

CANADA / JUDGMENT

Florence v. Westereng

2022 BCSC 1414

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1414 Florence v. Westereng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Florence v. Westereng,

2022 BCSC 1414

Date: 20220817

Docket: M114227

Registry: Kelowna

Between:

Gregory Florence

Plaintiff

And

Miriam Evelyn Westereng and Kenneth Douglas Westereng

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Kennedy

Counsel for the Defendants:

I. Currie;

J. Stephen

Place and Date of Trial/Hearing:

Kelowna, B.C.

May 17 - 19; 30, 31;

June 1 and 2, 2022

Place and Date of Judgment:

Kelowna, B.C.

August 17, 2022

[1] The plaintiff, Gregory Florence, was injured in a motor vehicle accident on August 2, 2016, when his truck was struck by a vehicle driven by the defendant Miriam Westereng, who had been pulled over to the side of the road when she suddenly attempted a U-turn, striking the side of Mr. Florence's truck. The defendants admit liability for the collision.

[2] The plaintiff claims for non-pecuniary damages, loss of income (both past and future), special damages, and for costs of future care. The parties dispute the quantum of damages under each head, but the claim for loss of past and future earning capacity is the area of greatest controversy.

Background

[3] The plaintiff is presently 58 years of age, and was 52 at the time of the accident. He was born and raised in Cranbrook and finished grade 12 in 1982. He described his academic performance as focused on general studies rather than an academic stream, and that his grades were generally between a C- and a B, with the exception being mechanics where he always excelled and got an A.

[4] Following graduation from high school, he took a mechanics course in Cranbrook and then secured an apprenticeship in Lloydminster. After a few years, he moved to Kelowna because he always had intended to return to British Columbia. He worked primarily as a heavy-duty mechanic.

[5] Hunting was his passion. He started when he was 14 years of age and has done it ever since. Even if it was not open season, he would be scouting areas for future trips. He was in the bush close to 90 days each year, and would sometimes go after work or on weekends. If it was after work, he would go to either the Big White or Rock Creek area. He went hunting by himself the majority of the time. He would hunt for deer, elk, bear, grizzly, and goat.

[6] Before the accident, he would frequently run up to seven kilometres on the Greenway Trail, a linear park that runs adjacent to Mission Creek in Kelowna. He went to the gym three to four times per week, generally after work. His work hours were generally 7:00 AM to 3:00

PM or 8:00 AM to 4:00 PM depending on workload. While at the gym, he would routinely bench press 225 pounds. He would do 10 repetitions followed by two more sets of 10. He did various leg exercises that involved 12 to 14 plates, and did arm work by way of deltoid exercises.

- [7] In terms of social activities, he would socialize with friends and go either to pubs, to their homes, or to movies. He would go out two to three times per week. Four or five times per year he would go to Alberta to see family. His brother lived in Alberta. He would return to the Cranbrook area every other weekend, as that was where he primarily did his scouting and hunting. When in the bush, he would carry a 50-pound pack. He had no physical restrictions prior to the accident.
- [8] The plaintiff had a number of Worker's Compensation Board ("WCB") claims or reports in the past. In approximately 2009, he had a torn or strained right deltoid. He felt pain immediately, and it came on quickly. He went to physiotherapy and was off work for approximately three weeks. After a brief period of lighter duties for a month or so, his evidence was that he was back at one hundred percent and suffered no lingering effects.
- [9] Similarly, approximately one year later, he suffered a tear or strain of the left deltoid. This also resulted in some time off work, albeit it may have been a slightly shorter period. Again, he returned to work on lighter duties for a very brief period, approximately two weeks, before he felt one hundred percent. He had no issues with this injury following the initial recovery.
- [10] There were two more WCB reports in 2011 and 2012. However, the plaintiff had no recollection of either incident and he did not take any time off work.
- [11] The final WCB claim was in 2013 for an injury while he was at his last job prior to the accident. He hurt his lower back while moving a grader blade on a forest service road. The grader blade weighed 250 to 300 pounds and he was lifting it along with the operator of the grader. It was necessary to lift the blade up onto the back of a truck, which is a lift of approximately three feet. He does not recall any prior WCB issues relating to low back issues. The injury did not result in any time off work.
- [12] He lives in a house at the end of a cul-de-sac that has a large yard. He did all his own yard work, and continues to do so after the accident, although with pain. He also repaired cars and trucks for friends and family, and would do so on twenty or so occasions throughout the year. He did many of his home renovations and maintenance tasks by himself, although there are some tasks he would hire someone to do.
- [13] At the time of the accident he was not working, having been laid off approximately six weeks earlier.

The Accident

- [14] The accident occurred when the plaintiff was driving from his home on Mary Court to the Salvation Army. He was taking some dressers from his basement and was going to drop them off. He drove eastbound on Highway 33, turned right on Dougall Road and then left on Gray Road. He was driving adjacent to a park when a vehicle that was parallel parked on the side of the road did a sudden U-turn.
- [15] On impact, he slammed into the back of his seat and then was lifted and was slung over his steering wheel at which point he could see the pavement below him. The vehicle then slammed back down to the ground. His understanding is that the vehicle that struck him, which was a blue Chevrolet Cavalier, hit his vehicle in the area of the rear axle and lifted his truck in the air after which it then slammed back down to the ground. While there is no specific engineering evidence on the mechanics of the accident, Mr. Florence's description would appear consistent with the damage to the Cavalier based upon my review of the photographs.
- [16] The plaintiff was initially at the accident scene for approximately 10 minutes while he called the police and then subsequently exchanged information with the defendant. Because the accident had punctured his tire, he drove his vehicle the one or two blocks to a tire shop. The tire shop was busy and he decided to start the process by removing his spare tire from under the truck. The spare tire is under the bed of the truck and he lowered it a short distance in order to remove a chain mechanism. He supported the weight of the partially lowered tire with his right arm and immediately felt excruciating and debilitating pain.
- [17] Over the next couple of days, his pain was not restricted to his shoulder but included pain in his neck, headaches, upper back, and also his left arm. His lower back was also starting to become painful by the time he saw his general practitioner, Dr. Ketch, on August 5.

