

CANADA / JUDGMENT

Green v. International Cosmetics Inc.

2020 BCSC 1187

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1187 Green v. International Cosmetics Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Green v. International Cosmetics Inc.,

2020 BCSC 1187

Date: 20200812

Docket: M153272

Registry: Vancouver

Between:

Garry Green

Plaintiff

And:

International Cosmetics Inc. and Darryl R. Segal

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

C.H. McDougall

Q. Fuglesteit

Counsel for the Defendants:

C.P. Collins

Place and Dates of Hearing:

Vancouver, B.C.

July 13-17, 20-22, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2020

Introduction

- [1] The plaintiff claims damages for injuries he sustained in a motor vehicle collision on June 25, 2013 when the vehicle in which he was a passenger was rear-ended while stopped for a traffic light at the intersection of No. 3 Road and Granville Road in Richmond, British Columbia (the "Accident"). Liability for the Accident has been admitted by the defendants.

Evidence at Trial Tendered by the Plaintiff

The Plaintiff

- [2] The plaintiff is currently 55 years old. He has never been married but has maintained a relationship with a woman named Kathy Jones ("Kathy") since approximately 1986.
- [3] The plaintiff is a machinist having started in that trade in 1997 after several years working for various sea plane companies on the ramp and as a dispatcher. His first job as a machinist was with a company called Southern Cross Machining Inc. in Surrey, British Columbia ("Southern Cross") where he worked as an apprentice machinist from 1997 to 2006 and again for four months in 2008. Over the years he also worked as a machinist for several other companies in the Lower Mainland of British Columbia and in Red Deer, Alberta. He became a journeyman machinist in 2011.
- [4] As the economy ebbed and flowed, the plaintiff was laid off from his employment several times. He was also terminated by three of his employers as a consequence of events the plaintiff testified were not of his making.
- [5] The plaintiff had minor colon surgery in 1999 and work-related back injuries in 2003 and again in 2012. The plaintiff also suffered an injury to both wrists and an elbow during a bicycle accident in 2010. He testified that all of those injuries had fully resolved and did not interfere with his ability to function prior to the Accident. The plaintiff described his physical and emotional health immediately prior to the Accident as having been "excellent". His plan was to work as hard and as long as he could prior to retirement, which he hoped would not occur until age 69.

- [6] The plaintiff was unemployed at the time of the Accident, having been laid off from a full-time position several weeks earlier due to a shortage of work.
- [7] The plaintiff testified that when he returned from Alberta to the Lower Mainland in 2007, he began living with his mother's in her home in Richmond. When Kathy returned from Alberta a short time later, she purchased a residence in Maple Ridge, an approximate one-hour drive from his mother's home in Richmond. The plaintiff testified that, prior to the Accident, he travelled to Maple Ridge regularly where he and Kathy enjoyed going on walks, to movies and camping together.
- [8] The plaintiff testified that, prior to the Accident, he and his mother shared all of the yard and household chores at their home. They hosted many family dinners which he testified were very important to him. The plaintiff has a brother ("Kelly") who also lives with the plaintiff and his mother. Kelly has schizophrenia. Prior to the Accident, the plaintiff helped provide care to Kelly, including driving him to medical appointments.
- [9] The plaintiff testified that, during the course of the Accident, his body was suddenly thrown back and then forward. On cross-examination he described the impact as "a great force pushing me forward". He testified that it felt to him as if his "head had popped off from his spine".
- [10] The plaintiff conceded on cross-examination that there was minimal damage to the Mazda Protégé vehicle he was occupying at the time of the Accident. The damage consisted of nothing more than a few minor scratches on the rear bumper.
- [11] After exchanging information with the other driver, the plaintiff and the driver of the Protégé continued to their planned destination, a coffee shop. The plaintiff testified that, within a short period of time, he began to experience pain throughout his back, shoulders, neck, and head. His friend drove him from the coffee shop to the hospital where he was examined and advised to see his family doctor. The emergency room clinical records indicate that the plaintiff described the impact as "slow speed" but on cross examination he denied having said those words to the examining physician. Those clinical records also indicate that he did not report having any low back pain. On cross-examination, the plaintiff testified that the low back pain did not develop until a few of days later.
- [12] On the day following the Accident, the plaintiff attended at a walk-in clinic and was prescribed Naproxen for his pain.
- [13] On July 12, 2013 the plaintiff visited his family doctor, Dr. John Hu. Although Dr. Hu's clinical records indicate that the plaintiff reported "no back pain", the plaintiff denied having so advised Dr. Hu. A September 2013 X-ray of the plaintiff's thoracic spine indicated minor arthritis was present. A 2016 CT scan showed that there was a bulging disc in the plaintiff's lower back. The plaintiff conceded on cross-examination that the bulging disc was likely caused by his 2012 back injury but insisted that the injury was close to being fully resolved at the time of the Accident and that the Accident aggravated it.

[14] The plaintiff testified that, in the weeks, months and years following the Accident, his pain symptoms worsened and he was unable to function as he had done before the Accident. He attended the following treatment modalities for his lower back, mid back, shoulder, neck and headache pain symptoms:

a) Dr. John Hu (Family Physician):

33 times from July 12, 2013 to November 27, 2018

b) Dr. Pankaj Dhawan (Physiatrist):

11 times from October 28, 2015 to October 7, 2019

c) Dr. Yves Thomas (Family Physician):

3 times from December 28, 2018 to January 29, 2019

d) Karp Rehab (Active Rehabilitation):

47 times from December 7, 2016 to November 21, 2017

e) Karp Rehab (Occupational Therapy):

3 times from May 12, 2017 to March 7, 2018

f) Pacific Sports (Physiotherapy):

48 times from July 17, 2013 to May 1, 2014

g) Lucjan Burzynski (Physiotherapy):

27 times from May 5, 2014 to August 25, 2014

h) Rick Chiu (Massage Therapy):

30 times from March 22, 2014 to November 21, 2016

i) Dr. Mian (Radiation Therapy):

6 times from September 13, 2019 to February 24, 2020

j) Centre Point (Massage Therapy):

11 times from October 3, 2019 to December 27, 2019

[15] The plaintiff testified that none of the treatments he received provided anything more than short-term pain relief. He testified that his lower back pain symptoms were also aggravated during one of this physiotherapy treatments in 2013.

[16] At the time of the Accident, the plaintiff was receiving employment insurance benefits. With the assistance of Dr. Hu, he later applied for and received medical employment insurance benefits.

