of a number of occasions when Mr. Chevez-Babcock attempted lifting duties at work that aggravated or worsened his back symptoms such that he could not continue with the task and he would experience a set back in his situation with his back. I accept his evidence that he undertook such tasks regularly in his employment prior to the December 1, 2014 accident with no such adverse outcomes except an occasionally sore back or neck at the end of a shift.
- [32] Between January 2015 and May 2015, Mr. Chevez-Babcock saw Dr. Poteryko regularly regarding his back. He worked lighter duties and attended physiotherapy. He had another flare-up at work on February 2, 2015, when trying to load a box of tiles into a customer's car. He missed about 6.5 weeks of work between the December 1, 2014 accident and early March 2015.
- [33] In April and May 2015, Dr. Poteryko made describing the low back as not symptomatic during light duties and having resolved during light duties. Dr. Poteryko cleared Mr. Chevez-Babcock to return to his pre-December 1, 2014 accident work duties subject to the condition that he restrict lifting in accordance with common sense. He reviewed back care with Mr. Chevez-Babcock. Mr. Chevez-Babcock testified that when Dr. Poteryko said he could go back to his regular duties so long as he used common sense about lifting, he initially tried to do heavier tasks at work but his back pain would flare up so he did not continue with the heavy duties of a pro-loader or even of a lot associate. He testified that he stayed on cash and stuck to modified duties. He testified he did not report back pain to any doctor during this timeframe because he was avoiding work or activities that would cause pain. This evidence makes sense and I accept it.
- [34] In May 2015, Mr. Chevez-Babcock attended counselling for anxiety that he experienced while being a passenger in a vehicle. He testified that he also addressed his frustration with his situation with the counsellor and that his goal was to get back to where he was before the accident. He testified that during this time frame and into the fall of 2015, he tried to make it seem like it was okay when he was around other people.

- [35] Mr. Chevez-Babcock's brother, Zackarias Chevez-Babcock, testified. He testified that during 2015, 2016 and part of 2017, the two brothers were close, as they had been most of their lives. They shared an apartment in 2016 and part of 2017. Due to issues that arose in 2017 and unrelated to the December 1, 2014 accident or this claim, they do not currently speak to one another.
- [36] Mr. Zackarias Chevez-Babcock testified that when he visited with Mr. Chevez-Babcock in the spring and summer of 2015, he observed him grimacing in pain and unable to be comfortable while sitting, such as while sitting and playing video games, which they often did together.
- [37] It is not disputed that on September 1, 2015, Mr. Chevez-Babcock was at work and counting stock for inventory purposes. He saw a box of tiles that was dislodged and while standing on a ladder platform, he tried to reposition it. He experienced a sharp pain in his low back. The boxes weighed 30-40 lbs. Mr. Chevez-Babcock testified that since that time, he has remained on cash at Home Depot and avoids lifting although avoiding it completely is not possible, especially when customers request assistance. He does not enjoy cash as much, in part because he likes to move around and in part because he finds that standing still also makes his back sore.
- [38] Brenda Thistlethwaite was the head cashier at Home Depot at the time of the December 1, 2014 accident up to 2019. She testified that at the time of Mr. Chevez-Babcock's December 1, 2014 accident, he was a lot associate (a pro-loader is a lot associate but not all lot associates work as pro-loaders). One of her duties was to ensure that cash was covered by cashiers and lot associates and to schedule the breaks of the cashiers and lot associates. During part of this period, the head cashiers also received the calls and arranged for replacement workers when cashiers and lot associates called in sick.
- [39] Ms. Thistlethwaite testified that before the December 1, 2014 accident Mr. Chevez-Babcock was a valued employee because he was keen, helpful and willing and able to lift heavy objects such as bags of cement. When he worked as a pro-loader, he got to know the contractors and what they wanted. She testified that after the December 1, 2014 accident, he has been scheduled to work on cash. She tried to schedule him to work on self-serve cash, which involves assisting customers on the automated checkouts. That allows him to move around more because she knows that standing still is problematic for him. She does not schedule him for shifts or tasks that could involve heavy lifting. She has observed him be very cautious about lifting, such as asking for a second person or simply saying he cannot do certain things.
- [40] In November 2015, Mr. Chevez-Babcock recommenced physiotherapy. In late 2015, he started a kinesiology program and resumed going to the gym. While he could not do all the things he did before the December 1, 2014 accident, he found the kinesiology and gym sessions made him feel better and more optimistic.

- [41] In 2016, Mr. Zackarias Chevez-Babcock was working with SEI Chemicals, doing power washing, repairs to the roofs of recreational vehicles and graffiti removal. Mr. Chevez-Babcock testified that he was struggling with his work at Home Depot because he found that standing in one place at the cash made his back sore. He decided to work part-time so that his back had time to recover between shifts. He could not afford to work part-time and support himself. He testified that Mr. Zackarias Chevez-Babcock arranged for him to work for SEI Chemicals. On some days, Mr. Chevez-Babcock worked as part of a crew that Mr. Zackarias Chevez-Babcock supervised. Mr. Zackarias Chevez-Babcock testified that on the first day, Mr. Chevez-Babcock struggled with pain when they lifted the power washer compressor out of the back of the truck. After that occasion, Mr. Zackarias Chevez-Babcock lifted it himself and did the heavier duties such as carrying heavy buckets of dirt so that Mr. Chevez-Babcock did not have to. Mr. Zackarias Chevez-Babcock also testified that Mr. Chevez-Babcock did not properly operate the power washer because instead of holding with two hands in front of him at an angle from his body, Mr. Chevez-Babcock held it almost vertical and rested the top of the wand on his shoulder. Mr. Chevez-Babcock testified that he used this posture to prevent stress on his lower back. During the late spring and summer of 2016, Mr. Chevez-Babcock worked for SEI Chemicals and Home Depot. In the fall, he was laid off from SEI Chemicals.
- [42] In July 2016, Dr. Poteryko ordered x-rays of Mr. Chevez-Babcock's lumbar spine. The x-ray report showed no sign of degenerative disc disease.
- [43] Mr. Zackarias Chevez-Babcock testified that while they were living together in 2016 and 2017, Mr. Chevez-Babcock demonstrated the type of pain behaviour that Mr. Zackarias Chevez-Babcock observed in the summer of 2015 and he began to complain about it more.
- [44] I accept the evidence of Mr. Zackarias Chevez-Babcock as accurately relating what he observed about his brother at the time he observed him.
- [45] Jarrett Stewart has been friends with Mr. Chevez-Babcock since they met in kindergarten. He describes Mr. Chevez-Babcock as a friendly, outgoing optimistic person who is athletically competitive. He and Mr. Chevez-Babcock weight trained together three to five times per week before the December 1, 2014 accident. He testified that they pushed each other during their weight training sessions. He testified that after the December 1, 2014 accident, Mr. Chevez-Babcock did not weight train for about a year and then eased back into it. He testified that they recommenced working out about three to five times per week together until recently when Mr. Chevez-Babcock switched gyms. He testified that Mr. Chevez-Babcock has regained his pre-December 1, 2014 accident form with a few exceptions, including that he no longer does squats with one hundred pound weights, Mr. Stewart hands Mr. Chevez-Babcock the weights so he does not have to lean over and pick them up, and on some occasions, Mr. Chevez-Babcock terminates the workout early because of pain. Mr. Stewart testified that Mr. Chevez-Babcock seems like the same person except that he has pain and complains about his pain.