The Medical Evidence

Dr. Peter Zarkadas

- [18] Dr. Zarkadas is an orthopedic surgeon who specializes in shoulders and elbows. He performed two surgeries on the plaintiff, described as subacromial decompressions. The left shoulder surgery included a Bankart repair related to degenerative fraying of the labrum. Both surgeries were conducted arthroscopically. Dr. Zarkadas found no rotator cuff tears during either surgery. He described how efforts are made to avoid causing any damage to the rotator cuff, therefore the procedures are generally done from above and below the rotator cuff tendons.

- [19] Dr. Zarkadas was questioned regarding the extent to which the plaintiff's ongoing symptoms relate to pre-existing injuries as opposed to having been caused by the accident. Dr. Zarkadas was aware of the injuries in 2009 and 2010 that resulted in the plaintiff missing time from work, but was not aware of the subsequent WCB reports, nor of the notation in Dr. Ketch's clinical records indicating shoulder complaints in 2014.
- [20] Dr. Zarkadas was of the view that if the plaintiff was working largely without incident and had not missed any time from work as a result of the subsequent matters of which he was not aware, he would not see the intervening complaints or reports as being particularly significant, although he observes in his report that "a component of his current pain relates to pre-accident pathology". He commented as follows on the question of causation:

Causation

Mr. Florence reported a history of bilateral shoulder pain with repetitive lifting at work. In 2009 he sustained a right shoulder injury and was off work for approximately 3-4 months. In 2010 he had a WorkSafe claim with respect to his left shoulder. Given the presence of previous injuries to both shoulders in the past and the very strenuous nature of his laboring occupation as a heavy-duty mechanic, I suspect a component of his current pain relates to pre-accident pathology. A large component of his pain however and the main reason why he is unable to return to work as a heavy duty mechanic relates largely to the MVA in question on August 2, 2016 and injuries he sustained during that accident. He had pre-existing glenohumeral arthritis of both shoulders and an element of calcific tendinitis that pre-existed this MVA. However the traumatic injury on August 2, 2016 largely contributed to his poor shoulder function and ongoing pain and inability to work. The August 2, 2016 MVA necessitated Mr. Florence's bilateral shoulder surgeries.

- [21] While both surgeries were successful to the extent that they resulted in improvement, Dr. Zarkadas does not believe that the plaintiff is suited to return to work as a heavy-duty mechanic. While his prognosis for the plaintiff is favourable, his future employability is nonetheless limited:

Prognosis

Following bilateral shoulder surgeries Mr. Florence's prognosis is favourable. In my opinion, further physiotherapy treatment is warranted as needed to treat future flare-ups. Prior to his bilateral shoulder procedures, Mr. Florence's shoulder symptoms were the major impediment prohibiting his ability to return to work as a heavy-duty mechanic. I am doubtful that Mr. Florence will be able to resume his employment as a heavy-duty mechanic, or any other form of full time heavy physical labor, either presently or in the long-term. I would advise that if Mr. Florence elects to return to his vocation in heavy vehicle maintenance and repair that he assumes a managerial role to minimize the recurrence of symptoms or further injury. I would agree with the care recommendations as per the Functional Capacity Evaluation by Melanie Bos dated May 17, 2021, and I am in agreement with her opinion that Mr. Florence does not meet the job demands of a heavy-duty mechanic.

Dr. John Oliver

- [22] Dr. Oliver is an orthopedic surgeon who saw the plaintiff at counsel's request in 2017, prior to either of the plaintiff's surgeries. He described the plaintiff as having recovered somewhat from the accident, but was still within the period of recovery.
- [23] He was told about the two prior WCB claims which involved some weeks off work, but like Dr. Zarkadas, he was not aware of the more recent WCB claim in 2012 and 2013, nor of Dr. Ketch's clinical notes indicating right shoulder pain when he prepared his report.
- [24] Based upon his review of the x-rays and MRI, there were pre-existing degenerative changes in the shoulder. Had he been aware of the prior records, he certainly would have reviewed them when forming his opinion, but notwithstanding the prior incidents, Dr. Oliver pointed out that the plaintiff was nonetheless able to work, notwithstanding those degenerative changes.

Mr. Joel Kryczka

- [25] Mr. Kryczka is a physiotherapist and is qualified as a sports physiotherapist. He treats musculoskeletal injuries, including joint mobilization, muscular weakness and pain management. He described the treatment regime for Mr. Florence. Mr. Kryczka took over the plaintiff's care from another physiotherapist at his clinic in 2017.
- [26] Prior to his first surgery, the physiotherapy process generally involved an assessment of Mr. Florence, which would include assessing for weaknesses and loosening the tighter areas with pressure, and then taking him to the gym area of the clinic. Certain exercises and weightlifting are largely unaffected by the injuries to his shoulders. For example, bilateral pulling and pushing below the waist has little to no impact on his shoulders. However, overhead work can be significantly problematic for the plaintiff, as can using one arm only.
- [27] In the middle of 2017, Mr. Florence, who by this time was attending at a rehabilitation program through Meridian Rehab, suffered an injury during that rehabilitation program. Mr. Kryczka wrote one medical legal report on the file that was from 2017. As such, his evidence was limited to fact evidence for the subsequent five years. However, his report refers to his contacting Meridian Rehab to advise that their program was not appropriate for Mr. Florence because he was not at the point where he should have been doing twisting overhead work as part of a return to work program. His level of recovery was far below that, which is why the setback occurred.
- [28] Mr. Kryczka agrees that over the course of some months, Mr. Florence returned to his baseline level pre-the aggravation at Meridian Rehab.
- [29] Mr. Kryczka described Mr. Florence's presentation after his surgeries as typical for someone in those circumstances. He had poor active range of motion and was somewhat pulled forward or hunched. He set up passive range of motion work by way of a pulley where the good arm pulls up the injured one. He described that it is normal for three to six months

post-surgery for the focus of the treatment to be passive. Thereafter, Mr. Florence was able to return to some work involving weights. With regard to the second surgery, his range of motion was fairly good immediately post-surgery and therefore that initial period of passive work was not required.