- [17] By December 2013 the plaintiff wanted to return to work. On December 13, 2013, the plaintiff was declared by Dr. Hu to be medically fit to return to work as a machinist with "regular duties, regular hours starting today". The plaintiff testified that he looked for work but there was "stiff competition" and that he was not able to find a full-time job as a machinist until June 2, 2014. He testified that his new employer accommodated his pain condition by not requiring him to perform the more physically demanding tasks of the trade.
- [18] On June 16, 2014, the plaintiff slipped and fell at work. He went to the hospital the following day. He was discharged and returned to work. Thereafter, the plaintiff continued to miss work due to pain flare-ups. His employment ended in February 2015 after eight months. During his direct evidence, the plaintiff testified that it had ended because he was unable to work consistently due to his pain. However, on cross-examination he conceded that his employment was terminated because his employer went out of business.
- [19] In 2015, the plaintiff found another job but it too ended due to lack of work. In March 2016 he started working as a machinist for another company. The plaintiff testified that he was fired after only two days as a result of an incident where he made a mistake when choosing a drill bit. He attributed the mistake to his inability to think straight due to pain.
- [20] The plaintiff has been unemployed since March 2016. He testified that he has not looked for work because he was told by his therapist at Karp Rehabilitation that he was not fit for work. In September 2018, the plaintiff began seeing a vocational therapist to assist him in finding a vocation that suited him, but had no success.
- [21] The plaintiff testified that, after the Accident, his mother assumed all of the household chores and yard work at their home. On occasion, he attempted some of that work, for example cutting a tree with a chain saw, painting the house and mowing the lawn but testified that on each occasion he had to stop because of the pain. Regarding the house painting project, he testified that "I believe it was eventually painted" but claimed not to be sure. On cross-examination, the plaintiff admitted to also having built a sun deck, shovelled snow and gone boating. He conceded that, as he had worked full-time from June 2014 to February 2015, it was likely that he had assisted his mother with the housework at least during that period.
- [22] The plaintiff testified that, after the Accident, his older sister, Judy Green, took over the care for Kelly that he had done prior to the Accident.
- [23] In 2014, the plaintiff was diagnosed as being "pre-diabetic". In February 2016, he was diagnosed as being a full type-2 diabetic.
- [24] In October 2015, the plaintiff was referred to a physiatrist, Dr. Pankaj Dhawan, who administered needles in the plaintiff's back, shoulders, and neck. The plaintiff testified that these treatments provided him with pain relief for only one-to-two months.

- [25] The plaintiff testified that, because his family physician (Dr. Hu) refused to prescribe OxyContin for his pain due to its addictive qualities, he purchased 300 pills of OxyContin "off the street". He testified that, although these drugs relieved his pain symptoms, he ultimately decided not to make any further such purchases because of a "fentanyl scare".
- [26] The plaintiff testified that he was prescribed Hydromorphone by an emergency room physician at the Ladner Memorial Hospital and saw a "huge improvement" in his pain symptoms as a result. He stopped seeing Dr. Hu because he felt Dr. Hu's refusal to prescribe the opiates he wanted demonstrated a lack of concern for his well-being and quality of life. In December 2018, the plaintiff began seeing Dr. Yves Thomas, a new general practitioner in Maple Ridge. Within a month, the plaintiff also stopped going to Dr. Thomas because Dr. Thomas too refused to renew the plaintiff's Hydromorphone prescription and the plaintiff did not think he was giving him the proper care.
- [27] The plaintiff testified that although he has "good days and bad days", overall his pain symptoms have not improved since the Accident. They flare up with physical activity and prolonged sitting. He continues to experience temporary pain relief in his lower back with Dr. Dhawan's treatments, but his mid-back, shoulder, neck, and headache pain persist. He testified that he has developed new pain symptoms that began in his abdomen and progressed up his sides and into his armpits.
- [28] In the years following his diabetes diagnosis, the plaintiff's weight dropped from a high of 200 pounds to approximately 130 pounds. The plaintiff stated on cross-examination that he "barely had enough strength to function". He agreed that he had poor control of his diabetes because he often forgot to take his medication.
- [29] In November 2018, the plaintiff was referred to an internal medicine specialist (Dr. Edward Auersperg) who explained to the plaintiff that his weight loss was likely due his uncontrolled diabetes and decreased intake of nutrition. The plaintiff was prescribed Glargine for his diabetes.
- [30] On March 9, 2020, the plaintiff reported to Dr. Auersperg that he no longer has abdominal pain. The plaintiff testified that he has now returned to his normal weight of between 150 and 155 pounds.
- [31] The plaintiff described his overall mood as depressed because he has little hope that his pain symptoms will improve. His self-esteem is low. He finds focusing on tasks to be a challenge and has periods of anxiety. He testified that he has occasional suicidal ideations when his pain symptoms become particularly intense. He was referred to a psychiatrist who he saw for approximately three sessions but he testified he stopped going because it was too painful to climb the stairs to the psychiatrist's office.
- [32] The plaintiff testified that his sleep is poor, limited to no more than four hours at night. On cross-examination, he conceded that he has had problems sleeping since he was a teenager.

- [33] The plaintiff testified that he stopped attending most of his mother's family dinners because several of the attendees said that they "hated seeing me like this". He testified that he simply stays in his room during these events. He testified that he now spends almost all of his days in his bedroom, leaving only occasionally to "stroll through the house".
- [34] The plaintiff testified that, recently, he has begun to do some exercises at home but generally stays idle. He testified that his social activities have all but been eliminated as a result of the Accident. He testified that his interactions with Kathy have also been significantly reduced and are now limited to him driving to Maple Ridge on the occasional weekend to help her with errands and chores as she does not have a vehicle.
- [35] The plaintiff testified that he would like his future treatments to include additional treatments from Dr. Dhawan, massage therapy, and active rehabilitation.