- [46] After being laid off from SEI Chemicals, Mr. Chevez-Babcock tried to get more hours at Home Depot. In 2018, he applied for and received a job in the appliance department which allowed him to walk around frequently and did not require heavy lifting. However, the hours he worked were less than he was getting working cash so he returned to cash. Since then, he has continued to go to the gym and to find various jobs to supplement his part-time work at Home Depot including at a costume store over Halloween, non-weight bearing tasks for his father's stucco business and working at a retirement home as a multiple services worker assisting with meal delivery and plate clearing in the dining room.
- [47] In 2019, on the recommendation of Dr. Zeeshan Waseem (a physical medicine and rehabilitation specialist), Mr. Chevez-Babcock underwent trigger point injection treatments. He found these helped in the short term but the relief did not last.
- [48] In January 2018, Dr. Poteryko sent Mr. Chevez-Babcock for a CT scan of the neck and lumbar spine because of his chronic low back pain. The CT scan report was normal and did not show any disc pathology, herniations or narrowing of the spinal canal.
- [49] At trial, Dr. Poteryko opined that Mr. Chevez-Babcock suffers from an ongoing whiplash type of strain injury to his low back muscles. He explained that his April and May 2015 notes described symptoms that were consistent with back pain resolution while Mr. Chevez-Babcock was undertaking light duties at work and were not a determination that his injury had fully resolved. He explained that he would not have made the notes about common-sense restrictions on lifting and review of back care if he felt that Mr. Chevez-Babcock's back symptoms had resolved to their pre-December 1, 2014 accident status.
- [50] Dr. Poteryko testified that in his examinations of Mr. Chevez-Babcock starting in January 2015 to the time he wrote his report, he noted muscle spasms in the muscles alongside the lumbar spine at the L4 level with greater intensity on the right side than the left. These are objective signs of an injury to the muscles in that area.
- [51] Dr. Waseem is a physical medicine and rehabilitation specialist who provided expert evidence at the request of Mr. Chevez-Babcock. Dr. Waseem opined that Mr. Chevez-Babcock suffers from chronic myofascial pain of the lumbar spine that limits his ability to sit and stand. Dr. Waseem stated the bases for this opinion included that there was no indication that Mr. Chevez-Babcock had lower back pain that pre-dated the December 1, 2014 accident and that the pain since the December 1, 2014 accident has been continuous. In this regard, he stated that Mr. Chevez-Babcock told him that the pain in his low back had been continuous since the December 1, 2014 accident and no better and no worse since onset.
- [52] The bases for Dr. Waseem's opinion was challenged by counsel for Ms. Peerens. First, they pointed out, and Dr. Waseem agreed, that Mr. Chevez-Babcock had not told him that he had lower back pain after some work shifts prior to the December 1, 2014 accident. Dr. Waseem agreed that he did not know that, and he agreed that he had not taken into account the December 1, 2014 hospital emergency record that noted pre-existing back pain. Dr. Waseem said that the evidence about pre-existing back pain did not change his opinion because the

type of pain he would be concerned about is pain that was ongoing at the time of the accident. I accept Dr. Waseem's explanation in this regard and that Mr. Chevez-Babcock did not have ongoing pain at the time of the December 1, 2014 accident because of the evidence that this pain was occasional and always resolved quickly.

- [53] Ms. Peerens urges me to ignore Mr. Chevez-Babcock's description of the pain because of the reliability problems with his evidence that she asserts. For the reasons I have given, I am not persuaded that his evidence is generally unreliable. I also note there is objective evidence that he did not have ongoing problems with low back pain at the time of the December 1, 2014 accident including that he had never missed work due to back problems, he was an active heavy weight lifter regularly both at the gym and in the workplace and neither had been disrupted by back pain, and he had never spoken to a doctor about back pain before being asked about it on the day of the accident.
- [54] .In addition, Mr. Chevez-Babcock called his work supervisor who dealt with shifts when he would have called in sick due to back pain and his family doctor, who had been his family doctor since he was a young child. Ms. Peerens had the opportunity to test Mr. Chevez-Babcock's evidence that such problems had never interfered with work or caused him to seek medical advice with those witnesses but did not. Ms. Thistlethwaite testified that prior to the accident Mr. Chevez-Babcock never shirked or hesitated to undertake heavy lifting tasks. There was no record of complaints of back problems in Dr. Poteryko's notes from prior to the December 1, 2014 accident. He was not asked on cross examination whether Mr. Chevez-Babcock had reported back pain to him prior to the December 1, 2014 accident.
- [55] Ms. Peerens also referred Dr. Waseem to inconsistent answers that Mr. Chevez-Babcock gave to pain questionnaires he had completed at different times. Ms. Peerens asserts that those answers were not only inconsistent with each other but also inconsistent with his statement to Dr. Waseem that his pain comes and goes and is very severe.
- [56] Dr. Maloon, an orthopedic surgeon who provided evidence for the defendant, reported that Mr. Chevez Babcock said this about his pain:

The pain is continuous. The pain does vary in severity from day to day and during the day. The pain is typically aggravated by bending and reaching. Prolonged sitting or standing may aggravate the pain. Occasionally, he has more pain after sleeping in a strange position. The discomfort is relieved with strengthening and stretching exercises, using the CBD balm and by walking. He does report his low back pain to radiate into the right buttock and groin. His back pain is more severe than the pain in his buttock. On specific questioning, he reports occasional pain in his back with coughing or sneezing. He has had no symptoms of bowel or bladder dysfunction. He has no significant pain at night. He has had no constitutional signs or symptoms related to his back pain. He reports occasional numbness in his lower limbs. He can describe two occasions when both legs became numb after prolonged standing at work. The numbness settled spontaneously. He reports no weakness in his lower limbs. On pain scale from 0 to 10 where 0 is no pain and 10 is unbearable pain, he reports his ongoing low back pain to vary between a 2 and

8 out of 10. He does report some improvement since the motor vehicle accident and likes to feel that the discomfort is continuing to improve.

[57] I set this out in full because what is reported there, that the pain varies daily and within the day, can be quite low or quite high and that he feels improvement, is consistent with what Mr. Chevez-Babcock has reported to various doctors, both clinically and experts, over time. When asked, or when reporting, on how he is on a given day, his reports have varied. This can be seen on pain questionnaires he has filled out which have included that his pain can be severe. Ms. Peerens says I cannot accept Mr. Chevez-Babcock's reporting as reliable because it has varied so much. However, when the evidence shows that he has reported varying pain within upper and lower bounds that have remained relatively constant.

[58] It is within the context of that day to day variance of pain that is aggravated by bending, lifting and prolonged standing or sitting, things he tries to avoid, that one must consider his statement to Dr. Waseem that the low back pain has been constant, no more, no less. During cross examination on this point, Dr. Waseem described that a critical fact for him is whether the pain has ever completely gone away. He testified that the questions he asks are structured to address that issue. He was satisfied that Mr. Chevez-Babcock's pain varied in severity from time to time, but had never completely gone away.

[59] Counsel for Ms. Peerens also noted that Dr. Waseem assumed that the December 18, 2018 accident that Mr. Chevez-Babcock was in did not impact his December 1, 2014 injuries, but the hospital records from that accident show that Mr. Chevez-Babcock reported developing low back pain following the December 18, 2018 accident. Mr. Chevez-Babcock testified that was the case, but his back symptoms returned to what he called his post-December 1, 2014 "normal" over the next few days.

[60] Ms. Peerens argues that Mr. Chevez Babcock has not proved that the accident caused a soft tissue injury to Mr. Chevez-Babcock's low back that has become chronic. Ms. Peerens says the low back pain is not a soft tissue injury but rather is mechanical.

