

CANADA / JUDGMENT

## Culver v. Skrypnyk

2019 BCSC 807

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 807 Culver v. Skrypnyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Culver v. Skrypnyk,

2019 BCSC 807

Date: 20190522

Docket: M166425

Registry: Vancouver

Between:

Zachary Simon Culver

Plaintiff

And

David M. Skrypnyk and Lisa Anne Bradley

Defendants

- and -

Docket: M166413

Registry: Vancouver

Between:

Zachary Simon Culver

Plaintiff

And

Hua Liang Huang

Defendants

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

January 7-11, 14-18 and 21, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 22, 2019

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## INTRODUCTION

- [1] On January 15, 2015, in Victoria, British Columbia, the plaintiff Zachary Culver was a passenger in a car operated by his girlfriend, the defendant Lisa Bradley. He suffered injuries when Ms. Bradley's vehicle struck a vehicle operated by the defendant, David Skrypnyk.
- [2] Mr. Culver was also injured in a second collision in Vancouver, British Columbia, on June 4, 2016, when the vehicle he was driving was struck from behind by a vehicle driven by the defendant, Hua Huang.
- [3] Mr. Culver's claims against Mr. Skrypnyk have been discontinued. His continuing claims against Ms. Bradley and Mr. Huang in the two actions that comprise the style of cause in this case have been joined for trial.
- [4] The liability of both defendants has been admitted. There are no claims as between the defendants for an apportionment of the damages suffered by Mr. Culver.

## ISSUES

- [5] Mr. Culver seeks recovery for the losses suffered in the two collisions under the following heads of damage:
- 1) Non-pecuniary damages;
  - 2) Loss of past and future earning capacity;
  - 3) Costs of future care; and
  - 4) Special damages that have not been agreed upon by the parties.

## BACKGROUND

- [6] Mr. Culver was born in Ontario and is now 37 years old. He was almost 33 years old when he was injured in the motor vehicle collision in Victoria and 34 at the time of the collision in Vancouver.

- [7] Mr. Culver has led an interesting life. He was the seventh of seven children and grew up in a small town in Ontario. In those early years he came to have a great love for the outdoors that he still has.
- [8] At an early age he was home schooled by his parents as were some of his siblings. However, Mr. Culver had difficulties with learning that his brothers and sisters did not have.
- [9] At about age 9 or 10 Ms. Culver was diagnosed with dyslexia. His dyslexia is more complicated than that usually associated with that learning disability which generally inhibits an individual's reading, writing and arithmetic skills. Mr. Culver also, however, suffers from scotopic sensitivity syndrome, a problem with one of the nerves that lets light into the eye. That additional problem exacerbates the effect of dyslexia by causing letters or numbers to move around a written page.
- [10] Accordingly, Mr. Culver has great difficulty focussing on printed words or numbers and his learning from print is greatly impaired.
- [11] Notwithstanding those physical challenges to academic study and associated problems that have negatively impacted his self-esteem Mr. Culver has, as I will later discuss, with time, accommodations, the assistance of others and most specifically personal perseverance been able to complete Grade 12 English and other high school level courses.
- [12] Before he was able to accomplish that educational milestone that he reached in his early thirties Mr. Culver travelled extensively and worked while doing so.
- [13] At the age of 15 with the support of his family Mr. Culver left school and home and lived in a Christian Commune in Chicago, Illinois by the name of Jesus People USA. As a part of that communal life he performed janitorial duties, cleaned dishes and did yard work. He worked in the kitchen and in the commune's shirt printing facility. He also travelled with a Christian band as a "Roadie" helping to set up concerts. Mr. Culver still has a continuing love of music and plays the guitar.
- [14] At about age 16 or 17 Mr. Culver returned to Ontario and attended sessions with an adult education group. He did not enjoy academic success and by the time he was 18 had begun to work full time doing laboring work doing paving stone restoration. The work was hard physical work of the type that Mr. Culver came to enjoy.
- [15] Hard physical work was a major component of almost all of Mr. Culver's employment endeavours before he was injured in the two motor vehicle collisions.
- [16] In his late teens or early twenties Mr. Culver again left Ontario and returned to the Chicago commune. He spent three months there working full time in the soup kitchen before travelling to the southern United States for about nine months where he worked on odd jobs to support his living and travels. Those jobs usually required heavy physical labour.

- [17] In about 2004 Mr. Culver again returned to Ontario, to in his words, establish "real roots" and to get a "real job". After about three months in Cambridge where his parents then lived Mr. Culver moved to Kelowna, British Columbia where he lived with his slightly older brother Aaron and his brother's fiancé. He found work as a restorative landscaper in the wake of the severe fires that had beset the area. That work included work as a laborer on irrigation work, garden work, and brick work as well as on retaining walls.
- [18] After about a year in Kelowna Mr. Culver and a girlfriend moved to Kitchener, Ontario where he worked through the summer in a factory making hospital beds. He was laid off in the winter. After that he moved to Clearwater, British Columbia and obtained a job working on the "green chain" at a lumber mill in Barrier. Again, the work was physically demanding.
- [19] In the fall of 2006 when he was about 24, Mr. Culver and his partner who had then obtained a job as a waitress moved to the Lower Mainland of British Columbia.
- [20] Over the next few years Mr. Culver lived in the Lower Mainland, and worked in a series of part time seasonal jobs.
- [21] Beginning in 2007 Mr. Culver sought to upgrade his education so that he could eventually develop a trade skill that would enable him to obtain a job that "paid a decent wage and was not seasonal".
- [22] His pursuit of that education continued from that time at Vancouver Community College for about seven years until the spring and summer of 2014.
- [23] To put that time frame in the context of Mr. Culver's learning disabilities it is necessary to refer to Agreed Statement of Fact #9 which forms part of the evidentiary record in this case.
- [24] The parties have agreed that on May 29, 2007 Dr. Larry Kryaniuk, a registered psychologist examined and interviewed Mr. Culver. Dr. Kryaniuk administered several tests in order to prepare a psycho-educational assessment and report addressed to the Adult Learning Development Association. On July 4, 2007 he delivered that report.
- [25] After recording the results of the tests he administered Dr. Kryaniuk stated under the heading "Discussion":

From an intellectual perspective, Mr. Culver is probably capable of average educational and vocational achievement. However, his major barriers will be his limited academic skills, his relatively slow processing speed and his weak working memory. On the other hand, he appears to have come to the realization that an education is important to him and I would expect that he will show a good level of effort and motivation. He may become discouraged somewhat easily and there is a sense of underlying depression or low moods that may affect his energy levels and his ability to stay with tasks over the longer term. He may need some support and encouragement along the way.

- [26] Under the heading "Recommendations" Dr. Kryaniuk wrote:

My general recommendation would be that Mr. Culver try to work on his basic classroom skills to bring them up to a higher level. However, it may be that he will not get them to the point where he can easily work in a traditional classroom environment over the next while.

It is likely that, whatever program he is in, Mr. Culver will require accommodation for his reading disability, poor working memory and slow processing speed.

Mr. Culver will need to decide between pursuing his interests, which appear to be largely in the area of creativity and production, with his interests in an occupation, such as welding, that will lead to higher financial rewards but probably will offer him somewhat less job satisfaction.

[27] Between 2007 when he started to upgrade his education at Vancouver Community College and when he completed the English 12 component of the "Basic Adult Education Program" in 2014 Mr. Culver received accommodations to enable him to complete the level of education in English that he was able to accomplish.

[28] Those accommodations included: one-on-one instruction; the use of audio books; allowances for time to complete assignments; and, after 2013, significant assistance from his girlfriend Ms. Bradley after that relationship had gone from dating to the more serious committed relationship that has continued to evolve and still exists.

[29] Notwithstanding all of his efforts and assistance that allowed him to finally attain his Grade 12 English, he was unable to achieve the same success in math in which he "really struggled".

[30] Official Transcripts from Vancouver Community College record the dates of Mr. Culver's attendance there, the courses he took and the results achieved. Those transcripts show that he was able to successfully complete Part 1 of Mathematics 10 in 2011 but that after that he concentrated only on English. Mr. Culver testified that he did so because he considered the ability to complete English most important to future job possibilities.

[31] While Mr. Culver was working towards completing his academic schooling, (much of which was done at night) he was employed in many different jobs. Some work was part time and other work was full time but seasonal.

[32] The evidence establishes that Mr. Culver worked for, amongst others, the following employers, in the capacities described between 2007 and the summer of 2014 when he completed his Grade 12 English studies at Vancouver Community College:

- 1) J.J. Bean: in its warehouse mixing coffee beans, roasting and packaging coffee and making deliveries;
- 2) Subeez restaurant: regularly working intermittently between other jobs in a "dish pit" and as a "bar back". He tried serving but found it was too difficult to get food orders down because that required reading and writing skills he did not have;

- 3) Perkins Construction: in the lead up to the 2010 Olympics in Vancouver; doing seasonal labouring work with shovels and by hand; building retaining walls; installing irrigation systems; sodding turf; and, ripping out clay piping from old buildings;
  - 4) Precision Drilling: an oil rig contractor in Alberta; where he worked for two seasons in 2011 and 2012 as a floor hand, roughneck; and, motor hand, all of which jobs had intense physical demands, that he left because he wanted year round work; and
  - 5) Ace Window Cleaners (Ace): a residential and commercial window cleaning company in Vancouver; where he worked seasonally in 2013 and 2014 doing window cleaning on multi-storey high-rise commercial buildings.
- [33] In addition to remuneration for work during that period the evidence establishes that Mr. Culver received some Employment Insurance benefits in 2013 and 2014.
- [34] In September of 2014, after completing his English 12 course Mr. Culver obtained employment with Cameron Canada Corporation (Cameron), an oil field supply company in Grande Prairie, Alberta. That employment is at the center of Mr. Culver's claims for past and future lost earning capacity.
- [35] Mr. Culver obtained employment with Cameron after being advised by a friend that Cameron was hiring employees to work in its oil field service operations in northern Alberta and British Columbia operating out of its facilities in Grande Prairie.
- [36] After learning of that opportunity Mr. Culver obtained contact information for Ms. Jessica McHaffie, a human resources manger at Cameron. After a telephone interview and after passing a physical test he was hired to work as a field technician.
- [37] He began work at Cameron on September 8, 2014 in Grande Prairie.
- [38] The evidence establishes that it was very physical work that Mr. Culver not only enjoyed but was good at. The work paid more than he had ever earned and, somewhat surprisingly, unlike other work in the "oil patch" Cameron's work was not seasonal.
- [39] I will later discuss in more detail: the nature of the work; Mr. Culver's performance; his earnings from the time he worked at Cameron until the first motor vehicle collision on January 1, 2015; his future prospects at Cameron; and, potential limitations on those prospects when discussing Mr. Culver's claims for loss of past and future earning capacity.
- [40] For the purposes of this chronology I will, however, now record that after the first motor vehicle collision, and after an unsuccessful attempt to return to work at Cameron on March 12, 2015 Mr. Culver was unable to do so because of the injuries he suffered in that collision. He has never been able to return to that work or to work like it.

- [41] In the first motor vehicle collision in Victoria on January 1, 2015 Mr. Culver and Ms. Bradley were returning from a day of "off-roading" with friends and were going to Ms. Bradley's parent's home. Mr. Culver was dozing in the front passenger seat in a slightly reclined position with his seatbelt on. He was tired from his work the day before, travel from Grande Prairie, and, the day's activities.
- [42] Before Ms. Bradley's vehicle struck the former defendant Mr. Skrypnyk's vehicle in an intersection Mr. Culver heard the wheels of her truck "lock up" a few seconds before impact and felt the truck slide sideways.
- [43] Upon impact Mr. Culver's right shoulder hit the side of the car and his body slid downwards and sideways but not all the way out of his seat. Mr. Culver testified that his adrenaline was high and he was very concerned for Ms. Bradley who was crying "pretty hard". Police and fire personnel attended the scene and a police officer drove them to Ms. Bradley's parent's home. Ms. Bradley's vehicle was towed to her brother's home for repairs.
- [44] Mr. Culver and Ms. Bradley stayed in Victoria for two days after the collision. Mr. Bradley was uncomfortable and sore with lower back pain and shooting pains into his legs as well as stiffness in his neck on the right side and in his right shoulder.
- [45] They left Victoria on the third day in a rental car. Mr. Culver drove and testified that the trip was very hard. He suffered pain in his lower back and shooting pain down his leg.
- [46] Mr. Culver testified that for the next few days he stayed at home hoping that the pain would go away so he could go back to work at Cameron in Grande Prairie on January 6, 2015 as scheduled.
- [47] When the pain did not improve, at the urging of Ms. Bradley, Mr. Culver visited the Stein Medical Clinic. Since that first visit he has been in the care of Dr. Burlin who testified at trial.
- [48] Dr. Burlin advised Mr. Culver to take time off work and he did so. He sent a note to Cameron advising that he would be unable to return on the scheduled date due to his injuries.
- [49] The evidence establishes that over the next two months Mr. Culver attended at Dr. Burlin's office six times. He also attended 13 physiotherapy sessions as recommended by Dr. Burlin. In addition he attended 9 massage therapy sessions also as recommended by Dr. Burlin.
- [50] During that time Mr. Culver continued to suffer from pain primarily in his right shoulder and lower back with the lower back pain radiating down to his legs. The physiotherapy and massage sessions were directed to attempting to alleviate the effect of those symptoms.
- [51] When Mr. Culver attended upon him on March 6, 2015 Dr. Burlin testified that Mr. Culver was anxious to get back to work. Dr. Burlin testified that he did not believe that Mr. Culver was yet fit to return but to enable him to return advised that he could do so.