Kathy Jones ("Kathy")

- [36] Kathy testified that she and the plaintiff have been in an intimate relationship as "boyfriend and girlfriend" and have been "a couple" since 1986.
- [37] Kathy testified that, prior to the Accident, the plaintiff was happy, social, outgoing, and "always in a great mood". He had a high level of energy and a healthy appetite. They went camping, fishing, for long walks, out for dinners and coffee together. They travelled to Penticton once every few months to visit Kathy's son from a previous relationship.
- [38] Kathy testified that all of that changed after the Accident. The plaintiff became reclusive and unhappy. He constantly complains of being in pain. He has a poor memory, he has difficulty concentrating, his mood is depressed, he does not like participating in activities with her and has told her that he feels like he is a waste. His once healthy appetite has been significantly reduced. When he occasionally accompanies her to the grocery store he often has to sit down within minutes and she continues shopping alone. She described him as tearful and in constant pain. Their pre-Accident vibrant intimacy has "fizzled" to the point of non-existence.
- [39] Kathy testified that the plaintiff has "really bad pain" in his left leg.
- [40] On cross-examination, Kathy conceded that the plaintiff's weight loss started in approximately 2018. She claimed not to have been aware of the plaintiff's diabetes until then. She described witnessing the plaintiff having a hypoglycemic attack on at least two occasions. She testified that she now makes sure that he takes his diabetes medication and checks his blood sugar level regularly.
- [41] In responding to questions from the court, Kathy confirmed that since her return from Alberta to British Columbia in 2007, she and the plaintiff have lived together in her home in Maple Ridge between two and three weeks per month and that the plaintiff has lived in his mother's house for no more than one week per month.

Carol and John Davidson ("Carol" and "John")

- [42] Carol is the plaintiff's older sister. John is Carol's husband. They were married in 2014. They gave evidence via video conference from their home in Richmond, first Carol and then John, in *seriatim*.
- [43] John first met the plaintiff in 2010. He testified that he does not know the plaintiff "that well".
- [44] Each of Carol and John testified that prior to the Accident the plaintiff was a happy, cheerful, outgoing, energetic, and engaged person who exhibited no indication of any physical limitations. He had a healthy appetite and a good sense of humour.
- [45] Each testified that they first saw the plaintiff after the Accident in October 2013 when they attended the family home for a Thanksgiving dinner. They testified that the plaintiff's demeanour, physical condition, and general disposition has deteriorated drastically between then and now. He complains of being in pain. He has become lethargic and physically weaker. Over the years, the plaintiff slowly stopped greeting them at his mother's door when they arrived for family dinners. During some of these events, the plaintiff would not leave his bedroom except to eat. On one occasion, the plaintiff did not leave his bedroom at all. Carol described him as having become disinterested, disengaged and a mere shell of his former self. She testified that he is simply "withering away".
- [46] Each testified that the plaintiff has experienced a significant weight loss. He began using a cane approximately two years ago. On cross-examination, they each confirmed that the plaintiff's weight loss and apparent fatigue did not begin to manifest until approximately two years ago.

Judy Green ("Judy")

- [47] Judy is the plaintiff's oldest sister. She described the plaintiff during his formative years as having been a happy, good natured, and social person.
- [48] Judy testified that in the years leading up to the Accident, she usually only saw the plaintiff at family functions and dinners. She described him as always being good-natured, kind, friendly, and devoted to his family. He never exhibited any outward sign of being in pain.
- [49] Judy testified that, prior to the Accident, the plaintiff and their mother were primarily responsible for Kelly's care, with their mother caring for him the bulk of the time and the plaintiff taking him once each month to the doctor for an injection, as well as grocery shopping and for haircuts.
- [50] Judy testified that, after the Accident, the plaintiff became withdrawn, less energetic, irritable and physically deteriorated. He is now "hunched over", walks slower, shows little energy, and attends fewer family dinners. She testified that, prior to Thanksgiving in 2018, the plaintiff started using a cane to assist his walking and that he did not leave his room for Thanksgiving dinner that year.

- [51] Judy testified that she has taken over the plaintiff's care duties for Kelly.
- [52] On cross-examination, Judy testified that she was unaware that the plaintiff had not been properly controlling his diabetes until recently.

Leon Massa

- [53] Mr. Massa is the owner of Southern Cross. He described the plaintiff as having been a reliable, proficient employee who paid attention to detail, liked his job, and did the work correctly.
- [54] Mr. Massa testified that he could not recall the plaintiff having had any health-related issues that impacted his ability to function at work.

Dr. John Hu

- [55] Dr. Hu is a general practitioner. He was qualified as an expert in the field of family medicine without debate. Dr. Hu was the plaintiff's family doctor from February 6, 2009 until November 27, 2018. He has not seen the plaintiff since then.
- [56] Dr. Hu's expert report is dated June 21, 2016.
- [57] When he first examined the plaintiff after the Accident (July 12, 2013), Dr. Hu found that the plaintiff's neck range of motion was normal and there was no paraspinal muscle tenderness in the lumbar region. However, the plaintiff was tender in the paracervical, trapezius, and bilateral rhomboids regions. Dr. Hu diagnosed a neck strain/sprain injury and referred the plaintiff to physiotherapy. He advised the plaintiff to stay active.
- [58] Dr. Hu next saw the plaintiff two weeks later on July 26, 2013. The plaintiff complained of ongoing neck and shoulder pain, although there had been some improvement since the last visit. The plaintiff's neck range of motion was normal, he had no paraspinal muscle tenderness (lumbar) and his lumbar flexion, extension, and lateral rotation was normal. However, there was tenderness in the mid-back and shoulder regions. Dr. Hu diagnosed soft tissue injuries to those areas. He recommended that the plaintiff continue his physiotherapy and referred him, as well, for massage therapy.
- [59] Dr. Hu next saw the plaintiff on September 6, 2013 for a follow-up examination. The plaintiff continued to complain of ongoing neck and bilateral shoulder pain as well as mid and lower back pain, although he advised that his lower back pain was improving.
- [60] Dr. Hu saw the plaintiff on July 29, 2014 while the plaintiff was working full-time. He complained that his neck, bilateral shoulder, and lower back pain was continuing but improving. He also stated that the intensity of his pain was 10/10 at times. Dr. Hu examined him and found that his neck range of motion was normal, he had no paracervical, trapezius, rhomboid or lumbar paraspinal tenderness and that the plaintiff had normal lumbar flexion, extension, and lateral rotation.

