
CANADA / JUDGMENT

Devito v. Watson

2020 BCSC 1106

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1106 Devito v. Watson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Devito v. Watson,

2020 BCSC 1106

Date: 20200728

Docket: Nanaimo

Registry: M80212

Between:

Jesse Devito

Plaintiff

And:

Joyce Watson

Defendant

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Plaintiff:

A. de Turberville

S. King

Counsel for the Defendant:

K. Roemer

L. Miller

Place and Date of Trial:

Nanaimo, B.C.

June 15-19, 2020

Place and Date of Judgment:

Nanaimo, B.C.

July 28, 2020

INTRODUCTION

- [1] This is a claim by the plaintiff, Mr. Devito, for damages as a result of a motor vehicle collision on February 1, 2015. Liability for the collision has been admitted by the defendant.
- [2] Mr. Devito says he suffered "soft tissue" or musculoskeletal injuries in the collision and seeks non-pecuniary damages, a very modest loss of past earning capacity, loss of future earning capacity, loss of housekeeping or "handyman" capacity, and special damages. An initial claim for cost of future care has been abandoned, quite properly given Mr. Devito's present circumstances.
- [3] In response, while acknowledging a brief period of impairment because of the collision, the defendant says Mr. Devito's ongoing discomfort or impairment is because of a 2014 back injury, coupled with the usual wear and tear a heavy duty mechanic, such as Mr. Devito, will inevitably suffer from, and not because of injuries he sustained in the February 1, 2015 collision. As a result, the defendant says any damages should be restricted to a modest non-pecuniary award, a nominal award for past wage loss, and special damages restricted to a year or so of physiotherapy and some mileage.
- [4] At the present time, Mr. Devito is employed with BC Hydro as a heavy duty mechanic, starting there in early July 2015 after working as a heavy duty mechanic with a private operation. Notwithstanding the lower back difficulties Mr. Devito says are a result of the collision, he was able to obtain his commercial transport and heavy duty mechanic red seals in September 2017. In addition, the defendant emphasizes Mr. Devito has secure employment with an "accommodating" employer, and now earns almost twice as much as he did in February 2015, prompting the defendant to submit there is no real and substantial possibility of any loss of future earning capacity.

THE ACCIDENT

- [5] Mr. Devito was a front seat passenger in a Honda Civic driven by his now wife, Natasha Devito. They were stopped at a traffic light on Sooke Road in the Colwood area when their vehicle was rear-ended by an F-150 truck driven by Ms. Watson.
- [6] The collision was relatively forceful and the damage was not insignificant. Mr. Devito testified that their Honda Civic was pushed forward but stopped short of the vehicle in front of them. No airbags were deployed. He and his wife got out of the vehicle and exchanged information with the defendant driver. There were no ambulance attendants required. Mr. Devito testified he did not experience any immediate symptoms of injuries, so he and his wife drove into Victoria and had dinner at a local restaurant. Mr. Devito testified that during dinner he started to experience a headache and some tightness in his neck and upper back. After dinner they drove back to Nanaimo, about an hour and a half drive, and went to the emergency room at Nanaimo Regional General Hospital. The hospital records confirm that at that time Mr. Devito complained of a headache as well as discomfort in his neck and between his shoulder blades. The records indicate Mr. Devito had full range of motion in his neck and lower back.
- [7] At the same time, the defendant points out that the emergency room record states, "No lower back pain." Moreover, Mr. Devito's prior lower back injury from April 2014 was documented in the emergency room record notes. The notes however, indicate he had fully recovered from this injury. Mr. Devito also testified that he had fully recovered from this minor injury prior to the February 1, 2015 accident.
- [8] At the conclusion of the 2015 hospital examination, the emergency room physician diagnosed a "whiplash injury" and suggested "gentle activity as could be tolerated." Some anti-inflammatory medication was prescribed.

SUBSEQUENT MEDICAL HISTORY

- [9] The next day, February 2, 2015, Mr. Devito saw Dr. Dunstan-Adams who agreed with the diagnosis of whiplash. This was the same physician he saw in 2014 for his workplace injury. On the earlier occasion, Dr. Dunstan-Adams prescribed a muscle relaxant and anti-inflammatory medication. She ordered an X-ray and told Mr. Devito to stay off work for a while. The X-ray at that time showed "no acute abnormalities." In February 2015, Dr. Dunstan-Adams did not prescribe any medication. She did not order an X-ray or advise Mr. Devito to stay off work for a while, as she did a year earlier. The defendant says these simple facts suggest the 2014 injury was more significant than the injury Mr. Devito sustained in the 2015 collision. Moreover, Dr. Dunstan-Adams' February 2, 2015 notes indicate "full range of motion" in the cervical spine and lumbar spine.
- [10] On February 13, 2015, Mr. Devito returned to the same medical clinic and saw Dr. Cancade, his wife's family physician at that time. Dr. Cancade's notes indicate that Mr. Devito "was not fully healed when this accident occurred" as he was recovering from the back injury he

incurred at work in 2014. Dr. Cancade documented that Mr. Devito had pain with "forward flexion greater than 60°" and that "resisted extension" also worsened his pain. The neurological examination by Dr. Cancade was "completely normal." Dr. Cancade noted however, "he is tender over the midline from both mid lumbar," but "muscles facet stretching produces no increased pain." Much like the emergency room physician, Dr. Cancade diagnosed Mr. Devito with "soft tissue lumbar strain" and mild neck strain. He suggested Mr. Devito could benefit from physiotherapy treatments.

- [11] About a week later, on February 18, 2015, Mr. Devito began physiotherapy. He was also provided with a home exercise program in an attempt to relieve his symptoms. He had 24 physiotherapy treatments. This physiotherapy ended on May 1, 2015 when Mr. Devito said that he was "feeling good." In April 2015, prior to stopping physiotherapy, Mr. Devito said he felt overall "about 70 to 80% of normal," including resolution of his neck pain. He re-attended physiotherapy three times between November 16 and November 23, 2015. Since then, Mr. Devito has only attended one physiotherapy appointment, November 30, 2018. Nevertheless, Mr. Devito recently advised Dr. Zabieliuskas, the expert retained by the defendant, that he feels he is still only about 70% to 80% of normal, but adds that physiotherapy has not been helpful.
- [12] Mr. Devito testified that from 2015 to the present time he has only used Tylenol when needed, and on rare occasions used Naprosyn, an anti-inflammatory medication.

