
CANADA / JUDGMENT

Domijan v. Jeon

2018 BCSC 1988

COURT

Supreme Court of British Columbia

DECIDED

9 November 2018

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2018 BCSC 1988 Domijan v. Jeon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Domijan v. Jeon,

2018 BCSC 1988

Date: 20181109

Docket: M142512

Registry: Vancouver

Between:

Lucas Domijan

Plaintiff

And

Tae Moon Jeon

Defendant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

J-M. Hébert

Counsel for the Defendant:

J.P. Cahan

J. Rusinek

Place and Dates of Trial:

Vancouver, B.C.

May 7-11 and 14-17, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 9, 2018

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Introduction

- [1] This is an action concerning a motor vehicle accident that occurred on September 8, 2012. The plaintiff, Mr. Lucas Domijan, was in his early 20s at the time of the accident. As the defendant concedes liability, this dispute regards the type of injuries the plaintiff sustained and the damages to be awarded for these injuries.
- [2] The plaintiff sustained injuries to his neck, wrist, shoulder, and lumbar spine. Over time the injuries to his neck, wrist, and shoulder resolved. However, almost six years later, he has not fully recovered from the damage to his lumbar spine.
- [3] The accident has had a major impact on the plaintiff's life. He has ongoing pain and disability in his back and has been unable to resume his formally active lifestyle. He has been particularly restricted in his ability to play sports, a large part of his pre-accident life, and to work as a pipefitter.
- [4] The plaintiff was working at a landscaping company at the time of the accident, but after the accident he trained as a plumber and subsequently as a pipefitter. After working as a pipefitter for several years, the plaintiff came to the conclusion that though it is a less lucrative career, he needed to retrain to become a train conductor due to his ongoing back pain.
- [5] The main issue before me relates to the plaintiff's argument that he has suffered significant financial losses due his career change from working as a pipefitter in northern Alberta to working as a train conductor in Richmond, BC. The plaintiff is claiming general damages, past wage losses, future loss of income, and special damages arising from the accident.
- [6] The defendant takes the position that Mr. Domijan has not demonstrated a real and substantial possibility that but for the accident he would have continued to work as a pipefitter in northern Alberta.

- [7] Though the defendant agrees that the plaintiff is entitled to some damages, there is a dispute about the type of injury suffered by the plaintiff and therefore the sum that should be awarded. Mr. Domijan argues that he suffers from a disc protrusion caused by the accident resulting in permanent disability. The defendant argues that he suffers from lumbar facet joint syndrome, a degenerative disc disease triggered by the accident. The defendant argues that the plaintiff will fully or partially recover from this syndrome.

Issues

- [8] The primary issues at trial were the type and extent of the plaintiff's low back injury, his prognosis, and how both relate to future earning capacity.
- [9] After briefly setting out the facts, I will address these issues in the following order:
- credibility and reliability of the plaintiff's evidence;
 - the extent of the plaintiff's injury and the prognosis;
 - non-pecuniary damages;
 - past wage loss;
 - future loss of earning capacity;
 - cost of future care; and
 - special damages.

Facts

- [10] The following is a summary of the evidence of each lay witness who testified at the trial. I set out their evidence in a general way but leave certain details for discussion under the issues I need to address. In reaching my conclusions, I have considered the totality of the evidence.

Pre-Accident

- [11] Mr. Domijan testified that he was raised in a traditional family where his father worked for wages and his mother stayed home with the children. The plaintiff is one of four boys. The plaintiff is very close to his family and especially to his younger brother. He and his younger brother socialize regularly and have often worked together, including currently working as train conductors.
- [12] During his youth, the plaintiff was a gifted athlete. He played many sports during high school and particularly excelled at soccer. He played competitively at the amateur level and has competed internationally.

- [13] The plaintiff was injured a number of times playing sports, but he suffered no lasting injuries. His family doctor, Dr. Kenneth Appleby, stated in his May 6, 2014 report that the plaintiff was always in excellent shape prior to the accident.
- [14] The plaintiff was not academically inclined during high school and spent the majority of his time playing sports.
- [15] After high school, the plaintiff took a year off before attending Douglas College. He attended classes mostly to allow him to play on the Douglas College soccer team, on which he was the captain. The plaintiff did not graduate from this institution.
- [16] During his time in college the plaintiff started dating his now fiancée, Mikayla Kosterman. They have been seeing each other for eight years and currently live together.
- [17] During and after college, the plaintiff worked at Pacific Bark Blowers, a landscaping company. He initially worked as a labourer but eventually became an estimator. He was working at this landscaping company at the time of the accident.

The Accident

- [18] The accident occurred on September 8, 2012. On the day of the accident, the plaintiff was operating a large truck heading westbound on Government Road in Burnaby. The plaintiff was in the inside lane. The vehicles to his right in the outside lane were slowing down or stopped in preparation to turn right into the Costco parking lot on Government Road. As the plaintiff was heading past the cars on his right, the defendant's vehicle exited the parking lot and attempted to turn left. The vehicles collided with the right front corner of the plaintiff's truck colliding with the left front corner of the defendant's sedan. Both vehicles were damaged.

Post-Accident

- [19] The plaintiff drove home from the accident after being checked by the paramedics who attended the scene. The plaintiff attended a walk-in clinic on the evening of the accident due to pain and was given Robaxacet with codeine as a painkiller and muscle relaxant. He subsequently saw his family doctor, which I will address under the "Medical Evidence" section.
- [20] Following the accident, the plaintiff took a month off work from the landscaping company. Rather than return to his previous job, in October 2012 the plaintiff started a job as a plumber's apprentice with Merit Mechanical. At Merit Mechanical the plaintiff worked as a labourer earning \$15 per hour. Once he earned his first year plumbing apprenticeship (by working and attending school at Pacific Vocational College), he earned \$16.50 per hour.

- [21] Unfortunately, the plaintiff had to discontinue all participation in sports due to neck, wrist, shoulder, and low back pain following the accident. To this day, he testified, he remains unable to play sports.
- [22] In January 2013, a seat became available in the railway conductor program at the British Columbia Institute of Technology ("BCIT"), for which the plaintiff had applied just prior to the accident on July 13, 2012. The plaintiff declined to enter the program claiming that he did not have any money or availability. He agreed in cross-examination that in 2012, his plan was to become a railway conductor.
- [23] The plaintiff worked at Merit Mechanical until October 2013, when he took a job as a plumber with JV Driver, a contractor at the Highland Valley Copper Mine (the "Copper Mine"), near Kamloops. It was at this job that he was first exposed to pipefitter work, which he described as industrial plumbing. He started making considerably more money than he had as a plumber.
- [24] The plaintiff testified that he had lower back pain when he started with JV Driver. However, on his job application he did not indicate any chronic back problem or trouble with lifting or maintaining certain positions.
- [25] At JV Driver, the plaintiff testified that he worked a 14 day schedule of 12 hour shifts, followed by seven days off. With money from his "live out allowance", he lived in Kamloops with his brother, who also worked at the Copper Mine, and they drove to the worksite together daily. The live out allowance is compensation for living expenses. The plaintiff testified that he never spent the entirety, or even most, of this allowance.
- [26] The plaintiff worked at JV Driver as a pipefitter until February 2014, at which point he was laid off due to completion of the project. He was unemployed for approximately one month.
- [27] In March 2014, the plaintiff got a pipefitting job working with Innovator Industrial in Cold Lake, Alberta. The project ended in April 2015, at which point the plaintiff was laid off.
- [28] Mr. Domijan testified that although he took no time off for illnesses or injuries, and he considered himself a better-than-average worker, he continued to have pain and occasional flare-ups during this period. The only time he used prescription medication was when he had such a flare-up.
- [29] Mr. Domijan testified that he found bending over, heavy lifting, and staying in static positions to be particularly painful.
- [30] Following his time in Alberta, the plaintiff completed the academic portion of his level I technical training for pipefitting at Pacific Vocational College. He received a mark of 90%.