Ms. Melanie Bos

[30] Melanie Bos was qualified as an occupational therapist who conducts functional capacity evaluations and cost of future care reports.

[31] Ms. Bos confirmed her report and was unshaken in cross-examination. She gave her evidence in an objective fashion, some portions of which helped the plaintiff and some portions that did not. She confirmed that the plaintiff was no longer capable of performing the functions of a heavy-duty mechanic.

[32] She concluded that the plaintiff tends to catastrophize his pain, and that his perception of his restrictions is greater than his actual restrictions, specifically as it relates to sitting, standing, and walking. She noted also that his self-perception of his ability to lift and carry underestimated his actual abilities. She noted as follows at page 25 of her report:

Mr. Florence estimated his abilities with variable accuracy. Exceptions were noted as follows:

- He estimated he could lift 15-20 lbs. - he was able to lift 70 lbs. on an occasional basis and 40-50 lbs. on a frequent basis.
- He estimated he could carry 15-20 lbs. - He was able to carry 70 lbs. on an occasional basis.
- He reported no difficulty with his balance. He was not able to perform unipedal stance for 30 seconds on either leg. He stepped off a board on floor level 2X while walking.
- He estimated his stooping tolerance was 5 minutes. He was observed to stoop for 15 minutes during testing.

These results suggest that Mr. Florence may benefit from education and support regarding his current abilities and limitations.

[33] However, she also noted that at times he will try to do too much and over do it, resulting in a flareup and a consequential setback. She made a recommendation of counselling because it is her opinion that he needs to better understand and recognize his limitations.

[34] Although her opinion was that the plaintiff was no longer suited to work as a heavy-duty mechanic, she did not preclude other work that was in the light to medium category in terms of physical demands.

Credibility and Reliability of Evidence

[35] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, are as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[36] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49-50.

[37] I generally found the plaintiff to be a credible witness. While I accept the evidence of Ms. Bos that he is more capable than he believes, I do not doubt that his self-assessment of his abilities is genuinely held. Dr. Zarkadas, in his last report, agreed with Ms. Bos' recommendations.

[38] I accept that the plaintiff had no recollection of the WCB reports from 2011 and 2012. Neither incident resulted in any time off work, and it is entirely possible that he may not even have been aware that his employer filed a report. The fact that he did not report either of these to the medical experts is of no moment.

[39] I do not accept that the plaintiff's condition has worsened over the past year. There is no medical evidence that would support that conclusion, nor is there evidence that recent deterioration would have been expected. Again, I do not doubt the plaintiff believes his condition has worsened.

[40] I accept that Mr. Florence has ongoing tendinopathy in both shoulders, and that he will not be able to return to his former occupation as a heavy-duty mechanic. As I will discuss below, I do not accept that he is unable to work in any capacity.

Past and Future Loss of Income

Facts

- [41] After completing a certification program in his hometown of Cranbrook, the plaintiff moved to Lloydminster for his apprenticeship. He worked at three different mechanic shops in Lloydminster, one of which was a general repair shop, followed by two dealerships. The work at the dealerships tended to be both cleaner and lighter work to the extent that the vehicles were newer and the shops had the tools required to be able to do the work.
- [42] In 1989, he relocated permanently to Kelowna. He initially worked at a small shop before getting hired for Kelowna Bus and Transportation, a company that repaired buses, primarily transit buses. It was a government position and therefore they also had all the tools required in order to be able to avoid substantial heavy lifting.
- [43] After approximately 10 years, the ownership and management changed and the new owners were more difficult to work for. He remained with the successor employer, Farwest Transit, for a further three years before moving to another mechanical shop, Multi-Power Products, that focused primarily on hydraulics. Work got slower because of the economy, and he was laid off.
- [44] After a few days, he was hired by Okanagan Iron Worx, a small one-man operation where he worked for a few years until that shop also slowed down, primarily because the owner started to focus on roadbuilding work as opposed to repair work. His hours were cut to only two or three days per week and he ultimately arranged to be laid off. The accident happened approximately six weeks after the layoff.
- [45] In terms of lifting at work, the two dealership jobs in Lloydminster and the bus repair job in Kelowna had proper equipment and therefore he was seldom called upon to lift more than a hundred pounds. At the other shops, which were smaller, lifting up to 200 pounds was not uncommon. In this regard, lifting does not mean with arms extended; rather, it means levering and manhandling pieces of equipment and parts from place to place, incrementally increasing the height if it is necessary to get it onto a bench for example.
- [46] Other than when he took the layoff at his last job, he was seldom without work. When he moved to Kelowna in 1989, it took him three weeks to get a job. He was still employed at Farwest Transit when he obtained the job at Multi-Power Products. When laid off from Multi-Power Products, he was employed a few days later by Okanagan Iron Worx.
- [47] In terms of other employable skills, he has done little work with the public and has not supervised employees beyond being a lead hand at the bus company. He says he can read well but does not write well and his computer skills are poor.