[61] Ms. Peerens relies on the opinion evidence of Dr. Maloon, an orthopedic surgeon who has a sub-specialty in spinal surgery and practices in the area of diagnosis and management of spinal disorders. Dr. Maloon opined that Mr. Chevez-Babcock probably sustained mild soft tissue strains to his neck and possibly his lower back in the December 1, 2014 accident. Dr. Maloon held that Mr. Chevez-Babcock's report of symptom severity was too high given the lack of objective findings he noted during his physical examination of Mr. Chevez-Babcock and inconsistent with Mr. Chevez-Babcock's ability to play seven-a-side soccer and volleyball. Dr. Maloon opined that Mr. Chevez-Babcock was exaggerating his symptoms and that Mr. Chevez-Babcock's symptoms are not consistent with a musculoskeletal injury, but rather with that of mechanical back pain that is "extremely common in the general population" and "usually the result of wear and tear in the joints of the lower back".

- [62] Dr. Maloon's opinion is problematic in a few regards. First, both an x-ray and a CT scan showed no degenerative changes to his lumbar spine, which undermines his opinion that Mr. Chevez-Babcock had mechanical pain due to pre-existing wear and tear. Dr. Maloon testified that he did not have the radiographs available to him. On cross examination, he confirmed that he had the x-ray report and the CT scan report, but he was not prepared to rely on them as he prefers to review the studies himself. While Dr. Maloon's practice may be to review x-ray films and CT scan studies himself when diagnosing a problem with the lower spine, it is problematic that he was prepared to opine that Mr. Chevez-Babcock had a pre-existing low back condition consistent with wear and tear changes in the joints without the x-ray film or the CT scan when the reports that he did have did not include any information that would support wear and tear changes in the joints.
- [63] Next, he holds the opinion that Mr. Chevez-Babcock's symptoms are not consistent with soft tissue injuries to the low back because such injuries usually surface shortly after the accident and resolve within six to eight weeks. He stated that reports of Mr. Chevez-Babcock's low back pain did not appear in medical records until September 2015, nine months after the accident.
- [64] Dr. Maloon is wrong about the medical records. While Mr. Chevez-Babcock's family doctor records do not contain a record of complaints of back pain on Mr. Chevez-Babcock's first visit after the December 1, 2014 accident, on January 2, 2015, Dr. Poteryko noted that Mr. Chevez-Babcock had strained his back at work "similar to where MVC injury" and noted paraspinal spasms at T4 (thoracic 4). On January 16, 2015, he noted paraspinal spasms at L4 (lumbar 4). There are several similar notes between that time and September 2015. In addition, as Dr. Maloon noted, the January 2015 physiotherapy notes contain complaints of low back pain.
- [65] Dr. Poteryko and Dr. Waseem noted objective signs of low back soft tissue injuries, including muscle spasms, muscle stiffness, increased muscle tone and trigger points, when they examined him. Dr. Maloon did not.
- [66] With regard to recovery rates, although the experts agreed that six to eight weeks is a typical timeframe for recovery from a whiplash-type of injury, no one offered the opinion that there are no cases that extend beyond that time. Indeed, there must be if chronic myofascial pain of the lumbar spine is a diagnosable condition. However, Dr. Maloon does not accept that chronic myofascial pain is a diagnosis. When asked to explain that opinion, he responded by asking the cross examiner what he meant by myofascial and by asking him what soft tissues he was talking about. He also asserted that pain is not a diagnosis and that he could not accept anything as imprecise as chronic myofascial pain to the lumbar spine.
- [67] While giving this evidence, Dr. Maloon was combative, argumentative and used arrogance in an attempt to quell the questions from counsel for Mr. Chevez-Babcock. When asked whether he would defer to or respect the opinion of a physiatrist whose specialty was to diagnose and treat soft tissue injuries, such as Dr. Waseem, he replied that he often was

referred patients by physiatrists, but he had never referred a patient to a physiatrist. From that answer, I understood him to mean that he does not respect the opinions of physiatrists because in his hierarchical construct, orthopedic surgeons are higher than physiatrists.

- [68] Dr. Maloon's hierarchical construct does not assist with the court's task of finding facts. His opinions and reasoning are circular and at odds with the objective evidence recorded by Dr. Waseem and Dr. Poteryko.
- [69] This court has found Dr. Maloon's evidence to be less than helpful for the same types of reasons I have given, and for other reasons: *Hanger v. Shin*, 2019 BCSC 99 at paras. 66-73; *Shinzay v. McKee*, 2014 BCSC 2317 at paras. 87-89; *Noori v. Hughes*, 2018 BCSC 965 at paras. 65-73; *Baxter v. Jamal*, 2010 BCSC 289 at para. 33.
- [70] I do not accept Dr. Maloon's evidence.
- [71] Based on the evidence that I do accept, including that of Mr. Chevez-Babcock, his brother, Mr. Stewart, his father, and Ms. Thistlethwaite, I conclude that Mr. Chevez-Babcock has chronic low back soft tissue pain which is aggravated by heavy lifting, prolonged standing, prolonged sitting and limits what Mr. Chevez-Babcock can do at work, at the gym in minor regards, and limits his recreational activities to non-contact sports.

Causation

- [72] Mr. Chevez-Babcock asserts that his chronic low back myofascial pain was caused by the accident. Ms. Peerens submits that it pre-existed the accident, was caused by the post-accident work incidents or the December 2018 accident, or a combination of those other incidents, but the evidence does not establish that it was caused by the December 1, 2014 accident.
- [73] Mr. Chevez-Babcock must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13. The primary test for causation is the "but-for" test: but for the defendant's negligence, would the plaintiff have suffered the injury: *Athey* at para. 14; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [74] The basic test for causation should be applied in multi-cause cases unless it is impossible to apply because of factors outside of the plaintiff's control, such as the limits of scientific knowledge, and the defendant breached a duty of care owed to the plaintiff that exposed the plaintiff to the risk of injury of the same type the plaintiff suffered. In such cases, the material contribution test is permissible: *Resurfice* at paras. 24-25.
- [75] Regardless of the applicable test for causation, the defendant's negligence need not be the sole cause of the injury, provided the plaintiff proves the accident was a cause of the injuries beyond the de minimus range: *Athey*, at paras. 17-20; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

- [76] Where there are both tortious and non-tortious causes of injury, the defendant is liable so long as the defendant's conduct is a cause of the plaintiff's injury. The plaintiff must establish such causation on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.

The December 1, 2014 Accident

- [77] Ms. Peerens relies on *White v. Stonestreet*, 2006 BCSC 801, in which Mr. Justice Ehrcke discussed the approach to take when a party's theory of causation is based on temporal evidence; i.e., the symptoms arose after the accident so must be caused by the accident. In that case, the symptoms did not arise immediately after the accident and had a course typical of soft tissue injuries. Within six months of the accident the plaintiff reported that his low back was 70-80% better and by a year after the accident, the plaintiff said he felt fit. Several months later, his symptoms became worse. At that time, his son was born and he reported that bathing and lifting his son aggravated his symptoms.
- [78] There are some similarities to this case in that Dr. Poteryko did not note back symptoms on December 4, 2014, three days after the accident, when Mr. Chevez-Babcock first saw him. In April 2015, Mr. Chevez-Babcock reported improvement to Dr. Poteryko. A month later he was approved to return to regular duties with a restriction of "common sense lifting". In January 2016, Dr. Poteryko reported that he was 85% better. In May 2016, Dr. Poteryko noted that after engaging in a kinesiology program, Mr. Chevez-Babcock reported that he was going to the gym five days per week and that he was "almost back to where I was before the accident".
- [79] However, other features are not similar. In *White*, the plaintiff's family doctor never noted objective signs of a back injury following the accident. The back symptoms Mr. White experienced after the accident improved and then deteriorated after the birth of his first child and seemed to be related to lifting and caring for the child. Post-accident investigations revealed degenerative changes and spondylosis in his lower spine. Mr. Justice Ehrcke accepted that those pre-existed the accident and would have become symptomatic in any event causing him to discount the temporal relationship between the accident and the onset of symptoms from the mechanical back issues.
- [80] In this case, there is no evidence of pre-existing degeneration of Mr. Chevez-Babcock's spine or current degeneration of his spine. Dr. Maloon's opinion on causation is based on a presumption of a pre-existing mechanical back condition about which there is no evidence. There is evidence to explain the recurrence of conditions after they were improving with light duties at work, namely the resumption of heavy lifting.