- [31] Mr. Domijan was rehired as a pipefitter by Innovator Industrial in 2014 for a different project in Fort McMurray. He worked there until June 2015, when he was again laid off. At this point he was making approximately \$46 per hour and \$48.75 per hour on night shifts. He also received a live out allowance and a travel budget.
- [32] In the summer of 2015 the plaintiff decided he needed to leave pipefitting due to his back pain. However, he had seen a vocational expert who advised him that he should still complete his schooling and obtain his Red Seal certification to become a journeyman pipefitter, rather than remain an apprentice pipefitter.
- [33] Around the summer of 2015, the plaintiff purchased a condominium with his fiancée, Ms. Kosterman.
- [34] The plaintiff next found a position as an apprentice pipefitter with Thermal Energy Systems at the end of July 2015, where he worked a rotation of ten days on and four days off. He received \$29 per hour. He was laid off in November 2015.
- [35] Following the layoff from Thermal Energy Systems in November 2015, the plaintiff received employment insurance until he returned to school in January 2016. The plaintiff completed his Red Seal certificate in June 2016.
- [36] After completing his Red Seal certificate, the plaintiff again began working with JV Driver at their Fort McMurray location. He was hired to assist with the construction of an oil and gas facility. He worked 14 days on and seven days off and received an hourly rate of \$44.87. He received an additional \$3.00 per hour premium for working the night shift.
- [37] In December 2016 the plaintiff was laid off from JV Driver. He was subsequently recalled for a short period to do finishing and accessory work, which completed in March 2017.
- [38] Due to his persistent and now permanent low back pain, which was aggravated by pipefitting work, Mr. Domijan decided to abandon his pipefitting career. He decided to attend BCIT to retrain as a train conductor. He started the program in March 2017. The plaintiff took out a loan to attend the BCIT program. The cost of the course was \$7,814.22.
- [39] Prior to completing the train conductor program, the plaintiff was hired by Blue Water Rail Services. He worked part time at Blue Water Rail Services while attending school. He completed the train conductor program at the end of June 2017. He attained high marks despite studying and working at the same time, and attending classes after having worked night shifts.
- [40] The plaintiff continues to work with Blue Water Rail Services as a train conductor. He earns \$35.97 per hour and expects to earn \$38.00 per hour by 2021 as an engineer. The plaintiff's current annual pay at Blue Water Rail Services is in the mid \$70,000 range, considerably less than he would be receiving had he continued to work in the North as a senior journeyman pipefitter. The plaintiff does not yet have a regular shift and is currently working on call. In busy weeks he works many hours. He is guaranteed 60 hours over a two week period.

- [41] Mr. Domijan likes the train conductor job and testified that it is not as physical as pipefitting. In particular, there is less heavy lifting, no constant bending over to work, and no static positions that must be held for periods of time. He finds sitting for lengthy periods to be a problem so he is happy that he can move around a fair bit as a train conductor. He also testified that he works approximately four hours out of a 12 hour shift, with the remaining hours being down time. He works a considerable amount of overtime.
- [42] The plaintiff is the ninth most senior of sixteen employees. Once he moves up one place on the seniority list, he will move to a regular schedule of four days on and four days off, alternating each rotation between days and nights.
- [43] The evidence established that it is possible the plaintiff will train to become a locomotive engineer in the future. This pays \$38.00 per hour whereas the plaintiff is currently making \$35.97 per hour. Becoming an engineer is contingent upon the plaintiff being physically able to do the job. This is unknown since engineers sit all day, a known trigger for Mr. Domijan's injury.
- [44] Throughout the years the plaintiff has applied for many jobs. On his applications he indicated that he had no health problems, including no back problems. He also indicated that he would not have trouble lifting heavy items, and no symptoms that would prevent him from doing all his job duties. The plaintiff never sought any accommodation from his employers and, to his knowledge, his employers never became aware of any limitations in his work. He never called in sick and he admitted to working a considerable amount of overtime. The plaintiff was able to perform his various jobs to appropriate standards although he testified that he would ask his coworkers to assist him with tasks involving heavy lifting.
- [45] Despite this impressive work history, the plaintiff testified that he was in considerable pain when working as a pipefitter and he would spend his weeks off recovering from the stress that it put on his body. His brother and friend testified that he was unable to play sports with them as he had done in the past. They were also aware that he was suffering from a back injury, although he rarely complained.
- [46] The plaintiff's father confirmed that although the plaintiff was not one to share his suffering, he was not able to resume his former lifestyle. A prime example of this is the plaintiff's inability to play sports post-accident.
- [47] Both the plaintiff and Ms. Kosterman grew up in families that struggled financially and it is very important to them that they provide well for their own family. The plaintiff testified that he worked in northern Alberta primarily for financial reasons.
- [48] Ms. Kosterman testified that the plaintiff shares household chores but that when he performs them, he is in a considerable amount of pain. He has trouble with certain chores such as washing the dogs. She testified that he has been much better since working as a train conductor.

- [49] Although many individuals do not last working in the North (and indeed the plaintiff's brother did not last), the plaintiff testified that he was planning to continue working in the North in his chosen career. The plaintiff had discussed living away from his family with Ms. Kosterman. He testified that she planned to be a stay-at-home mom and that they planned to have three children. She testified that she might work part-time in the future. She also testified that she was comfortable with the plaintiff working in northern Alberta and being away for weeks at a time. She testified that if she did find this difficult after they started a family, she was willing to move to the North. Mr. Domijan confirmed that they discussed her relocating to northern Alberta if she struggled with the long distance relationship.
- [50] Ms. Kosterman never visited Mr. Domijan in northern Alberta or at the Copper Mine outside of Kamloops. Consequently, it will be difficult for her to know what challenges she would experience living there while caring for a family. It is unclear if she could find part-time work in her chosen field in the North.
- [51] The plaintiff is now almost 30, is about to be married to his fiancée, and plans to have a family. He still experiences pain, but far less since he stopped working as a pipefitter.
- [52] The records of employment establish that the plaintiff was earning well over \$100,000 per year as a second year apprentice pipefitter. His salary would have increased once he became a journeyman with his Red Seal. He obtained this certification after he had already decided he needed a career change, one that would put less stress on his lower back. The Red Seal certificate would allow the plaintiff to return to pipefitting, which he does not plan to do.
- [53] At the hearing Mr. Domijan presented as a bright and well-adjusted individual, who cares deeply about his fiancée, family, and friends. Based on the plaintiff's testimony, and that of other witnesses, he is determined and hard-working. The evidence also established that the plaintiff was good at finding new work after he was laid off from a job.