- [52] On March 12, 2015 Mr. Culver attempted to work for Cameron in Grande Prairie. Even though he was somewhat sheltered that day from the type of heavy labour intensive work that the job required and that he had done before Mr. Culver was unable to work the next day due to excruciating pain in his low back. He had difficulty getting out of bed. He telephoned his employer and told them he could not work that day. He left Grande Prairie shortly thereafter when his pain did not improve and returned to Vancouver.
- [53] He did not again return to work at Cameron.
- [54] With Ms. Bradley's assistance Mr. Culver wrote a letter to Cameron advising that he was unable to work due to his injuries. He also stated that "Upon recovery I would like to be considered for re-hire and enjoyed being a part of the Cameron team."
- [55] My consideration of the totality of the evidence including that of Mr. Culver and my assessment of Mr. Culver's credibility leads me to conclude that his employment by Cameron was for him a dream job that offered him the opportunity to succeed in full time non-seasonal employment for which he had persevered for so many years of academic struggle.
- [56] I have no doubt that if Mr. Culver had, at any time after March 12, 2015, sufficiently recovered from his injuries to do the type of work he had been doing at Cameron he would have sought to be re-hired. The evidence of Ms. Jessica McHaffie who was the human resources manager at Cameron who initially hired Mr. Culver also satisfies me that had Mr. Culver again been physically able to do the required work there is a very strong likelihood that he would have been re-hired.
- [57] The loss of his employment with Cameron and the pain from his injuries with which he has now lived for more than four years have had a devastating impact not only upon Mr. Culver's income earning ability but also upon his enjoyment of life and the impact of that pain upon not only his emotional mental well being but also his social relationships, including his relationship with Ms. Bradley.
- [58] The extensive medical evidence adduced by Mr. Culver in this case supports and is entirely consistent with Mr. Culver's subjective assessment of his physical and mental health. It is also consistent with the evidence of Ms. Bradley who, like Mr. Culver was a straightforward and entirely credible witness.
- [59] After returning to Vancouver from Alberta in March of 2015 Mr. Culver continued to suffer from pain in his lower back and shooting pain in his legs that would travel as far as his heels.
- [60] Notwithstanding those continuing back and leg pain issues Mr. Culver returned to work at Ace doing window cleaning in late March of 2015 on a part time basis. He did so because he needed the money.

- [61] Unlike his work before the first collision Mr. Culver only worked on window cleaning ground work at Ace rather than the high level suspended "Bosun Chair" work on high rises that he had done before leaving Ace the year before to go to work for Cameron in Alberta.
- [62] That ground work also required the use of ladders and "tucker poles" but he used shorter ladders than he had used previously because he could not now handle the weight of the longer ladders.
- [63] Although his employer at Ace was accommodating there was pressure upon Mr. Culver to start work on the higher buildings using the Bosun Chair.
- [64] By the end of the season in 2015 Mr. Culver started doing so. However, the work was not only far more difficult than it had been before he was injured but his productivity was much less. He bought a lumbar support for his back to help maintain his posture and balance well enough to do the work. He could, however, only work smaller spreads - the distance he could stretch while cleaning - and he worked much more slowly than he had before he was injured.
- [65] By the end of the season in 2015 while Mr. Culver's back pain was about the same the shooting pain into his legs began retracting somewhat to the knee rather than going all the way to his heel.
- [66] After the 2015 window cleaning season until he returned to Ace for work in March of 2016 Mr. Culver continued with physiotherapy treatment and Pilates treatment and continued to see Dr. Burlin. His back pain felt better with the time off work and the cessation of twisting movements at work but still persisted although at a reduced level. He also continued to have associated buttock pain, but his shoulder was, well on the mend.
- [67] In March of 2016 Mr. Culver again returned to work at Ace. His employer now wanted him to work full time and exclusively in the Bosun Chair. Mr. Culver testified that when he did so the pain came back strongly and the work got more difficult again. He described particular problems with, among other things: movement including certain body mechanics; positioning; pushing off with his toes; "suction cupping" on overhangs; and, reaching in and around windows and ledges.
- [68] At the same time Mr. Culver was finding driving difficult and was having intimacy issues with Ms. Bradley due to his low back pain. He continued to see his physiotherapist for physiotherapy and Pilates.
- [69] On March 28, 2016 while working on a building on Hastings Street and being "pretty much done for the day", with 2 or 3 drops left, and while doing the same movement he had been doing all day he "went to pull himself in". He testified that he "felt a twinge something weird". Although it did not stop him from finishing the work that day he felt "strange but nothing too crazy".

- [70] By the evening he was, however, feeling the same way he had felt immediately after the first collision with the same radiating pain. He called an Emergency line and was told to lie on his back with his feet up and to go to an Emergency ward if it got worse.
- [71] The following morning Mr. Culver's symptoms were worse and he was sore but he still went to work. He unloaded the truck and took his window washing gear up to the roof and suddenly felt "pasty white". He began vomiting and had a "sort of panic". He walked to the clinic where Dr. Burlin practised and was told to go to the Emergency ward at St. Paul's Hospital. He did so.
- [72] Mr. Culver took time off work after what he calls this "flare up" of his symptoms. His employer was understanding and were willing to wait for his return.
- [73] The defendants do not suggest that this flare up was an intervening cause that broke any chain of causation arising from the injuries suffered by Mr. Culver in the first collision and I find that the totality of the evidence establishes that the flare up manifested only as a consequence of the low back and other injuries that Mr. Culver suffered in the first collision.
- [74] During the months that followed the flare-up Mr. Culver was unable to return to work. He testified that for the first week he was for the most part unable to do anything except lie on the floor even while trying to sleep at night. At times Ms. Bradley would sleep beside him on the floor and they eventually got a hard foam mattress for their bed. During that time Mr. Culver also had difficulty cleaning himself and had to have Ms. Bradley help him shower.
- [75] Mr. Culver continued to experience back pain, again shooting down his legs to his heels with the same low back and buttocks pain he had suffered from earlier. He testified that then, as well as now, his back pain is always there but on an up and down scale. He said that at times he feels "80% good" and on some days "20%" and with movement, bending and twisting as well as during intimacy the pain would be worse.
- [76] After being off work from March 30, 2016, Mr. Culver said that just before the second collision on June 4, 2016 the pain was again beginning to retract from his heels back to the lower part of his thighs and into his buttocks.
- [77] During that period that he was off work in the spring of 2016 before the second collision Mr. Culver continued to attend physiotherapy treatments on a weekly basis. He also saw Dr. Burlin four times who prescribed medication to assist in the alleviation of pain. On Dr. Burlin's advice Mr. Culver also twice attended a "Change Pain Clinic" before the second collision.
- [78] On June 4, 2016 while he was driving near his home Mr. Culver's vehicle was struck from behind by the defendant Huang's vehicle at an intersection. Although it was not a high speed collision Mr. Culver testified that the impact felt like a ram or a shove. He also testified that before the collision he saw the defendant's vehicle coming in his rear view mirror and tensed up. He stated that following the impact he felt a sharp pain in his back and was not comfortable getting out of the car. He immediately took some of the pain medication that he

always carried with him.

- [79] In the weeks following the second collision Mr. Culver testified that he again had pain in his back and buttocks and pain radiating down to the back of his knees. He remained off work until near the end of the summer but then resumed working for Ace two days per week.
- [80] Before returning to work Mr. Culver saw Dr. Burlin on at least two occasions and continued his weekly physiotherapy treatments. He continued with sessions at the Change Pain Clinic roughly every two weeks before returning to work and also until the end of September of 2016 after returning to work. Thereafter Mr. Culver attended the Clinic less frequently with about one visit every two months for the next year.
- [81] At the Change Pain Clinic Mr. Culver first tried trigger point injections and then numbing injections until eventually receiving cortisone injections. He testified that the injections brought varying degrees of temporary pain relief but never permanent relief. His last recorded visit was in February of 2018.
- [82] When Mr. Culver returned to work at Ace for two days a week at the end of the summer of 2016 he again performed only ground work. He did not do any high level Bosun chair work and no ladder work with a pressure washer. His employer did not pressure him to do more than he could do and when the season ended Mr. Culver obtained Employment Insurance benefits.
- [83] Before returning to work with Ace in the spring of 2017 Mr. Culver moved apartments with the help of friends. He also sold a motorcycle that he used to ride but could no longer enjoy because of his injuries.
- [84] When he again started working with Ace in the spring of 2017 he told his employer that he was not capable of Bosun chair work because he was afraid of the risk of going "back to square one". Although his employer was understanding he still wanted Mr. Culver to do work in the Bosun chair. Mr. Culver then left that employment and found work on June 12, 2017 with another window washing company where he could do only ground work.
- [85] He soon left that employment due to differences about payment for his work. He was then employed by a third window washing company where the work was more physically demanding than at the second company and was very painful.
- [86] Mr. Culver next again reached out to Ace to see if he could come back to work. He told his employer what he could and could not do. His employer agreed that Mr. Culver could return to work and would not have to do Bosun chair work or work with 40 foot ladders and would take on a role in training new employees.
- [87] Mr. Culver continued in that new role during his seasonal work with Ace in 2017 as well as through the season in 2018 that ended before this trial.

- [88] He testified that the work is not without its physical difficulty. He always has someone with him who can move the heavier equipment that must be used. He has also adapted the way in which he works to avoid twisting. He usually now works five days per week at a rate of \$27 per hour but at times works four days per week because of "flare ups".
- [89] Video surveillance evidence at trial that was obtained by the defendants but adduced by Mr. Culver as part of his case shows the extent to which he is able to work and also shows instances of Mr. Culver seeking relief for his back by squatting and stretching after some work.
- [90] Mr. Culver also testified that his present symptoms after work are similar to his symptoms after the first collision and that the pain has never gone away. He must take an extended period after work to lay on his back with his feet up. He still takes anti-inflammatories as prescribed and has started using "high CBD low THC" marihuana at night to help him sleep. He is also still prescribed pain medication which he keeps with him but he is trying to take fewer pills.
- [91] Since his return to work at Ace in 2017 until the end of 2018 and during his work with the other two window washing companies for a short time in the summer of 2017 Mr. Culver has continued with physiotherapy treatment as well as massage treatment and has continued to receive some injections.
- [92] He testified that he has never felt well enough to return to the type of work he did at Cameron before the injury not only because of pain but because of the physical demands of that work that he can no longer meet.
- [93] Agreed statements of fact filed in this case establish that in 2017 and 2018 Mr. Culver attended for medical consultation and treatments as follows:
- 1) At Dr. Burlin's office: 10 attendances;
  - 2) At Gastown Massage Therapy: 2 attendances;
  - 3) At the Change Pain Clinic: 3 attendances;
  - 4) At Back in Motion for physiotherapy and kinesiology treatments: 40 attendances;
  - 5) At Back in Motion for massage therapy: 60 attendances; and
  - 6) At Access Community Therapists for occupational therapy: 7 attendances.
- [94] In addition to those attendances Mr. Culver attended upon a psychologist, Dr. Dan Bilsker, on 12 occasions between June 12 and November 27, 2018 for counselling related to the psychological impact of his injuries upon his well being.

- [95] The defendants have agreed that to the extent that all of those attendances resulted in Mr. Culver incurring out of pocket expenses for his treatments and therapy as well as expenditures for all of the medications that were prescribed for his pain those expenses are recoverable as special damages arising as a consequence of the defendants' negligence. The total amount of those agreed special expenses is \$17,187.78.
- [96] I will discuss Mr. Culver's ongoing need for future care and the costs associated with that care later in these reasons.
- [97] Before turning to my determination of the appropriate award of damages to which Mr. Culver is entitled under the specific heads of damage claimed I will first address the evidence related to Mr. Culver's need for the psychological assistance of Dr. Bilsker.
- [98] The evidence establishes that after the second collision Mr. Culver felt that the roller coaster like "ups and downs" of his lack of progress were getting to him. He began to feel depressed and described one particular episode while on a sailboat with Ms. Bradley when he should have been aware of the beauty all around him but felt like he had "hit the bottom of the well". He had thoughts of harming himself. Ms. Bradley also testified about her fears for Mr. Culver and especially those fears on that day.
- [99] Mr. Culver testified that since the collisions he often had to keep re-evaluating himself as a person. He felt lost and that he had stopped doing "all of the things that were me". Those things included training, boxing and rock climbing none of which he could no longer do and enjoy.
- [100] He testified that he got through the worst of that with the help of Dr. Bilsker and antidepressant medication prescribed by Dr. Burlin. He described at times feeling depressed and that he had no value. He remains concerned that his physical condition will not allow him to be a breadwinner if he and Ms. Bradley have children and that she will have familial responsibility in which he cannot share equally.
- [101] Notwithstanding those concerns my impression of both Mr. Culver and Ms. Bradley is that they will work together to attempt to overcome the lasting effects of his injuries.
- [102] I am satisfied that notwithstanding the vicissitudes of life to which Mr. Culver has been subjected he remains a resilient, stoical and mostly optimistic individual who will deal with continuing pain and suffering with the same perseverant outlook with which he has dealt with obstacles for most of his life. That will, however, require not only his own fortitude but the continuing support of Ms. Bradley, his parents and his siblings together with professional assistance when necessary.
- [103] Before discussing the issues of causation that the defendants have raised and the various heads of damage upon which the appropriate award for Mr. Culver's losses must be assessed I will first address some of the medical evidence adduced by Mr. Culver and the defendants that bears upon those issues.