- [81] Ms. Peerens argues that even if the pain does not have a mechanical source, it is simply the same pain as the pre-accident back and neck pain that Mr. Chevez-Babcock experienced. Ms. Peerens argues that I should not accept Mr. Chevez-Babcock's evidence that it was occasional and not disruptive because his evidence is not generally credible. However, I have concluded that his evidence is generally credible and I accept it on this issue for the reasons already discussed.
- [82] The preponderance of probabilities supports the conclusion that Mr. Chevez-Babcock's occasional low back pain and stiffness was not an ongoing problem at the time of the accident and was not significant enough to report to his doctor or to interfere with his work or his physical activity.
- [83] Ms. Peerens submits, in the alternative, that if Mr. Chevez-Babcock has established soft tissue injuries to his low back caused by the December 1, 2014 accident, they resolved by April or May of 2015, at which time Dr. Poteryko noted that they had resolved. However, when Dr. Poteryko cleared Mr. Chevez-Babcock to return to work in May 2015, he did not examine Mr. Chevez-Babcock's back for the objective symptoms, such as spasms, which Dr. Poteryko noted in April through March of 2015 and again subsequently. As I have discussed above, I find that the symptoms have varied from day to day but have never completely resolved. The April and May 2015 notes do not say they did. Dr. Poteryko made his return to work subject to a restriction about common sense lifting and back care education. Mr. Chevez-Babcock testified that he sought counselling in May 2015 at which he attempted to address his anxiety over his symptoms and his feelings of loss over how they had changed his life. The evidence of his brother and Ms. Thistlethwaite add to the picture that there was not complete resolution and no time when Mr. Chevez-Babcock's back returned to its pre-December 1, 2014 state.
- [84] I reject the underlying thesis of Ms. Peerens's arguments, stated frankly by Dr. Maloon (that Mr. Chevez-Babcock is exaggerating his symptoms) and more subtly by Ms. Peerens' arguments that include the precept that Mr. Chevez-Babcock is making up the back injury or the chronic nature of it. If he decided to falsely claim he had a chronic injury, it would have made more sense to describe the neck injury he reported at the December 1, 2014 accident scene and to Dr. Poteryko within days of the December 1, 2014 accident as chronic instead of completely making up a back injury as Ms. Peerens suggests he has.
- [85] I conclude that the December 1, 2014 accident is a cause of the plaintiff's chronic myofascial back pain. I conclude that his prior incidents of back pain were caused by occasional overuse of his back during heavy work shifts and that there is no evidence of any underlying problem with his back.

- [86] With regard to the subsequent workplace incidents, the evidence is that the type of lifting he was doing and the weights he was lifting when he experienced pain at work after the December 1, 2014 accident were consistent with the work he did regularly without incident, except the odd stiffness at the end of a shift. I conclude that these incidents were not causes of his chronic back pain, but rather manifestations of the chronic back pain caused by the December 1, 2014 injury to the soft tissues in his back.
- [87] I conclude that the December 1, 2014 accident is a cause of his chronic myofascial back pain.

The December 18, 2018 Accident

- [88] On December 18, 2018, Mr. Chevez-Babcock was in an accident that he was at fault for. He had stopped his vehicle behind a pick-up truck that was stopped at a stoplight. The traffic started to move. Mr. Chevez-Babcock moved his vehicle forward and then looked down, at which time the pick-up truck stopped moving. Mr. Chevez-Babcock did not stop and drove into the back of the pick-up truck. Mr. Chevez-Babcock went to the hospital. He reported back pain at the hospital. He testified that he did have back pain that day and within a few days it returned to his normal post-December 1, 2014 accident level. He testified that he could not recall whether he changed any plans as a result of the second accident. He testified that he did not miss any work.
- [89] Ms. Peerens submits that the impact must have been harder than what Mr. Chevez-Babcock described because he testified he was in first gear but he also told a hospital emergency worker he was going about 40 km/h. On cross examination, Mr. Chevez-Babcock testified that he was estimating the speed and conceded that his car was a write-off. I take into account that without expert evidence, one cannot conclude what forces were applied to a body during a collision based on evidence of the speed of one of the vehicles and damage to a vehicle since different vehicles are built differently. However, I do accept that the December 18, 2018 accident was a significant impact.
- [90] I do not find Mr. Chevez-Babcock tried to mislead the Court. In general and on this issue specifically, he answered questions without regard to whether they would help or hurt his case. For example, when asked whether he changed any plans in the days following the December 18, 2018 accident, he testified that he could not remember, instead of saying no. In this regard, Ms. Peerens points to Mr. Chevez-Babcock's employment records which show that he was off work from December 18, 2018 to December 26, 2018, when generally he only had 2-3 days off between shifts. He also testified that the time up to Christmas is busy and after that, it slows down and is more difficult to get shifts.
- [91] Given this evidence and that Mr. Chevez-Babcock could not recall whether he changed any plans after the December 18, 2018 accident, I conclude that he did take some time off work due to the December 18, 2018 accident. I also conclude that his pain from that accident was different from the post-December 1, 2014 workplace incidents that caused flare-ups of his

low back pain. Unlike workplace lifting, which he did regularly prior to December 1, 2014, the motor vehicle accident was a significant impact of the type his body was not usually subjected to and after which he suffered pain and likely missed work. I conclude that the December 18, 2018 accident is also a cause of his chronic back pain.

Damages

[92] The fundamental principle of compensation in personal injury cases is that a plaintiff should receive full and fair compensation, calculated to place them in the same position as they would have been had the tort not been committed, insofar as this can be achieved by a monetary award: *Lines v. Gordon*, 2009 BCCA 106 at para. 167, citing *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at 962-63.

Pain, Suffering, Loss of Enjoyment of Life

- [93] Full and fair compensation is accomplished by ensuring that the pecuniary losses are appropriately compensated and will not erode the non-pecuniary damages and through an award of non-pecuniary damages assessed to compensate for pain, suffering, and loss of enjoyment of life prior to trial and in the future,
- [94] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set out a non-exhaustive list of factors to consider when assessing damages for pain, suffering and loss of enjoyment of life: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism. Courts also consider cases in which the plaintiff has suffered similar injuries as a guide. However, they are no more than a guide since similar injuries may not have similar consequences for the injured person: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.
- [95] Mr. Chevez-Babcock submits that an appropriate award for pain, suffering and loss of enjoyment of life is \$90,000-\$110,000.
- [96] Ms. Peerens submits that if I accept that the only injury caused by the December 1, 2014 accident is the neck strain injury that resolved within a year, the non-pecuniary damages should be \$15,000-\$20,000. She submits that if I find that Mr. Chevez-Babcock also suffered a lower back injury, the appropriate award for pain, suffering and loss of enjoyment of life is \$45,000-\$50,000.
- [97] Turning to the *Stapley* factors, I observe that Mr. Chevez-Babcock was a very young man, age 22, at the time of the December 1, 2014 accident. He worked in a physical job. He worked out vigorously and frequently. He played competitive sports for recreation. He was raised to value physical work and athletics and he was good at both of them. He was a valued employee because he was enthusiastic and hard working. Following the December 1, 2014 accident, he did not go to the gym or engage in competitive sports for a year. He has returned to playing soccer in a seven-a-side league because it is less competitive and non-

contact, which is better for his back. He no longer plays basketball in a league, but he does shoot hoops and plays 21 from time to time. He has taken up recreational volleyball because it is non-contact.