Medical Evidence

- [54] The following is a summary of the evidence of each expert witness whose reports were filed as exhibits at the trial and/or who testified at the trial. Again, I leave certain details for discussion under the issues I need to address. In reaching my conclusions, I have considered the totality of the evidence.

Dr. Appleby, Family Doctor

- [55] On September 14, 2012, approximately six days post-accident, Mr. Domijan saw Dr. Appleby, his family doctor. The plaintiff reported that his wrist as well as his lower back and neck were quite sore. His doctor assumed he would be off work for some time, sent him for massage therapy, and gave him a prescription for naproxen, an anti-inflammatory painkiller.

- [56] On September 28, 2012, in a visit approximately three weeks after the accident, Mr. Domijan was still reporting being sore in his trapezius muscles and between the scapulae. He was also sore across his lower back. His doctor noticed that he was emotionally upset from the accident. It appears that he was frustrated that his injuries were not resolving.
- [57] On the following visit to Dr. Appleby on October 29, 2012, Mr. Domijan was still quite sore across his lower back but reported that he had been able to return to work using analgesics. He returned to his doctor on November 30, 2012 at which point Dr. Appleby felt there could be a central disc issue and sent him off for X-rays and a CT scan. His doctor reported that the X-ray of his lumbar spine taken on December 6, 2012, showed evidence of a possible compression fracture of the L-5 vertebrae.
- [58] During a visit on December 10, 2012, Dr. Appleby ordered blood work be done to rule out any inflammatory conditions. The blood work did not reveal any inflammatory diseases; this was later confirmed by a rheumatologist.
- [59] A bone scan, a CT scan, and an MRI scan were performed between December 2012 and April 2013. These scans showed no evidence of compression fracture but did reveal a small central L4-5 disc herniation. An additional MRI was performed in March 2014.
- [60] At an appointment with Dr. Appleby on March 25, 2013, Mr. Domijan reported he had seen a new physiotherapist who was helping with his symptoms. He also reported feeling better as he was doing plumbing apprentice schooling with less physical work. On May 22, 2013, his doctor reported that the plaintiff was unable to play soccer or to run.
- [61] In his report to the court, Dr. Appleby stated: "[a]s I mentioned earlier, this gentleman has been a patient of mine since his birth and besides various sports injuries, he has been in excellent shape. He did have significant pain from this accident and I think that he has to really live with the chronic discomfort from this L 4-5 disc protrusion."

Dr. Yu, Pain Specialist

- [62] The plaintiff saw Dr. Andrew Yu, a pain specialist, just over a year after the accident. At that time the plaintiff was still complaining of pain and was unable to enjoy leisure activities, including soccer. Dr. Yu reported that the plaintiff said he experienced severe pain and was unable to continue when he did try to play soccer. Dr. Yu reported a small diffuse disc bulge at L3-4. He also reported spina bifida occulta at L5-S1A, an incidental finding of a congenital condition.

Dr. Nikolakis, Neurosurgeon

- [63] The plaintiff saw Dr. Nikolakis, a neurosurgeon, on August 14, 2015, at the request of the plaintiff's lawyer. Dr. Nikolakis stated that Mr. Domijan presented with symptoms of discogenic back pain.

- [64] Dr. Nikolakis reported that Mr. Domijan had low back pain beginning immediately after the motor vehicle accident which had never completely resolved. The pain was variable in intensity, depending on which aggravating or relieving factors the plaintiff encountered on any given day. Aggravating factors for Mr. Domijan are prolonged sitting and standing, working in a flexed position, and flexing forward. This pain was interfering with Mr. Domijan's day to day functioning.
- [65] Dr. Nikolakis reported functional limitations, especially when trying to work in a forward flexed position. He commented on this in testimony, noting the difference in his findings from that of Dr. Rickards, the defendant's expert orthopedic surgeon.
- [66] Dr. Nikolakis is of the opinion that the plaintiff's ongoing pain is related to a disc protrusion. His specific diagnosis was an L4-5 intervertebral disc injury with central disc herniation. He relied on the fact that the plaintiff pointed to an area of pain below L3-4 which was consistent with his radiographic studies indicating an L4-5 intervertebral disc injury. He also reported the active range of motion testing revealed a mild restriction with forward flexion, as well as a significant abnormality on right rotation and mild to moderate pain. He noted that the April 8, 2013 MRI scan, for which he had only reviewed the radiology report, indicated "the presence of a moderate midline focal disc protrusion at L4-5 with mild bilateral recess stenosis and evidence of disc desiccation."
- [67] Dr. Nikolakis noted in his March 27, 2018 report that Mr. Domijan "has had spina bifida occulta since he was approximately 8 weeks gestation." Dr. Nikolakis reported that apart from back pain, the plaintiff was a healthy young man. He reported that the March 3, 2014 MRI scan showed no sign of lumbar spinal stenosis or lumbar facet injury.
- [68] One option recommended by Dr. Nikolakis was that Mr. Domijan undergo surgical fusion. At the hearing, due to advances in technology, Dr. Nikolakis recommended a disc replacement instead. The risks of the surgery include death, nerve root injury/paraplegia, sexual dysfunction and cerebral spinal fluid leakage. These risks are low but material.
- [69] The plaintiff chose not to undergo the surgical fusion on the recommendation of his family doctor. He also declined surgery due to the risks, including the risk that the surgery could impact his ability to enjoy sexual relations and to have children. In his February 9, 2018 report, Dr. Nikolakis stated that only Mr. Domijan can make the decision whether to have the surgery given the material risks. He added, "based on my clinical experience, many young patients are reluctant to expose themselves to the risks associated with lumbar disc arthroplasty or lumbar disc fusion."
- [70] Dr. Nikolakis was of the opinion that should the plaintiff forgo surgery, he should reconsider his vocational path as a pipefitter. He was of the opinion that without surgery, the plaintiff would continue to live with back pain and find it difficult to perform his pipefitter job requirements.