## MEDICAL AND OTHER EXPERT EVIDENCE

- [104] Mr. Culver relied upon medical and other expert evidence from many sources in support of his claims. Those included medical expert reports from Dr. Hugh Anton, a physiatrist; Dr. Stephen Anderson, a psychiatrist; and Dr. Robert Burlin, Mr. Culver's primary treating physician. In addition, Mr. Culver adduced the evidence of Mr. Jamie Snow, a physiotherapist who treated Mr. Culver for his injuries in 2015 and 2016 as well as the evidence of Mr. Tariq Dossa, a massage therapist who treated Mr. Culver from 2017 and is still doing so.
- [105] Mr. Culver also adduced the expert opinions of Mr. Min Kyi, an occupational therapist and functional capacity evaluator; Mr. Robert Corcoran, an occupational therapist; Mr. John Lawless, a vocational consultant; and Mr. Darren Benning, an economist.
- [106] I will discuss that evidence to the extent necessary when considering Mr. Culver's claims under the heads of damages associated to that evidence.
- [107] The defendants adduced the expert medical evidence of Dr. Paul Marks, an orthopaedic surgeon and Dr. Douglas Connell, a radiologist.
- [108] I will not summarize all of the medical reports or opinions because it is not necessary to do so. I will, however, now address some of that medical evidence to the extent that I find it useful in determining issues related to causation and the appropriate awards for Mr. Culver's losses that arise from the negligence of the defendants.

### The plaintiff's medical evidence

- [109] Dr. Anton provided a total of four reports dated March 28, 2017; April 3, 2018; May 1, 2018; and October 11, 2018 that were admitted into evidence. In his first report Dr. Anton opined that Mr. Culver had suffered chronic and permanent mechanical low back pain due to the two collisions with referred pain into the gluteus and legs due to the mechanical back pain. He found objective signs that correlated with Mr. Culver's subjective complaints.

- [110] In his second report Dr. Anton wrote:

When I first saw Mr. Culver, I expressed the opinion it was too early to provide a final prognosis, but the duration of his pain suggested a guarded prognosis for complete resolution of pain in future. He has since then had further treatment including active rehabilitation and psychological intervention. He continues to have pain and depression despite treatment.

As noted in my earlier report, there is a complicated relationship between depression and chronic pain. It is possible improvement in Mr. Culver's depression could lead to improvement in his pain. I would defer to my colleagues in psychiatry regarding the prognosis for improvement in his depression.

Based on the information available to me at this time, it is my opinion that even with further improvement Mr. Culver will not become pain free. Instead, he will probably have some degree of fluctuating pain that may be exacerbated by specific activities indefinitely.

[111] In his third report Dr. Anton reviewed opinions provided by Dr. Anderson and by Mr. Kyi both of which were entered into evidence. He then wrote:

In Mr. Kyi's report, he described the results of a functional (work) capacity evaluation performed on April 10, 2018. Based on the results of that assessment, he expressed the opinion that Mr. Culver was not physically suited to his former work as an oil field worker/labourer. He also expressed the opinion that Mr. Culver could perform significant work as a window cleaner, but was not physically suited to the full spectrum of work tasks associated with that field.

Dr. Anderson's report described an independent psychiatric assessment of Mr. Culver he performed on April 18, 2018. He expressed the opinion that physical and emotional factors were likely interacting to create Mr. Culver's chronic pain condition. He also expressed the opinion that Mr. Culver had a DSM-V diagnosis of persistent somatic symptom disorder with predominant pain. He further expressed the opinion that Mr. Culver had a major depressive disorder of mild to moderate severity and a generalized anxiety disorder of mild to moderate severity.

The findings and opinion of Mr. Kyi are consistent with my own assessment of Mr. Culver. I am concerned that if Mr. Culver is no longer able to continue in his current work then it will be difficult for him to identify alternative work. A vocational evaluation would likely be helpful to identify the types of work that might be possible for Mr. Culver in future.

Dr. Anderson's opinions regarding the contribution of emotional factors to Mr. Culver's chronic pain are consistent with my own. I defer to Dr. Anderson's expertise as a psychiatrist regarding Mr. Culver's specific psychiatric diagnoses and treatment recommendations for those diagnoses.

[112] The fourth report was a rebuttal report concerning the report of Dr. Connell that I will later discuss.

[113] Dr. Anderson the psychiatrist saw Mr. Culver on April 18, 2018 and provided an expert opinion dated April 20, 2018. Among other things, in that opinion Dr. Anderson wrote:

Mr. Culver has seen a number of physical medicine specialists to date since the first MVA occurred. Mr. Culver's most significant ongoing physical symptoms following the 2015 MVA have been low back pain, sciatic pain (right greater than left), right shoulder pain, and reduced energy. Mr. Culver has been assessed and treated at the CHANGEpain Clinic by Dr. Sun, he has seen a number of allied health professionals (e.g. physiotherapy, massage therapy and kinesiology) and he has had assessments from physiatrist, Dr. Anton, and interventional pain physician, Dr. Helper.

Mr. Culver's present physical symptoms began after the January 1, 2015 MVA occurred. His physical symptoms were exacerbated by the work-related accident which occurred in March 2016 and further exacerbated as a result of the June 4, 2016 MVA. I will defer opinion to physical

medicine specialists to determine the extent to which Mr. Culver's present physical symptoms are directly due to the January 1, 2015 MVA versus the other two accidents. In Mr. Culver's case, however, physical and emotional factors are likely interacting to create his pain condition. Mr. Culver scored at the 80th percentile for chronic pain clinic patients on the pain catastrophizing scale (PCS score 32/52). Mr. Culver's life largely revolves around his pain. Mr. Culver worries about doing activities which may exacerbate his pain (e.g. kinesiophobia).

Mr. Culver's pain is exacerbated by working at his present job and it is unclear how much longer he will be able to continue working on the ground crew as a window washer. The new term for chronic pain disorder, as given in the 'Diagnostic and Statistical Manual of the American Psychiatric Association' (DSM-5) is a persistent somatic symptom disorder with predominant pain. Patients with this disorder have physical symptoms that are distressing and/or result in significant disruption of daily life. Patients can have disproportionate and persistent thoughts about the seriousness of their symptoms, a persistently high level of anxiety about them and can spend excessive time/energy devoted to their symptoms/health concerns. Mr. Culver has pushed himself to continue working but his pain is frequently on his mind. He worries about his pain worsening in future and he is frequently restless, irritable and on edge.

Patients with chronic pain are at high risk of developing anxiety and depressive illnesses. Mr. Culver became increasingly depressed over time following the MVA's. Mr. Culver reached his lowest point emotionally in May 2017. He has been prescribed antidepressant medication since that time, Pristiq and Wellbutrin. Mr. Culver continues to be prescribed these two medications in addition to analgesic medications, Flexeril and Pregabalin. Mr. Culver has not noticed a significant improvement in his mood with his present medications but he does feel that he has more "pep" in his step.

Mr. Culver continues to score in the moderate range on a depression inventory (PHQ-9 score 13/27). Mr. Culver's score on "the PHQ-9 in June 2016 was 19/27. His PHQ score reached its lowest point in September 2017 (9/27). Mr. Culver's ongoing "depressive symptoms" overlap with his symptoms due to anxiety and pain and include depressed mood (ranging from 2-7/10), fatigue, cognitive difficulties, decreased libido, social withdrawal, weight gain, insomnia, irritability, low self-esteem, guilt, reduced interest and pleasure in activities, hopelessness and suicidal thinking...

[114] Dr. Anderson also wrote:

Mr. Culver's preferred psychiatric diagnosis, in addition to a persistent somatic symptom disorder with predominant pain, is a major depressive disorder (MDD) of mild to moderate severity and generalized anxiety disorder (GAD) of mild to moderate severity. The most appropriate treatment for Mr. Culver's anxiety and depressive symptoms would be a combination of pharmacotherapy and psychotherapy. Mr. Culver will likely require long-term treatment with antidepressant medication. A further course of psychotherapy, preferably cognitive behavioral therapy (CBD) with an experienced psychologist, such as Dr. Bilsker, would be recommended.

Mr. Culver would likely also benefit from being referred to a comprehensive multidisciplinary pain clinic where both physical and emotional factors can be addressed in one setting by experienced therapists. Both anxiety and depression increase pain perception and negatively affect one's ability to cope with pain. Appropriate multidisciplinary pain clinics in the Lower Mainland include the Lifemark Pain Management Program and the Orion Health Rehabilitation and Assessment Centre.

Mr. Culver has had increased concentration and memory difficulties since the MVA's occurred. Mr. Culver has a learning disorder/dyslexia. Since the MVA's occurred, Mr. Culver has experienced a further reduction of his cognitive functioning. His increased cognitive difficulties are likely due to a number of factors including pain, insomnia, fatigue, anxiety, and depression. There is no evidence that Mr. Culver had a head injury as a result of the MVA's.

[115] In addition Dr. Anderson also offered the following opinion:

Long-term prognosis for Mr. Zachary Culver, from a psychiatric point of view, is guarded. The longer psychiatric disorders last the less likely they are to fully remit with treatment. Prognosis is also poor for patients who have more than one psychiatric diagnosis. In Mr. Culver's case he has three psychiatric disorders: a persistent somatic symptom disorder with predominant pain, MDD and GAD. He was appropriately treated with a course of psychotherapy from Dr. Bilsker and with psychotropic medication, Pristiq and Wellbutrin. Despite the treatment that he has received to date Mr. Culver continues to have significant anxiety and depressive symptoms.

[116] Dr. Burlin's clinical notes as well as his expert report dated June 4, 2018 were adduced in evidence and Dr. Burlin also testified. As Mr. Culver's primary treating physician he gave a thorough history of his treatment of Mr. Culver and his reasons for that treatment. He was a compelling witness who offered significant medical and practical insight into Mr. Culver's injuries, the course that they took and the toll of them upon Mr. Culver's physical, emotional and social well being.

[117] In his report dated June 4, 2018, Dr. Burlin offered observations and opinions that I find to be specifically germane to the issues and consistent with the evidence of Mr. Culver and others whose evidence I accept and findings I have made.

[118] In that report Dr. Burlin wrote:

- (1) To summarize, Mr. Culver was a front seat passenger, asleep with the seat reclined at the time of the initial MVA on 1-1-2015. He had no pre accident pain or physical limitations and indeed was performing very heavy manual labour in the oil and gas industry in northern Alberta just prior to the accident.

He was in excellent physical condition and was very active in a number of recreational activities including rock climbing, hiking, snowboarding, skiing, kickboxing and martial arts.

Although he has dyslexia, he was consistently employed in physically demanding jobs since he was a teenager, and was actively engaged in very demanding recreational pursuits as noted

above.

Subsequent to the accident, he developed severe low back pain with right sided sciatica pain that completely prevented him from returning to the physically demanding oil field work. He attempted to go back to high rise window washing work that required him sitting while suspended in a bosun chair or on a fixed platform high above ground. Both these jobs entailed repetitive twisting and turning movements of the neck, shoulders, upper and lower back. He was unable to continue this type of work.

After enduring significant pain, especially in his right lower back, he had to restrict himself to window washing while on the ground. He had to give up all of his high output recreational activities, which contributed to considerable stress in his relationship with his common law partner Lisa, as these were mutually enjoyed endeavours they could no longer enjoy together.

He attended many sessions of physiotherapy including IMS, massage therapy, and active rehabilitation kinesiology therapy with very slow improvement over 15 months. There was a marked exacerbation of low back pain and right sided sciatica pain in a work related injury on 29-3-2016 while suddenly leaning forward while suspended in a bosun chair, as well as a second MVA that occurred on 4-6-2016 while driving a vehicle that was rear ended.

He was referred to the Change Pain Clinic, where he was treated with trigger point injections and ultrasound guided medial branch blocks left L3,4,5, right L3,4,5, left sacroiliac joint and left sacroiliac ligament injections, right sacroiliac joint injections, and caudal epidural steroid injection. Dr. Sun suggested referral to St Paul's Hospital Interventional Pain Clinic (Dr. Alan Berkman) for radiofrequency neurotomy of bilateral sacro lateral branches, but Mr. Culver elected not to pursue this course of treatment.

He is a non smoker, and although he gained some weight initially with the decline in his vocational and recreational physical activity, he has been diligent with both exercising within his capabilities and maintaining a healthy diet which appears to be back close to his pre accident weight of 3.5 years ago.

- (2) After the 1-1-2015 MVA, I observed Mr. Culver to have a marked restriction in his lumbar range of motion, paralumbar muscle spasm, and restriction in straight leg raising testing, especially, on the right side, without noticeable loss of muscle strength, sensation, or deep tendon reflexes. With time, I observed an increasingly depressed and anxious mood, as he began to develop the features of a Chronic Pain Syndrome.