- [48] He did not have any savings as he had gone through a divorce in 2013. His home was not subject to a mortgage, but he had signed a promissory note in favour of his mother. He had other interests in properties, all of which were ostensibly acquired by family members and put into his name, in whole or in part. In terms of cash flow, his only income was from employment. He did have a TFSA that was purchased for him by his mother who told him not to use it. He did not recall when the TFSA was purchased.
- [49] Mr. Florence testified that he enjoyed working. Following his divorce, he felt healthy, and that life was going well for him. While at Okanagan Iron Worx, he had been making \$33.80 per hour.
- [50] The plaintiff has four trade certificates. He is qualified as a heavy-duty mechanic, an automotive service technician, a commercial transport vehicle mechanic, and a hydraulic service mechanic. According to Mr. Kevin Turnbull, an economist who was retained by the plaintiff, it is unusual for someone to have four trade certifications. In terms of its impact on this case, he said that it would not necessarily result in higher earnings because the person would generally find employment using the certificate that earned the higher wage, which in this case is a heavy-duty mechanic. However, he said that the impact of the additional certificates would be that he would be less likely to experience long periods of unemployment because of the breadth of employment opportunities for which he would be qualified.
- [51] The plaintiff has not worked since the accident.

Jodi Webster, vocational rehabilitation consultant

- [52] The plaintiff hired Jodi Webster, a vocational rehabilitation consultant, to aid Mr. Florence following the accident. She prepared two reports, a progress report dated July 28, 2020, and a vocational update report dated February 23, 2022. She concluded that the plaintiff was employable but not placeable in his pre-injury occupation as a heavy-duty mechanic. In this context, employability involves consideration of whether a person is ready for work, which itself is dependent on the selection of a suitable occupation. The suitability of an occupation considers the person's aptitudes, personality, temperament, and residual functional capacity.
- [53] Whether a person is placeable addresses the question of whether the individual would meet the hiring requirements of employers. Ms. Webster's evidence, which I accept, is that an employer is much more likely to make accommodations for an existing employee who suffers an injury and is no longer able to perform all of the tasks of a position, than they are to take on a new employee who is subject to those restrictions.
- [54] In her second report, Ms. Webster concludes that Mr. Florence:
- a) is employable but not placeable with respect to his pre-injury occupation as a heavy-duty mechanic; and

- b) is neither employable nor replaceable with respect to alternate transferable skills-based occupations.

[55] The defendant concedes the former, but takes issue with the latter.

[56] In her first report, Ms. Webster's recommendation was that she continue to work with Mr. Florence to "continue to target placement opportunities with the goal of alternate paid employment". At the time of her first report, Mr. Florence had been pursuing alternative employment, but without success. She stated the following in her first report:

Mr. Florence has participated in all aspects of his vocational rehabilitation plan. Recently we completed an online application for a lighter duty mechanics position at FortisBC. The changes to the labour market are outside of this workers control and have presented additional barrier to finding alternate employment. Mr. Florence has attended meetings and interview with possible employers as they have been scheduled and has taken an active role in his applications. It is recommended that we continue with the same occupational goals as with surgeries completed, we should not face any additional rehabilitation interruptions and can continue to target placement opportunities with the goal of alternate paid employment.

[57] On cross-examination it was determined that the meetings, interviews, and possible employers referenced a single instance when Ms. Webster had the plaintiff meet with a locksmith, a job for which he would be physically suited but was not trained.

[58] In furtherance of her recommendation that she continue to try to find suitable employment for Mr. Florence, Ms. Webster kept the file open and it was still open at the time of her second report. In the second report, she concluded as follows:

Taking all these factors into consideration, vocationally Mr. Florence is considered to be employable, but not placeable with respect to his pre-injury occupation as a Heavy Duty Mechanic. He is also considered to be not employable and not placeable with respect to alternate transferable skills based occupations. This is based on my review of all the medical and functional information provided to me, in addition to the vocational rehabilitation services and strategies provided. Despite his extensive experience and multiple journeyman certificates his functional capacity limitations and the limited transferability of skills significantly restrict his access to the labour market [emphasis in original].

[59] The primary basis upon which Ms. Webster concluded that Mr. Florence was not placeable in 2022, was that she had been unsuccessful in placing him in the intervening eighteen months. There had been no new medical evidence to suggest a deterioration in the plaintiff's condition that would justify a different conclusion or outcome.

- [60] However, notwithstanding the comment in the first report that Ms. Webster would continue to work with the plaintiff to "continue to target placement opportunities", the evidence suggests that few if any placements were ever specifically targeted and her ongoing work on the plaintiff's account appeared to be nothing more than occasional online searches for possible jobs, but doing nothing further with any information that was obtained.
- [61] Ms. Webster was cross-examined extensively with regard to the work she did trying to find employment for Mr. Florence, with reference to her invoice to plaintiff's counsel which details her activities, and her file notes. Not unlike many professionals who bill based upon time spent, time is posted to a specific file by way of file number in order to keep track for billing purposes. Ms. Webster had a number of entries pertaining to Mr. Florence, but her file contained no information as to what she may have discovered by way of her search.
- [62] Ms. Webster also said that she would have conducted job searches generally, but without recording them, to a specific file with numerous clients, not limited to Mr. Florence. When she was specifically asked about the lack of specific information in the plaintiff's file, she repeatedly fell back on having conducted general research and having undertaken general communications with employers that were not "tagged" to Mr. Florence's file. She did not recommend anything to Mr. Florence as a result of these inquiries, nor did she bring any opportunities to his attention. She was also unable to recall any specific possibilities or opportunities that she had considered with reference to Mr. Florence in the absence of a file note.
- [63] In November 2018, Ms. Webster sent an unsolicited email to Mr. Grant Stevens, the vice president at KF Aerospace. Her email was very detailed and included reference to the plaintiff's certifications and background. Mr. Stevens responded very positively and put Ms. Webster in touch with Ms. Christa Kantola, one of the HR advisors of KF Aerospace. Mr. Stevens provided Ms. Webster with Ms. Kantola's email in order to follow-up - Mr. Stevens' positive response to Ms. Webster was sent only 11 minutes after Ms. Webster's initial email. Ms. Webster contacted Ms. Kantola by email, but not for nine months after Mr. Stevens provided her with the email contact. After a misunderstanding as to the plaintiff's ability to lift up to 50 pounds, Ms. Kantola encouraged Ms. Webster to have the plaintiff apply for a runner position that was posted on the company's website, and she also indicated that she would give the recruiter the heads up with regard to the plaintiff's application.
- [64] Ultimately, neither Ms. Webster nor the plaintiff took any steps to pursue the opportunity, even though KF Aerospace had provided every reason for encouragement. I note that Ms. Kantola's response to Ms. Webster's email in August 2019, in which she requested a copy of Mr. Florence's resume, was sent to Ms. Webster less than one hour after receiving Ms. Webster's email.