MR. DEVITO'S EVIDENCE

- [13] Mr. Devito is 30 years of age, married to Natasha Devito. They are expecting their first child in August.
- [14] Mr. Devito grew up in Powell River. He graduated with his high school diploma as well as a welding accreditation. As a result, at the end of Grade 12, he had his Grade C Welding Certification.
- [15] Mr. Devito testified that he has been working steadily since first being employed at the age of 14 as a labourer in his father's concrete business. He had several physically demanding jobs as a teenager until he went to Okanagan College in 2009-2010 where he enrolled in a pre-apprenticeship heavy duty mechanic course.
- [16] Mr. Devito relocated to Vancouver Island and in 2011 commenced working as a heavy duty mechanic apprentice. He completed his apprenticeship between 2012 and 2015, which included four years of classes at Vancouver Island University in Nanaimo.
- [17] Whilst employed at two private trucking facilities, Mr. Devito did everything related to large truck repair and maintenance. He testified this was heavy physical work but he enjoyed it and had no problem completing all of his assigned tasks.

- [18] As has been emphasized by the defendant, Mr. Devito acknowledged the earlier incident relating to his lower back. In this regard, Mr. Devito testified that in April 2014 he was changing two tires when he "felt a slight tweak in [his] back." Nevertheless, he finished his full shift that day with "no problems". He went home, then went to an outdoor activity organized by his wife. He testified that when he bent over to pick up a ball he immediately felt pain in his lower back. He testified that this incident occurred on a weekend, but that on Monday he returned to work and had no difficulty completing all of his duties. He initially testified he did not miss any work whatsoever as a result of this incident but acknowledged in cross-examination, given the documentation he was confronted with, he may have taken some time off work. I pause here to note that I do not find this inconsistency undermines Mr. Devito's overall credibility or reliability with relation to his assertion that he had fully recovered from the 2014 incident at the time of the collision.
- [19] The defendant also refers to Mr. Devito's examination for discovery where he stated he complained of lower back pain at the emergency room, a statement inconsistent with what he said to the emergency room doctor and his testimony at trial, and says this is another example of Mr. Devito's unreliable evidence. As far as this is concerned, it is sufficient for me to simply quote McEachern C.J. in *Diack v. Bardsley* (1983), 46 B.C.L.R. 240 (S.C.) at 247, *aff'd* (1985), B.C.W.L.D. 309 (C.A.):
- I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence.
- [20] Mr. Devito testified that since the collision, his lower back pain has affected his ability to do some of the heavier tasks in his job he was once able to successfully complete on his own, acknowledging at the same time that there are some jobs that, even when 100 percent healthy, require two mechanics.
- [21] Mr. Devito testified his back pain has also curtailed his once active social and recreational lifestyle. He now walks, rather than runs, a lengthy, strenuous "Tough Mudder" race at Whistler. His once strenuous and lengthy workouts in the gym have been reduced. On this point however, it is clear that Mr. Devito is hardly incapacitated, as while he was once lifting 80-85 pound dumbbells, his "best results" now "max out" at 60 pounds. He also testified he sometimes has to end his gym sessions relatively early due to discomfort in his back.
- [22] Mr. Devito conceded that due to the reduction in his exercise programme and physical activities since the collision, his weight has gone from 165-170 pounds pre-collision to something in the area of 205 pounds. Mr. Devito testified he is working on his diet and trying to be as physically active as his back will allow in order to get back to something near his pre-collision weight. He accepts losing weight will significantly assist him physically and emotionally.

SUPPORTING WITNESSES

- [23] Mr. Matthew Bieber is a childhood friend who now resides in Maple Ridge. He testified Mr. Devito was a physically active young person. The two of them played soccer, went hiking in the forests around Powell River and did a lot of outdoor activities. He added that Mr. Devito was hardworking and held landscaping and gardening jobs and the like growing up. Mr. Bieber testified that at no time before the accident did he see any physical limitations on the part of Mr. Devito. Mr. Bieber stated he and Mr. Devito presently get together every two to four months. Mr. Bieber testified that a couple of months after the February 1, 2015 accident he saw Mr. Devito "nursing his back a bit" and that from time to time he appeared to be in some discomfort or pain. Mr. Bieber said that he has seen Mr. Devito favour his back and complain about discomfort. Mr. Bieber further testified that he and Mr. Devito participate in far fewer outdoor activities, stating this activity "kind of fell off" after the collision.
- [24] Mr. Graham Hopkins is Mr. Devito's neighbour. His only evidence was in reference to an occasion, about two years ago, where he assisted Mr. Devito with shovelling drain rock into a French drain. While Mr. Hopkins testified Mr. Devito was able to shovel "partial loads" of drain rock, it "looked like he was having some difficulty."
- [25] Mr. Nicholas Boeckner is the foreman of vehicle services at BC Hydro in Nanaimo and Mr. Devito's immediate supervisor. He spoke highly of Mr. Devito's capabilities and work ethic. He testified Mr. Devito has taken on foreman duties when Mr. Boeckner is away. He added he would have no hesitation in recommending Mr. Devito as foreman if Mr. Boeckner was to move up the corporate ladder at BC Hydro. At the same time, Mr. Boeckner testified he has seen Mr. Devito struggle with some heavier tasks. As a result, Mr. Boeckner ensures he assigns another mechanic to assist Mr. Devito when necessary. Mr. Boeckner agreed that BC Hydro is a very accommodating employer, tolerant of employees who might need assistance from time to time, and prepared to accept a longer time to complete a job than would be the case at a private facility. Conversely, Mr. Boeckner was of the view that Mr. Devito "would be a liability" in a private shop due to his slower pace and the need for another mechanic to assist him in performing some heavier tasks. As a result, Mr. Boeckner does not expect Mr. Devito to leave BC Hydro, a point understandably emphasized by the defendant when it comes to Mr. Devito's claim for loss of future earning capacity.
- [26] Mr. Jessie Dunbar is an apprentice mechanic who works with Mr. Devito. He too speaks highly of Mr. Devito's skills and leadership qualities, saying he is "one of the best workers I've ever been around." Mr. Dunbar confirmed that he has had to assist Mr. Devito from time to time on some heavier jobs, such as taking large tires off and then putting them back on when doing a brake job. He testified he would assist Mr. Devito about once a month "on average." Mr. Dunbar also confirmed that at BC Hydro there is "no sense of urgency," and mechanics have "as much time as they need" to safely complete a job, stating "Hydro is a completely different world than the real world" of private repair facilities. At the same time, he acknowledged it is a tough job, and when Mr. Dunbar works on his own, the next day he sometimes can "barely get out of bed."