- [61] In December 2014, Dr. Hu assessed the plaintiff as being pre-diabetic and advised him to stop consuming sugary drinks (Powerade). On February 29, 2016, Dr. Hu diagnosed that the plaintiff was diabetic and prescribed MetFormin. The plaintiff declined Dr. Hu's recommendation that he attend a diabetes management clinic. When Dr. Hu saw the plaintiff on January 9, 2017, the plaintiff advised that he was not taking his MetFormin regularly. He was advised to do so.
- [62] On May 1, 2017, Dr. Hu prescribed Glyburide to help manage the plaintiff's diabetes but the plaintiff later reported to him that it caused dizziness and the plaintiff discontinued taking it.
- [63] The plaintiff admitted to Dr. Hu in October 2017 that he was not taking his diabetes medication regularly.
- [64] Dr. Hu opined that the plaintiff's CT scan indicated that he had signs of arthritis in his lower back. Dr. Hu agreed that back pain caused by arthritis can flare up spontaneously.
- [65] Based on his clinical records from February 6, 2009 to June 6, 2016, two consult letters from Dr. Dhawan dated October 28, 2015 and March 3, 2016 and a CT scan report regarding the plaintiff's lumbar spine dated April 15, 2016, Dr. Hu opined that the Accident likely caused the plaintiff to suffer the following:
- a) cervical spine strain, grade 2;
 - b) thoracic spine strain, grade 2;
 - c) lumbar spine strain, grade 2; and
 - d) tension headaches.
- [66] He opined that the plaintiff's 2012 low back injury was "significantly aggravated" by the Accident. He opined that the plaintiff's prognosis, as at June 2016, was "guarded" and that his pain symptoms in the future may continue and be exacerbated by lifting, bending, or prolonged sitting or standing. However, he also opined that there was evidence of the plaintiff having pre-existing degenerative changes in his lumbar spine which may exacerbate his lower back pain in the future. Finally, he opined that the plaintiff may in the future require a combination of different therapeutic modalities such as anti-inflammatories, physiotherapy, massage therapy, acupuncture and active rehabilitation, as well as nerve and facet blocks.
- [67] On cross-examination, Dr. Hu acknowledged that he is unable to assess the extent of the plaintiff's low back pain at the time of the Accident. Dr. Hu also confirmed that the plaintiff specifically denied that he had low back pain when he saw him on July 12, 2013. The plaintiff's complaints were limited to neck pain, bilateral shoulder pain, and headaches.

- [68] Dr. Hu also agreed that, at most, the plaintiff suffered a relatively mild whiplash injury during the Accident. He testified that the certification dated December 13, 2013 that the plaintiff was medically fit to return to work was provided at the plaintiff's request. Dr. Hu testified that, although the plaintiff was still experiencing pain, he considered he would be able to return to work without limitations.
- [69] Dr. Hu advised the court that he was not aware of the plaintiff having used OxyContin purchased from "the street". He testified that, during the plaintiff's last visit with him, the plaintiff asked for but was refused a prescription for medical marihuana. The plaintiff was angry and accused Dr. Hu of not helping him with his pain.
- [70] Dr. Hu agreed on cross-examination that the plaintiff lacked good insight into his medical condition.

Dr. David Flaschner

- [71] Dr. Flaschner is a physiatrist. He is currently the Medical Director of the Aspen Physical Medicine and Rehabilitation, EMG and Multidisciplinary Pain Clinic in Calgary, Alberta. He was qualified as an expert in the field of Physical Medicine and Rehabilitation as well as in the field of assessment and management of chronic pain. He conducted an examination of the plaintiff on October 19, 2018. He also reviewed the plaintiff's medical records after the examination. His report is dated that same day.
- [72] The plaintiff's weight at the time of the examination was 165 pounds. His gait was normal and he walked without a cane. He had the ability to heel walk, toe walk, as well as squat. He demonstrated full range of motion in the cervical spine, shoulder, lumbar spine, and hips. There was no reported back pain on palpation, nor was there reported discomfort at the mid thoracic spine. There was minor discomfort reported upon palpation of the right trapezius. His range of motion in the neck was decreased in extension.
- [73] The plaintiff advised Dr. Flaschner that he had sustained a low back injury from work in 2012, that the pain had improved but was "not entirely resolved" at the time of the Accident, although his pain at the time of Dr. Flaschner's assessment was far worse than it had been prior to the Accident. Dr. Flaschner stated that the first clinical record post-Accident recording a report from the plaintiff of low back pain was that of a physiotherapist on July 17, 2013. However, he opined that it was common for there to be a delayed onset and gradual progression of low back pain in cases where mid-back pain had previously been reported.
- [74] Dr. Flaschner opined that the plaintiff likely suffered the following injuries as a result of the Accident:
- a) cervicothoracic musculoligamentous sprain/strain;
 - b) thoracolumbar sprain/strain;
 - c) headaches influenced by both the whiplash and medication overuse; and

d) mood disturbance.

- [75] Dr. Flaschner opined that, given the length of time that has elapsed since the date of the Accident, it is more likely than not that the plaintiff's symptoms are permanent and will require long-term management. Dr. Flaschner opined that untreated chronic pain tends to lead to mood disorders such as depression and anxiety. These disorders have a significant influence on pain symptoms and are often the primary determiner of a patient's ability to function despite pain sensations.
- [76] Dr. Flaschner recommended that the plaintiff stay as active as possible in order to prevent further deconditioning. He recommended that the plaintiff participate in an active rehabilitation program, including with a kinesiologist to ensure that he performs the appropriate exercises with proper technique.
- [77] Dr. Flaschner also recommended that the plaintiff discontinue his use of over-the-counter analgesics and non-steroidal anti-inflammatories due to their likely contribution to his headaches. He recommended that Duloxetine would likely help reduce the plaintiff's myofascial pain and that Nortriptyline at night would likely improve his sleep.
- [78] Dr. Flaschner opined that Dr. Dhawan's radiofrequency ablation therapy will likely continue to provide longer lasting, albeit temporary, symptomatic relief.
- [79] On cross-examination, Dr. Flaschner agreed that, given the plaintiff's low back injury in 2012 had not entirely resolved at the time of the Accident, by definition, that low back pain would have been chronic prior to the Accident. Dr. Flaschner also agreed that the plaintiff's complaint of low back pain to his physiotherapist on July 17, 2013 could have been unrelated to the Accident because the pain from the 2012 injury would be expected to have been intermittent. However, Dr. Flaschner made clear that the cause of the plaintiff's low back pain was "not black and white" and that, based upon the plaintiff's clinical history, the Accident likely aggravated the 2012 injury.
- [80] Dr. Flaschner agreed that the plaintiff's reports of dizziness were probably unrelated to the Accident.

Russell McNeil

- [81] Mr. McNeil is an occupational therapist who was qualified without debate as an expert in that field. Mr. McNeil conducted a functional capacity evaluation of the plaintiff on January 6, 2020. His report is dated March 3, 2020. It provides both an evaluation of the plaintiff's functional capacity as well as recommendations regarding his future care and the costs thereof.
- [82] Mr. McNeil's assessment of the plaintiff was scheduled from 9:45 a.m. to 3:15 p.m. Mr. McNeil reported that:

Due to a severe increase in pain testing was stopped by this evaluator. Mid way through the assessment he required a 45 minutes [sic] break to manage pain, however, pain levels did not subside substantially. After attempting further testing between 1:40 and 3:15, this evaluator stopped the testing.