- [65] There is no evidence that either Ms. Webster or the plaintiff followed up on Ms. Kantola's suggestion that they review the job description, and no application was ever submitted for the position. There was no evidence as to what the runner position entailed and therefore no evidence that the plaintiff would not have been physically capable of performing it. KF Aerospace is a large private employer in the Kelowna area and therefore may have provided opportunity for advancement.
- [66] One of the jobs Ms. Webster said she inquired about on behalf of the plaintiff was as a hose technician at Multi-Power Products. She agreed that the description of the position, which is in the materials, contains no indications that Mr. Florence would not be suitable. Ms. Webster's evidence was that she went to Multi-Power Products and verified that he would not be suitable for that work, although she had no file notes of doing so. I note that during Mr. Florence's testimony he made no reference to a hose technician position at Multi-Power Products, even though he used to work there and had previously dropped off a resume related to a different position. Ms. Webster agreed that she had Ms. Bos' functional capacity evaluation and Dr. Zarkadas' report, neither of which would indicate that the plaintiff would not have been capable of performing the tasks of the hose technician position.
- [67] I find that very little was done, either by Mr. Florence or by Ms. Webster on his behalf, between Ms. Webster's first report of July 28, 2020, and the second report of February 23, 2022.
- [68] It follows that I cannot accept Ms. Webster's conclusion that her failure to place Mr. Florence in remunerative employment is proof that he is not placeable. I find that although the plaintiff is unable to return to his former work as a heavy-duty mechanic, he remains employable in occupations that involve lighter or medium strength duties on at least a part time basis.

Law

- [69] In *Grewal v. Naumann*, 2017 BCCA 158 [Grewal], Mr. Justice Goepel summarised the correct approach when assessing loss of both past and future earning capacity:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

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

Past Loss of Earning Capacity

- [70] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned, not could have earned but for the accident.
- [71] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has a discretion to determine what period of time is appropriate for the determination of net income loss: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186 [Lines]. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position they would have been in had the accident not occurred: *Lines*, at paras. 185-186.
- [72] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Loss of Future Earning Capacity

- [73] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? 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. Golajy*, 1985 CanLII 149 at 4 (B.C.S.C.) [Brown]; *Pallos v. Insurance Corp. of British Columbia*, 1995 CanLII 2871 (B.C.C.A.) [Pallos].
- [74] Insofar as possible, the plaintiff should be put in the position they would have been in but for the injuries caused by the defendant's negligence: *Lines*, at para. 185. The court's task 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.

- [75] Our Court of Appeal restated the legal tests for past and future loss of income earning capacity in *Grewal* as follows:
- [46] . . . What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events [citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 613].
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event
- [76] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. The "earnings approach" will generally be more helpful when the loss is easily measurable, whereas the "capital asset" approach may be more appropriate if it is not: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [77] The earnings approach engages a form of mathematical analysis that involves an estimation of the plaintiff's annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years, and calculating the net present value: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 [Gilbert].
- [78] As described in *Gilbert*, at para. 233, the capital asset approach involves considering factors such as:
- [233] . . . i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market.
- [79] The overarching principles that apply in assessing loss of future earning capacity were summarized by Mr. Justice Low in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff

would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79

Positions of the parties

- [80] The plaintiff's position is that his loss of earning capacity, both past and future, should be viewed by way of the earnings approach.
- [81] Mr. Kevin Turnbull is an economist who was retained by the plaintiff. He was asked to make assumptions based on if the motor vehicle accident had not happened. Unlike with some occupations, income tends to decrease with age for heavy-duty mechanics based upon the census data. Mr. Turnbull expects this is due to the physical nature of the work - as age increases, earnings decrease.
- [82] Mr. Turnbull prepared a series of calculations that project what Mr. Florence could expect to earn based upon the average wage of a heavy-duty mechanic and assuming that he would work until age 72. His calculations assume a reduction in his work starting at age 65, followed by another reduction at age 68. Mr. Turnbull then calculates the net present value of those earnings, adjusts for the probability of survival, resulting in an estimate of his discounted earnings, excluding pension contributions, of \$1,074,046. The plaintiff acknowledges that the work of a heavy-duty mechanic is physically demanding and that he already had some degenerative changes in his shoulders at the time of the accident. He therefore seeks a sum of \$700,000 for his loss of future earning capacity.
- [83] The defendant argues that the earnings approach is not the appropriate one. He argues that the plaintiff's position assumes that the plaintiff has no residual ability to work, which is the plaintiff's self-assessment but is unsupported by the medical evidence.
- [84] The defendant points to the evidence of both Dr. Zarkadas and Ms. Bos, both of whom conclude that while the plaintiff is no longer suitable to work as a heavy-duty mechanic, he nonetheless is capable to work in occupations that involve lighter and some medium duties, at least on a part-time basis. The defendant says the only evidence that would suggest that the plaintiff is not employable at all is from Ms. Webster, and her evidence should be disregarded.

[85] The defendant argues that the capital asset approach in the amount of four years of income ($4 \times \$65,000 = \$260,000$) would be fair compensation for the plaintiff in all of these circumstances. Alternatively, he argues that if the mathematical approach is appropriate, it is reasonable to assume that Mr. Florence would have retired at age 62.

Discussion

[86] For the reasons explained earlier, I do not accept Ms. Webster's opinion that Mr. Florence is not employable. While I accept that the plaintiff does not believe he is capable of working, Ms. Bos' report and her testing of the plaintiff's functional capacity suggest that he is more capable than he believes.