Dr. Rickards, Orthopedic Surgeon

- [71] Dr. Rickards, an orthopedic surgeon, provided a report at the request of the defendant. He based his review on the clinical records, the various imaging studies provided to him, and one physical examination of the plaintiff.
- [72] Dr. Rickards testified that 70% of individuals have facet joint syndrome and that Mr. Domijan has "possible lumbar facet joint syndrome." He testified that there is no correlation between facet joint symptoms and abnormality in scans. Therefore it was from his physical examination that Dr. Rickards opined that the plaintiff's ongoing pain relates primarily to lumbar facet joint syndrome. He based this on his finding that Mr. Domijan had low back pain with extension (arching backward) and with "positive facet loading manoeuvres lumbar spine." Despite Mr. Domijan reporting that he avoids forward bending, and Dr. Rickards noting this in his report, he did not investigate this further.
- [73] Dr. Rickards also found that Mr. Domijan suffered from degenerative lumbar spine spina bifida occulta which was not altered by the motor vehicle accident. His report states that this can be "associated" with altered mechanics in the low back area" but notes the studies are controversial in this regard. He opined that spina bifida occulta is a pre-existing degenerative disease.
- [74] The MRI of the plaintiff's spine showed disk degeneration and a disc protrusion. However, both Dr. Rickards and Dr. Nikolakis testified that the medical literature indicates that 37 to 52% of asymptomatic men in the plaintiff's age category have disc degeneration. It also shows that 29 to 31% of men in the plaintiff's age group have a disc protrusion, again without symptoms. Therefore, it is difficult to say, from the MRI alone, whether the disc protrusion is accident-related. This point was made by Dr. Yu in his clinical report dated December 16, 2013:

It is difficult to know whether the [motor vehicle accident] and his low back pain and the changes of his MRI are causative in nature, as I suspect no one would be able to answer that question. His onset of pain is certainly temporally related. It is difficult to ascertain whether the pain and symptoms are causatively related to the changes of his MRI.

- [75] Dr. Nikolakis and Dr. Appleby were of the opinion that the plaintiff's low back pain is more likely than not due to a disc protrusion caused by the accident. Dr. Nikolakis reported that "[a]ll three diagnostic studies are concordant, revealing evidence of an L4-5 intervertebral disc injury with a central disc herniation." He also noted that Mr. Domijan had "no such symptoms prior to the motor vehicle accident."
- [76] In coming to his conclusion that the plaintiff may suffer from lumbar facet joint syndrome, Dr. Rickards relied primarily on his physical examination of the plaintiff. He emphasized that Mr. Domijan presented pain with extension, meaning when he arched backwards.

- [77] Dr. Rickards stated that the "relationship between the motor vehicle accident of 2012 and onset of facet low back symptoms suggest that these two events are related in a cause - effect relationship." He also stated there "is unlikely to be any permanent disability relating to the motor vehicle accident of 2012."
- [78] In his report, Dr. Rickards did not mention any physical test regarding leaning forwards. This is surprising given the other medical reports regarding the plaintiff and the fact that when referring to the plaintiff's current job, he notes, "Mr. Domijan states that he avoids prolonged sitting and forward bending, going down on his knees preferably instead of bending forward." Given this statement by the plaintiff, it would seem important to test and comment upon the plaintiff's pain, or lack thereof, when leaning forward. Dr. Rickards stated in cross-examination: "he did tell me he had back pain when leaning forward, but he could be torqueing."
- [79] Dr. Rickards agreed in cross-examination that if the plaintiff had consistently reported pain over the past five years from leaning forward, that would be suggestive of disc herniation. He also agreed that if the pain was not from facet joint syndrome the plaintiff would need to restrict his career and his participation in sports. In any event, his report stated that it was not unreasonable for the plaintiff to retrain as a train conductor given his symptoms.
- [80] Dr. Rickards is of the opinion that Mr. Domijan's ongoing pain relates primarily to lumbar facet joint syndrome which, with further treatment, will likely improve and possibly resolve.
- [81] In his report dated March 27, 2018, Dr. Nikolakis challenged Dr. Rickards' use of the Kemp's test to diagnose lumbar facet syndrome. He stated that an MRI scan is the gold standard for diagnosing the anatomical source of back pain. The scans revealed no abnormality of Mr. Domijan's lumbar facet joints but do reveal "significant degeneration of the L4-5 intervertebral disc."

Mr. and Ms. Terlicher, Physiotherapists

- [82] The plaintiff attended physiotherapy and worked hard at rehabilitation. The plaintiff reported experiencing partial relief of his symptoms after undergoing physiotherapy treatments with Mr. Terlicher. In the November 27, 2014 clinical notes of the physiotherapist, there was a notation that the plaintiff was still experiencing pain with forward bending. This was confirmed in a clinical note on February 11, 2015, made by Ms. Terlicher, also a physiotherapist, and the clinical partner and wife of Mr. Terlicher. Mr. Terlicher stated in testimony that the most prominent pain reported by the plaintiff was forward bending, which Mr. Terlicher noted was compressive.
- [83] Mr. Terlicher reported that the plaintiff has mechanical back pain, likely a result of L4-5 intervertebral disc desiccation with a central posterior herniation and interior bulge. In terms of the plaintiff's future, he opined:

I believe that Mr. Domijan will continue to experience chronic lower back pain. His change of careers to a locomotive engineer has and will continue to help him avoid more frequent and intense lower back flare-ups, however I do believe that he will continue to experience pain and flare-ups indefinitely into the future.

[84] Mr. Terlicher opined in his February 9, 2018 report that regular physiotherapy treatments keep Mr. Domijan's "symptoms from compiling over time and helps them from getting out of control." He also felt it was important that Mr. Domijan maintain a base level of cardio fitness and strength to prevent further degeneration.

[85] While Mr. Domijan testified that physiotherapy was very helpful in relieving his symptoms, Dr. Nikolakis testified that he was not confident that the physiotherapy treatments were beneficial.

Other Expert Evidence

[86] In addition to the medical evidence, evidence regarding Mr. Domijan's vocational rehabilitation options and future earning capacity was presented at trial.

Vocational Rehabilitation Experts

[87] Dr. Dean Powers, a vocational rehabilitation consultant retained by the plaintiff, opined in his November 20, 2015 report that the plaintiff is ill-suited for work as a pipefitter due to his accident-related symptoms. His report stated the following regarding the plaintiff's capacity as a pipefitter:

. Given that [Mr. Domijan] is now three years post [motor vehicle accident] in my opinion, it is likely an unrealistic career path for him in light of his unresolved medical conditions and limitations. Mr. Domijan is gainfully employable, but not competitively employable as a pipefitter in my opinion.

[88] Dr. Powers opined that the plaintiff is suited to alternate employment. He suggested working in project management or as a construction safety officer, two careers in which Mr. Domijan had expressed some interest.

[89] Mr. Ralph Cheesman, an occupational therapist and functional capacity evaluator, provided a report at the request of the plaintiff. Mr. Cheesman stated in his July 29, 2015 report that Mr. Domijan did not present with functional incapacities, but does have limited tolerance for "task intensive work positions requiring sustained spinal flexion from either standing postures (stooping) or kneeling postures." He stated that Mr. Domijan will need regular breaks.

[90] Mr. Cheesman opined that Mr. Domijan is at risk of hurting his spine further through work. He advised that if his spine degenerated further, this may impede on his ability to manage the medium to heavy strength loads that are required in pipefitting.