- [83] The plaintiff weighed 145 lbs at the time of the assessment. Mr. McNeil observed the plaintiff consistently using postural accommodations in an attempt to complete tasks or improve his performance. No fear of avoidance of tasks was observed. The plaintiff attempted to persist with the tests despite increased pain. The plaintiff's reports of pain and ongoing physical restrictions were generally consistent with his measured and observed abilities. Mr. McNeil opined that the plaintiff consistently put forth his best effort during the evaluation and that the test results are an accurate and reliable measure of his overall physical capacity.
- [84] Mr. McNeil found that, while the plaintiff had some restriction in the range of motion in both shoulders, his trunk, movement in his cervical, lumbar regions, he has sufficient functional mobility in all of those areas as compared with average men of his age. Although his grip strength was below average, he was able to perform repetitive grasping. The plaintiff had moderate to severe weakness in his left and right shoulder extension/abduction and left and right elbow flexion/extension. There was a slight to moderate weakness in hip flexion. There was moderate to severe weakness in hip abduction and knee extension.
- [85] Mr. McNeil reported that the plaintiff had a severe restriction in his capacity to perform static vertical and dynamic vertical and horizontal reaching and demonstrated the capacity to perform such reaching on a "modified occasional basis" although not at a productive work pace.
- [86] The plaintiff had no restrictions regarding his dexterity or coordinated use of his arms and hands.
- [87] The plaintiff demonstrated limitations in his capacity to perform activities requiring static and dynamic bending and looking up, crouching and/or kneeling and required accommodations.
- [88] In Mr. McNeil's opinion, the plaintiff did not demonstrate the capacity to be competitively employable, including sedentary employment.
- [89] On cross-examination, Mr. McNeil conceded that he was not in any position to provide an opinion on the cause of the plaintiff's physical limitations, that he was unaware of the plaintiff's diabetes and that the plaintiff's reports of pain were subjective and incapable of objective measurement, although he testified that there is a correlation between a person's reports of pain and what is observable in terms of the person's physical movements and capacity. Mr. McNeil also agreed that many of the plaintiff's reports of increased pain were of abdominal pain, which the plaintiff stated at the outset of Mr. McNeil's assessment were "constant" and "sensitive to touch" and, according to Mr. McNeil's Appendix H - Functional Pain Scale, "very disabling" resulting in the person being unable to work.

Evidence at Trial Tendered by the Defendants

Dr. John Thompson

- [90] Dr. Thompson is an orthopaedic surgeon with a specialty in spinal surgery who was qualified without debate as an expert in that field. He assessed the plaintiff on January 30, 2018. His report is dated April 10, 2018. He provided a second report dated May 29, 2020 responding to those of Drs. Hu and Flaschner.
- [91] Dr. Thompson noted that the plaintiff carried out spontaneous movements in both the waiting room and examining room without apparent limitation or discomfort, displayed no abnormal pain behaviour and demonstrated full range of motion of the neck and cervical/lumbar spine. He had no difficulty walking heel to toe. His core muscles were deconditioned. Dr. Thompson noted during his neurologic examination of the plaintiff that there were no reflex, motor or sensory abnormalities other than those normal for the plaintiff's age and diabetes condition. He found no evidence of spinal nerve irritations.
- [92] Dr. Thompson opined that the plaintiff did not suffer a structural or neurological injury as a result of the Accident. Rather, he opined that the Accident likely caused the plaintiff to sustain grade 1-2 soft tissue strains and sprains involving his neck and upper back region. Given that the plaintiff did not complain of low back pain until more than one month after the Accident, Dr. Thompson disagreed with the opinion of Dr. Flaschner that the plaintiff's low back pain was attributable to the Accident. Rather, he opined that those pain symptoms were more likely related to his pre-existing, chronic low back injury as well as his degenerative scoliosis, rotatory olithesis and facet osteoarthritis condition that was evident not only on his clinical examination but also on a CT scan from April 2016.
- [93] Dr. Thompson opined that, in addition to the plaintiff's pre-existing degenerative back condition, there are likely other factors that have led to the progression of the plaintiff's low back pain symptoms, all of which are unrelated to the Accident. They include:
- a) his hypothyroidism and poorly controlled diabetes;
 - b) his lifestyle choices, including smoking and use of opioid analgesic;
 - c) pre-Accident back injury and post-Accident falls and snow shovelling;
 - d) significant inactivity and lack of active rehabilitation; and
 - e) psychosocial factors which can influence how the plaintiff perceives his pain symptoms.
- [94] Dr. Thompson opined that the plaintiff's inactivity and deconditioning likely increased his pain symptoms. He recommended that the plaintiff become mobilized and engage in a supervised exercise program of active rehabilitation.

Dr. Roy O'Shaughnessy

- [95] Dr. O'Shaughnessy is a forensic psychiatrist who was qualified without debate in that field. He assessed the plaintiff on February 25, 2020 for approximately two hours for the purpose of determining whether he has suffered any mental disorder following the Accident. Dr. O'Shaughnessy's first report is dated March 7, 2020. He also provided a second report dated May 30, 2020 upon receipt of additional records he requested in the first report.
- [96] Dr. O'Shaughnessy reported that the plaintiff did not appear depressed or unduly anxious during the interview although he was forlorn regarding his situation and financial matters. He also seemed preoccupied with his complaints of pain, particularly in his low back, rather than with his recovery.
- [97] Dr. O'Shaughnessy opined that the plaintiff has an enhanced and exaggerated sense of disability. He noted that the plaintiff's physical condition has deteriorated obviously and dramatically since approximately October 2018. He noted that the plaintiff now perceives himself as being severely disabled and that his dizziness episodes are related to some form of head injury. The plaintiff also perceives that a number of his symptoms are due to "nerve pinching" and has self-diagnosed the nature of his difficulties as being contrary to the findings of his physicians.
- [98] Dr. O'Shaughnessy reported that the plaintiff's lifestyle over the course of the last several years of smoking, not properly controlling his diabetes and doing virtually nothing physically was counter-productive to his health, not conducive to improvement and likely is a major contributing factor in his ongoing pain and other difficulties.
- [99] Dr. O'Shaughnessy opined that, whatever the cause of the recent deterioration in the plaintiff's physical and mental health, it was not the Accident. While he opined that the plaintiff has underlying issues regarding personality functioning, those issues do not meet the clinical criteria for a specific diagnosis of a mental disorder or personality disorder and certainly not one that is attributable to the Accident.
- [100] Dr. O'Shaughnessy's opinions were rigorously tested during cross-examination. He was steadfast in his view that if the plaintiff sustained any mental health issue as a result of the Accident (such as a somatic symptom disorder), it would have manifested early on. Instead, the plaintiff was able to return to work and function relatively well until approximately two years ago. He opined that it was "highly unlikely" that the plaintiff would have felt the need to buy OxyContin from the street for pain when it had not been previously prescribed by his doctor. Dr. O'Shaughnessy stated that it was more likely that the plaintiff purchased these street drugs for mood change.
- [101] Although he did so reluctantly, Dr. O'Shaughnessy accepted on cross-examination that the plaintiff probably is suffering from Somatic Symptom Disorder (extreme focus on pain) but was unyielding in his opinion that it was not caused by the Accident because, had it been, the disorder would have been apparent within a few months.