[87] In terms of evidence I do accept, namely that of Ms. Bos and Dr. Zarkadas, and in the absence of contrary medical evidence, I find that the plaintiff has a residual ability to earn an income, but I accept that he is not capable of working as a heavy-duty mechanic.

[88] Ms. Bos recommended that the plaintiff obtain counselling to assist with his understanding of his limitations and abilities, and Dr. Zarkadas agreed with her recommendations. The plaintiff has not done so.

[89] *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, sets out the test for failure to mitigate by not pursuing recommended treatment:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[90] The difficulty in this case is determining an appropriate basis to assess the plaintiff's loss. Although he clearly has a reduced earning capacity because he can no longer work as a heavy-duty mechanic, the fact that he has not attempted, nor even really actively pursued, employment in any other field renders the assessment of his damages necessarily speculative to a degree. It is difficult for the court to determine whether the plaintiff would be capable of working in an occupation that is less physically demanding than a heavy-duty mechanic on a full-time basis, or whether he would be limited to something less than full-time, regardless of the physical demands.

[91] In order to assess the plaintiff's claim for loss of earning capacity, both past and future, the court must determine a reasonable baseline of income for the plaintiff if the accident had not occurred, and then subtract the income he could have made, or in the case of the claim for future loss of earning capacity, the income the plaintiff could make in the future given his injuries.

Past income loss

- [92] Mr. Turnbull's calculations assume that the plaintiff would have earned the average wage for a heavy-duty mechanic.
- [93] The average salary for a heavy-duty mechanic residing outside the Lower Mainland was \$87,542 in 2016. An automotive technician, another occupation for which the plaintiff was certified, earns \$60,833 per annum.
- [94] Mr. Turnbull was also asked to assume that the plaintiff would have also received certain benefits, such as earning a pension, that are concomitant with a union position. However, the plaintiff has not been a member of a union for almost twenty years, and he earned less than the industry average for heavy-duty mechanics in his last job. It was clear from the plaintiff's evidence that he would not be prepared to relocate in order to earn more money.
- [95] A review of the plaintiff's actual earnings shows that he generally earned less than the industry average for a heavy-duty mechanic, but more than the average automotive technician. A review of his income tax returns shows that Mr. Florence earned the following amounts in the years preceding the accident:

Year

Income

2012

\$75,553

2013

\$62,605

2014

\$69,070

2015

\$65,976

- [96] In 2016, the year of the accident, he had been laid off in the middle of June, by which time his earnings, according to his record of employment, were \$37,577.15, which included \$5,027.76 by way of severance. After subtracting the severance payment, his income equates to approximately the equivalent of \$71,000 per annum.
- [97] Mr. Florence had chosen to work at Okanagan Iron Worx because he knew the owner, which had some non-financial advantages. Given that the Okanagan Iron Worx job was at an end, he may not have taken a position that afforded him flexibility and therefore may have earned more.

[98] I conclude that Mr. Florence's pre-accident income should be determined based on an annual income of \$72,000 per annum.

[99] Mr. Turnbull indicated that two-and-a-half percent per year represented an appropriate adjustment for inflation. Based upon an income of \$72,000 in 2016, Mr. Florence's income would therefore be as follows in the years preceding the trial:

Year

Income

2017

\$73,800

2018

\$75,645

2019

\$77,536

2020

\$79,474

2021

\$81,461

2022 (January 1 to June 1 at \$83,500)

\$34,790

[100] I accept that Mr. Florence could not work at any time and in any capacity prior to his surgeries. It is also necessary to take into account the rehabilitation required following the second surgery that took place in November 2019.

[101] Because Mr. Florence has taken no concrete steps to seek employment, nor to follow through on Ms. Bos' recommendation for counselling as to his abilities and limitations, the extent to which he may have been able to work is difficult to estimate. I find that Mr. Florence was able to earn one-half of his prior income as adjusted starting in July 2020. Mr. Florence's wage loss up to the date of trial is \$344,712. The defendant proposes a fifteen percent adjustment for taxes, which I conclude is appropriate.

[102] The plaintiff is therefore entitled to compensation for his past loss of opportunity to earn an income in the amount of \$293,000 (rounded).

Loss of future earning capacity

- [103] In *Tyler v. Sowinski*, 2022 BCSC 878, Madam Justice D. MacDonald summarized the principles for loss of earning capacity following recent decisions of the Court of Appeal in *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.
- [104] At paragraph 116 of her decision, Justice MacDonald summarized the analysis as follows:
- [116] In determining a claim for loss of future earning capacity, the court must consider two questions. First, has the plaintiff's earning capacity been impaired by their injuries? To answer this question in the affirmative, there must be sufficient evidence that there is a real and substantial possibility of future income loss. Second, if so, what compensation should be awarded for the resulting financial harm that will accrue over time?: *Hoy v. Williams*, 2014 BCSC 234 at para. 153.
- [105] In this case, it is conceded by the defendant that the plaintiff's earning capacity has been impaired because he can no longer work as a heavy-duty mechanic. The defendant concedes that of the four trade certificates held by the plaintiff, the work of a heavy-duty mechanic is the most remunerative.
- [106] Because the plaintiff is precluded from working as a heavy-duty mechanic for the rest of his life, the earnings approach is an appropriate way to assess his loss. That is, this is not a situation where the loss is occasioned by an overall reduction in his attractiveness as an employee, but is an actual loss because he is no longer able to perform the duties of his chosen profession or trade.
- [107] Mr. Turnbull was asked to assume when preparing his report that the plaintiff would have worked full-time until age 68, and then would have worked half-time from age 68 to 72. However, the work of a heavy-duty mechanic is extremely physically demanding. Mr. Turnbull's evidence was that the earnings of heavy-duty mechanics decline as they enter their sixties, although it was not clear as to whether this was because older heavy-duty mechanics earn a lower wage or simply work less hours, whether by choice or otherwise. The plaintiff had already experienced symptoms of degenerative changes in his shoulders before the accident and had twice missed time from work as a result. I also conclude that while he was not in a position to retire from a financial perspective, it is unlikely that he would have chosen to continue to work any longer than he needed to.
- [108] While estimating when someone might have retired is an exercise in speculation, I do not accept the defendant's submission that he would have retired at 62 years of age. The primary premise of the defendant's argument is the plaintiff's pre-existing degenerative changes, and I accept that those were manifest and could play a role in determining the plaintiff's retirement date. However, he had continued to perform very heavy work notwithstanding those degenerative issues, and even went to the gym regularly at the end of his workday. I do not find that he would have been forced to retire at age 62 due to his

degenerative condition.