- [27] Natasha Devito described the collision much the same as her husband. She also confirmed the 2014 incident when at a day camp she was involved in Mr. Devito bent over to pick up a ball and "felt lower back pain." She however testified he had fully recovered from this incident prior to the collision, pointing out that three months later, in August 2014, they completed a 10-hour hike in the difficult terrain of Strathcona Park with "no problem." She stated her husband is less active now. They bike less and they hike less. She says however that some days he is relatively fine. She now "assists" him with yard work that he performed on his own prior to the accident. At the same time, now that she is pregnant, Ms. Devito says Mr. Devito is doing more of the regular household tasks than he has in the past.
- [28] The defendant had limited cross-examination of these witnesses and neither their credibility nor reliability was seriously challenged.

THE PLAINTIFF'S MEDICAL EVIDENCE

- [29] Mr. Devito called one medical witness, Dr. Brooks, a general practitioner with significant expertise in occupational medicine. Even though Dr. Brooks does not have a "specialist" designation from the Royal College of Physicians and Surgeons of Canada, on the basis of the totality of his experience, I declared him an expert in occupational medicine and the diagnosis, treatment and prognosis of musculoskeletal injuries and chronic pain. Nevertheless, the defendant says I should give little weight to Dr. Brooks' testimony and his reports, on the basis that Dr. Brooks was an advocate for Mr. Devito and not objective. While there is no doubt Dr. Brooks' testimony and reports could have been more succinct, I do not find he was a biased or unobjective witness in favour of Mr. Devito. As a result, I am not prepared to reject Dr. Brooks' opinion.
- [30] Dr. Brooks first saw Mr. Devito on January 21, 2017, at the request of plaintiff's counsel. He prepared a report dated January 27, 2017.
- [31] In that report, Dr. Brooks outlined Mr. Devito's subjective reporting pertaining to his personal circumstances before and after the motor vehicle collision and his consistent complaint of pain and discomfort in his lower right back, from the day after the motor vehicle accident to the time of his assessment. Dr. Brooks documented Mr. Devito's assertion that before the motor vehicle collision on February 1, 2015, he had no significant prior medical issues, be they physical or emotional. Mr. Devito did advise Dr. Brooks that he had experienced back pain stemming from the 2014 episode at work, but that any discomfort was not severe and did not affect his ability to carry on working, although, as I have noted, Mr. Devito did concede in cross-examination that it appeared he did miss a few days of work at that particular point in time. Dr. Brooks' report indicates that Mr. Devito told him any pain or discomfort from the 2014 workplace injury had resolved itself prior to the 2015 collision.
- [32] Dr. Brooks noted that Mr. Devito consistently expressed he had pain only in his lower right back, as opposed to many people who claim several areas of pain and discomfort after a motor vehicle accident.

- [33] Dr. Brooks stated that, as Mr. Devito told him he was symptom-free for many months before the 2015 accident, it was his opinion that the pain and discomfort described by Mr. Devito has been caused by the motor vehicle collision and not because of the previous back injury. Dr. Brooks concluded that "Mr. Devito has mild to moderate impairment with symptoms involving the low back."
- [34] Based primarily on the subjective reporting of Mr. Devito, Dr. Brooks then stated in his January 2017 report that, "these musculoskeletal symptoms do affect him in both his personal and work life with the current limitations to work in jobs with physical demands. He is moderately affected in tasks requiring forward bending or sustained standing postures."
- [35] Dr. Brooks' prognosis was that Mr. Devito's "low back may improve somewhat with time," but there is no guarantee. Dr. Brooks added that surgery was not necessary or appropriate given Mr. Devito suffers only mild to moderate discomfort. Dr. Brooks testified the "best thing" for Mr. Devito is to "stay active."
- [36] At the same time, Dr. Brooks surmised that Mr. Devito may have suffered a "lumbar disc injury without substantial disc protrusion" in the collision, given Mr. Devito's "reported continued pain with forward flexion." This is, however, merely a possibility, according to Dr. Brooks.
- [37] In September 2018, Dr. Brooks also referred to Mr. Devito's June 18, 2018 MRI which indicated a disc bulge or protrusion at L4-5, which he said could generate low back pain. Dr. Brooks nevertheless still considered Mr. Devito "to be a non-surgical candidate."
- [38] In conclusion, Dr. Brooks opined that Mr. Devito has chronic lower back pain and that this pain "does not appear to be substantially improving over time and continues to limit him in his occupational, personal and recreational activities."
- [39] Dr. Brooks provided a second report dated January 15, 2020, which basically confirmed his initial opinion as to the cause of Mr. Devito's persistent lower right back pain. He noted that the limitations in Mr. Devito's lower back movement had "worsened" since he first saw Mr. Devito in 2017, but that "his overall condition has shown little change." The prognosis in 2020 from Dr. Brooks was that "it is very likely that Mr. Devito will continue to have chronic low back pain indefinitely. At the present time, he is almost 5 years post-collision and appears to have followed the path of limited recovery despite various treatments."