Credibility and Reliability

- [102] The following quote from *Bradshaw v. Stenner*, 2010 BCSC 1398 provides a succinct summary of the law regarding the assessment of the credibility of witnesses:
- [186] 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* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para.128). 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).
- [103] I found each of Kathy, Carol, John, and Judy to have been a sincere witness regarding their respective observations of the plaintiff. However, their evidence was vague and generalized in nature, lacking the detail one would expect in order for the court to make a determination as to whether the plaintiff's ongoing and current pain symptoms are attributable to the Accident or, rather, to some other cause. As is natural for people who have close personal relationships with a litigant, they tended to be advocates for the plaintiff and many of their answers strayed into areas beyond personal knowledge. I found portions of testimony to have been overly rehearsed and replete with hearsay. I find that, while their evidence collectively assisted in providing an understanding of the plaintiff's condition within the past two years, it did little to assist in the determination of the length of time that the plaintiff's Accident-related injuries persisted. Accordingly, I give their evidence little weight.
- [104] Mr. Massa was an excellent witness. He was down to earth, well spoken, and forthright. I have no hesitation accepting his evidence in its entirety. However, again, it did very little, if anything, to assist in the determination of the issues before the court.
- [105] Each of Drs. Flaschner, Thompson, and O'Shaughnessy was well qualified and an impressive witness. Indeed, each was the epitome of an objective expert who both understands and objectively carries out his or her role in the proceedings, namely, to assist the court in a candid fashion and not to advocate for one party or the other. Each was well prepared, articulate, and helpful. With one exception, I accept their respective opinions to the extent that the facts upon which they are based have been established by the plaintiff. I will deal with that exception under the heading "Causation" below.

- [106] Dr. Hu was also an objective, credible witness who provided his evidence in a helpful and forthright manner. I have no hesitation accepting his opinion to the extent that the facts upon which they are based have been established by the plaintiff.
- [107] Mr. McNeil was obviously well prepared and knowledgeable. However, I have concerns about the extent of his objectivity during his assessment of the plaintiff's physical capabilities. Mr. McNeil's report that the plaintiff was unable to continue "due to pain" and that his pain levels "did not subside" is tantamount to advocating on behalf of the plaintiff. Equally advocative is his blanket opinion that the plaintiff does not have the capacity to be competitively employable, in any capacity, and that there are no realistic options available to him. It is noteworthy that Mr. McNeil's assessment of the plaintiff's capacity occurred when the plaintiff was suffering from significant and debilitating abdominal pain that was unrelated to the Accident. That abdominal pain has since resolved. As a result of the foregoing, I find Mr. McNeil's opinions to be an unreliable assessment of the plaintiff's functional capacity and of no assistance in determining the extent to which the plaintiff's functional capacity has been affected by the Accident rather than non-Accident related issues.
- [108] As is generally the case in personal injury actions, the most important witness is the plaintiff himself. Once an assessment of the credibility and reliability of the plaintiff's evidence has been made, the court is generally in a position to determine causation, usually with the assistance of opinion evidence from qualified medical experts. A plaintiff who accurately and forthrightly describes his symptoms and circumstances before and after the collision without minimizing or embellishing them can reasonably anticipate that the court will find his evidence to have been credible and reliable. A plaintiff who exaggerates his symptoms and blames the defendant's negligence for all of his physical and psychological afflictions must expect to have his evidence closely scrutinized. The court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time beyond the normal or usual recovery: *Buttar v. Brennan*, 2012 BCSC 531 at para. 24, citing *Price v. Kostryba*, (1982) 70 B.C.L.R. 397 (S.C.), at p. 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41. Generally, a plaintiff will not receive compensation in the absence of convincing evidence that his complaints of pain are true reflections of a continuing injury: *Price* at 399.
- [109] At the outset of his direct examination, the plaintiff appeared to do his best to articulate to the court what his life has been like since the Accident as compared to prior to it. However, as his direct evidence proceeded, I began to perceive that his testimony was excessively rehearsed and exaggerated. On cross-examination, the plaintiff's demeanor changed markedly. He became aggressive, argumentative, and defensive regarding his symptoms and the steps he had taken to resolve them. His answers were lengthy, prolix discourses. His attempts to explain the numerous inconsistencies between his testimony and the clinical records defied common sense. He "highly doubted" the accuracy of virtually every clinical record that was put to him if it tended to paint him in a light he perceived might be

contrary to his financial interests in this action.

- [110] The plaintiff testified during his direct evidence that his 2012 low back injury fully resolved quickly and not interfere with his ability to function thereafter and that his physical health was "excellent" prior to the Accident. On cross-examination, he conceded that his low back injury had not fully resolved. Moreover, he told Dr. Flaschner that, although his back injury had improved, it was not entirely resolved at the time of the Accident.
- [111] During his examination for discovery the plaintiff testified that, with the exception of Southern Cross, he had issues with every one of his employers prior to the Accident and was determined to be more "choosy" about who he worked for in the future. When the transcript was put to him on cross-examination, he back-pedalled, stating that he had had a chance to reflect upon his discovery evidence and did not believe he had issues with his employers to the extent he had previously deposed. This retraction was an overt attempt to paint himself in a more favourable light.
- [112] Kathy testified that, since 2007, the plaintiff has lived with her in Maple Ridge for approximately two-to-three weeks of every month since she moved there from Alberta in 2007. In contrast, the plaintiff's evidence was that he has essentially had to confine himself to his bedroom in his mother's house, rarely able to leave it except to occasionally drive to Kathy's residence in Maple Ridge to assist her with her errands. I note that the plaintiff advised Dr. O'Shaughnessy that "now he only spends time with his mother and brother at home and periodically with his friend, Kathy, who lives in Maple Ridge".
- [113] The plaintiff used a cane and appeared to significantly struggle while walking to the witness stand to give his evidence. Judy's evidence was that the plaintiff began using a cane to walk in 2018 prior to Thanksgiving of that year. However Dr. Flaschner testified that the plaintiff was not using a cane during his independent medical examination of him ten days later on October 19, 2018 and had no difficulty whatsoever walking on that date. My impression was that the plaintiff's use of a cane in the courtroom was more theatrical than it was required.
- [114] The attribution by the plaintiff of all of his pain symptoms and virtually all of his life's woes to the Accident seriously undermined his credibility, as did his demeanour on cross-examination. His evidence that he has lived with his mother since returning from Alberta in 2007 and now rarely leaves his bedroom there was in such conflict with Kathy's evidence that the court is in no position to accept much, if any, of the plaintiff's evidence.
- [115] This is a case where a plaintiff claims significant, life-changing and debilitating pain has been inflicted upon him as a result of what can at most be described as a minor impact. His pain complaints are virtually entirely subjective. There is an absence of corroborative evidence. In such cases, the credibility and reliability of the plaintiff's evidence must be closely scrutinized.