- [109] I conclude that the plaintiff likely would not have worked past his 67th birthday, and therefore his damages ought to be assessed on that basis. As with the plaintiff's past wage loss, I have assumed that his residual earning capacity allows him to make one-half of what he would have made but for the accident. According to Mr. Turnbull's report, the multiplier in this scenario is \$8,030 if the plaintiff worked to age 67. Prior to adjustment for other contingencies, the value of the plaintiff's loss would be \$335,252 (50% of \$83,500 x \$8,030/1000).
- [110] If the same analysis is applied but assuming the plaintiff would retire at age 65 as opposed to age 67, the amount would be \$265,655 (50% of \$83,500 x \$6,363/1000); retirement at age 66 results in an amount of \$300,934 (50% of \$83,500 x \$7,208/1000).
- [111] If I were to accept the defendant's submission that the capital asset approach would be appropriate, four times the plaintiff's pre-accident income would be \$288,000 (\$72,000 x 4).
- [112] I make no further adjustment relating to the contingency of the plaintiff's degenerative changes as I have already taken that into account in determining the plaintiff's retirement age.
- [113] Because I consider the scenario of retirement at between ages 66 and 67 to have been the most likely eventuality, an award of damages based on the earnings approach using that assumption is appropriate. I therefore award the plaintiff \$320,000 as compensation for his loss of future earning capacity.

Costs of Future Care

- [114] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. When full restoration cannot be achieved, the court will attempt to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 1985, 1985 CanLII 179 (B.C.S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351 at paras. 29-30.
- [115] The test for determining the appropriate award under the heading of costs of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable: *Milina v. Bartsch*, at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [116] Future care costs are considered to be justified if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not previously made use of a particular item or service in the past it may be inappropriate to include its cost in a future care award.

However, if the evidence shows that previously rejected services will likely be used in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, & 68-70.

- [117] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert*, at para. 253. If an expense may be used for both accident-related and unrelated issues, an apportionment of the expense may be necessary.
- [118] An assessment of damages for costs of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Discussion

- [119] The plaintiff's claim for costs under this head of damages is set out in Ms. Bos' report, with the future calculations determined by Mr. Turnbull.
- [120] The largest single claim under this head of damage is for future physiotherapy treatments. The evidence establishes that the plaintiff's use of physiotherapy continues to be beneficial for the treatment and management of his ongoing pain. The defendant does not dispute that ongoing physiotherapy is medically necessary, and concedes that Mr. Florence will continue to make use of physiotherapy. However, the defendant argues that the plaintiff has been increasingly seeking treatment for injuries not related to the motor vehicle accident, and therefore argues that only one-half of the physiotherapy costs as set out in the evidence should be recovered.
- [121] I agree that some adjustment is appropriate because Mr. Florence has received physiotherapy for unrelated issues, but I do not accept that a fifty-percent reduction is appropriate. It is apparent that notwithstanding other ailments, his shoulder pain remains his primary reason for receiving physiotherapy. I allow \$25,000 for this claim.
- [122] The plaintiff's claim originally included two medication costs, Zopiclone and Tramacet. The plaintiff no longer seeks the cost of the Zopiclone as he was using it prior to the accident. As for the Tramacet, the defendant concedes that an amount is payable but seeks a fifty-percent reduction because it says that it is required for non-accident purposes and for the pre-existing shoulder pain that may have necessitated its use in any event.

- [123] I do not accept the defendant's submissions in this regard. The evidence does not establish that the plaintiff's pre-existing shoulder pain would have necessitated medication such as Tramacet but for the accident, and I am not satisfied either that his other medical complaints would have led to a recurring Tramacet prescription. The plaintiff's claim in the amount of \$16,326 is allowed.
- [124] The plaintiff's claim for a cervical pillow is not allowed as he did not find it helpful, but the claim for a heating pad in the amount of \$557 is allowed, as conceded by the defendant.
- [125] Finally, the plaintiff claims for loss of housekeeping capacity. Although he has not incurred any third-party expenses, they can be included in an award of non-pecuniary damages in cases where the plaintiff is able to perform all the services necessary but does so with pain. In my view this is such a case, and no separate award is made.
- [126] Finally, the plaintiff claims for additional costs associated with home renovation work in the future. The defendant argues that no award should be made because it would be rare that even an uninjured person over a certain age would undertake home renovations alone without professional assistance, regardless of whether the homeowner had suffered any injuries. The defendant also points to the degenerative changes that would likely have rendered it more difficult for Mr. Florence to do his own home renovation work, and that he would likely retain professional assistance even if the accident had not occurred.
- [127] In the circumstances, I consider a modest award to be appropriate under this aspect of the plaintiff's claim. But for the accident, Mr. Florence was physically very capable. He is mechanically inclined, and while I accept that he is not as incapacitated as he believes himself to be, his ability to manoeuvre heavy objects with his arms extended has been significantly compromised as a result of the accident. I consider an award of \$10,000 to be fair compensation.
- [128] The total amount of the plaintiff's award for cost of future care is \$51,883.