This condition appears to develop unwittingly in some people whenever a deepening repetitive cycle such as this begins:

PAIN-----INSOMNIA-----DEPRESSED MOOD/ANXIETY -----

MORE PAIN-----MORE INSOMNIA-----MORE DEPRESSION/ANXIETY--

(repeat, repeat, repeat)

At the time of his first visit at Coal Harbour Clinic on 11-5-2017, Mr. Culver was clearly suffering from major depression and anxiety. He was having some passive suicidal ideation. He was started on the SNRI antidepressant Pristiq at 50 mg, later increased to 100 mg on 23/5/2018, with the addition of another class of antidepressant, Wellbutrin SR 100 mg (for augmenting antidepressant efficacy and to alleviate sexual dysfunction thought to be caused by the Pristiq). ,

He was referred for high intensity 1:1 Cognitive Behavioural Therapy (CBT) with Dr. Dan Bilsker, a PhD clinical psychologist. Although I have never received reports from Dr. Bilsker, I understand he received 8 sessions but am uncertain if he completed the full recommended course of at least 12 sessions.

Prior to 5/2017, all therapies were focusing on pain reduction and mobility improvement (physiotherapy, massage therapy, active rehabilitation exercise therapy, injection therapies). Medications used were the muscle relaxant cyclobenzaprine (Flexeril) the synthetic opiate tramadol/acetaminophen combination (Tramacet), the NSAID / PPI combination of naproxen and esomeprazole (Vimovo) and the centrally acting non opiate pain modulator pregabalin (Lyrica) as well as the synthetic cannabinoid nabilone (Cesamet). The latter, prescribed by Dr. Sun, was poorly tolerated at even at ½ tab at bedtime, as it made him feel "stoned" the next day.

On 23-5-2018, nearly 3.5 years after his initial MVA of 1-1-18, his physical and emotional state had plateaued. He appeared to be experiencing constant pain, as he remained standing through most of the visit, exhibiting some grimacing expressions while constantly undergoing small movements of extension, flexion, and side bending of his lower and middle back regions in an apparent attempt to alleviate pain.

He had achieved a maximal dose of pregabalin, 150 mg bid and was still using Vimovo and cyclobenzaprine. I knew from his history that experimenting with cannabis in his teens and early twenties had caused episodes of anxiety (THC mediated side effect commonly experienced with initial dosing) and he rarely ever used recreational cannabis for that reason. Nabilone had also produced a similar unwanted side effect from Dr. Sun.

- (3) His MVA associated soft tissue injuries have progressed into a Chronic Pain Syndrome (referred to by Dr. Anderson as a "persistent somatic symptom disorder with predominant pain", DSM V) and is associated with Major Depressive Disorder and Generalized Anxiety Disorder.

Being close to 3.5 years post MVA, I agree with Dr. Anderson that his long term prognosis from a psychiatric viewpoint is poor.

In my opinion, Mr. Culver failed to respond as well as anticipated to the treatments he received through Change Pain, and that a re referral into an alternate and more comprehensive multidisciplinary pain treatment program, as suggested by Dr. Anderson, is warranted at this time.

Unfortunately, publicly funded clinics, such as the St Paul's Hospital Pain Clinic, have wait lists that stretch into years.

In my opinion, such a comprehensive multidisciplinary pain program should commence sooner than later, as I suspect this will be his last opportunity to maximize his physical, emotional, psychological and vocational level of recovery from the MVA. At the young age of 36, such a program has the potential to produce a major positive impact on the rest of his life.

[119] Although they were not qualified to provide expert evidence the lay evidence of Mr. Dossa and Mr. Snow as well as their extensive clinical records were useful in establishing that Mr. Culver's subjective complaints about what areas to massage or in which area physiotherapeutic treatment was needed were objectively verifiable by these experienced treatment providers.

### **The defendants' medical evidence**

[120] The defendants adduced the expert report and testimony of Dr. Marks, an orthopaedic surgeon from Ontario. Due to difficulties arising from Dr. Marks' failure to provide the notes of his assessment of Mr. Culver in a timely way as well as issues related to the extent that he required Mr. Culver to provide written responses to a questionnaire when it had been agreed between counsel for the parties that Mr. Culver would not be required to do so I limited Dr. Marks' opinion testimony to his physical testing and findings as well as his consideration of other medical evidence.

[121] Dr. Marks testified that Mr. Culver did not suffer any musculoskeletal injuries in either collision and suffers no impairment or disability.

[122] I find Dr. Marks' evidence to be of little assistance. Although he is qualified to provide opinion evidence I cannot reconcile his opinions or conclusions with those of the medical experts called on behalf of Mr. Culver that I accept. That is especially so when his evidence is contrasted to that of Dr. Anton and even more so when contrasted to that of Dr. Burlin who had the opportunity to see, interact with, physically examine and treat Mr. Culver from the time of the first collision until trial.

[123] Dr. Marks was also at times argumentative during cross-examination and at other times avoided answering questions that were properly put to him in respect of the conclusions of those doctors with whose opinions he did not agree.

[124] Dr. Marks' opinion cannot be reconciled with what I have found to be the debilitating effects of Mr. Culver's injuries on his life and his ability to work. His opinion also cannot be reconciled with the extensive medical intervention that has been necessary because of the injuries suffered by Mr. Culver as a result of the collisions and in respect of which out of pocket costs (including for extensive massage, physiotherapy and medication) totalling in excess of \$17,000 have been accepted by the defendants as special damages.

[125] The defendants also adduced the evidence of Dr. Connell a radiologist with a sub-specialty in Musculoskeletal Radiology who reported upon an MRI of Mr. Culver's lumbar spine from November 1, 2016.

[126] Dr. Connell did not see Mr. Culver and did not review an earlier April 2015 MRI of Mr. Culver's spine. Although he was provided with Mr. Culver's medical records he testified that "if" he reviewed them he only did so in a cursory way.

[127] In his report Dr. Connell wrote:

This individual does have mild degenerative disc- disease with a broad based disc protrusion at the L5-S1 level. There is no narrowing of the spinal canal and no narrowing of the neural foramina. There are no features present which would explain radiation of pain to the legs.

In response to your question "Would the findings which are present have been caused by the motor vehicle accident?"

Disc degeneration is common at all ages. A disc-protrusion related to a single traumatic event is a rare event with only several case report[s] having been published in the medical literature. At this individual's age in the asymptomatic population 31% of individual will demonstrate a disc protrusion and greater than 50% disc degeneration.

Only mild degenerative change is present involving the L4-5 facet joints. No traumatic bony injuries are present. As noted, the disc changes are not out of keeping with those which may be seen in the general population.

In response to your question "Would the findings present on the MR evaluation explain this individual's radicular pain or his inability to function at work?"

As I have noted in my above report, no narrowing of the spinal canal, nor of the exiting neural foramina is noted. There are no features which would explain nerve root irritation with radiation to the legs.

Since the findings in this individual are not out of keeping with those which are seen in the population in general, there are no specific findings present in the imaging studies which would explain this individual's disability.

[128] In cross-examination Dr. Connell acknowledged that with musculoskeletal injuries MRI imaging must be correlated with physical findings as well as a patient's history to properly understand the patient's condition. He also agreed that in his role as a musculoskeletal radiologist in reviewing only an MRI image he is unable to opine on impairments, limitations or restrictions in a patient's life.

[129] In his fourth report dated October 11, 2018, Dr. Anton reviewed Dr. Connell's report concerning the MRI. In doing so he wrote:

In his report, Dr. Connell expressed the opinion that there were no features on MRI which would explain nerve root irritation with radiation to the legs. When I evaluated Mr. Culver, he reported leg symptoms suggestive of a radiculopathy (irritation of a nerve root) but there were no findings on examination to confirm that. The absence of signs of nerve root irritation on examination at the time of my assessments does not rule out the possibility that Mr. Culver previously had nerve root irritation which had resolved by the time I saw him.

I would emphasize that there is an imprecise correlation between imaging findings of the low back and symptoms. Some patients may have apparently significant changes with no significant symptoms whereas others may have minimal findings and yet have significant symptoms. Interpretation of imaging studies in clinical practice therefore depends on a patient's clinical presentation.

When I last saw Mr. Culver, he reported pain radiating down the legs, but not below the knee, a finding most often due to referred pain from the low back rather than nerve root, irritation. The lack of findings that would explain nerve root irritation on MRI therefore does not affect my opinion.

[130] I accept Dr. Anton's opinion. I find that all of Mr. Culver's back injuries and the manifestation of them in his buttocks and lower extremities were caused by the collision.

## CAUSATION

[131] In most cases the test for causation in tort claims is the "but for" test. Simply put, the question to be answered is: has the plaintiff proven on a balance of probabilities that he or she would not have suffered the losses suffered but for the negligence of the defendant. A defendant's negligence need not be the sole cause of the injuries so long as it is part of the cause beyond the de minimis range. Causation need not be determined with scientific precision. See: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] and *Farrant v. Laktin*, 2011 BCCA 336.

[132] Causation as the source of a loss is not, however, to be confused with the rules of damage assessment in tort. As stated by the Supreme Court of Canada in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

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

[133] In this case the defendants do not submit that their negligence did not materially contribute to the losses suffered by Mr. Culver. Their submission is that Mr. Culver's "original position" was such that his present injured position cannot be wholly attributed to the fault of the defendants.

[134] In support of that position the defendants submit that pre-existing conditions that should be considered in determining the quantum of Mr. Culver's damages include:

- 1) a pre-existing learning disability that would have effected his future income earning ability with or without the defendants' negligence;
- 2) pre-existing degenerative disc disease that, as part of the natural aging process and his work history, would limit his vocational options notwithstanding the defendants' negligence;
- 3) pre-existing episodes of depression that created an increased risk of developing a depression and General Anxiety disorder independent of the defendants' negligence by reason of his "past frustration associated with his inability to read, write and do math which has not been altered by the Accidents"; and
- 4) risk of physical conditions at work given his history of "back pain with heavy labour, wear and tear and the wear and tear to his body when engaging in physical work".

[135] The defendants submit that those pre-existing conditions should result in a 10 to 20 percent reduction of Mr. Culver's non-pecuniary damages; damages for his loss of past and future earning capacity; and, the damages awarded for the cost of his future care costs.

[136] In *Athey* at paras. 34 and 35 Major J. discussed the "Thin Skull" and "Crumbling Skull" rules. He wrote:

34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, *supra*, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be

taken into account in reducing the overall award: *Graham v. Rourke*, 74 D.L.R. (4th) 1; *Malec v. J. C. Hutton Proprietary Ltd.*, 169 C.L.R. 638; *Cooper-Stephenson*, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[137] I apprehend the defendants' submission to be based upon principles applicable in those situations categorized as "crumbling skull" cases.

[138] There is no question that Mr. Culver suffers from a learning disability that has had the effect of channelling his employment efforts into work requiring physical strength and dexterity.

[139] There is also evidence from Dr. Connell that a 2016 MRI of Mr. Culver's spine shows some mild disc degeneration. There is also some evidence in Dr. Anton's report that Mr. Culver had suffered occasional episodes of back pain associated with physical work before the first collision.

[140] Dr. Anderson reported that Mr. Culver had depressive symptoms in late adolescence when three close friends died. He was prescribed anti-depressant medication for a short period of time and had counselling with church elders. Dr. Anderson also reported other periods in the past when Mr. Culver had "mild depressive symptoms". Dr. Anderson agreed on cross-examination that Mr. Culver was always at risk of developing a psychiatric condition because of his pre-existing depressive episodes.

[141] Although there is some evidence to support all of the defendants' assertions of pre-existing conditions I am not satisfied that the evidence related to any such condition taken either singularly or in combination establishes a "measurable risk that the pre-existing conditions would have detrimentally affected Mr. Culver in the future regardless of the defendants' negligence".

[142] I say that because:

- 1) Mr. Culver's pre-existing learning disability has required that he not only take all possible remedial action to overcome it but has required that he focus on physical work. In my view, the fact that his injuries have now made physical work of the type he was doing at Cameron less available to him increases rather than decreases the liability of the defendants for his injuries. His situation is in my view, best assessed as a "thin skull" rather than a "crumbling skull" one from the perspective of his learning disability.
- 2) Although Dr. Connell identified some mild disc degeneration in his review of the MRI of Mr. Culver's spine he did not provide any evidence that there was a measurable risk that the degeneration identified would have affected Mr. Culver's life and functioning had it not been for the injuries to his low back caused by the defendants' negligence.

- 3) Although Dr. Anton reported that Mr. Culver had suffered occasional episodes of back pain associated with physical work before the first collision he also stated Mr. Culver "did not have any significant back problems that would predispose him to problems he had after the accidents".
- 4) Although Dr. Anderson agreed that Mr. Culver's prior history of depression put him at risk of developing a psychiatric condition he did not identify that as a material risk and more specifically did not relate that risk to his present psychiatric diagnosis. Even more significantly Dr. Anderson attributes Mr. Culver's present condition to the correlation between anxiety and depression with chronic pain. The defendants acknowledge that Mr. Culver suffers from chronic pain and there is no evidence to suggest that he did so before the first collision.

[143] I am accordingly satisfied that the evidence does not support a finding that Mr. Culver's damages arising from the defendants' negligence should be reduced because of any pre-existing physical, mental or emotional condition.

## DAMAGES

[144] I next turn to my assessment of the appropriate damage award which will compensate Mr. Culver monetarily to the extent possible for the injuries he has suffered because of the defendants' negligence.