THE DEFENDANT'S MEDICAL EVIDENCE

- [40] The defendant responded to Dr. Brooks' suggestion that Mr. Devito's ongoing back issue might be due to a disc protrusion that was caused by the collision by tendering two reports from Dr. Connell, an expert in the field of radiology. Dr. Connell's evidence was that degenerative disc protrusions are extremely common, irrespective of age, and that if a disc protrusion is causally connected to a traumatic incident, significant and immediate symptoms would be expected, unlike Mr. Devito's situation.
- [41] Dr. Brooks' lengthy response to Dr. Connell's March 2020 report basically said that in his view, the observations of Dr. Connell did not rule out a disc protrusion being a possible cause of Mr. Devito's present symptomology.
- [42] In any event, I do not find this equivocal evidence is sufficient to establish that Mr. Devito's disc protrusion was related to the accident as suggested by Dr. Brooks. This however does not end the matter, as Dr. Brooks is of the view that his persistent low back pain since the collision supports his opinion that Mr. Devito's ongoing discomfort "is a consequence of the 2015 motor vehicle collision."
- [43] In response to Dr. Brooks' evidence and ultimate opinion as to Mr. Devito's future prognosis and any impairment he may have as a result of the motor vehicle collision, the defendant retained Dr. Zabieliauskas, a medical practitioner licensed to practice in Ontario and British Columbia. Dr. Zabieliauskas also holds a specialist qualification from the Royal College of Physicians and Surgeons of Canada in the field of physical medicine and rehabilitation. On the latter point, whilst there is no doubt Dr. Brooks has a lengthy history of practical experience with respect to occupational medicine, the defendant points out that Dr. Brooks has no Royal College certification as a specialist. Be that as it may, I am not persuaded that this in and of itself is determinative of the ultimate weight I should give to the opinions expressed by either of these two experienced medical professionals.
- [44] Dr. Zabieliauskas provided a report dated March 12, 2020 and testified via video from Toronto. Dr. Zabieliauskas emphasized that on the day of the accident, the initial diagnosis was a "whiplash" injury. Dr. Zabieliauskas also pointed out that the emergency room physician noted Mr. Devito had a full range of motion of the cervical spine "although it was indicated that he was a little bit uncomfortable." As a result, Dr. Zabieliauskas stated in his report, "a full range of motion of the cervical spine on the first day is a good prognostic indicator for an uncomplicated and rapid recovery from a whiplash injury."
- [45] Dr. Zabieliauskas also noted that on February 13, 2015, Mr. Devito saw Dr. Cancade, who documented Mr. Devito had pain that was induced by forward flexion greater than 60 degrees and that resisted extension also worsened his pain. Dr. Zabieliauskas referred to Dr. Cancade's diagnosis of "soft tissue lumbar strain and mild neck strain" and the referral to physiotherapy. Dr. Zabieliauskas referenced Mr. Devito's regular attendance at physiotherapy until May 1, 2015 when he stopped physiotherapy because he was "feeling good."

- [46] Dr. Zabieliauskas also referred to the fact that some time in April 2015, while still receiving physiotherapy, Mr. Devito was again assessed by Dr. Cancade who noted Mr. Devito reported he was "overall about 70 to 80% of normal."
- [47] In contrast to Dr. Brooks' opinion that because Mr. Devito has chronic "mild to moderate impairment with symptoms involving his lower back," his "employability" is reduced, Dr. Zabieliauskas was of the view that Mr. Devito does not have any physical impairment or physical disability as a result of injuries received in what he viewed was a relatively modest motor vehicle collision.
- [48] Nevertheless, Dr. Zabieliauskas did note that Mr. Devito advised him in late February of this year that he "continues to experience pain across the lower lumbar area that varies in intensity from a 3/10 on a good day to a 7-8/10 when it becomes quite sharp and radiates into both buttocks. His work as a mechanic accentuates the lower back pain. He recorded no other pain."
- [49] Notwithstanding that subjective report by Mr. Devito, given Dr. Zabieliauskas' evidence, the defendant submits that Mr. Devito's ongoing lower back pain is not causally connected to the motor vehicle collision, but rather the normal everyday wear and tear a heavy duty mechanic with a physically demanding job might well suffer from. In addition, Dr. Zabieliauskas noted that Mr. Devito, who I find to be a credible witness who did not embellish his symptoms of discomfort or underestimate his present capabilities, advised Dr. Zabieliauskas that when the weather permits, he has ridden his bike to work, about a one hour ride each way. On this point, Mr. Devito testified he did ride his bike "on occasion" when the weather permits, not on a "regular basis" as stated by Dr. Zabieliauskas.
- [50] In the end, Dr. Zabieliauskas reported that because Mr. Devito did not have an immediate complaint of back pain the day of the collision, as opposed to the next day, along with the fact Mr. Devito had full range of motion in his neck and lower back the night of the accident, he was of the view that Mr. Devito should have a "quick and rapid resolution of musculoskeletal strain injuries." As a result, Dr. Zabieliauskas opined that any back pain caused by the collision resolved within several months, as did the initial complaint of a sore neck.
- [51] Dr. Zabieliauskas also emphasized that despite Mr. Devito experiencing back pain, he still works full-time as a heavy duty mechanic, suggesting any impairment must be minimal. Dr. Zabieliauskas was also adamant that if Mr. Devito lost the extra weight he has put on since the collision, this in and of itself would go a long way in reducing his ongoing back pain, as this would "unload the lumbar facet joints and resolve most of his lower back pain, which is unrelated to the motor vehicle accident." I accept this is a logical and sensible suggestion, but I am not persuaded the extra weight Mr. Devito has put on due to his reduced physical exercise regime after the accident is the sole cause of Mr. Devito's ongoing chronic back discomfort.