- [91] Dr. Colleen Quee Newell, a registered clinical counsellor and vocational rehabilitation consultant, was retained by the defendant. She provided a response to Dr. Powers' vocational assessment report and Ms. Christiane Clark's economic analysis report concerning the plaintiff. Dr. Quee Newell did not meet with Mr. Domijan.
- [92] Dr. Quee Newell relied on Government of Alberta and Government of Canada statistics. Dr. Quee Newell opined that the Alberta labour market for steamfitters, pipefitters and sprinkler system installers was limited for the 2017 to 2019 period. This is partly because demand is tied to activity levels in the oil and gas industry, which were low during that period. On the other hand, the employment potential for railway conductors in Alberta for the same period was fair.

Economists

- [93] Ms. Clark, an economist, was retained by the plaintiff. She provided two reports: one regards estimates for Mr. Domijan's past and future loss of earnings and non-wages benefits; the other contains present value calculations for cost of future care items put forward by an occupational therapist, Theresa Wong.
- [94] Ms. Clark based her assessment of the total present value of potential future earnings on full-time, full year employment. She did estimates under "risk and choice" and "risk only."
- [95] "Risk and choice" includes the involuntary factors that cause an individual: i) not to participate in the labour market, to be unemployed or to work part-time (risk); and ii) the average probability that a worker would choose to withdraw from the labour market or to work part-time (choice).
- [96] Mr. Mark Szekely, an economist, provided a report at the request of the defendant. Mr. Szekely disagreed with Ms. Clark's assumption that Mr. Domijan will do continuous full-time work to age 65 as well as her proposed model of "risk only" work. He found her assumption of retirement at age 65 with no chance of voluntary part-time work to be arbitrary. Mr. Szekely commented that the cost of care multipliers used by Ms. Clark were different than those he used and thinks are appropriate. However, he and Ms. Clark came to almost identical results (\$31,656 and \$31,658, respectively) for the present value cost of future care.
- [97] With respect to estimates of future earnings, Mr. Szekely stated that Ms. Clark used a multiplier of \$26,567 in coming to her calculations, whereas he used a multiplier of \$22,926. He noted that Ms. Clark's report did not consider labour market contingencies relating to non-participation in the labour market, unemployment or part-time work. Despite this, his projected earnings for a man working in Alberta as a journeyman steamfitter, pipefitter, or sprinkler system installer to age 65 was \$2,961,063 whereas Ms. Clark's "risk and choice" assessment projected earnings for pipefitters across all industries in Alberta to age 65 to be \$2,955,651. Again, these numbers are remarkably similar. This is because some labour market contingencies are incorporated in the risk and choice model utilized by Ms. Clark.

- [98] Mr. Szekely challenged Ms. Clark's assumption that a 38% premium exists in the oil and gas sector, suggesting it is lower. In his report he discussed how world oil prices dropped sharply in 2014 and 2015. However, in cross-examination he testified that the premium today is 45.6%.
- [99] Dr. Quee Newell thought it a weakness in Ms. Clark's report that she did not provide any information with respect to the recent and future employment demand for steamfitters, pipefitters and sprinkler system installers within the Alberta labour market generally, or within the Alberta oil and gas industry specifically. Ms. Clark also did not provide any occupational or labour market information for railway conductors. Dr. Quee Newell opined that one must be aware of the employment demand for each occupation within a labour market analysis.

Analysis

Credibility and Reliability of the Evidence

- [100] Mr. Domijan was open, sincere and willing to admit when he could not clearly remember an event throughout his testimony. The defendant agrees that there are no significant issues with credibility in this case. Mr. Domijan argued, and the defendant acknowledged, that the plaintiff is motivated to get better and is not a malingerer. Dr. Nikolakis reported that Mr. Domijan came across as very forthcoming. He stated the plaintiff was a reliable historian who was generally frustrated with his physical impairments following the accident.
- [101] The only issue with regard to credibility at trial was the failure of Mr. Domijan to inform his employers of his low back pain. I do not read too much into this lack of reporting. As Dr. Powers and Mr. Cheesman stated in their respective reports, Mr. Domijan advised that he was afraid to tell his employers about his pain for fear of being laid off. This is consistent with Mr. Domijan's own testimony.
- [102] I am of the opinion that Mr. Domijan was a credible and reliable witness. I find that Mr. Domijan is a stoic young man who wants to work and get on with his life. He assumed his injuries would resolve over time and sought a career based on this assumption. However, his pain has persisted, exacerbated by his job as a pipefitter, which led to him changing careers. The pain has also kept him from being able to participate in sports, which were a significant part of his life pre-accident.

Extent of the Plaintiff's Injuries and Future Prognosis

- [103] The main injury complaint at trial was low back pain that has persisted over time. Regardless of any asymptomatic disc degeneration that the plaintiff may have had prior to the accident, the defendant agreed that the accident likely triggered the ongoing pain suffered by the plaintiff. All medical professionals who provided evidence in this case agreed that the lack of back pain prior to the motor vehicle accident of 2012, and the onset

of low back symptoms subsequent to the accident, suggest that there is a cause and effect relationship between the two events. The onset of the plaintiff's pain is temporally related to the accident. Therefore, the first issue is not whether the accident caused the plaintiff's injury to his lower back, but how significant his injuries are going forward.

- [104] There is a debate between the specialists regarding whether the pain is a result of a disc protrusion caused by the accident, or whether it is a result of a natural degenerative disc disease triggered by the accident. The future prognosis is dependant upon the current diagnosis.
- [105] Dr. Nikolakis is of the opinion that the plaintiff's ongoing pain is related to a disc protrusion. His specific diagnosis is L4-5 intervertebral disc injury with central disc herniation. Dr. Nikolakis is of the opinion that unless the plaintiff undergoes surgery, he will continue to have functional limitations and ongoing pain. This is because, in his opinion, the plaintiff has discogenic back pain. Dr. Nikolakis testified that once the disc is injured, it will always be desiccated, meaning "dried up."
- [106] No one took issue with the plaintiff deciding against surgery. The surgery has material risks of nerve root injury/paraplegia, sexual dysfunction, cerebral spinal fluid leakage and death. I find that it is reasonable that the plaintiff does not want to subject himself to such risks.
- [107] Dr. Rickards is of the opinion that Mr. Domijan's ongoing pain relates primarily to lumbar facet joint syndrome which, with further treatment, will likely improve and possibly resolve.
- [108] I must resolve this conflict in the evidence.
- [109] I am not convinced that the plaintiff's issue is simply pain relating to lumbar facet joint syndrome as put forward by Dr. Rickards. In fairness to Dr. Rickards, he stated this diagnosis in guarded terms using the word "possibly" numerous times. I prefer the testimony of Dr. Nikolakis and Dr. Appleby, that the plaintiff has a disc protrusion, specifically an L4-5 intervertebral disc injury with central disc herniation. This is based on the onset of pain being temporally related to the accident and the objective findings in the scans. As Dr. Nikolakis reported:

I was able to view the images from this diagnostic study [the March 3, 2014 MRI scan] This investigation reveals desiccation of the L4-5 intervertebral disc along with a central disc herniation posteriorly and bulging of the intervertebral disc and anteriorly as well. There is a loss of disc height, which is significantly different relative to the healthy disc above and below this level .