### 1) Non-Pecuniary Damages for Pain and Suffering and Loss of Enjoyment of Life

[145] Non-pecuniary damages are intended to, insofar as any monetary award can, compensate an injured person for their pain and suffering and loss of enjoyment of life caused by the fault of a tortfeasor.

[146] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, Kirkpatrick J.A. set out a useful, non-exhaustive list of factors that offer guidance as to what may influence an award of non-pecuniary damages. The list includes the:

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

[147] Kirkpatrick J.A. went on to say:

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

- (g) impairment of family, marital and social relationships;
  - (h) impairment of physical and mental abilities;
  - (i) loss of lifestyle; and
  - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [148] With those considerations in mind I will now assess the compensation to which I consider Mr. Culver is entitled for his pain, suffering, and loss of enjoyment of life, for the injuries he suffered as a consequence of the defendants' negligence.
- [149] Before the first collision Mr. Culver was a physically active young man who enjoyed life to the fullest extent possible. He had overcome educational difficulties through hard work and perseverance but his life largely revolved around his love of hard physical work, other physical activity, and the outdoors.
- [150] He enjoyed: hiking; rock climbing; martial arts; riding a motorcycle; and, 4 x 4 exploring with friends and with Ms. Bradley.
- [151] He went on long difficult hikes in order to avail himself of rock climbing opportunities. He enjoyed camping in out of the way hard to reach places. He had a love of music and people and was socially active and popular. He trained hard in the gym and was able to lift heavy weights which allowed him to obtain and perform the intensely physical work required of him at Cameron.
- [152] In the four years following the first collision Mr. Culver has endured chronic pain in his back and legs that has precluded him from working without pain and he can no longer do physical work as heavy or demanding as that he once did or enjoy strenuous physical activity.
- [153] He cannot now climb rocks and his hiking is limited to easy trails. He can no longer train as he did and cannot enjoy martial arts.
- [154] He is far less socially active and his relationship with Ms. Bradley has suffered. His mental condition is fragile and he has great difficulty with sleep.
- [155] To be able to work he has to rest long hours after work to obtain relief from his pain. He must also take medication for his pain in order to work and function.
- [156] Mr. Culver's prospects for a full recovery and a life free from pain are slight.
- [157] Mr. Culver is still a very young man with a long life in front of him. That is a significant factor in evaluating the appropriate award for his pain and suffering. He is also a stoical individual who has worked hard to overcome obstacles placed in the way of his recovery. He has always worked to the extent that he can given his educational shortcomings from which he has compensated by hard physical work at which he has excelled.

- [158] Mr. Culver has now lost very much of the enjoyment, personal satisfaction and feelings of self-worth and self-confidence that such hard work gave him.
- [159] He is not entitled to less compensation because he has worked so hard to maintain employment after the collision. That is especially so given the impact that his injuries have had on his ability to enjoy life because so much time and effort is now required daily to allow him to recover from the physical effects of even the less physically demanding work that he is now able to do.
- [160] Mr. Culver's counsel submitted that an award of from \$150,000 to \$175,000 would appropriately compensate Mr. Culver for his non-pecuniary losses.
- [161] In making that submission Mr. Kendall relied upon the following decisions:
- 1) *Murphy v. Hofer*, 2018 BCSC 869 in which the plaintiff who was 39 years old at the time of the collision and who worked as a conveyor belt technician suffered shoulder, neck and back injuries. Mr. Murphy had shoulder surgery that left him with some relatively minor residual pain five years post accident but his headaches and neck pain remained much more severe. His dexterity and lifting capacity had improved since the accident but his strength and endurance remained far below what they were pre-accident. Mr. Justice Sewell found that although Mr. Murphy continued to live independently and care for his daughter his life was profoundly changed by his injuries. His circle of friends had been diminished and he could no longer enjoy outdoor activities as he once had. His self-esteem derived from his work performance was greatly diminished. He suffered from depression, low mood, and cognitive difficulties, PTSD and ongoing pain with attendant sleep deprivation. Prognosis for improvement of his condition was poor to guarded. Mr. Murphy was awarded \$175,000 for his non-pecuniary damages.
  - 2) *Pearson v. Savage*, 2017 BCSC 1435 in which the plaintiff who was 21 years old at the time of the accident went on to suffer chronic soft tissue injuries in her neck, back and knee and ongoing headaches caused by the collision. She also suffered from depression, anxiety and symptoms of PTSD all of which were in partial remission at the time of trial approximately six years post-accident. Madam Justice Loo found that Ms. Pearson suffered difficulties with her recreational activities including hiking, boating, fishing and snowboarding and the relationships with family and friends had been impacted. Her medical prognoses were poor and at best guarded. Ms. Pearson had, however, continued to work as much as she could despite her pain. She was awarded \$175,000 for her non-pecuniary damages.
  - 3) *Domil v. Cheung*, 2017 BCSC 65 in which the plaintiff who was 37 years old at the time of a first collision almost five years before trial. She also suffered from injuries caused by a second collision that occurred four years before trial. At the time of the first collision she was working as a tax examiner for the Canada Revenue Agency and had qualified for a higher level in that position. The second collision exacerbated her injuries. Ms. Domil suffered soft tissue injuries to her neck and shoulders as well as a contusion to her left knee and multiple bruises. The soft tissue injuries continued to cause her pain and suffering at

the time of trial, well beyond the normal recovery time for such injuries but were not permanently disabling and would continue to improve with proper treatment. The plaintiff also suffered psychological injuries as a consequence of the collisions. Mr. Justice Skolrood accepted that the plaintiff's injuries would not prevent her from returning to her previous employment and found that her mental health would likely improve despite a long-term prognosis that was somewhat guarded. Ms. Domil was awarded \$175,000 for her non-pecuniary damages.

- 4) *Risling v. Riches-Glazema*, 2016 BCSC 2423 in which the plaintiff a house painter who was 42 years old at the time of the collision suffered soft tissue injuries to her shoulders, neck, low-back, ongoing headaches and psychological injuries. Although Affleck J. found that her injuries would limit her capacity to paint houses but also found that her injuries were not serious enough to prevent her from working entirely. Mr. Justice Affleck also found that although Ms. Risling's hobbies, including playing guitar, camping, boating and fishing had been limited they were not entirely prevented as a consequence of her injuries. Ms. Risling was awarded \$150,000 for her non-pecuniary damages.

[162] The defendants submit that Mr. Culver should be awarded non-pecuniary damages of between \$100,000 and \$125,000.

[163] In making those submissions the defendants submit that Mr. Culver suffered moderate soft tissue injuries in both collisions. They also acknowledge that he suffers from chronic pain and will likely suffer at least some form of fluctuating pain indefinitely. They submit, however, that Mr. Culver is still able to enjoy hiking and camping albeit in less remote locations and is still capable of at least medium strength work and can go to the gym for some exercise and can swim. They also submitted that with treatment his physical and mental condition should improve. Although they acknowledge Dr. Anderson's diagnosis of Mr. Culver's psychiatric difficulties they also submitted that he was pre-disposed to developing a psychiatric condition and that his learning disabilities should reduce his damage awards. I have rejected those submissions.

[164] In making their submissions the defendants rely upon the following cases:

- 1) *Curry v. Powar*, 2015 BCSC 610 in which a tow truck driver who was 41 years of age at the time of the motor vehicle collision in which he was injured suffered injuries to his neck that required surgery as well as a significant injury to his right hip that would likely require surgery. At trial three years post-collision Mr. Justice Tindale found that Mr. Curry was suffering from myofascial pain syndrome, a major depressive disorder and persistent somatic disorder as a result of the collision. Mr. Justice Tindale also found that the plaintiff's evidence concerning his subjective complaints had to be viewed with caution. Mr. Curry was awarded \$100,000 for his non-pecuniary losses.
- 2) *Elpel v. Glover*, 2018 BCSC 1404 in which a bookkeeper and housekeeper who was 46 years old at the time of a motor vehicle collision in September of 2011 suffered soft tissue injuries to her upper back and neck. At trial almost seven years post-collision Pearlman J. found that

Ms. Elpel continued to suffer from chronic pain, had developed a somatic symptom disorder, depression related to chronic pain and that her prognosis for improvement was guarded. Mr. Justice Pearlman also found that Ms. Elpel had the capacity to engage in light physical activity and likely retain that capacity over the long term. Ms. Elpel was awarded \$95,000 for her non-pecuniary losses.

- 3) *Easton v. Wolovets*, 2015 BCSC 210 in which a carpenter who was 33 years old at the time of trial in 2014 had been involved in three motor vehicle collisions. The first of those had occurred almost six years earlier in October of 2008, the second in November of 2011 and the third in March of 2013. He suffered soft tissue injuries to his shoulder, neck and back. Mr. Justice Williams found that the principal injury suffered by Mr. Easton in the 2008 collision was one that resulted in a diagnosis of Thoracic Outlet Syndrome which Williams J. stated was the "driver for most of the injuries that found his claims". The effects of Thoracic Outlet Syndrome included myofascial and chronic pain, and a moderately severe depressive disorder. It has also negatively impacted his relationship with his spouse, his ability to fully participate in the upbringing of their infant son and his ability to work in his trade. His pre-accident outdoor pastimes were substantially limited and at trial he continued to suffer depression and anxiety in an automobile. Mr. Justice Williams also found that although many of Mr. Easton's symptoms would likely continue after trial "albeit with some level of resolution to be expected". Mr. Easton was awarded \$125,000 for his non-pecuniary losses.

[165] Although other cases are of some assistance in assessing an award of non-pecuniary damage it is an off-cited principle that no two cases are the same. Each person who endures a debilitating injury is unique and the nature of the injuries suffered by plaintiffs and their life circumstances will rarely be identical. See: *Schubert v. Knorr*, 2008 BCSC 939.

[166] In my opinion Mr. Culver's injuries have in some ways had a more profound impact upon all aspects of his enjoyment of life than any of the plaintiffs in the cases to which I was referred by counsel. In part that has arisen because of the extent to which Mr. Culver's efforts to overcome his learning disabilities resulted in his pursuit of excellence in physical activities that dominated his life before he was injured. While he persevered in attempting to improve his educational standing so that he could obtain more remunerative full time non-seasonal employment he was able to enjoy life because of his physical prowess and agility. That prowess translated into not only employment opportunities, but also his ability to enjoy the outdoors and rock climbing. It was also at the core of his self-esteem that has been badly shaken notwithstanding his stoicism.

[167] Mr. Culver's last four years have been drastically altered by the physical, mental and emotional injuries that he suffered as a consequence of the defendants' negligence. The prospect of significant improvement in his life is at best guarded.

[168] In all of those circumstances I am satisfied that an award of \$175,000 will appropriately compensate Mr. Culver to the extent that any monetary award could, for his pain and suffering and his loss of enjoyment of life.

## 2) Past Loss of Income Earning Capacity

- [169] In *Grewal v. Neumann*, 2017 BCCA 158, Goepel J.A., in dissent in the result but with the concurrence of the majority on the issue of the assessment of both past and future loss of earning capacity wrote at paras. 48 and 49:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [170] In this case the fundamental question to be answered in relation to both Mr. Culver's past and future loss of earning capacity claims is whether the evidence establishes a real and substantial possibility that but for the negligence of the defendants he would have continued to be employed by Cameron or a like employer at a similar rate of remuneration for the remainder of his working life.
- [171] If that is established the subsidiary question of the quantification of that loss becomes what are the possibilities and probabilities of events that may affect the extent of his loss. The latter inquiry requires consideration of not only positive but also negative contingencies that could impact upon the assessment of the loss.
- [172] In this case also, quantification of the appropriate compensation for Mr. Culver's past and future lost income capacity must have regard to the extent that he has been and will be able to earn income in his post collision condition.
- [173] Mr. Culver asserts that his past loss of income earning capacity should be assessed as being approximately \$288,000 less the necessary income tax deduction required by s. 98 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231. Mr. Culver suggests application of a tax rate of 25 percent that would result in a net award of approximately \$228,000.
- [174] The defendants submit that Mr. Culver's past loss of income earning capacity should be assessed as being from approximately \$62,000 to \$72,000 net of the necessary income tax deduction (suggested to be 20 percent) under s. 98 of the Insurance (Motor Vehicle) Act.

- [175] The difference in the positions advanced by Mr. Culver and the defendants lies primarily in their assessment of the likelihood that Mr. Culver would have had a lengthy career with Cameron if his physical abilities had not been diminished to the extent that he could no longer do the work required of him.
- [176] Mr. Culver's submission was based in large measure upon the proposition that the work at Cameron was the culmination of all of his years of effort expended to obtain his Grade 12 English equivalency that made employment at Cameron possible.
- [177] Support for this proposition is evidenced by the facts that plans had been made not only by him but also by Ms. Bradley for a long life in a smaller more remote community in which they could both earn good money and enjoy the outdoor lifestyle they both wanted.
- [178] The defendants' submission is premised upon Mr. Culver's work at Cameron being far less than permanent given his past work history and the short length of time he had been employed by Cameron.
- [179] To put Mr. Culver's claims for loss of past and future income earning capacity into perspective it is necessary to examine the nature of the work at Cameron as well as the prospects for his continued employment and advancement there when considered against Mr. Culver's past work history as well as the limitations upon that earning capacity arising from his learning disability.
- [180] It is also necessary to consider the extent to which Mr. Culver remains employable as a window washer or in other less physically intensive work than that if in future his injuries and chronic pain prevent him from doing window washing work.
- [181] The evidence establishes that the work Mr. Culver was doing at Cameron was very physically demanding. It required heavy lifting and physically demanding body movements and dexterity to allow movement of very heavy fittings both in the shop and in the field to assemble fracking towers and other structures needed for use in the gas and oil fields of Alberta and British Columbia. The work in the shop involved torque wrenching, hammer wrenching, impacting and manipulating parts of machinery to both assemble and disassemble the necessary structures and equipment.
- [182] In the field the work was even more physically demanding and more intense because of the lack of overhead cranes to assist with movement of structural components and because of the time constraints involved in placing or removing structures. Field work also involved long and at times difficult drives over rough terrain for long distances.
- [183] Mr. Culver was able to do all of the work required of him as a field technician at Cameron. Cameron also invested in Mr. Culver as an employee by paying for all of the necessary courses he had to complete to be certified to work for Cameron in that capacity. That included training and certification in first aid, wildlife awareness, space entry, petroleum safety, forklift operation, and overhead crane operation.