- [98] Mr. Chevez-Babcock's age and the impact the injuries have had on both work and recreation in his particular circumstances tend to place his case in the higher range of damages for a soft tissue injury to the neck which resolved by a year after the December 1, 2014 accident and a chronic soft tissue injury to the back which interferes with work and recreation.
- [99] It is not unusual to see chronic injuries associated with diagnoses of depression or anxiety. The evidence includes some references to changes in his mood and that he was trying to deal with the losses he was experiencing. The evidence was not substantial on this point and it was not something Mr. Chevez-Babcock addressed in his evidence in any detail. He saw a counsellor for anxiety while driving following the accident. There was no evidence of a diagnosed psychological or psychiatric condition. There was no evidence attributing any change in any of Mr. Chevez-Babcock's relationships with family members or friends that are attributable to his accident injuries.
- [100] These features place Mr. Chevez-Babcock case lower in the range of chronic injury cases that include cases with diagnosed psychological or psychiatric injuries.
- [101] Mr. Chevez-Babcock relies on *Patterson v. Solymosi*, 2019 BCSC 1508, *Gunson v. Sekhon*, 2015 BCSC 2491 and *Stocking-Pearson v. Vinette*, 2019 BCSC 2182.
- [102] In *Patterson*, the severity of the injuries was similar but affected the plaintiff's sitting and ability to undertake coursework in pursuit of attaining a particular career aspiration in a way that is more significant than in this case. The injuries impacted the plaintiff's participation in recreational activities. There was significant evidence about changes in her demeanour and social activities. Mr. Justice Skolrood awarded \$95,000 in non-pecuniary damages.
- [103] In *Gunson*, Mr. Justice Grauer awarded \$80,000 for pain, suffering and loss of enjoyment of life to a man who was 32 years old at the time of the accident. His chronic injury included a disc bulge in his lower back and injury to the joint, as well as soft tissue injuries similar to those that Mr. Chevez-Babcock has. Mr. Gunson continued to work full time at a physically demanding job but was able to delegate the most physically challenging aspects of the job.
- [104] In *Stocking-Pearson*, the plaintiff was 27 years old at the time of the trial (likely 22 years old at the time of the accident) and worked as a mover. The plaintiff had physical work he enjoyed, worked out at the gym regularly and engaged in recreational sports. He suffered soft tissue injuries to his neck and back in the accident. He felt 95% recovered within two years of the accident but experienced pain flare-ups during his work as a mover. He had to change his occupation. Mr. Justice Grauer awarded him \$80,000 for pain, suffering and loss of enjoyment of life, noting that *Gunson* was a more serious injury and the award would have been \$85,000 after adjustment for inflation in December 2019.

- [105] Of the cases relied upon by Ms. Peerens, the only one that deals with chronic back pain is Baxter. The plaintiff was 30 years old at the time of trial and had sustained neck and back injuries that were unlikely to resolve. Like Mr. Chevez-Babcock, Ms. Baxter played soccer before the accident but had to cease for some time and then could only return in a reduced capacity. She was no longer capable of physically demanding work. The damages for pain, suffering and loss of enjoyment of life were \$59,426 in 2020 dollars.
- [106] Ms. Peerens also relies on *Tang v. Duong*, 2020 BCSC 85, but not specifically for the award for pain, suffering and loss of enjoyment of life. However, I find it to be helpful on this head of damages because the trial judge found that the plaintiff had endured a significant amount of pain, disability and emotional suffering from neck and back pain which had recovered in the order of 80% but would continue to bother him and affect how he worked and his recreational activities, albeit minimally. Mr. Tang was 52 years old at the time of the trial and 47 or 48 years old at the time of the accident. The award for pain and suffering was \$80,000. Tang is similar to this case except the plaintiff was much older and there was more substance to the evidence of depressed mood and anxiety. However, like in this case, Mr. Tang's low mood and anxiety was not the subject of any evidence of a diagnosed psychological or psychiatric condition.
- [107] Given Mr. Chevez-Babcock's age and pre-accident love of physical work and competitive sports, as well as the nature of his injuries compared to those described in the precedents, I award \$80,000 for pain, suffering and loss of enjoyment of life.

Loss of Earning Capacity

- [108] At the time of the December 1, 2014 accident, Mr. Chevez-Babcock was working full time at Home Depot earning approximately \$12 per hour as a pro-loader. Since the December 1, 2014 accident, he has continued to work at Home Depot, primarily on cash, and part-time since 2016. He has not worked as a pro-loader since the accident but has tried to do some of the duties of a lot associate, the broader category of positions that a pro-loader is part of. He claims that had the accident not occurred, he had the opportunity to do construction work for a contractor whom he met when he worked as a pro-loader at Home Depot. He also claims that if he was fit to do heavy labour, he would have had the opportunity to work for his father's stucco business earning \$30 per hour or more.
- [109] Ms. Peerens's position is that the functional capacity evaluation that Mr. Chevez-Babcock underwent proves he has physical limitations that are not due to the accident, that he did not have an opportunity to work in construction, and that in 2016 he reduced his hours to work with his brother, not because he could not do the work at Home Depot. Ms. Peerens submits that Mr. Chevez-Babcock has proven past wage loss of \$550.
- [110] Mr. Chevez-Babcock underwent a functional capacity evaluation conducted by Stephanie Kaczmarek. Ms. Kaczmarek concluded that Mr. Chevez-Babcock cannot meet the job demands of a pro-loader because of shortcomings in left-hand gross dexterity, balance,

walking, standing, lifting from floor to waist, waist to shoulder or shoulder to overhead and the carrying strength requirements. She opined that Mr. Chevez-Babcock is suited to positions in the light-medium strength category. She opined that if the work requires prolonged sitting or standing, he will be limited to doing it part-time unless he has the opportunity to avoid prolonged sitting or standing postures by alternating sitting or standing with walking.

- [111] Ms. Peerens referenced many sections of the functional capacity evaluation that report pain or difficulties she asserts are inconsistent with chronic low back pain, such as weight shifting, pain in his hips, pain in the right scapula, lower back and neck on the right side, pain in his knees and pain in his shoulders. I agree that pain in his shoulders and knees is not explained by his December 1, 2014 accident injuries. However, the pain in his lower back, his hips and the weight shifting are all consistent with his symptoms of chronic lower back pain. The evidence before me is that the pain in his neck is consistent with the injury to the soft tissues of his neck or his shoulder injury or something else.
- [112] Ms. Peerens argues that Mr. Chevez-Babcock reported lifting abilities to Dr. Poteryko that are inconsistent with what Ms. Kaczmarek observed and so his current limitations must be due to his right shoulder pain. I do not agree with this interpretation of the evidence. The lifting ability that Mr. Chevez-Babcock reported to Dr. Poteryko was about what he could do at the gym under the supervision of a kinesiologist and were all under 100 pounds. Ms. Kaczmarek's score sheets show that Mr. Chevez-Babcock had restrictions or was unable to: lift and carry some items of 100 pounds; lower a 50-pound item to the floor; lift a 50-pound item to eye level; carry a 30-pound item; and carry a 20-pound item up a step ladder. These limitations and inabilities in a dynamic workplace environment are not the same as being able to lift weights in a gym.
- [113] The evidence demonstrates that Mr. Chevez-Babcock has, since the December 1, 2014 accident, developed right shoulder pain that limits his ability to throw a baseball. It was painful enough that Dr. Poteryko had an ultrasound done. Mr. Chevez-Babcock agreed on cross examination that it affects his ability to lift things. I also accept the before the development of right shoulder pain, Mr. Chevez-Babcock suffered setbacks to his lower back pain at work when he tried to engage in heavy lifting. Shoulder pain cannot explain all the limitations that Ms. Kaczmarek noted, such as lifting from floor to waist and the inability to carry things.
- [114] Mr. Chevez-Babcock testified that during his work as a pro-loader, he met many contractors. He testified that he thought he was good at the job because he was good at building relationships, and that is what Home Depot wants to do with contractors. Ms. Thistlethwaite's evidence supported that of Mr. Chevez-Babcock.
- [115] Mr. Chevez-Babcock testified that a number of contractors had suggested that he could work in construction as a contractor's assistant. He described these conversations as casual. One of those was with Howard Grant, who works in residential construction in the Nanaimo