- [110] I accept Dr. Nikolakis' and Dr. Appleby's evidence regarding diagnosis and am satisfied on the balance of probabilities that Mr. Domijan's pain is due to an L4-5 disc protrusion in his lower back, which was caused by the motor vehicle accident. It is more likely than not that the plaintiff will have ongoing, albeit partially resolved, back pain for the remainder of his life.

Damages

General Legal Principles

- [111] A primary issue in this case is the proper amount to award to the plaintiff for his injuries. The injuries must have been at least partially caused by the accident, for which the defendant concedes liability, in order for them to be compensable.
- [112] The generally accepted test for causation is the "but for" test. The plaintiff bears the onus of proving on a balance of probabilities that but for the defendant's negligent act or omission, the injury would not have occurred: see *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey]; *Blackwater v. Plint*, 2005 SCC 58; and *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18.
- [113] The causation test should not be applied too rigidly. Causation need not be determined by scientific precision. It is essentially "a practical question of fact which can be best answered by ordinary common sense": *MacDonald (Litigation Guardian of) v. Goertz*, 2009 BCCA 358 [MacDonald] at para. 22, *aff'g Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328.
- [114] It is not necessary that the plaintiff establish that the defendant's negligence was the sole cause of the injury. As long as it is a contributing cause of the injury, the defendant is liable: *MacDonald* at para. 23.
- [115] It is a basic principle of tort law that the damage award operates to place the plaintiff in the position he would have been in but for the defendant's negligence. Tortfeasors must take their victims as they find them. Under the "thin skull rule", if the plaintiff has a pre-existing medical condition that was a contributory cause of the injury, the defendant remains liable. However, under the "crumbling skull rule" tortfeasors need not compensate the plaintiff for debilitating effects of a pre-existing condition which he or she would have experienced in any event: *Athey* at paras. 32-35.
- [116] Here, Mr. Domijan had no pre-existing injuries although he has spina bifida occulta, which caused him no problem prior to the accident. The experts agreed that the "underlying degenerative change [spina bifida occulta] is not caused by the motor vehicle accident of 2012 and has unlikely been aggravated by this event."
- [117] Mr. Domijan may also have lumbar facet joint syndrome, a common degenerative disc disease among adults in his age group. Prior to the accident, the lumbar facet joint syndrome caused the plaintiff no problems or pain.

Mitigation

- [118] The court must be satisfied that Mr. Domijan mitigated his damages. Whether the plaintiff acted reasonably is a question of fact which involves a consideration of all the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [119] While a defendant may demonstrate that the plaintiff acted unreasonably to reduce or eliminate his loss, the defendant did not make that argument in this case.
- [120] I find that once Mr. Domijan came to the realization that he was not getting better, he mitigated his losses by retraining to become a railway conductor in short order. The plaintiff changed his career within three months. He now works in a unionized, well-paying job with employment security. This is a suitable career for the plaintiff given his ongoing low back injury.
- [121] Here there was no failure to mitigate damages. Since the medical experts agreed that it was reasonable for Mr. Domijan not to opt for surgery, there are no issues regarding the plaintiff failing to pursue recommended treatment: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

Non-Pecuniary Damages

- [122] Non-pecuniary damages are awarded to compensate the plaintiff for "pain, suffering, loss of enjoyment of life, and loss of amenities": *Trites v. Penner*, 2010 BCSC 882 at para. 188 [Trites]; and *Stapley v. Hejslet*, 2006 BCCA 34 [Stapley] at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100. Non-pecuniary damages must be fair to all parties; fairness is measured against awards made in comparable cases. However, each case depends on its own unique facts: *Trites* at paras. 188 - 189.
- [123] The factors the court should consider include: the plaintiff's age; the nature of his or her injury; the severity and duration of his or her pain; resultant disability; emotional suffering; impairment of marital/social relationships; any impairment of physical and mental abilities; and loss of lifestyle: *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 [Bouchard] citing *Stapley*, at para. 155.
- [124] The plaintiff suggests non-pecuniary damages in the range of \$100,000 to \$110,000. The defendant argues that they should be assessed in the range of \$80,000 to \$100,000.
- [125] It was clear that prior to the accident the plaintiff was a healthy young man who was physically active and an accomplished athlete. It is also clear that Mr. Domijan immensely enjoyed physical activities, enjoying soccer in particular.
- [126] Evidence was led by Mr. Domijan, his fiancée, his brother, his best friend, and his father regarding his athletic abilities and his inability post-accident to play sports. Subsequent to the accident, despite trying, the plaintiff was unable to continue any of his athletic pursuits from which had derived so much pleasure. Although Mr. Domijan still enjoys his life with his fiancée, time spent with family and friends, and his current work, it is obvious that his

chronic pain intrudes and lessens his ability to enjoy his leisure time. He has been unable to work in the field he had previously chosen.

- [127] Counsel referred me to a number of cases regarding non-pecuniary losses. These cases differ regarding the age of the plaintiff, their pre-accident abilities, and their ability to enjoy life in the future. They include psychiatric issues that could be attributed to the accident in those cases.
- [128] Here there was no evidence that the plaintiff suffered from psychiatric issues, such as depression, from the accident. He has demonstrated success post-accident despite the demanding physical labour of his work. He works through the pain, although he often suffers. He is certainly not completely disabled. It is clear that the plaintiff is not a complainer, he keeps his pain largely to himself, and overall presents as a stoic young man.
- [129] It would be improper to penalize Mr. Domijan for his stoicism, a factor that should not, generally speaking, be held against a plaintiff: *Stapley* at para. 46; *Clark v. Kouba*, 2014 BCCA 50; and *Giang v. Clayton*, 2005 BCCA 54 at para. 54.
- [130] I note that the plaintiff was a relatively young man at the time of the accident and now faces his adult life with chronic pain, although his pain has diminished since he changed his career to that of a railway conductor.
- [131] I do not give much weight to the defendant's submissions that participation in sport typically decreases with age as career and family obligations increase, or that the plaintiff never intended to pursue soccer professionally, in my assessment of non-pecuniary damages. The evidence suggests that Mr. Domijan was an avid soccer player and would have continued to play regularly but for the accident.
- [132] In all the circumstances, I consider an appropriate award of non-pecuniary damages to be \$100,000. This amount recognizes the plaintiff's ongoing pain, loss of enjoyment of life, especially his inability to participate in sports, and the longevity of his claim.

Earning Capacity

- [133] Where the court is satisfied that the plaintiff suffered injuries due to the defendant's negligence, the plaintiff is entitled to damages both for the wage loss they suffered from the date of injury to the beginning of the trial, and for the wage loss they will fail to earn in the future due to their injuries.
- [134] It is not necessary that the medical evidence specifically establish impairment of earning capacity. Such impairment must be established on the totality of the evidence: *Miscisco v. Small*, 2001 BCCA 576.