- [184] Mr. Culver successfully completed all of those courses and that training. He was also scheduled to take training to obtain his Class 3 driver's license in January of 2016 that would have been paid for by Cameron so that he could do more driving for the company for field work. He could not do that training or obtain that license because of his injuries.
- [185] One aspect of the work at Cameron that was particularly attractive to Mr. Culver was it being centered in a smaller community with ready access to the outdoors for both work and pleasure.
- [186] Although counsel for the defendant urged upon me the proposition that work in such remote locations is very much a "young man's game" and that Mr. Culver's relationship with Ms. Bradley was such that he would be unlikely to continue with long term employment with Cameron. I do not accept that submission.
- [187] The evidence establishes that Ms. Bradley was supportive of Mr. Culver's work away from Vancouver and had herself taken steps to obtain a Class 1 license with air brake training to be able to also find employment in or near Grande Prairie. Also, as indicated by Mr. Culver's perseverance in completing his Grade 12 English to be able to obtain work with better remuneration and long term job stability, in all of which he was aided by Ms. Bradley, the job at Cameron was in fact his dream job. I am satisfied that he would have continued to do that work and enjoy it and the lifestyle it provided well into the future if the negligence of the defendants had not prevented him from continuing with the job with Cameron.
- [188] In addition to Mr. Culver, Ms. Jessica McHaffie who hired Mr. Culver to work at Cameron and Mr. Daron Sarmaga who worked with Mr. Culver at Cameron testified about Mr. Culver's performance while at Cameron; remuneration for the work; employment benefits; the job market for Cameron employees; the stability of Cameron's workforce; prospects for advancement with Cameron; and, overseas opportunities for employees such as Mr. Culver.
- [189] Ms. McHaffie was the human resources manager specialist at Cameron who hired Mr. Culver as a field service technician in September of 2014. She held that position from June of 2014 until November of 2017 when she moved to British Columbia to work for Veg Pro in Coldstream where she is still a human relations specialist.
- [190] She described the physical testing required to be successfully completed by Mr. Culver before he was hired as well the physical duties required of the job. Those included lifting, crouching, sitting, bending, maneuvering under equipment, working at heights and in extreme weather as well as the requirement to routinely lift equipment well in excess of 50 pounds.
- [191] Field service technicians worked on a schedule of 15 days on and 6 days off. They were paid hourly and were paid time and one half for work over 44 hours per week. She testified that most technicians would be into overtime within their third day of work, especially in the field where they were paid for all hours from the time of leaving the shop until they completed the work in the field and returned to Grande Prairie.

- [192] She testified that Mr. Culver made a positive impression on his supervisors, showed up on time, worked all of his shifts and that she never had a complaint about his ability to learn or do any work required of him.
- [193] Ms. McHaffie testified that the average cost to Cameron for the training and certificates that Mr. Culver was required to take and obtain was between \$1,000 and \$2,000.
- [194] She further testified that when Mr. Culver attempted to return to work in March of 2016 after the first collision he was unable to come to work the next day and that Cameron did not have the ability to give modified duties to someone injured outside of work. She also testified that any short term benefits to which he might otherwise have been entitled would not "kick in" until he had been employed for at least 6 months.
- [195] Significantly also, Ms. McHaffie testified that work at Cameron is consistent and remained steady notwithstanding the ups and downs of the oil and gas industry. That is so because of the extent to which work at Cameron in Grande Prairie is more involved with natural gas than crude oil. In the latest downturn Cameron only had two major lay-offs and all employees were hired back within two months.
- [196] Ms. McHaffie further testified that:
- 1) field service technicians generally averaged \$100,000 in gross earnings per year and shop employees averaged \$80,000 per year in 2016;
  - 2) in 2018 an employee in Mr. Culver's position at Cameron earned \$115,00 that year;
  - 3) some more senior technician employees make between \$150,000 and \$170,000 because of the high incidence of overtime and have hourly wage rates in the "high 30's per hour";
  - 4) the age of field technicians at Cameron ranges from 18 years old into the mid 60's;
  - 5) many technicians in their 50's and 60's work in the shop environment;
  - 6) many long term employees have worked for Cameron for 10, 15 or even 30 years;
  - 7) all Cameron employees receive 2.5% of their gross wages as additional pension contributions;
  - 8) Cameron offers various possibilities for advancement including sales positions which require, reading, writing and computer skills;
  - 9) Cameron also offers overseas jobs that require work very similar to that of the field technicians in Canada that are available after about two years of employment; and
  - 10) overseas positions can last from 3 to 5 years and overseas work is paid on the basis of 28 days on and 28 days off with the employee being paid full base salary even during those 28 days off.

[197] Mr. Sarmaga was a field service technician with Cameron in Grande Prairie while Mr. Culver worked there. He started in October of 2014.

[198] Mr. Sarmaga worked as a field service technician for Cameron for about three and one half years before advancing to a sales role in the company. Among other things that role requires computer skills as well as product knowledge.

[199] Concerning his work as a field service technician Mr. Sarmaga testified that:

- 1) In the shop the work required to build equipment for use in the oil or gas fields was physically demanding requiring snipe wrenching, hammer wrenching, impacting and manipulating equipment;
- 2) Work in the shop required lifting of a minimum of 50 lbs and a maximum of "as much as you can lift";
- 3) The maximum he could lift was about 173 pounds but he had seen others lift more and at times two people would lift objects as heavy as 500 pounds;
- 4) In the field the work also required lifting where equipment including valves had to be lifted and top sections of some equipment weighed as much as 1000 pounds. In those cases the equipment would be lifted with a crane but the technicians were required to guide pieces by hand using their own strength. They also had to lift and carry equipment that could weigh up to 150 pounds per piece;
- 5) Field work required extensive physical labour in lifting and body positioning including lengthy periods of bending;
- 6) Work on a specific project could take up to four shifts of nine hours all of which the technician was required to work without interruption but for which significant overtime would be paid; and
- 7) He recalled working 120 hours of overtime in one two week period.

[200] Mr. Sarmaga testified that while working as a field service technician he did not advance beyond the level of a "helper". He had a Grade 12 education and had taken some additional college level courses. Many field service technicians did not have a full high school diploma.

[201] As a field service technician Mr. Sarmaga earned \$24 per hour in 2015 and earned about \$100,000 that year. Field service technicians at Cameron are currently paid \$29 per hour to start. The average pay for field service technicians is about \$100,000 per year but some employees earn as much as from \$140,000 to \$180,000 per year because of overtime.

- [202] Mr. Sarmaga testified that there are opportunities for advancement for field service technicians at Cameron including overseas work and inspector positions as well as sales positions. The inspector positions are still very hands on and require some reading and writing.
- [203] Mr. Sarmaga testified that he worked with Mr. Culver in the shop almost every day at Cameron from October of 2014 until December of 2014. His impressions of Mr. Culver were that he was "funny", "outgoing", and a "hard worker". He had a "go, go, go" attitude. He was physically in good condition and could perform the tasks required without taking physical breaks. He never displayed any physical problems.
- [204] An Agreed Statement of Facts establishes that in the four months that Mr. Culver worked at Cameron in 2014 he earned approximately \$25,000 as well as vacation pay of approximately \$5,000.
- [205] The totality of the evidence that I accept satisfies me that for a starting point my assessment of Mr. Culver's loss of past earning capacity should be based upon a yearly income of no less than \$90,000 plus \$2,250 per year of lost pension contributions.
- [206] That yearly income assessment includes my consideration of negative contingencies such as short layoffs of the type testified to by Ms. McHaffie as well as positive contingencies such as salary increases. It also includes my assessment of the substantial likelihood that Mr. Culver would have remained as an employee of Cameron in Grande Prairie for the four year period from the time of the first collision until the time of trial. I consider it highly unlikely that he would not have continued to be so employed given his performance albeit for a relatively short time and his determination to succeed in his dream job.
- [207] Mr. Culver's claim for past income loss will accordingly be assessed based upon total income lost at Cameron because of the defendants' negligence of \$369,000 from the date of the first collision until the start of trial.
- [208] From that total amount must be deducted:
- 1) Income earned from other employment;
  - 2) Income from other sources; and
  - 3) An appropriate deduction for income tax required by s. 98 of the Insurance (Motor Vehicle) Act.
- [209] Mr. Culver earned a total of \$115,167 in income from employment for the four year period from 2015 to the beginning of 2019. That amount is based upon reported earnings of \$39,653 (including vacation pay from Cameron) in 2015; \$20,359 in 2016; \$17,608 in 2017; and \$37,550 in 2018.
- [210] In those four years Mr. Culver also received approximately \$24,500 in Employment Insurance benefits including approximately \$6,300 estimated as being paid in 2018.

[211] Mr. Culver accordingly received a total of approximately \$139,667 from income and Employment Insurance in the period from the first collision until the commencement of trial.

[212] In result, I conclude that Mr. Culver's post-accident loss of income earning capacity is \$229,433.

[213] I have concluded that the appropriate income tax deduction to be applied to that award under the provisions of s. 98 of the Insurance (Motor Vehicle) Act is 25% (\$57,358) resulting in a net award of \$172,075.

### 3) Future Loss of Income Earning Capacity

[214] Determination of the appropriate award for Mr. Culver's lost of future earning capacity requires consideration of much of the same evidence as that relevant to the determination of the award for his past loss of capacity but also requires consideration of whether the evidence establishes a substantial likelihood that he would have continued to be employed by Cameron or a similar employer at wages similar to those he received at Cameron in 2014. It also requires consideration of potential positive contingencies such as the prospects for advancement in Cameron or with another employer, the likely length of his future working life with Cameron or in similar employment as well as the potential for wage increases.

[215] Determination of the appropriate award for Mr. Culver's loss of future income earning capacity also requires consideration of negative contingencies that could decrease the amount of likely remuneration he might receive over his remaining working life including: the relatively short period of time for which he had been employed at Cameron; his past working history with seasonal and part time employment over many years; the demanding physical aspects of the job; the volatility of the oil and gas industry; the effect his learning disabilities might have on his prospects for continued employment or advancement; and, the potential for disruption to employment because of the remoteness of the location of the work upon his relationship with Ms. Bradley.

[216] In addition to those negative and positive contingencies, determination of the appropriate award for Mr. Culver's future loss of earning capacity must also have regard to the extent that he is still able to earn income from sources such as Ace or other window washing companies, bearing in mind, however, the toll that such work continues to take upon him emotionally and physically; the extent to which his present condition may in future preclude such work, and if so what alternate work he may be able to do and for how long.

[217] Counsel for Mr. Culver has submitted that the appropriate award for Mr. Culver's future loss of earning capacity should be between \$900,000 and \$1,300,000.

[218] Counsel for the defendants submit that an appropriate award for Mr. Culver's future loss of earning capacity should be in the range of \$150,000 and \$200,000.

- [219] As I have earlier noted, in Grewal, the Court of Appeal confirmed that the assessment of the loss of both past and future income earning capacity involve the consideration of hypothetical events. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.
- [220] I note also that in Perren v. Lalari, 2010 BCCA 140 cited by Goepel J.A. in Grewal, Garson J.A. for the Court stated (at para. 32) that if a plaintiff has discharged the onus of proving a real and substantial possibility that a future event will lead to an income loss the plaintiff may prove that loss of capacity on an earnings approach or a capital asset approach.
- [221] I find that the potential for the long term employment of Mr. Culver at Cameron is a real and substantial possibility. Notwithstanding the short time that he was employed by Cameron before the first collision precluded him from continuing that employment, the totality of the evidence satisfies me that long term employment with Cameron was not only possible but likely.
- [222] Mr. Culver was a good fit for the job and very much enjoyed the work. He had worked hard to establish the necessary educational status to obtain the type of employment that he sought - full time non-seasonal employment that offered a secure future. The work required that which he was most able to provide - physical strength, dexterity and endurance. He did well in all aspects of the job and was well regarded by his supervisors and fellow employees. Further, Ms. McHaffie testified that it is likely that she would have re-hired Mr. Culver if he had not been injured.
- [223] The assessment of Mr. Culver's loss of future earning capacity thus requires that, among other things, I must weigh the possibilities and probabilities of hypothetical events that could impact the real and substantial possibility of the future long term employment of Mr. Culver by Cameron.
- [224] Counsel for Mr. Culver has primarily addressed the issue of Mr. Culver's loss of future income earning capacity on an earnings approach. He does so comparing Mr. Culver's potential income from Cameron, but for the first collision, with Mr. Culver's likely income from other employers, such as Ace, that he is still able to earn. He submits that Mr. Culver's loss of future income earning capacity should be based upon the differences between those income streams.
- [225] In addition counsel for Mr. Culver adduced the expert evidence of an economist, Mr. Darren Benning who provided a statistical approach upon which to assess Mr. Culver's future loss of income capacity by comparing Mr. Culver's potential earning as an oil and gas technician (with employers other than Cameron) and his work as a window cleaner or alternatively as a low income worker earning \$15 per hour. In the further alternative Mr. Benning compared Mr. Culver's potential pre-collision earnings as a "tradesperson" as opposed to a window cleaner or a low income worker earning \$15 per hour.