area. Mr. Chevez-Babcock testified that they had discussions before the accident. Mr. Chevez-Babcock was asked at his examination for discovery about job opportunities that he had turned down as a result of the accident, and he testified that he had turned down offers made in 2016 and 2017; however, he did not mention the discussions with Mr. Grant. At trial when his examination for discovery evidence was put to him, he testified that at the time of his examination for discovery, he did not remember the job opportunity that Mr. Grant offered in 2014.

[116] Mr. Grant testified. He testified that in 2014 he was working on a project building decks, and was at Home Depot several days a week buying lumber. Mr. Grant testified that if he had a helper, especially one he could eventually leave to work unsupervised, he would be able to take on more jobs and he had lots of offers to do work that he could not do unless he had a helper. He testified that Mr. Chevez-Babcock impressed him because while some people give the impression that they do not want to work, Mr. Chevez-Babcock clearly wanted to work. Mr. Grant testified that he offered Mr. Chevez-Babcock a job in November 2014. The terms were that Mr. Chevez-Babcock would earn \$20 per hour and would work at least 40 hours per week. Mr. Grant testified that if Mr. Chevez-Babcock did well, and could be left to work unsupervised, he would increase his pay. He testified that he had a skilled worker in the past whom he paid \$25 per hour.

[117] Mr. Grant testified that he understood Mr. Chevez-Babcock would give his notice at Home Depot and come work for him a couple of weeks later, although in his evidence he commented that Mr. Chevez-Babcock had wanted to keep his "feet in" at Home Depot. He did not explain how that would be accommodated within the position that Mr. Grant had offered to Mr. Chevez-Babcock. Mr. Grant did not see him for a period at Home Depot and so asked someone there about him and learned that he had been in an accident. When he next saw him, he could see that he was hurting and Mr. Chevez-Babcock told him he could not lift. Mr. Grant said that they decided to just leave it until Mr. Chevez-Babcock was well enough to do a heavy lifting job. He testified that he asked Mr. Chevez-Babcock how he was doing a few times since then, as he still would hire him if he could.

[118] Mr. Chevez-Babcock did not testify directly contrary to his examination for discovery evidence, however, it is unusual that Mr. Chevez-Babcock would not have remembered discussions progressing as far as Mr. Grant described. I believe Mr. Grant's evidence but I conclude that he and Mr. Chevez-Babcock had not reached a firm agreement on a job. I conclude that Mr. Grant's comment that Mr. Chevez-Babcock wanted to keep his feet in at Home Depot is evidence that Mr. Chevez-Babcock had not made up his mind to take Mr. Grant's job offer.

[119] Danilo Chevez, Mr. Chevez-Babcock's father, testified that in 2018, Mr. Chevez-Babcock needed financial help and so Mr. Chevez told him to come to his job site and help out. He testified that Mr. Chevez-Babcock was only capable of doing light work. He could not apply stucco, work with his arms above his shoulders, or carry the heavy objects involved in stucco application. Mr. Chevez testified that his younger son, Mr. Zackarias Chevez-

Babcock, came to work for him full time in 2019. He can do full duties as a stucco applicator. Mr. Chevez pays him \$30 per hour. Mr. Chevez says that when Mr. Zackarias Chevez-Babcock is capable of managing a worksite, he will pay him \$40 or \$45 per hour. Mr. Chevez says there are not many stucco application businesses because the work is so physically demanding and so there is no shortage of work for his business.

- [120] During his evidence, I was struck by Mr. Chevez-Babcock's description that he did not do well in academic subjects at school, but he was a good athlete and he likes being outside. He testified about the work ethic and love of sports that his father instilled in him. He testified that when he went back to work at Home Depot as a cashier, he would look for opportunities to get away from the cash job and be outside. He was disappointed with the setbacks he suffered when he tried to do the heavy lifting work. He testified that he liked the work at SEI Chemicals because it allowed him to be outside and move around, even though before he was laid off he was finding that he was having increased pain doing it.
- [121] At the time of the December 1, 2014 accident, Mr. Chevez-Babcock was making a modest living doing physically demanding work and was considering the offer from Mr. Grant which would have paid more, but still modestly. I conclude that a physical job was what he wanted to do and what gave him self-worth, notwithstanding the modest pay. He is not arguing that he missed the opportunity to earn degrees of magnitude more than he earns at Home Depot; he is seeking recompense for the inability to do hard physical work for modest pay. I do not accept the argument that he would stop doing the work he liked and replace it with being a cashier so he could pursue this claim.
- [122] Based on the evidence as a whole, including Mr. Chevez-Babcock's attempts to return to his pre-accident physical work which failed due to low back pain before the shoulder problem developing in 2017, I conclude that Mr. Chevez-Babcock's accident injuries preclude him from doing work involving heavy lifting.
- [123] Since the accident, his hourly rate has gone up to \$14.37 per hour but he missed work in 2015 due to his accident injuries and he reduced the hours he worked in 2016 when he went to work for SEI Chemicals, which he also attributes to his accident injuries. I accept that he reduced his work hours to part-time because he had increased pain when standing still doing cash work. I also accept that SEI Chemicals offered the opportunity to make more money and be outside, both of which were attractive to him. I do not accept that he left SEI Chemicals because of the increased pain as he testified. Based on the evidence, specifically that of Mr. Zackarias Chevez-Babcock, I find that Mr. Chevez-Babcock was laid off due to a lack of work. Ms. Peerens does not argue that he has failed to mitigate by working part-time at Home Depot.

Past Loss of earning capacity

- [124] Past income loss is determined by assessing the income that the plaintiff would have earned based on evidence that establishes a real and substantial possibility of such earnings: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144.
- [125] The burden of proof regarding actual past events is the balance of probabilities. However, some of the facts about past loss of earning capacity may be hypothetical. For example, what the plaintiff earned between the accident and trial is an actual fact subject to proof on the balance of probabilities. What the plaintiff would have earned absent the accident is a hypothetical fact and even though it is a past hypothetical fact, it can be established based on demonstrating real and substantial possibility: *Athey* at para. 27; *Falati v. Smith*, 2010 BCSC 465 at paras. 40-41; *aff'd* 2011 BCCA 45. Allowances for contingencies should be made and the award must be fair and reasonable taking into account all of the circumstances: *Falati* at para. 41.
- [126] The key issue is whether Mr. Chevez-Babcock has proven a real and substantial possibility that he would have earned more between the accident and the trial had the accident not occurred than what he did earn.
- [127] In October 2015, Home Depot prepared a document showing that Mr. Chevez-Babcock missed 48 hours of work between December 1, 2014 and December 11, 2014. I accept Mr. Chevez-Babcock's evidence that he took the entire block of time off, plus other shifts when his back was sore in 2015. He has provided work records showing his hours. I conclude he has proved on a balance of probabilities that he missed shifts totalling 6 weeks of work in early December 2014 and early 2015 due to his accident injuries. Given that he earned about \$24,000 in 2014, missing 12% of the work year equates to roughly \$2,800 lost wages before statutory deductions.
- [128] Other than the missed shifts I have described, Mr. Chevez-Babcock continued to work full time at Home Depot in 2015. His earnings were \$22,590. In 2016, he reduced his hours to part-time and went to work for SEI Chemicals. This job paid \$15 per hour. His earnings in 2016 were \$22,322.74. In 2017 he earned \$15,148.26 and in 2018 he earned \$22,050.18.
- [129] Mr. Chevez-Babcock submits that he has proven a real and substantial possibility that he would have been able to earn \$20 or more doing construction work or \$30-\$45 per hour at his father's stucco business.
- [130] I conclude he has not proved a real and substantial possibility that he would have worked at his father's stucco business between the accident and the trial but for the accident. He and his father testified that he had worked at that business when he was younger. His father testified that he would always have a job for him and if he could do the full duties, he would earn \$30 per hour or up to \$45 if he could supervise others. However, Mr. Chevez-Babcock