- [52] In conclusion, Dr. Zabieliauskas stated that the injuries Mr. Devito suffered in the February 1, 2015 collision are at most "a mild cervical strain," and a "mild lumbosacral strain." As Mr. Devito had full range of motion in the lumbar spine area immediately after the accident, Dr. Zabieliauskas shared the view of Dr. Cancade that there should be no long lasting impairment to Mr. Devito's work or recreational activities and that Mr. Devito's prognosis "continues to be excellent." Dr. Zabieliauskas then stated, "[a]s he has no residual objective organic pathology attributable to the remote motor vehicle accident at this time [f]rom a physical medicine and musculoskeletal point of view, he is fully capable of all activities of daily living without any physical restrictions or functional limitations." Indeed, Dr. Zabieliauskas opined that "Mr. Devito made a full physical recovery a long time ago from uncomplicated soft tissue strain injuries."
- [53] In this analysis, it is important to note that Dr. Zabieliauskas candidly acknowledged that before he saw Mr. Devito, considering the medical documentation that was available to him, he felt "it was a clear cut file" and "[he] knew where [he] was going" by reading the file and relying to a great extent on Dr. Cancade's evaluation and assessment. However, Dr. Zabieliauskas' conclusions must be tempered by the fact that Dr. Cancade acknowledged his initial assessment could very well be inaccurate and misleading, given Dr. Cancade's concession that he might have misinterpreted or misstated Mr. Devito's statement that he had recovered from the 2014 workplace incident at the time of the collision.
- [54] It is clear that the two medical experts have different opinions as to the cause and degree of Mr. Devito's ongoing pain and discomfort. In this regard, I accept Mr. Devito's evidence that his lower back does cause him problems from time to time and that he has relatively persistent mild to moderate discomfort. Moreover, while I am cognizant of the daily physical demands of Mr. Devito's employment, I am unable to accept Dr. Zabieliauskas' hypothesis that Mr. Devito's ongoing chronic discomfort in his lower back is caused by a combination of the earlier 2014 incident, daily work related wear and tear, and his extra weight, and not because of the injury he sustained in the collision. On the other hand, the evidence of both Mr. and Ms. Devito, as well as the other lay witnesses, is consistent with Dr. Brooks' opinion that the motor vehicle collision is the cause of Mr. Devito's ongoing back issues, which have not yet completely resolved. As a result, as far as causation is concerned, I am satisfied that "but for" the February 2015 accident, Mr. Devito would not have his ongoing lower back discomfort and modest impairment. As a result, Mr. Devito is entitled to reasonable compensation because of the February 1, 2015 collision.

DAMAGES

Non-Pecuniary Damages

- [55] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life and amenities (*Trites v. Penner*, 2010 BCSC 882 [*Trites*] at para. 188) and provide "reasonable solace for [the plaintiff's] misfortune" (*Lindal v. Lindal*, [1981] 2 S.C.R. 629 [*Lindal*] at 636).
- [56] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A. No. 100. The factors to be considered include the plaintiff's age, the nature of the injuries, the severity and duration of pain, disability, emotional suffering, loss of enjoyment of life, the impairment of family, marital and social relationships, the impairment of physical and mental abilities, and loss of lifestyle. A stoic nature is also to be considered and a plaintiff's stoicism should not penalize him. I find that Mr. Devito is relatively stoic, and his stoicism ought not to result in a lesser award.
- [57] When it comes to awards for non-pecuniary damages in motor vehicle cases, there is no "tariff." An award must reflect the specific circumstances of each individual case: *Lindal* at 637. Both counsel have presented a few authorities which they argue support their respective positions on what would be a fair assessment for non-pecuniary damages. While an assessment is an individual process, awards made in somewhat similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. They do however serve only as a guide to what is appropriate compensation. In this analysis I must consider the pain, suffering and loss of enjoyment experienced by this particular plaintiff. At the same time, it is important to remember that the award must be fair and reasonable to both parties (*Trites* at para. 188).
- [58] Mr. Devito's counsel submits that an award of \$85,000 to \$90,000 would be appropriate for non-pecuniary damages, citing the following authorities in support of his submission:
- Carlisle v. Vanthof*, 2015 BCSC 2427: an award of \$90,000 for chronic pain in the 34 year old plaintiff's neck, back, shoulder and hips which was aggravated by "activity."
- Vankholl v. Williamson*, 2020 BCSC 271: an award of \$85,000 for a 25 year old plaintiff who had chronic lower back pain as a result of the collision.
- Pett v. Pett*, 2008 BCSC 602, rev'd on other grounds 2009 BCCA 232: an award of \$85,000 for a 22 year old plaintiff who experienced chronic lower back pain which was present 24 hours a day and impacted his social life and sporting activities. The plaintiff also experienced modest ongoing neck pain. An injury to his shoulder had resolved by the time of trial.
- Campbell v. Peter Kiewit Infrastructure Co.*, 2020 BCSC 805: an award of \$90,000 for a plaintiff born in 1988 (either 31 or 32 years old at the time of the judgment release) whose headaches and knee injury quickly resolved, but who had ongoing neck and back pain.

Andrusko v. Alexander, 2013 BCSC 985: an award of \$80,000 for a 26 year old plaintiff's initial sore neck and shoulder, which progressed to lower back pain that was "ongoing."