- [226] I am satisfied that Mr. Benning's statistical approach is of limited value because of the extent to which it relies on data that does not recognize the idiosyncratic nature of Mr. Culver's before and after earning capacity - because of his learning disability or the type of work done by Cameron in the "oil patch" because of the "boom or bust" nature of oil field drilling work.
- [227] For those reasons I am satisfied that the appropriate approach to the assessment of Mr. Culver's loss of future earning capacity is to use his income earning capacity at Cameron as a starting point and to compare that to his income earning capacity as a window washer at Ace or a similar employer.
- [228] In both cases I must consider positive and negative contingencies that would effect the earning capacity of each type of work. The difference between his likely earnings at Cameron and those as a window washer as a measureable income loss must then be further assessed to determine the appropriate quantification of his loss of a capital asset.
- [229] Before turning to my determination of the appropriate award for Mr. Culver's loss of income earning capacity I must first address the evidence of Mr. Min Kyi an Occupational Therapist and Functional Capacity Evaluator and Mr. John Lawless a Vocational Rehabilitation Consultant whose opinions were adduced as expert evidence by Mr. Culver.
- [230] Mr. Kyi performed a functional capacity evaluation of Mr. Culver on April 10, 2018. Mr. Kyi was a well-qualified witness whose evidence is consistent with the evidence of Mr. Culver and others whose evidence I accept.
- [231] He opined that Mr. Culver did not exaggerate his physical limitations and stated: "He overestimates what may be good for him. We have to be cautious that he won't do too much".
- [232] Mr. Kyi also reported that over the time required to complete the necessary physical testing Mr. Culver's performance declined to the extent that "encountered work activity exceeded Mr. Culver's reasonable daily work capacity to some extent". That evidence is consistent with Mr. Culver's evidence about the extent to which a day's work of ground level window washing - even with the lesser physical requirements required for high level washing - results in declining production and requires periods of rest during the day as extended periods of recuperation including laying on his back and doing nothing at the end of a day's work.
- [233] Mr. Kyi also opined that Mr. Culver is not now physically suited to the type of work expected of oil field workers or worker/laborers. Obviously, the intensely physical work at Cameron falls within or exceeds the physical requirements of those comparator jobs.

- [234] In addition, Mr. Kyi opined that Mr. Culver is not now physically suited to the full spectrum of the work tasks associated with the type of window washing, especially Bosun chair and rope work, that he did before he was injured. He also testified that even with ground level work a part time schedule would improve Mr. Culver's functional work tolerance.
- [235] Mr. Lawless met with and assessed Mr. Culver on August 15, 2018. He tested and evaluated Mr. Culver's abilities in various areas likely to be involved in different work related settings. The evaluation included math, reading and writing tests which not surprisingly given the totality of the evidence indicated Mr. Culver has significant difficulty in each area.
- [236] He noted that Mr. Culver's pre-collision work history showed progressively higher income in years leading up to the collision and opined that but for the collision he could have continued work with Cameron.
- [237] Mr. Lawless also offered the opinion that Mr. Culver may have been able to achieve supervisory roles with Cameron and believed that Mr. Culver had the basic interest and education to potentially pursue trades with Cameron to advance in the oil industry.
- [238] While I accept that Mr. Lawless is qualified to give that opinion I am not satisfied that there is a strong evidentiary foundation for it. The evidence of Mr. Culver's supervisory role at Ace leads me to conclude that Mr. Culver's potential to supervise others in the role of field service technician is within the realm of possibility. However, the evidence of Mr. Sarmaga about the need for computer skills and organizational skills to advance in other areas leads me to the opposite conclusion about work in other than the type of job Mr. Culver was doing at Cameron before his injuries, although perhaps in a supervising role.
- [239] Mr. Lawless also testified that Mr. Culver's post-accident vocational potential is now "much diminished". I agree Mr. Culver obviously cannot return to the type of physically demanding work at Cameron and even his work at Ace is to a significant extent dependent upon an accommodating employer.
- [240] Mr. Lawless offered a pessimistic but in my view realistic opinion about Mr. Culver's job prospects if he is unable to continue as a window washer without significant accommodation.
- [241] He wrote " if Mr. Culver is no longer suited to the laborious work that characterised his career, and he is likewise unsuited to the lighter and more skillful occupations that are their normal alternatives, there is going to be little else for him to consider vocationally."
- [242] Having considered the totality of the evidence that I consider reliable and the submissions of counsel I have concluded that:
- 1) There is a real and substantial likelihood that Mr. Culver would have continued to work for Cameron not only until the date of trial for which he has been compensated by my award of damages for past income loss but into the future. I reach that conclusion notwithstanding the defendants' submissions that Mr. Culver's career history of earnings in part time and

seasonal jobs made it likely that the work at Cameron would also have been short-lived. The facts that: this was a "dream job"; he had worked so hard to obtain a level of education that allowed him to pursue that job; his ability to do the work to the satisfaction of his employer who would have likely rehired him if he had not been injured; and, the arrangements made by Ms. Bradley to accommodate life and work in a smaller community all convince me that there is a real and substantial likelihood that but for the defendants' negligence Mr. Culver would have continued to work for Cameron into the foreseeable future if he had not been injured.

- 2) The length of time for which Mr. Culver would likely have continued employment with Cameron cannot be determined with any degree of precision. The fact that Cameron was engaged in an area of oil and gas field work that was largely recession resistant is a positive contingency. The physical nature of the work is both a positive and negative contingent factor. While Mr. Culver's pre-existing learning disabilities would not preclude continuation of that heavy physical work they would negatively impact his ability to obtain other or similar employment that require more non-physical skills that he lacks. I accept the evidence of Ms. McHaffie that employees at Cameron do the type of work that Mr. Culver was doing into their 60's but that evidence is lacking in sufficient particularity for me to determine that Mr. Culver would have worked that long. I find that a reasonable expectation of continued employment with Cameron as Mr. Culver gained experience and knowledge would be from age 37 (his age at the date of trial) to age 55.
- 3) I find that it is reasonable to assume that during those 19 years of employment Mr. Culver would have earned no less than \$100,000 per year inclusive of pension contributions. That conservative estimate is markedly lower than could be supported by the evidence of Mr. Sarmaga or Ms. McHaffie but is based upon the assumption that his income would not increase markedly, notwithstanding his experience in the job, to reflect my assessment of negative contingencies including the possibility of layoffs, work related injuries or the vicissitudes of life that could negatively affect his earning capacity.
- 4) I accordingly find that a reasonable estimate of Mr. Culver's post-trial loss of future income earning capacity from work at Cameron or like employment is \$1,900,000.
- 5) I also find that it is not unreasonable to assume that Mr. Culver will continue to work as a seasonal window washer doing the same type of work that he now does with the accommodations of his present employer and that his remuneration will continue to be at a rate of approximately \$27 per hour.
- 6) As with the 19 years that Mr. Culver would likely have worked at Cameron, I am also satisfied that given his strong work ethic Mr. Culver will continue to work in the window washing field for as long as he can given his physical limitations.

- 7) I also recognize, however, that Mr. Culver will continue to require significant accommodation by an employer which cannot be expected to last for as long as 19 years and that Mr. Culver will always be at risk of diminished earnings either by way of cessation of accommodation, layoffs or, as suggested by Mr. Lawless, reduced work each week during the window washing season.
  - 8) For all of those reasons I am satisfied that for the purpose of determining an appropriate award for Mr. Culver's loss of future income earning capacity, a reasonable estimate for Mr. Culver's continuing ability to work notwithstanding his injuries caused by the defendants negligence is approximately \$45,000 per year (based upon Mr. Culver's projected 2018 earning) for 19 years, being in total \$855,000.
  - 9) In the same way that I have not adjusted Mr. Culver's estimated income from Cameron over those years upwards to adjust for inflation, wage increases or possible promotions or downwards to reflect negative contingencies such as layoffs, work related injuries or the vicissitudes of life I have not adjusted Mr. Culver's estimated income from Ace or a similar employer upwards to account for inflation, salary increases or promotion or because of those same negative contingencies.
  - 10) The difference between these two income earning capacity projections that have been adjusted to account for negative and positive contingencies Mr. Culver would be entitled to an award of \$1,045,000. That award would have to be reduced to reflect actuarial future income loss multipliers provided by Mr. Benning.
  - 11) Application of those economic multipliers provided by Mr. Benning (which in his view are appropriate when income is expressed on a full time full year basis including non-wage benefits) and include consideration of the lump sum present value of future income loss required by s. 56(3)(a) of the Law and Equity Act, R.S.B.C. 1996, c. 253 results in an award of \$764,885 rounded to \$765,000.
- [243] I conclude that the appropriate award for Mr. Culver's future loss of income earning capacity is \$765,000.
- 4) Costs of Future Care
- [244] The relevant principles governing claims for the cost of future care were addressed by Madam Justice Harris in, *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-145 as follows:
- [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.

- [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: Milina; Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63
- [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: Izony v. Weidlich, 2006 BCSC 1315 at para. 74; O'Connell v. Yung, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.
- [145] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.
- [245] Mr. Culver has advanced a claim for the cost of future care in the amount of between approximately \$164,500 and \$167,750.
- [246] The majority of those claims and the costs associated with them are included in a cost of future care report prepared by Mr. Rob Corcoran, an occupational therapist based upon his assessment of Mr. Culver and that of other experts whose evidence was allowed by Mr. Culver. A summary of those claims and associated costs is reproduced below:

Service Item

Cost

Recommended by

Replacement

Total cost to age 65 (multiplier of 21.8444)

Counselling

\$2,123

Dr. Anderson

Yearly

\$46,375

Massage therapy

\$1,290

Dr. Anton

Yearly

\$28,179

Occupational therapy

\$1,072

Dr. Anderson

One time

\$1,072

Vocational counselling

\$2,262

Dr. Anderson

Dr. Anton

One time

\$2,262

Supervised exercise (phase I)

\$600

Dr. Anderson

Dr. Anton

One time

\$600

Supervised exercise (phase II)

\$600

Dr. Anderson

Dr. Anton

Yearly starting in 2019

\$12,768 \*(using multiplier for 28 years, 21.2813)

Multidisciplinary pain program

\$14,390

Dr. Anderson

One time

\$14,390

Pristiq

\$960

Dr. Anderson

Yearly

\$20,970

Bupropion

\$69

Dr. Anderson

Yearly

\$1,507

Pregabalin

\$146 -

\$292

Dr. Anderson

Yearly

\$3,189 - \$6,378

Tramadol

\$119

Dr. Burlin

Yearly

\$2,599

Cyclobenzaprine

\$59

Dr. Burlin

Yearly

\$1,288

Dispensing Fees

\$60

N/A

Yearly

\$1,310

Low height task stool

\$230 plus tax (\$257.60)

Mr. Corcoran

Every 7.5 years

\$980

\*(using multiplier for 4 (3.8077))

Ergonomic creeper

\$61 plus tax (\$68.32)

Mr. Corcoran

Every 10 years

\$197\*(using multiplier for 3 (2.8839))

Obusforme back support

\$90 plus tax (\$100.80)

Mr. Kyi (IT)

Every 4 years

\$652

\*(using multiplier for 7 (6.4720))

Orthopedic pillow

\$125

Mr. Kyi (OT)

Every 2.5 years

\$1,223

\*(using multiplier for 11 (9.7868)

Total future care costs in Mr. Corcoran's report

\$139,561 - \$142,750

[247] In addition to those claims totalling between \$139,561 and \$142,750 Mr. Culver's counsel has submitted that Mr. Culver should be awarded:

- 1) \$20,000 for job placement assistance based upon five required job assistance placements at \$4,000 each; and
- 2) \$5,000 for CBD oil.

[248] The defendants acknowledge that they should compensate Mr. Culver for some of the costs he has claimed but dispute some costs as well as the length of time attributed to the need to incur such costs.

[249] The defendants submit that the total award for the costs of Mr. Culver's future care should be between approximately \$50,500 and \$67,000.

[250] More specifically, the defendants submit the following with respect to the cost of care claims advanced by Mr. Culver:

- 1) Psychological counselling:

The defendants submit that the award for psychological counselling should be based upon 30 to 36 sessions over four years at a total cost of from \$5,790 to \$6,948 with a present value of \$5,659 to \$6,9712 as opposed to Mr. Culver's claim for counselling costs of \$2,123 per year to age 65 totalling \$46,375;

- 2) Massage therapy:

The defendants submit that the award for massage therapy should be calculated on a decreasing incidence of therapy sessions totaling 30 to 40 sessions over the next five years at a cost of between \$3,225 and \$4,300 with a present value of between \$3,142 and \$4,176 as opposed to Mr. Culver's claim for massage therapy costs based upon \$1,290 per year to age 65 totalling \$28,179.