did not do that work after he graduated from high school. Instead, Mr. Chevez-Babcock stayed in the Nanaimo and Ladysmith area and found jobs on his own. When he testified about asking his father for financial help after the accident and his father replying that he could come work for the financial assistance, Mr. Chevez-Babcock became emotional. I conclude that the work ethic he learned from his father was such that he wanted to make his own success and that he regards the work and financial support his father provides as a hand out which is not in keeping with his values. Also, Mr. Chevez testified that he had a shoulder injury and so did not run his stucco business between 2015 and 2017. Accordingly, during about one half of the pre-trial period, there was no opportunity for Mr. Chevez-Babcock to work for his father.

[131] With regard to the opportunity to work for Mr. Grant, I find that Mr. Chevez-Babcock has proved a real and substantial possibility of earning more had he been capable of heavy lifting. However, I do not accept that Mr. Chevez-Babcock had decided to accept Mr. Grant's offer and leave Home Depot. Based on all of the evidence, I conclude that Mr. Chevez-Babcock liked the job at Home Depot and the security it offered. Mr. Grant testified that some times he works alone and so I infer that his offer of residential construction work would not guarantee full time. I conclude that if Mr. Chevez-Babcock could have combined construction work with part-time work at Home Depot for income security, he would have taken an opportunity to work construction and earn more money as he did when he went to work for SEI Chemicals in 2016. Although this is a real and substantial possibility, I consider it to be quite low. I assess it at approximately 25% probability of working and earning \$40,000-\$45,000 working full time in construction work. I assess this loss to be about \$10,000 additional income per year, including \$2,800 lost Home Depot wages, over the five years and two months prior to trial. I assess past loss of earning capacity at \$52,000 before apportionment for liability and before statutory deductions.

Future Loss of Earning Capacity

[132] Assessing an award for loss of future earning capacity involves a comparison between the likely future earnings of the plaintiff if the accident had not happened and the plaintiff's likely future earnings taking the accident into account. The assessment is fact-intensive and case-specific: Gregory at paras. 32-33. There are two widely used approaches to quantify loss of future earning capacity: the earnings approach and the capital asset approach. Under both approaches, the threshold issue is proof of a real and substantial possibility that the plaintiff will lose income in the future due to the accident injuries: Grewal v. Naumann, 2017 BCCA 158 at para. 48. Under both approaches, the court must assess the loss, not calculate it, and must consider the overall fairness and reasonableness of the award: Rosvold v. Dunlop, 2001 BCCA 1 at paras. 11, 18; Shapiro v. Dailey, 2012 BCCA 128 at para. 40, citing Morris v. Rose Estate (1996), 23 B.C.L.R. (3d) 256 at 264 (C.A).

- [133] The earnings approach is a more mathematical approach to the assessment and generally more useful when the loss is easily measurable. The earnings approach is essentially the difference between the present value of the plaintiff's projected with accident annual income and the plaintiff's projected absent accident annual income over the working years until retirement: *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-57, citing *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [134] Where the evidence is such that lost earnings are not measurable, the capital asset approach is used: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. That approach involves considering: (i) whether the plaintiff has been rendered less capable overall from 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 to him or her; and (iv) whether the plaintiff is less valuable to himself or herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); *Gilbert* at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [135] Mr. Chevez-Babcock submits that the Court should utilize the earnings approach and assess the loss based on a reduction of earning capacity of \$33,750 per year to age 70, totalling \$1,000,000 over his future working life.
- [136] Ms. Peerens submits that if I accept that Mr. Chevez-Babcock has chronic back pain due to the accident, there is no evidentiary foundation to make an award of future loss of earning capacity because the expert evidence does not establish that Mr. Chevez-Babcock is precluded from working full time as a cashier at Home Depot. Ms. Peerens submits that the functional capacity evaluation shows limitations that are due to other problems not related to the accident and that the experts assumed that he was not working full time because of his accident injuries. Ms. Peerens submits that if I do award loss of earning capacity, that I should assess it through the capital asset approach and base the damages on six months of his current annual income.
- [137] I am of the view that there is too much uncertainty in the evidence to map out the future working life of this young man to use the earnings approach. Mr. Chevez-Babcock was 22 years old at the time of the accident. He had worked as a pro-loader for about one year and at Home Depot for less than two years. He had offers to work on construction but had not decided on a move. As I have discussed, I do not accept that he was planning to work for his father, but that opportunity was there for him if he changed his mind in the future.
- [138] Mr. Chevez-Babcock has proved a real and substantial probability that he has a loss of future earning capacity. The argument that there is no loss because he can continue to work as a cashier at his pre-accident earnings does not address the type of loss the capital asset approach is intended to address. I have concluded that the evidence establishes that the December 1, 2014 accident has caused Mr. Chevez-Babcock to be unable to do work

involving heavy lifting. This was his job at the time, and independent of that, it was work he was capable of doing at the time and is not capable of doing now. His evidence, that of his brother, father and Ms. Thistlethwaite all lead to the conclusion that he was previously capable of heavy lifting at work and is not now. He needs accommodation in a position that involves heavy lifting or requires prolonged standing or sitting. If the world unfolds in such a way that his job at Home Depot is no longer available, he has lost the ability to do heavy lifting work due to the accident, a type of work that covers a vast range of positions he might have otherwise been able to secure but cannot now. He derived self-worth from physical work and he prefers to work outside and move around. He is less valuable to himself due to the limitations caused by the December 1, 2014 accident.