- [116] While there are some portions of the plaintiff's evidence that I accept, in particular, his symptoms immediately following and for the first several months after the Accident, I find that most of his post-Accident physical complaints were embellished for maximum effect at trial. I find the plaintiff was neither a credible, nor a reliable, witness.

Causation

- [117] The legal test for causation is the "but-for" test--the plaintiff must prove on a balance of probabilities that, but-for the defendant's negligence, he would not have suffered his injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Chappell v. Loyie*, 2016 BCSC 1722 at paras. 4-7.
- [118] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: "causation need not be determined by scientific precision". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [119] As is typical in these types of cases, the medical expert opinion evidence as to the plaintiff's prognosis was largely based on a review of the clinical records and the plaintiff's own account of his symptom history.
- [120] I find that the plaintiff's evidence regarding his pain symptoms largely if not entirely related to what he has experienced over the course of the past two years. I find that the evidence of Kathy, Carol, John, and Judy as to the plaintiff's life and struggles was also related to that same time frame. None of the plaintiff's lay witnesses, including the plaintiff himself, provided persuasive evidence that those struggles were occurring prior to October 2018 to any significant degree.
- [121] I am satisfied on the evidence as a whole that the plaintiff suffered a Grade 1-2 soft tissue injury to his shoulders, mid-back and neck with headaches caused by associated pain, all as diagnosed by Drs. Flaschner and Thompson.
- [122] The one exception to Dr. Flaschner's opinion that I do not accept is his attribution of the plaintiff's complaint of low back pain to the Accident. I find that Dr. Flaschner simply confused or misread the physiotherapy clinical record in question when he stated that the plaintiff first complained of low back pain after the Accident on July 17, 2013. I find that the plaintiff's first such complaint was to Dr. Hu on July 26, 2013. I accept Dr. Thompson's opinion that it is more likely than not that Accident-caused low back pain would have been reported by the plaintiff well before his first report of it one month after the Accident. Indeed, Dr. Flaschner agreed that the plaintiff's low back pain could have been unrelated to

the Accident because the pain from the 2012 injury would be expected to have been chronic and intermittent at the time of the Accident. Dr. Flaschner also agreed that the longer the delay between the time of the Accident and the plaintiff's first report of low back pain the less the likelihood is that it was Accident-related.

[123] I accept Dr. O'Shaughnessy's evidence and opinions on causation in their entirety.

[124] I am persuaded on the evidence as a whole that the plaintiff's ongoing lower back pain symptoms are not attributable to the Accident but rather to his pre-existing low back injuries and degenerative back condition that began to exhibit itself to a significant degree in late 2015 and exacerbate thereafter due to the plaintiff's sedentary lifestyle and uncontrolled diabetes. The plaintiff's distrust of and failure to follow the advice of his various doctors and his lack of regard for his own health perpetuated his deteriorating condition. I find that the plaintiff's pain complaints have a significant psychosocial component.

Assessment of Damages

Non-pecuniary Damages

[125] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.

[126] Assessments of non-pecuniary damages turn on the facts of each case. Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Zamora v. Lapointe*, 2019 BCSC 1053, at para. 56; *Tzotzolis v. Wyman*, 2019 BCSC 2026 at para. 45.

[127] Counsel for the plaintiff seeks a non-pecuniary award in the range of \$85,000 to \$125,000, relying on the decisions of this court in *Sebaa v. Ricci*, 2015 BCSC 1492 (\$80,000); *Cumpf v. Barbuta*, 2014 BCSC 1898 (\$150,000); *Alafianpour-Esfahani v. Jolliffe*, 2017 BCSC 701 (\$120,000); *Randall v. Boettger*, 2020 BCSC 802 (\$100,000); *Lauriente v. Schoonhoven*, 2017 BCSC 2246 (\$100,000); *Scelsa v. Taylor*, 2016 BCSC 1122 (\$125,000) and *Clark v. Koouba*, 2012 BCSC 1607 (\$85,000), *aff'd* 2014 BCCA 50.

- [128] I find that the plaintiff has failed to demonstrate on the balance of probabilities that his Accident-caused soft tissue injuries to his back, shoulders and neck substantially persisted to any significant degree after December 13, 2013 when Dr. Hu provided his certification that the plaintiff was fit to return to his full duties at work without restriction. I also find that the plaintiff has failed to demonstrate on a balance of probabilities that the impact of the Accident on his day-to-day living and ability to function was other than modest at best.
- [129] I find that, although the plaintiff had low back pain flare-ups after starting work in June 2014, he has failed to prove on a balance of probabilities that those symptoms were related to the Accident rather than his pre-existing condition. I find that the plaintiff's ongoing low mood and general dysfunction are not attributable to the Accident but rather to a combination of the progressive mechanical degeneration of his lumbar spine structures, his hypothyroidism and poorly controlled diabetes, his lifestyle choices, including smoking, his substantial weight loss, his use of opioid analgesics, significant inactivity and lack of active rehabilitation and to psychosocial factors which are influencing how he perceives his pain symptoms.
- [130] Each of the decisions relied upon by the plaintiff to support his claim for non-pecuniary damages involved accident-related injuries that were more significant, long-lasting and had a greater effect on the claimant's enjoyment of life, both past and likely into the future. In each, the court was provided with reliable and cogent evidence regarding the degree of impairment caused by the accident. In my view these cases are distinguishable from the facts in this case as I have found them.
- [131] Counsel for the defendants submits that where, as here, a mild to moderate soft tissue injury resolves within one year, a non-pecuniary damages award in the range of \$25,000 to \$40,000 is appropriate, with the upper range applying only where the injury lingers although without disability thereafter, relying on the following decisions of this court: Janda v. MacKenzie, 2018 BCSC 168; Erwin v. Buhler, 2017 BCSC 362, Nguyen v. Bhatti, 2017 BCSC 1537 and Dizon v. Losier, 2017 BCSC 431.
- [132] In my view, the cases relied upon by the defendants are more helpful in assessing the plaintiff's non-pecuniary loss than are those relied upon by the plaintiff.
- [133] After considering the factors set out in Stapley, the evidence as a whole, the submissions of counsel, as well as the case authorities they rely upon, I conclude that an appropriate award of non-pecuniary damages in this case is \$30,000. The award includes an allowance for the plaintiff's loss of capacity, if any, to perform housekeeping tasks as a result of his Accident-related injuries.