Past Wage Loss

- [135] Compensation for past wage loss considers what the plaintiff likely would have earned, not what he could have earned, if the injury had not been sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30. Section 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers a loss of income as a result of an accident is entitled to recover "as damages for the income loss suffered after the accident and before the first day of trial not more than the net income loss that the person suffered in that period as a result of the accident." Net income loss refers to prescribed deductions and tax credits, which will consequently need to be calculated and subtracted from the award.
- [136] The plaintiff is entitled to past wage losses for work missed due to his injuries and his reduction in income following his change of career in 2017. His past wage loss is calculated up to May 6, 2018, the day before trial.
- [137] The plaintiff is entitled to \$1,253.59 for the four weeks of work he missed from Pacific Bark Blowers, the landscaping company, following the accident.
- [138] I assess, based on Ms. Clark's probable or "risk and choice" model, that Mr. Domijan's past earnings from January 1, 2017 to May 6, 2018, would have been \$152,600 had he remained working as a pipefitter.
- [139] In actuality, Mr. Domijan earned \$74,756.43 from January 1, 2017 to May 6, 2018, that being the \$48,739.22 he earned as a railway conductor and the \$26,017.21 he earned at JV Driver.
- [140] I therefore award Mr. Domijan past wage loss in the gross amount of \$79,097.16. I leave it to the parties to make the appropriate adjustments to reach the net figure.

Loss of Future Earning Capacity

- [141] In determining a claim for loss of future earning capacity, the court must consider two questions: *Hoy v. Williams*, 2014 BCSC 234 at para. 153 [Hoy]. The first question is: has the plaintiff's earning capacity been impaired by his or her injuries? This is measured by whether there is sufficient evidence that there exists a real and substantial possibility of future income loss. If yes, the second question is: what compensation should be awarded for the resulting financial harm that will accrue over time?
- [142] The law regarding loss of future earning capacity was further expanded upon in *Hoy*:
- 153 The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos]; *Pett v. Pett*, 2009 BCCA 232.
- 154 The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

155 Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.

[143] In *Hoy*, Justice Kent explained there are two possible approaches when assessing loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*, both of which are correct. The earnings approach is more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 [Perren] at para. 32. The capital asset approach is more appropriate where the loss is not measurable in a pecuniary way: *Perren* at para. 12.

[144] Justice Kent described the difference between the earnings approach and the capital asset approach as follows:

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

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

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

[145] Justice Saunders articulated the principles for assessing damages, which I summarize as follows:

- i. The court should assess damages rather than calculate them mathematically;
- ii. The plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation;
- iii. Hypothetical events are weighed according to their relative likelihood;
- iv. Allowances must be made for contingencies that the assumptions upon which an award is based may be incorrect; and
- v. The overall assessment should be fair and reasonable.

Falati v. Smith, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45.

Has The Plaintiff's Earning Capacity Been Impaired by His Injuries?

- [146] The defendant takes the position that Mr. Domijan has not proven any loss to his future earning capacity. The defendant argues that the evidence before the court is not sufficient to discharge the evidentiary burden of showing a real and substantial possibility of a future loss of income. In the alternative, if such a possibility exists, the award should "reflect the low chance of such loss occurring and be subject to contingencies reflecting the plaintiff's history of success as well as the uncertainty connected to his work pipefitting."
- [147] The defendant points out that the plaintiff applied to become a train conductor in 2012, just prior to the accident. The defendant argues that it was always part of his long-term plan to become a train conductor. This argument is buttressed by the fact that the train conductor job is less strenuous, which is more realistic as one becomes older, and offers better job security for the plaintiff.
- [148] The plaintiff vigorously opposed this argument and argues that this issue was not put to the plaintiff in cross-examination, which would be counter to the rule in *Browne v. Dunn*.
- [149] I accept the argument that the defendant was not attacking Mr. Domijan's credibility nor trying to impeach him. Therefore the rule in *Browne v. Dunn* is not invoked. In any event, I find that while Mr. Domijan was interested in this program in 2012, he abandoned this career option in favour of pipefitting. His interest in 2012 is not determinative of what might have been, but for the accident.
- [150] The defendant argues that the plaintiff continues to have the capacity to work as a pipefitter since he demonstrated his ability to work in that field from 2012 to 2017. Moreover, Dr. Rickards testified that if the plaintiff fully recovers he could return to work as a pipefitter. Dr. Rickards testified that there is a chance of a full recovery and at least significant further improvement. However, I preferred the evidence of Dr. Nikolakis to that of Dr. Rickards with respect to causation of the injury and the prognosis for recovery. Dr. Nikolakis is of the view that recovery has plateaued and Mr. Domijan's remaining injury is permanent. I also note that Dr. Rickards stated on the last page of his report that it was reasonable for the plaintiff to retrain to become a locomotive conductor.
- [151] I find that the plaintiff would have continued in his chosen career of pipefitting in the absence of his ongoing lower back pain. I find that on a balance of probabilities, the injury Mr. Domijan sustained in the accident has impaired his long-term earning capacity. The preponderance of evidence establishes a real and substantial possibility that his injury will result in a loss of earning capacity.

What Compensation Should be Awarded for Loss of Future Earning Capacity?

- [152] Given that I have found a real and substantial possibility of loss of future earning capacity, I must quantify that loss in a fair manner. To do so, I must ask what compensation should be awarded for the resulting financial harm that will accrue over time, and what contingencies should be applied to the future earning capacity to ensure the assessment is fair to both the plaintiff and the defendant?
- [153] Mr. Domijan testified that, but for the accident, he would have continued to work as a pipefitter in northern Alberta indefinitely. Both he and his fiancée were adamant that this was his career choice. The defendant submits that the balance of the evidence did not support such a scenario. The defendant argues that the likelihood of the plaintiff remaining in northern Alberta indefinitely is unrealistic given that his fiancée has never lived in the North and because they wish to raise a family. Mr. Powers admitted in cross-examination that people generally only work in northern Alberta when they are younger, due to the physical demands of the job and the climate in the North.
- [154] The defendant points out that Mr. Domijan never worked in a position lasting more than a year and he was unemployed with the completion of each project. Dr. Powers testified that employment in oil and gas is cyclical and tough years are unavoidable. The reports of Mr. Szekely and Dr. Quee Newell establish that there was a trend of workers leaving Alberta for work in British Columbia from 2015 to 2017. Prior to this time, the evidence established that the average income for pipefitters in Alberta was \$47 per hour and the median income was \$43 per hour. The downward direction of oil prices in Alberta meant that jobs were becoming scarce. The slow recovery in the oil and gas sector has not led to additional jobs.
- [155] Although early in his career trajectory, I am persuaded that it was the plaintiff's intention to work in northern Alberta throughout his career. I am not convinced, however, that the plaintiff would necessarily have remained employed in the oil and gas sector indefinitely. I must take labour market contingencies into account, especially given the boom and bust fluctuations in the oil and gas sector. I accept the testimony of Mr. Powers, an expert retained by the plaintiff, and of Mr. Szekely, the economist retained by the defendant, that individuals tend to leave the sector as they get older. Moreover, given his work ethic Mr. Domijan would have sought work elsewhere if the oil and gas market became depressed. He may well have worked as pipefitter outside the oil and gas sector, or in another career altogether.
- [156] As noted above, the assessment of loss must be based on the evidence. This requires an exercise of judgment and is not simply a mathematical calculation. However, the court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss: see *Rosvold v. Dunlop*, 2001 BCCA 1 [Rosvold] at paras.11 and 18; *Jurczak v. Mauro*, 2013 BCCA 507 [Jurczak] at paras. 36-37; and *Knapp v. O'Neill*, 2017 YKCA 10, at para. 19. Of the two accepted approaches, the earnings approach will be more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64.