- [139] The capital asset approach may use projections of earnings as an evidentiary reference point for the assessment. In this case, Mr. Chevez-Babcock has led evidence that his lifetime earnings as a stucco applicator earning \$40 per hour would be \$2.5 million, lifetime earnings doing construction work at \$25 per hour would be approximately \$1.5 million and his lifetime earnings at \$15 per hour are about \$770,000. Those calculations are based on him achieving and sustaining significantly higher earnings over his entire working lifetime. He had not yet decided to leave the Home Depot position despite the offer from Mr. Grant. I do not accept them as an appropriate means of assessment, but they provide a basis to work off or to assess other approaches against.
- [140] If I follow the approach I used for past loss of earning capacity and assume a loss of \$10,000 per year, based on the multipliers that the Mr. Chevez-Babcock's expert put into evidence the loss to a working age of 70 would be \$308,270. That was the approach taken by Mr. Justice Branch in Hanger.
- [141] An approach discussed in cases such as *Grimm v. Young*, 2019 BCSC 1549 at paras. 118-20, is to award a multiple of the annual pre-accident income as an approximation of the loss of earnings capacity. In *Pallos*, the court described using one or more years as the basis for the assessment. In *Grimm*, citing *Pallos* and *Miller v. Lawlor*, 2012 BCSC 387 (where the court utilized three years annual income to assess future loss of earning capacity), Mr. Justice Riley determined that due to the plaintiff's young age, the range of uncertainty and the presence of several negative contingencies, the assessment should be based on one year's salary plus a figure related to a certain category of additional loss of earning capacity.
- [142] Ms. Peerens advocates this approach in the event I find that there is evidence, or a real and substantial possibility, of income loss, which I have. She relies on *Tang*, a case in which Mr. Justice Thompson awarded future loss of earning capacity for a plaintiff with similar injuries in an amount slightly less than six months of salary. The injuries were similar, but prior to the accident Mr. Tang worked in a sedentary job and was 52 years of age. Mr. Justice Thompson accepted that he had to "work around his symptoms as best as possible" and even though he was earning about the same as before the accident, there was a real and substantial possibility of events resulting in future loss. However, he did not assert that he was using a multiplier of salary approach but rather awarded the amount the plaintiff

asserted was reasonable.

- [143] Tang is not similar to this case on this issue. That plaintiff did not have a history of working a physically challenging job and was much older than Mr. Chevez-Babcock. The real and substantial possibility of loss that Mr. Chevez-Babcock has proven has a much greater opportunity to play out because he is at the beginning of his adult earnings years, whereas Mr. Tang was closer to the end.
- [144] I take into account that if I follow the approach I used for past loss of earning capacity, the award would be \$300,000 assuming he worked to age 70. I also take into account that such an approach should have negative and positive contingencies applied to it such as the possibility that a person engaged in physical labour may not work to age 70, the chance of improvement to his back symptoms, the possibility that his shoulder symptoms would have limited or precluded heavy lifting work in any event, and that he had the possibility of earning more than I have taken into account doing construction work if he advanced to a position where he could work unsupervised and earn \$25 or \$30 per hour. I take into account that if I were to base it on two or three years of his present annual income, it would be in the range of \$45,000-\$75,000.
- [145] Considering all of this, especially Mr. Chevez-Babcock's very young age, I assess his future loss of earning capacity to be \$150,000.

Cost of Future Care

- [146] Mr. Chevez-Babcock seeks damages for the cost of kinesiology and physiotherapy sessions on an ongoing basis. Ms. Peerens argues that I should not make an award for these services because even if I accept that he has ongoing injuries caused by the December 1, 2014 accident, there is no medical justification for them and there is no evidence that Mr. Chevez-Babcock will use the services.
- [147] Awards of cost of future care must be objectively supported by medical evidence, the claims must be reasonable, and if the plaintiff will not use the services, the awards ought not to be made: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
- [148] In her report, Ms. Kaczmarek recommended kinesiology sessions, physiotherapy on an ongoing basis taking into account Dr. Waseem's opinion that he would likely have flare-ups from time to time. She also recommended an occupational assessment and a vocational assessment. Mr. Chevez-Babcock attended physiotherapy and kinesiology sessions during his recovery when he could afford them or they were paid for by ICBC. He found them beneficial. He did not testify that he had the intention to undergo them again if he could afford them. Mr. Chevez-Babcock did not testify about vocational issues (other than he has considered working with children with autism) and specifically did not testify about whether he thought an occupational assessment and/or a vocational assessment would be

useful.

[149] In his first report, dated June 2018, Dr. Waseem recommended physiotherapy and kinesiology for two years into the future (i.e., until June 2020). He did not repeat this recommendation in his second report dated October 7, 2019, but recommended trigger point injections which Mr. Chevez-Babcock has undergone. Dr. Poteryko had regard to Ms. Kaczmarek's recommendations and endorsed the recommendation of vocational counselling, which Mr. Chevez-Babcock does not seek.

[150] I conclude that the kinesiology and physiotherapy that Dr. Waseem recommended was more time-limited than what Ms. Kaczmarek costed and the time over which Dr. Waseem recommended them was close to being over at the time of trial. The recommendations were made two years after the time that Mr. Chevez-Babcock had already utilized such services. Mr. Chevez-Babcock did not pursue them again prior to trial and did not explain why. He did not testify that he would pursue them in the future. I conclude that Mr. Chevez-Babcock has not proved these damages.

Special Damages

[151] The parties agree that special damages are \$2,281.59.

Apportionment of Liability between accidents

[152] The injuries caused by the December 1, 2014 accident and the December 18, 2018 accident are indivisible.

[153] In *Demidas v. Poinen*, 2012 BCSC 416 at para. 56, and *Blenkarn v. Mills*, 2016 BCSC 1976 at paras. 23-30, this court has addressed the approach to take where multiple accidents cause indivisible injuries and the plaintiff is at fault for one or more and not at fault for one or more. The goal is to apportion the damages so that the tortfeasor only pays for the portion of the harm he or she caused: *Blackwater* at para. 70; *Blenkarn* at para. 23. The approach is to assess the overall damages, then estimate the damage caused by the at-fault accident, and deduct it from the award. In practice, courts attempt to determine a percentage of the overall loss that is caused by the accident for which the plaintiff was at fault and then apply it to the dollar figure of overall damages. This is different from the apportionment of damages, which compares the degrees of departure from the standard of care as between several tortfeasors and the plaintiff if the plaintiff has been contributorily negligent.

[154] The details of the analyses undertaken in *Demidas* and *Blenkarn* is not of assistance in this case because in both those cases, the first accident was the accident that the plaintiff was at fault and started the chain of indivisible injuries, followed by some accidents which the facts showed aggravated those injuries minimally or not at all. In this case, the accident which started the chain, and on the evidence, was the largest contributor to the ongoing injuries is the accident for which Ms. Peerens is the sole tortfeasor. The accident for which Mr. Chevez-Babcock was at fault aggravated the injuries but only to a limited extent. I have considered whether such aggravation is *de minimus*. I find that the evidence around Mr.

Chevez-Babcock's pain after the December 2018 accident to be unclear. The experts did not address it perhaps because Mr. Chevez-Babcock was not clear about it. In these circumstances, I consider it appropriate to conclude that it was not de minimus. I apportion 10% of Mr. Chevez-Babcock's damages for loss of pain and suffering, 10% of his past loss of earning capacity between December 2018 and trial, and 10% of his future loss of earning capacity to the December 2018 accident.

[155] I have also considered Mr. Chevez-Babcock's right shoulder pain. There was not a lot of evidence about the origins of this pain but what is clear is that it does not form part of his claim against Ms. Peerens. As noted, Ms. Kaczmarek noted limitations and pain due to his right shoulder or both shoulders on functional capacity testing. I have not apportioned liability to any incident specifically but there is no evidence on which to do so, but I have taken it into account in assessing future loss of earning capacity as described above.

Summary of Damages and Costs

[156] Taking into account the apportionment of liability I have determined, the damages are:

a) non-pecuniary damages:

\$ 72,000

b) past loss of earning capacity:

\$ 50,800 before statutory deductions

c) future loss of earning capacity:

\$ 135,000

d) special damages:

\$ 2,281.59

[157] The total is \$260,081.59 before statutory deductions on past loss of earning capacity. I leave it to the parties to agree on statutory deductions.

[158] Subject to any matters of which I am not aware relating to costs, I award Mr. Chevez-Babcock costs at Scale B. If the parties wish to address costs, they shall deliver written submissions to me through the Registry within 30 days of these reasons for judgment and written reply submissions, if any, within 45 days of these reasons for judgment. If, after reviewing the written submissions, I require oral submissions, I will advise the parties through the Registry.

"Matthews J."

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