- 3) Occupational therapy:

The defendants agree to a one time expense of \$1,072.

- 4) Vocational counselling and job search assistance:

The defendants agree that vocational counselling is an appropriate cost of future care but submit that a cost of \$1,523 to reflect the cost of counselling provided by Progressive Rehabilitation as opposed to the average cost of two service providers in the amount of \$2,262 suggested by Mr. Corcoran in his report.

The defendants also submit that the \$20,000 suggested by counsel for Mr. Culver in job placement assistance are not necessary.

5) Supervised exercise:

The defendants agree that some costs related to supervised exercise should be awarded but submit that the amount should be limited to from \$450 to \$900 based on a cost of \$75 per session as opposed to Mr. Culver's claims based upon Phase I and Phase II supervised exercise to age 65 totalling \$13,368.

6) Multidisciplinary pain clinic:

The defendants agree that a comprehensive multidisciplinary pain program as recommended by Dr. Burlin has the potential to produce a major impact upon Mr. Culver's life and agree that a one time expense of \$14,930 is medically justified.

7) Medications (Pristiq, Bupropion, Pregablin, Tramadol, Cyclobenzpiline, CBD oil and dispensing fees):

The defendants agree that the cost of some medication is appropriately awarded as a cost of Mr. Culver's future care but submit that the total award should be between \$23,395 and \$36,451 as opposed to a total medications award of \$39,052 (including \$5,000 for CBD oil) sought by Mr. Culver.

8) Adaptive aids:

The defendants submit that adaptive aids such as a back support, orthopaedic pillow, low height (task) stool and ergonomic creeper are items that relate to Mr. Culver's enjoyment of life rather than an ongoing medical need. They are, however, prepared to accept a one time expense of \$500 to \$1,000 as a onetime payment for the costs of such adaptive aids for the course of his lifetime as opposed to Mr. Culver's claims for a total of \$3,052 based upon periodic replacement of those aids as recommended by Mr. Corcoran in his report.

[251] After consideration of the totality of the evidence that I consider reliable, the submissions of counsel and the legal principles to which I have referred I have concluded that the appropriate award for Mr. Culver's cost of future care is \$80,860. That amount is a net amount that reflects, to the extent necessary, the lump sum present value of those aspects of the award that will be required over time required by s. 56(3)(b) of the Law and Equity Act

[252] I reach that conclusion based upon my assessment and reasons for that assessment of each item for future care sought by Mr. Culver as follows:

1) Psychological counselling: \$15,000:

Dr. Anderson recommended that Mr. Culver be enrolled in a further course of cognitive behaviour therapy with an experienced psychologist. He also suggested that Mr. Culver be seen for a further 10 to 12 sessions before re-assessing needs for further treatment and says Mr. Culver may require long term supportive therapy of 10 to 12 sessions per year. I do not accept the defendants' submission that a total of 30 to 36 sessions is sufficient to account for Mr. Culver's future emotional and psychological care, the need for which is directly related to the defendants' negligence. On the other hand I am not satisfied that the totality of the evidence is capable of supporting the need for 10 to 12 psychological consulting sessions per year to age 65. The evidence of Mr. Culver about the progress he has made to date with psychological counselling and the impact it has had on lessening his depression and isolation convinces me that although he will likely need continuing support it will not be as intensive or for a long time as suggested by his counsel. I am satisfied that Mr. Culver's worst emotional and psychological times are behind him. In these circumstances I am satisfied that a total lump sum award of \$15,000 will appropriately address Mr. Culver's need for continuing emotional and psychological care.

2) Massage Therapy: \$8,000:

I am not satisfied that the award for the cost of medically necessary and reasonable massage therapy should be limited to the number of sessions submitted by the defendants or limited to five years. Although Dr. Anton did report that he would prefer active to passive treatment which only provides temporary relief and also recommended that Mr. Culver "wean himself off" of massage therapy. Dr. Anton also testified, however, that massage therapy may be necessary for flare ups. What the defendants' submissions seeking to limit the award for massage therapy fail to recognize is that the temporary relief that Mr. Culver obtains from massage therapy plays a significant role in his ability to continue to work as a window washer notwithstanding the exacerbation of his lower back and leg pain associated with that work. Without that temporary relief Mr. Culver's income earning ability would be more impaired than it is and could result in the need to pursue less physical employment with attendant loss of remuneration. I am satisfied that a lump sum award of \$8,000 for massage therapy for Mr. Culver's future care is both medically necessary and reasonable.

3) Occupational therapy: \$1,072:

As agreed.

4) Vocational counselling and job search assistance: \$6,232:

I do not accept the defendants' position that the lower cost of Progressive Rehabilitation should be accepted as the basis for the medically necessary counselling recommended by Dr. Anderson and Dr. Anton. In my opinion the averaging of the cost of the two quotations is as recommended by Mr. Corcoran is reasonable. I find that \$2,232 for counselling is medically necessary and reasonable.

I do not, however accept that an additional \$20,000 for job search assistance based upon five searches during Mr. Culver's working life is either necessary or reasonable. The totality of the evidence establishes that limited job opportunities are available to Mr. Culver because of his physical limitations and pre-existing learning difficulties are limited. Also, previous job search assistance of which he availed himself was of limited value. In addition, Mr. Culver has always been able to obtain work that he was capable of doing and I find that he remains capable of doing that.

Having said that, I accept Mr. Lawless' assessment that in the event that Mr. Culver leaves employment with Ace which he eventually expects him to do he would benefit from job placement assistance. That assistance would cost \$4,000 each time that it is required. While I agree with Mr. Lawless that it is likely that Mr. Culver will eventually leave employment with Ace I do not accept that Mr. Culver will require such job replacement assistance each time he seeks new employment. I am satisfied that Mr. Culver is intelligent and capable of learning enough from one future job assistance search to be able to look for other jobs without again incurring such an expense. I am accordingly satisfied that a one time payment of \$4,000 will reasonably compensate Mr. Culver for the cost of job search assistance rendered necessary by the defendants' negligence.

5) Supervised Exercise: \$900:

The evidence does not support that the cost of supervised exercise for the length of time suggested by counsel for Mr. Culver is necessary. Mr. Culver is engaged in a self-directed exercise program. Dr. Anton recommended "fine tuning" of that program and suggested more cardiovascular exercise. He suggested an additional 6 to 12 sessions. Dr. Anderson recommended that Mr. Culver be enrolled in a supervised exercise program under the direction of a kinesiologist. In his report Mr. Kyi opined that Mr. Culver is well aware of appropriate exercise technique. The cost of 12 sessions as reported by Mr. Corcoran is \$900 over two years. In all of the circumstances I find that an award of \$900 for supervised exercise is medically necessary and reasonable.

6) Multidisciplinary pain clinic: \$14,930:

As agreed.

7) Medications (Pristiq, Bupropion, Pregablin, Tramadol, Cyclobenzpiline, and dispensing fees): \$31,674:

I am satisfied that Mr. Culver's claims for the future cost of pharmaceutical medicine expenses are all medically necessary and reasonable and may be understated given that the claims are based on that medication only being necessary to age 65. I find that the cost associated with all of the claims should be allowed as presented with the exception of Pregabalin for which a range of from \$3,189 to \$6,378 was suggested by Mr. Corcoran. I find that the cost for should be assessed at \$4,000 to reflect the fact that with the support of Dr. Burlin Mr. Culver is tapering down his use of that drug. I accordingly award \$31,674 for prescription drugs and dispensing fees.

I do not accept the defendants' submission that the award for prescription drugs should be reduced by 30 to 40 percent for potential decreased use of those drugs or the possibility of recovery under a future health care plan.

8) Adaptive aids: \$3,052:

I disagree with the defendants' submissions that the adaptive aids such as a back support, orthopaedic pillow, low height (task) stool and ergonomic creeper which Mr. Culver claims as costs of future care relate only to Mr. Culver's enjoyment of life. In my view those aids are necessary to enable him to cope with the ongoing pain that he suffers due to the negligence of the defendants. I also disagree with the position taken by the defendants that Mr. Culver's ongoing care needs can be met with a one time payment for the purchase of those necessary aids. The evidence establishes to my satisfaction that replacement of those aids at the frequency for each identified by Mr. Corcoran is necessary and reasonable. I accordingly find that Mr. Culver's claims for adaptive aids should be allowed in the total amount of \$3,052 as presented.

9) CBD Oil - \$0:

The most controversial claim made by Mr. Culver for future medications relates to the use of CBD oil for pain. Dr. Burlin suggested Mr. Culver's use of medical marihuana and CBD oil for his pain and sleeplessness but also testified as to a lack of evidence of the future benefits of the oil to Mr. Culver. Mr. Culver testified that each vial of CBD oil costs about \$125 and last about a week.

In *Murphy v. Hofer*, 2018 BCSC 869 at para. 218 Sewell J. declined to make and award for CBD oil as a part of a cost of future care award because of lack of evidence that the beneficial effects are unavailable from other analgesics or sedative medication that would cost less.

In *Carillo v. Deschutter*, 2018 BCSC 2134, Dardi J. awarded \$12,000 for medical cannabis as a part of the plaintiff's cost of future care award. In that decision Dardi J. had the benefit of a significant amount of evidence about the potential benefits of medical cannabis and especially CBD oil as a pain management tool and as a potential replacement for other drugs. She also had the evidence of Mr. Carillo about the positive effects of the medical cannabis that he believed he was obtaining from its use.

Although I have Mr. Culver's evidence that he prefers the use of CBD oil to other analgesics I do not have the benefit of a medical opinion on the benefits of that use. This is a medical issue which is likely to receive much attention in the coming years and medical evidence may in future establish a sufficient evidentiary base capable of supporting an award of the type now sought by Mr. Culver.

However, based upon the evidence adduced by Mr. Culver I am unable to award any amount for his use of CBD oil.

5) Special Damages

[253] The parties have agreed that the defendants are obligated to pay Mr. Culver \$17,187.78 in reimbursement of special damages paid by him as a consequence of the defendants' negligence.

[254] The one item upon which the parties have not agreed is \$903.32 paid by Mr. Culver as reimbursement for his purchase of medical marihuana and CBD oil.

[255] The legal principles governing whether reasonable expenses incurred by a plaintiff as a consequence of the negligence of a defendant are not complex.

[256] In *Chamberlain v. Giles*, 2008 BCSC 171 at para. 69 Sinclair-Prowse J. wrote:

As far as the legal principles governing this claim are concerned, a plaintiff is entitled to recover all reasonable expenses incurred as a result of his or her injuries. The reasonableness of a particular expense is to be measured in the context of the surrounding circumstances at the time that the expense was incurred: K.D. Coopers - Stephenson, *Personal Injury Damages In Canada*, 2nd ed. (Scarborough: Carswell, 1996).

[257] More recently in *Dhillon v. Singer*, 2017 BCSC 414 at para. 200, Fleming J. wrote:

Claims for special damages are subject to a standard of reasonableness in the context of the injuries suffered: *Redl v. Sellin*, 2013 BCSC 581 at para. 55. Medical justification for a treatment related expense aimed at promoting the plaintiff's physical or mental well-being is a factor in determining whether it is reasonable. Subjective factors can also be considered, including whether the plaintiff believes the treatments were medically necessary. With respect to cost, the courts have been prepared to allow claims for expenses at the level of optimum care, although plaintiffs are not entitled to recovery for the cost of any procedure they believe will make them feel better.

[258] Mr. Culver incurred the expense of \$903.32 for medical marihuana and CBD oil to help with the pain and difficulty with sleeping that he was suffering from because of his injuries. Dr. Burlin suggested that he do so and Mr. Culver reports that he obtained some relief from his use of those products.

[259] Although I denied Mr. Culver's claim for purchase of CBD oil as a component of his cost of future care I did so because of Dr. Burlin's inability to testify as to the future benefits of that product for Mr. Culver's future care.

[260] I am satisfied that the lack of proof of medical necessity for future care does not preclude reimbursement of Mr. Culver for the costs incurred by him for medical marihuana and CBD oil as special damages.

[261] I find that the expenditure of the funds for marihuana and CBD oil at the time those cost were incurred in circumstances in which Dr. Burlin was prepared to suggest the use of those products to assist Mr. Culver's recovery establishes medical justification. Mr. Culver's testimony as to the benefits he received from the expense establishes the reasonableness of the expense incurred. I am satisfied that the products would not have been purchased but for the injuries suffered by Mr. Culver as a result of the defendants' negligence.

[262] In result I find that Mr. Culver is entitled to reimbursement by the defendants for the special damages he has incurred in the total amount of \$18,091.

## SUMMARY

[263] As a consequence of the injuries he has suffered because of the defendants' negligence Mr. Culver is entitled to the following awards of damages:

Non-Pecuniary damages for pain and suffering and loss of enjoyment of life:

\$ 175,000

Past loss of income earning capacity:

\$ 172,075

Future loss of income earning capacity:

\$ 765,000

Costs of Future Care:

\$ 80,860

Special damages:

\$ 18,091

Total Award:

\$1,211,026

## COSTS

[264] Unless there are matters of which I am unaware Mr. Culver is entitled to his costs of this proceeding on Scale B.

"Davies J."

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