- [157] The court must always consider the overall fairness and reasonableness of the award, taking into account all of the evidence: Rosvold at para. 11.
- [158] Given all the contingencies, Mr. Domijan's loss is not easily measurable. I have therefore determined that the capital assessment approach is appropriate for assessing the plaintiff's loss of future earning capacity. Nevertheless, I will endeavour to use factual mathematical anchors as a starting foundation to quantify his loss.
- [159] The plaintiff had excellent earning prospects leading up to the accident. Due to the plaintiff's young age at the time of the injury, this will result in significant pecuniary losses over the course of the plaintiff's working life. As stated in Rosvold, the task of the trial judge is as follows:
- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence . They include:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether 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] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market. (citations omitted).
- [160] Trying to quantify his lost is difficult since, as the defendant pointed out, Mr. Domijan's income fluctuated pre-accident depending on his particular contract and the ups and downs of the oil and gas sector.
- [161] The plaintiff and defendant took me to a number of cases regarding loss of future earning capacity. Predictably, all are distinguishable on one or more factors from the case of Mr. Domijan.
- [162] The plaintiff argues that his decision to leave pipefitting came at an annual cost to him of \$50,000-\$70,000 a year. This is based on a median pipe fitter income of \$152,836. Even using the defendant's economic multiplier, which discounts for "choice and risk" contingencies in the amount of 34.5%, this results in \$1.14 to \$1.6 million in future losses, assuming employment to age 65.
- [163] According to Ms. Clark, the plaintiff's potential full-time, full-year employment income as a pipefitter in Alberta between May 7, 2018 and age 65 would be \$3,592,300. Adjustments should be made to reflect standard contingencies that may arise over the plaintiff's working life: Jurczak at para. 30. Subtracting 17.7% for "risk and choice" contingencies, the plaintiff would have earned \$2,955,700 to age 65. This is an estimate based on statistical calculations.

- [164] Assessing Mr. Domijan's likely earning capacity post-accident is easier to quantify than his pre-accident capacity. Between May 7, 2018 and age 65, Ms. Clark's table 7 anticipates that the plaintiff will make \$2,278,200 as a train conductor in BC, working full-time and full-year. Subtracting 18% for risk and choice contingencies, it is anticipated that the plaintiff will instead make \$1,868,000. This figure does not factor in the higher salary Mr. Domijan will earn if he becomes a locomotive engineer, which Ms. Clark did not estimate. I am persuaded that there is a high likelihood that Mr. Domijan will become a locomotive engineer based on his motivation and his ability to work through some pain. He may also have other promotions given that he is such a good employee. Subject to the usual contingencies, his anticipated income will likely be higher than \$1,868,000.
- [165] Although the plaintiff submits he would have tried to work full-time and full-year as a pipefitter in Alberta to age 65, I find that but for the accident there was a 50% probability that the plaintiff would have actually done so. Adjustments must be made to reflect other standard contingencies that may arise over Mr. Domijan's working life: Jurczak at para. 30. For example, I must factor in additional compensation for benefits and living allowances that the plaintiff may have earned and possible promotions. I must also consider negative contingencies such as unemployment (especially due to the fluctuations in the oil and gas sector), illness, and the normal risks individuals encounter during their working lives.
- [166] Using Ms. Clark's multiplier to age 65 as a guide, I must discount Mr. Domijan's loss of future earning capacity award to reflect the above contingencies, including my finding that there is approximately a 50% probability that Mr. Domijan would have worked in this industry to age 65. I also note that he has only established simple probability of his future earning capacity, rather than certainty: Kathuria v. Wildgrove, 2015 BCCA 186 at para. 27.
- [167] Based on the above contingencies and factors, I assess Mr. Domijan's damages in the amount of \$650,000 for future loss of earning capacity.

Costs of Future Care

- [168] A plaintiff is entitled to compensation for costs of future care. These costs are based on what is reasonably necessary to restore the plaintiff to his pre-accident condition. The amount is to be based on what is reasonably necessary according to the medical evidence to preserve and promote the plaintiff's physical and mental health: Gignac v. Rozylo, 2012 BCCA 351 at paras. 29 to 30.
- [169] Here, the plaintiff is entitled to the cost of future physiotherapy. I note that there was limited medical support for the physiotherapy but the plaintiff finds it helpful. His physiotherapist is of the opinion that it will help prevent further degeneration. I therefore award Mr. Domijan 8 sessions per year at an estimated cost of \$75 per session. That results in \$600 per year for the balance of Mr. Domijan's life. Ms. Clark provided a multiplier of 31.658, resulting in a present value of \$18,995.

[170] As Mr. Domijan has elected not to pursue surgery, he is not entitled to any costs for future surgical intervention. I also decline to award the cost of yoga or loss of housekeeping capacity. There was insufficient evidence to support yoga and, since Mr. Domijan has been working as a train conductor, the evidence established that he has found household chores less difficult.

Special Damages

[171] The plaintiff has incurred an out of pocket expense in relation to the accident. Receipts have been provided for tuition in the cost of \$7,814.22 for attending the train conductor course.

[172] I find that he is entitled to the full cost of the train conductor course, that being \$7,814.22, in special damages.

Costs

[173] Either party may apply for a hearing on costs within 45 days of this judgment. If there is no application to determine costs within this timeframe, the plaintiff is awarded ordinary costs.

Summary

[174] I find that Mr. Domijan is entitled to the following damages for the injuries he sustained due to the motor vehicle accident caused by the defendant on September 8, 2012:

- a) \$100,000 for non-pecuniary damages;
- b) \$79,097.16 for past wage loss;
- c) \$650,000 for loss of future earning capacity;
- d) \$18,995 for costs of future care;
- e) \$7,814.22 in special damages; and
- f) ordinary costs, unless either party files an application to determine costs within 45 days of this judgment.

[175] I leave it to the parties to make appropriate income tax adjustments to the past wage loss award. If they cannot agree, they are at liberty to make submissions.

"The Honourable Madam Justice D. MacDonald"

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Prepared on 29 October 2026 · Esheria