- [59] In response, the defendant submits that Mr. Devito's 2014 workplace lower back injury had not resolved at the time of the accident, "even if the injury was asymptomatic," and that this earlier injury was aggravated by the accident, causing a "flare up" of pain and impairment. The defendant also submits that the pain in Mr. Devito's back that is attributable to the collision resolved in a few months, as set out in Dr. Cancade's records and in the opinion of Dr. Zabieliauskas. The defendant says any ongoing discomfort or impairment is attributable to the 2014 workplace incident and the demands of Mr. Devito's job.
- [60] As a result, the defendant says an appropriate award for non-pecuniary damages is \$30,000, citing Chagnon v. Clover Trading Co. Ltd., 2019 BCSC 2397 and Chapman v. Zilm, 2020 BCSC 695.
- [61] In my view, the defendant's two authorities involve plaintiffs with much less significant chronic discomfort and limitations than Mr. Devito, such that these awards are inapplicable in the present case. At the same time, I find the plaintiff's authorities identify a range of non-pecuniary damages where the plaintiffs' injuries and ongoing complaints and impairments are more significant than Mr. Devito's "mild to moderate" chronic lower back pain.
- [62] In this analysis, the defendant does not suggest that Mr. Devito, or indeed any of the lay witnesses, are not credible witnesses. The defendant acknowledges "the plaintiff testified in a straight forward manner," and "does not suggest that [Mr. Devito] lacked credibility, but rather that he is a poor to average historian and that his evidence on certain points is unreliable."
- [63] It would appear the primary basis for the defendant's assertion comes from Dr. Cancade's notes, which indicate that Mr. Devito told Dr. Cancade he "was recovering" and "not fully healed" from the 2014 workplace injury at the time of the motor vehicle accident. Mr. Devito disputes the accuracy of the notes, testifying he told Dr. Cancade he was fully recovered from the 2014 incident. Mr. Devito testified he did not tell Dr. Cancade he was "not fully healed."
- [64] In addition, in cross-examination, Dr. Cancade conceded, for obvious reasons given the notes were made in 2015, that he had no independent recollection of his interaction with Mr. Devito. But more importantly, Dr. Cancade conceded that at the time the notes were made he was having difficulties with a new dictation device which would produce errors in transcription. Finally, Dr. Cancade acknowledged he may have simply misunderstood or inadvertently erred in putting the word "not" before the words "fully healed."
- [65] While it is legitimate for the defendant to refer to Dr. Cancade's notes to challenge Mr. Devito's reliability given the apparent inconsistency in what Dr. Cancade recorded and Mr. Devito's testimony, given the concessions made by Dr. Cancade as to the reliability of his notes, I place no weight on the alleged inconsistency.

- [66] In addition, Mr. Devito's testimony is consistent with the information he provided the emergency room physician the night of the collision, that is, that he had recovered from the 2014 workplace incident.
- [67] Given these concessions by Dr. Cancade and the evidence of Mr. Devito, I accept that the lower back pain that bothered Mr. Devito for a brief period in April 2014, had fully resolved shortly thereafter and did not contribute to his pain and discomfort post-accident. Considering the totality of the evidence, I find Mr. Devito does suffer from mild to moderate chronic lower back pain as a result of the 2015 accident. This lower back pain has affected his ability to perform some heavier tasks at his work place, and has affected his personal life and recreational activities.
- [68] At this point, it is appropriate to consider whether Mr. Devito's claim for loss of housekeeping or "handyman" capacity should form part of the assessment of non-pecuniary damages or be a separate discrete pecuniary head of damages.
- [69] Mr. Devito submits that the totality of the evidence establishes that he has suffered a loss of housekeeping or "handyman" capacity, both in the period up to trial and in the future, and says an award of \$15,000 under this head of damages is appropriate, citing *Kim v. Lin*, 2018 BCCA 77 [Kim] at para. 33, in support of his position:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [70] Justice Adair said in *Amaral v. Glasser*, 2020 BCSC 639 [Amaral] at para. 266:
- [266] Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See, for example, *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78. Where homemaking can be done, although with pain, it may be more appropriate to reflect that in the award for non-pecuniary damages, rather than make a separate award for loss of housekeeping capacity.

- [71] In this particular case, Mr. Devito frankly testified that even though he needed assistance from his wife and neighbours when he was digging the "French drain" in early 2019, he still was able to shovel drain rock, although he did need to take breaks and stretch his back because of discomfort. Similarly, Mr. Devito stated that in June of this year he was able to get on the roof and apply moss detergent, even though he had to stop from time to time and stretch his back.
- [72] Similarly, whilst he testified that he has discomfort and "difficulty" when he is doing yard work such as digging, "weed whacking" and raking, he acknowledged in cross-examination that there "is no yard work which I cannot do any more." Moreover, as noted, Ms. Devito testified that as she is now pregnant, Mr. Devito has taken on more of the housekeeping jobs, albeit with some discomfort.
- [73] It is now well-settled that any interference with or impairment of housekeeping duties or activities can be treated as an aspect of pain and suffering and loss of enjoyment of life under non-pecuniary damages or it can be assessed separately. To reiterate, in *Kim*, the Court of Appeal explained that a pecuniary award is appropriate where the plaintiff has suffered a true loss of capacity. Where the loss is "more in keeping with loss of amenities or increased pain and suffering," the award should be an aspect of non-pecuniary damages.
- [74] The defendant resists any award under this head of damages. While I do not agree with the defendant that there should be no acknowledgment as to the difficulty Mr. Devito has in performing some household or yard tasks due to his back pain, I find it more appropriate to factor his discomfort when doing these activities in the assessment of Mr. Devito's non-pecuniary award. See *Eaton v. Regan*, 2005 BCSC 3, and *Bains v. Park*, 2014 BCSC 1818 at para. 57.
- [75] As a result, there will be no separate pecuniary award for loss of housekeeping or "handyman" capacity.
- [76] Applying the Stapley factors to the totality of the evidence in the present case, I find an award of \$65,000 for non-pecuniary damages is fair and reasonable to both parties.

Loss of Earning Capacity

- [77] Mr. Devito seeks damages for loss of earning capacity as a result of the injuries he received in the accident.
- [78] Claims for both past and future loss of earning capacity are subsumed under an award of damages for loss of earning capacity, and are to be assessed in the same manner: *Falati v. Smith*, 2010 BCSC 465 at para. 39, *aff'd* 2011 BCCA 45. Past income losses are, net of income tax and any amounts actually earned during the relevant period: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98; *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 27.