Non-Pecuniary Damages

Law

- [129] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities.
- [130] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

The inexhaustive list of common factors cited in *Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;

- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

[131] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases, recognizing that no two cases are alike.

Positions of the parties

[132] The plaintiff seeks an award of \$180,000 in general damages, relying on this Court's decisions in *Ferguson v. Watt*, 2018 BCSC 1587 [*Ferguson*]; *Lai v. Griffin*, 2020 BCSC 377 [*Lai*]; *Lee v. MacLean*, 2022 BCSC 312; *Power v. White*, 2010 BCSC 1084; and *Risling v. Riches-Glazema*, 2016 BCSC 2423.

[133] The plaintiff's evidence was that he was an amiable and relatively social person prior to the accident, but has since become more reclusive. Not only does he frequently avoid social outings, he no longer pursues his primary passion, which was hunting. He says his life has been substantially and negatively impacted as a result of the accident.

[134] For her part, the defendant says that while the plaintiff's recreational activities are somewhat curtailed since the accident, this is a result, at least in part, of physical issues unrelated to the motor vehicle accident. The defendant argues that the appropriate range is \$90,000 to \$120,000, and points to the decisions of *Naseem v. Dhami*, 2022 BCSC 602; *Davis v. Gill*, 2021 BCSC 1866; and *Taylor v. Grundholm*, 2010 BCSC 860 to support its position.

Discussion

- [135] I find that the authorities referred to by the plaintiff are cases that involve parties with more significant injuries in terms of a detrimental adjustment to their pre-accident lifestyle. In Ferguson, the accident forced the plaintiff to abandon her work as an operating room nurse, resulting in questions regarding her own self-worth. In Lai, the plaintiff was an army reservist who lost his military career, which was very important to him.
- [136] The plaintiff's authorities also include a psychological overlay on top of the physiological symptoms. While there is a possibility of a similar conclusion in Mr. Florence's case, there is no specific evidence on the point.
- [137] Mr. Florence's case is more problematic to some degree in that his inability to go hunting, his primary passion, appears to have been impacted more as a result of the complaints related to his knee, which is not compensable in this action. The plaintiff's evidence was that he continued to go running for at least a year after the accident and only stopped because he had issues with his knee. The primary reason he no longer goes hiking and hunting in the bush is because he is concerned that his knee will give way, as opposed to anything to do with his shoulders.
- [138] Given that the curtailing of his hunting activities is related to the condition of his knee rather than his shoulders, an award of non-pecuniary damages must recognize that not all of the negative impacts in the plaintiff's life in the time following the accident are necessarily compensable. As was discussed earlier, the plaintiff's self-perception of his physical capabilities is inconsistent with the medical evidence. Ms. Bos described the plaintiff as catastrophizing his pain, and his physiotherapist, Mr. Kryzcka, has encouraged the plaintiff to be active, including through running, hiking, and riding a bicycle.
- [139] That said, it is indisputable that the plaintiff's lifestyle has been permanently affected by the accident. While he is able to perform the majority of the activities of daily living, such as maintaining his home, his vehicles and his yard, many of his previous activities are impacted by his inability to manipulate heavy objects with his arms extended. The plaintiff's lifestyle was not a sedentary one and therefore the impact of his physical injuries is more significant than they would be for someone less active. Moreover, the plaintiff had to undergo two shoulder surgeries, each followed by a significant amount of rehabilitation.
- [140] In all of the circumstances, I conclude that \$130,000 is fair compensation for the plaintiff's pain and suffering.

Special Damages

- [141] Prior to trial, the parties agreed to \$15,943.54 in special damages. The parties also helpfully identified a number of disputed special damage claims. As the trial progressed, some of the disputed claims were either withdrawn by the plaintiff or conceded by the defendant. What remains to be determined are some third-party costs associated with home renovations that Mr. Florence would have done on his own but for his injuries and some of the costs associated with Ms. Webster's work on behalf of the plaintiff.
- [142] The defendant conceded that a claim for a mattress was appropriate because it was recommended by Dr. Zarkadas. The plaintiff withdrew his claim for cannabis extracts. Certain travel costs associated with visits to Dr. Zarkadas, in addition to mileage for physiotherapy treatments were conceded by the defendant.
- [143] Starting with the home renovations, the plaintiff withdrew his initial claim for costs associated with flooring as it was conceded during cross-examination that flooring was not work he would have done in any event. As for the electrical work, I accept that Mr. Florence would have done some of the work on his own but because the work required a permit, he would have incurred expenses in any event. I accept that he may have assisted with but not done all of the drywalling work as well. The plaintiff's claim is for \$1,576.88, and I conclude that \$1,000 represents fair compensation for costs that were incurred by Mr. Florence, which would not have been incurred had he been able to perform the renovations, or at least contribute to them, but for the accident.
- [144] As for Ms. Webster's accounts, the defendant concedes that it was reasonable to retain her and therefore acknowledges that her initial invoice of \$577.50 is appropriate. It disputes her subsequent account in the amount of \$4,416.17, covering the period of November 8, 2017 to June 24, 2021, and says that Ms. Webster provided no value.
- [145] Based upon my earlier findings with regard to Ms. Webster's evidence, there is some merit to the defendant's position. However, I do not accept the entire invoice ought to be denied, and her invoice up to and including December 31, 2018, will be allowed. I assume the parties will have no difficulty in determining the appropriate amount.

Summary

In summary, damages are awarded to the plaintiff as follows:

a)

Non-pecuniary damages:

\$130,000

b)

Past wage loss:

\$293,000

c)

Cost of Future Care:

\$51,883

d)

Future Loss of Earning capacity:

\$320,000

e)

Special damages as agreed:

\$15,943.54

f)

Disputed special damages:

To be determined per these reasons

Costs

[146] Normally the plaintiff would be entitled to costs at Scale B, but if either party wishes to speak to the matter, they may contact Supreme Court Scheduling within 21 days of these reasons to arrange to do so.

"Wilson J."

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