- [79] The plaintiff must initially demonstrate both impairment to earning capacity, and a "real and substantial possibility" that the impairment has resulted, or will result, in pecuniary loss: see *Donovan v. Parker*, 2014 BCSC 668 [Donovan] at para. 44; *Perren v. Lalari*, 2010 BCCA 140 [Perren] at para. 32; *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at paras. 42, 48.
- [80] The purpose of an award for loss of earning capacity is to "provide the plaintiff with full compensation for all pecuniary losses ... to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred": *Grewal* at para. 42, quoting the remarks of the trial judge. See also *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, appeal ref'd [2009] S.C.C.A. No. 197 [Lines]; *Sandher v. Hogg*, 2010 BCSC 1152 at para. 87.
- [81] Such loss is to be quantified using either an "earnings approach" or a "capital asset" approach, depending on the facts of any given case: *Perren* at para. 32. These approaches were summarized by the Court in *Donovan* as follows:
- [51] The earnings approach is generally used in cases where the evidence allows for easy measurement, such as in cases where the plaintiff had already embarked on a career path or had steady employment and a known rate of pay prior to the accident.
- [52] The capital asset approach is usually applied in situations where the uncertainty of the plaintiff's future renders quantification difficult. It asks whether the plaintiff's earning capacity, as a capital asset, has been diminished because a) the plaintiff has been rendered less capable overall of earning income from all types of employment; b) has been rendered less marketable or attractive as an employee to future employers; c) has lost the ability to take advantage of job opportunities which might otherwise have been open to him; or d) is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8. Although quantification under this heading may be more difficult, this does not mean that the assessment is entirely at large: the court should consider these factors and make findings of fact as to the nature and extent of the loss of capacity and its relation to the plaintiff's ability to earn income: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [82] Any assessment must take into account both negative and positive contingencies to recognize the possibility that the assumptions on which the award is based may prove to be inaccurate: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.) [Milina v. Bartsch].
- [83] As the Court of Appeal said in *Grewal* at para. 49:
- [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.

- [84] Ultimately, the court must assess these damages based on what is fair and reasonable in all of the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

Past Loss of Earning Capacity

- [85] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [Rowe] at para. 30, the Court of Appeal explained that a claim for "past loss of income" is actually a claim for past loss of earning capacity, that is, "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury." The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, or by a replacement cost evaluation of tasks that the plaintiff is now unable to do: *Rowe* at para. 31. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would or will occur and that the event occurring is not based upon mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 [Smith] at para. 29; *Grewal* at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. Such events are to be given weight according to the relative likelihood that they would have occurred or will occur: *Athey* at para. 27; *Smith* at paras. 29, 31.
- [86] Mr. Devito testified he missed two half shifts and one full eight hour shift as a result of the collision. At the time he was earning \$24.78 an hour. His actual lost income is therefore 16 hours at \$24.78 an hour for a total of \$396.48 gross income. In 2015, Mr. Devito was earning approximately \$53,000 gross income. As a result, to account for income tax, it is appropriate to deduct something in the area of 20 percent from this gross income loss to arrive at a net income loss. Deducting \$80 leaves a net income loss of \$316.48.
- [87] Mr. Devito also testified that even though the BC Hydro records confirm he worked 120 hours of overtime in both 2017 and 2018, and 150 hours in 2019, he has "on occasion" turned down overtime, without any other evidence to support this claim. Mr. Devito testified that the overtime he accepted did not involve heavy lifting, but was restricted to a "visual service inspection." I take from this testimony the insinuation that, if not for the accident, Mr. Devito would have been able to accept overtime involving heavy lifting. Counsel submits about \$2,000 would be a fair assessment for lost overtime.
- [88] While the defendant accepts the actual hourly loss of \$396.48 in gross income, the defendant rejects the submission there should be an award for loss of overtime, pointing out that the BC Hydro work records "show no pattern of lost overtime work," and instead show increasing overtime work being done by Mr. Devito year after year following the accident. The defendant says, given the complete absence of any evidence as to when Mr. Devito might have turned down occasional overtime or how long any such shift might have been, there is insufficient evidence to make an award for lost "occasional" overtime.

- [89] While I doubt that BC Hydro would document occasions when Mr. Devito turned down invitations to work overtime, I agree with the defendant that the evidence is insufficient for me to conclude that Mr. Devito turned down overtime tasks involving heavy lifting because of the chronic back pain and discomfort he suffers as a result of the collision, rather than simply being worn out after an arduous eight hour shift. In other words, turning down the overtime might have been because of the demands of the job itself, not because of any pain and discomfort stemming from the collision.
- [90] Even though loss of earning capacity is an assessment and not a mathematical calculation, I agree with the defendant that the evidence is insufficient for me to conclude Mr. Devito has suffered a loss of past earning capacity greater than the actual accepted hourly wage loss. Past loss of income or earning capacity will be \$316.48.

Loss of Future Earning Capacity

- [91] In addition to the general principles that are applicable to both past and future loss of earning capacity, a claim for loss of future earning capacity involves two fundamental questions. First, has the plaintiff's future earning capacity been impaired by their injuries and, if so, what compensation should be awarded for the resulting financial harm that will accrue over time: *Hoy v. Williams*, 2014 BCSC 234 [Hoy] at para. 153. This is an assessment of loss based on the evidence, and is not the application of a purely mathematical calculation: *Hoy* at para. 153.
- [92] In discussing the question of loss of future earning capacity, Garson J. said in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144:
- [32] It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry.
- [93] The fact that the assessment of damages is a matter of judgment, not a strict mathematical calculation, was highlighted by McLachlin J., as she then was, in *Milina v. Bartsch* at 93:

A final question of principle concerns the use of actuarial evidence in assessing lost future earnings. Where the assumptions upon which the calculations are made are relatively certain, precise mathematical calculation of lost earnings may be possible. Where, however, they cannot be ascertained with some degree of precision, the court must take a more general approach and "assess such sum for loss of future income as may be determined from a reasonable appraisal of the evidence. "

- [94] As mentioned, the two possible approaches to assessment of loss of future earning capacity are the earnings approach and the capital asset approach: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Perren* at paras. 11-12. The earnings approach will generally be more useful when the loss is easily measurable, for instance where a mathematical calculation can be used to demonstrate the future loss, while the capital asset approach is more appropriate where the loss "is not measurable in a pecuniary way": *Perren* at paras. 12, 32. Mr. Devito submits the capital asset approach is appropriate, given his particular circumstances. I agree.
- [95] Mr. Devito has the benefit of working for an accommodating employer. The evidence is clear that at the present time Mr. Devito is a well-regarded, valuable employee in the eyes of his fellow workers. His future at BC Hydro is bright. He is foreman material. He is active in the union and has taken on the role of union shop steward. He is now making nearly twice the money he did working at a private repair facility at the time of the accident. In addition, in 2019 he worked 150 hours of overtime at over \$80 an hour. Given all this, the defendant says Mr. Devito's future is secure and he will likely remain at BC Hydro until he retires, and even if his back does bother him indefinitely, he will suffer no loss of future earning capacity.
- [96] Mr. Devito says he will continue to suffer from chronic pain and while he can complete all necessary tasks in the workplace if he gets help from his coworkers, there is no certainty BC Hydro will remain as accommodating as they have to this point in time. Similarly, counsel submits that if for any reason Mr. Devito wanted to take advantage of a work opportunity outside of BC Hydro, it is clear the private sector would not be as accommodating as BC Hydro. In response, the defendant says there is no way Mr. Devito will leave BC Hydro. Indeed, the defendant points out that even Dr. Brooks agreed that "BC Hydro is the best place possible" for Mr. Devito."
- [97] In this analysis, the defendant emphasizes that Mr. Devito is "making more money" since the accident, from \$53,700 in 2015 to \$93,000 in 2019. While an obvious factor in any assessment for loss of future earning capacity, this does not, in and of itself, determine the issue. A plaintiff may still prove a real and substantial possibility of a loss of future income, despite having returned to their usual employment, as was the case in both *Pallos* [*Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260] and *Parypa* [*Parypa v. Wickware*, 1999 BCCA 88]. See *Perren* at para. 32.

- [98] Nevertheless, mere speculation as to future loss of earning capacity is not sufficient to justify an award under this head of damages. The possibility of future loss of earning capacity must be real and substantial.
- [99] While Mr. Devito's departure from BC Hydro is not highly probable, there is in my view a real and substantial possibility he may not be employed at BC Hydro for the next 35 years, due to, for instance, opting to relocate and being required to seek employment in the "real world" of private enterprises. As Baird J. said in *Mannella v. Obregon*, 2020 BCSC 715 [Mannella] at para. 43:
- [43] A degree of caution is also required in considering his position with the City of Vancouver. I am not prepared to assume that it amounts to a job for life, as it were, or in any event that he is bound to stay there forever even if he could. The plaintiff may resign or be dismissed for any variety of perfectly plausible hypothetical reasons ranging from the bona fide desire to do something else, to personality conflicts, to disciplinary issues, to corporate reorganisation. If any such thing happens, the evidence leaves me in no doubt that all four of the Brown factors cited above will apply.
- [100] The same applies to Mr. Devito. As a result, the four *Brown v. Golaiy* factors apply in the present case as well (at para. 8):
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
 2. The plaintiff is less marketable or attractive as an employee to potential employers;
 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [101] As to what would be a reasonable amount, Mr. Devito says an appropriate award under this head of damages would be two or three years of his present salary, as was done in *Mannella and Patterson v. Solymosi*, 2019 BCSC 1508 [Patterson]. In *Patterson*, Skolrood J. confirmed the capital asset approach permits an award equivalent to one, two or more years of salary, depending on the real and substantial possibilities under consideration and the relative likelihood of their occurrence: *Mannella* at para. 45, citing *Patterson* at para. 104.
- [102] Counsel for the plaintiff points out that Mr. Devito's present salary is "about \$90,000." He therefore says the range of damages for loss of future earning capacity would be \$180,000 for two years' salary, to \$270,000, the equivalent of three years' salary.
- [103] While I agree Mr. Devito is entitled to an award under this head of damages, I am not persuaded Mr. Devito's future earning capacity has been diminished to the extent he claims. Instead, I find a fair and reasonable award to both parties is the equivalent of one year of salary, taking into consideration both positive and negative contingencies or

vagaries of life (Lines at para. 57). These include: the possibility that Mr. Devito's discomfort will subside with weight loss and ongoing exercise programmes as suggested by both Dr. Zabieliauskas and Dr. Brooks, or his condition may worsen given the demands of his job, the possibility there may be a decline in the economy and corporate downsizing, or conversely, the opportunity for advancement within the corporate structure. As the evidence has established that Mr. Devito's 2019 income was about \$93,000, I am satisfied that an award of \$93,000 for loss of future earning capacity is a fair and reasonable assessment, given the totality of the circumstances.

Special Damages

- [104] Whenever a plaintiff claims an expense as a special damage, there must be proof, on a balance of probabilities, both of the amount claimed and the fact that the expenditure is casually connected to the injuries sustained in the accident. Generally speaking, claims for special damages are subject to the standard of reasonableness. Justice Adair said in *Amaral*:
- [298] However, as with claims for the cost of future care, when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: see *Redl v. Sellin*, 2013 BCSC 581, at para. 55.
- [105] In this particular case, Mr. Devito's claim for special damages is very modest. It includes: total physiotherapy for a claim of \$835; mileage to and from physiotherapy and medical appointments of \$362.20; and \$875 for the private MRI that he had in 2018. The defendant has no difficulty with respect to the reasonableness of the physiotherapy and mileage claims, but resists the \$875 for the private MRI. The reason Mr. Devito had the MRI was because Dr. Brooks had questions as to the actual underlying cause of Mr. Devito's pain and discomfort in his right lumbar area. He therefore recommended an MRI. Due to Dr. Brooks' concern and the lengthy waitlist for an MRI through the public system, Mr. Devito felt that it was reasonable to pay for the private MRI. I accept his explanation and find the private MRI was a reasonable expense. I am satisfied that this expense has been incurred in relation to treating the injury Mr. Devito sustained in the accident, in order to promote his physical and mental well-being. Therefore, special damages will be \$835 for physiotherapy costs, \$362.20 for mileage and \$875 for the private MRI, for a total of \$2072.20.

CONCLUSION

[106] For these reasons, I award Mr. Devito damages as follows:

a) Non-pecuniary damages

\$ 65,000.00

b) Past wage loss

316.48

c) Loss of future earning capacity

93,000.00

d) Special damages

2,072.20

TOTAL:

\$160,388.68

[107] Mr. Devito is entitled to costs on Scale B.

"The Honourable Mr. Justice B.D. MacKenzie"

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