Past Loss of Earning Capacity

- [134] Compensation for past wage loss is based on the value of the work that the plaintiff would have, not merely could have, earned, but-for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [135] An assessment of past wage loss requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Mills v. Graham*, 2019 BCSC 641, at para. 82.
- [136] The overall fairness and reasonableness of the award must be considered taking into account all the evidence. It requires an assessment of the plaintiff's past loss of earning capacity, not a calculation according to some mathematical formula: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19.
- [137] Regardless, the question to be determined is whether the plaintiff has demonstrated a real and substantial possibility that he would have earned income but for the Accident. A host of factors in this case enter into the required analysis, including the impact of the plaintiff's low back injury he sustained in 2012 and the fact that he was unemployed at the time of the Accident.
- [138] The evidence shows that, prior to the Accident, the plaintiff had a longstanding history of patchwork earnings, with average gross earnings in the three years immediately preceding the Accident of approximately \$18,000. He had been laid off from his job approximately one month prior to the Accident.
- [139] The plaintiff seeks a past loss of earning capacity award of \$123,310.80 (gross). This amount is based upon the proposition that, but-for the Accident, the plaintiff would have worked 2000 hours per year of work since the date of the Accident then, uses a weighted average discount that assumes full-time work throughout for 20% of that time, full-time work with stints of unemployment for 60% of that time and an inability to obtain full-time employment, but working $\frac{1}{4}$ of full-time for 20% of that time. A reduction of 25% is then taken for contingencies.
- [140] The main difficulty (there are many) I have with the plaintiff's approach is that it is based entirely upon vacuous speculation. Although his employer from 12 years ago testified that the plaintiff was a good employee, no other employer, actual or perspective, was called as a witness. The plaintiff's evidence was that, prior to the Accident, he had decided that he was going to be choosy about who he worked for. He led no evidence that he was looking for work prior to the Accident after having been laid off. He led no evidence regarding the availability of work between the date of the Accident and December 2013, or the likelihood that he would have obtained it. The plaintiff's evidence was that the competition for machinist jobs was "stiff" between December 2013 and June 2014 when he was able to find work.

- [141] Moreover, the plaintiff's non-Accident related issues clearly had a considerable bearing on his ability to work after March 2016 but he proffered no evidence from which the court can discern the degree to which the injuries he sustained during the Accident may have played a role.
- [142] As best I have been able to determine, the plaintiff's pre-Accident average earnings in the three years preceding the Accident was approximately \$18,000. After the Accident, he earned approximately \$24,000 (gross) in the eight-month period between June 2, 2014 and February 2, 2015 when he was laid off. This equates to approximately \$36,000 annually. The average of his approximate pre and post-Accident full-time annual income is \$27,000. In my view, it is fair and reasonable to find that, but for the Accident, the plaintiff would have earned some income as a machinist during the six month period between June 25, 2013 and December 13, 2013. I assess his past loss of income earning capacity at \$10,000, net of income tax.
- [143] I agree with counsel for the defendants that the plaintiff has failed to demonstrate a real and substantial possibility that, but for the Accident, he would have earned additional income beyond what he did earn after June 2, 2014. I have found that the plaintiff has failed to prove that any disability he suffered after June 2, 2014 was caused by the Accident.
- [144] Having considered all of the evidence, I assess the plaintiff's damages for past loss of income earning capacity at \$10,000.

Future Loss of Earning Capacity

- [145] An award for future loss of earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits his capacity to perform certain activities and consequently impairs his income-earning capacity, he is entitled to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8. The plaintiff must demonstrate both impairment to his earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.
- [146] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward v. Berezan*, 2007 BCCA 150, by Bauman J. in *Chang v. Feng*, 2008 BCSC 49, and by Tysoe J.A. in *Romanchych v. Vallianatos*, 2010 BCCA 20, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or a capital asset approach, as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).

The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa v. Wickware*, 1999 BCCA 88. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

See also *Mills* at para. 87.

[147] As is the case with past loss of earning capacity, the task of the court is to assess the future loss of income-earning capacity, not a calculation according to some mathematical formula. Since the course of the 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. The proper deduction (usually a percentage) will depend on the facts of each case, including the plaintiff's occupation, but generally it will be small: *Brewster v. Li*, 2013 BCSC 774 at para. 142, quoting *Reilly* at para. 101; *Raikou v. Spencer*, 2014 BCSC 1 at para. 83.

[148] Where an award of damages based upon the permanency of an injury or functional incapacity is sought, it is incumbent upon the plaintiff to demonstrate the permanency of his injuries with cogent evidence. The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41:

[41] In my view, it was open to the trial judge to find - essentially as a matter of common sense - that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.

[149] These principles were applied by this court in *Merko v. Plummer*, 2016 BCSC 1403 at para. 99:

[99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.

[150] The plaintiff bears the burden of proving that:

a) his accident-related injuries have impaired his capacity to earn income;

- b) those injuries are likely to persist into the future; and
- c) there is a real and substantial possibility he will suffer a loss of income as a result.

[151] In my view, the plaintiff has failed to meet that burden. The court has been left with so many unknowns regarding whether his ongoing afflictions and functional incapacities are causally connected to the Accident that an award for loss of future income earning capacity cannot be justified. I find that the plaintiff has failed to demonstrate a real and substantial possibility that he will suffer a loss of income earning capacity as a result of his Accident-related injuries.

[152] I decline to award the plaintiff any damages under this head.

Future Care Costs

[153] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the plaintiff to the position he would have been in had the Accident not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar (Guardian ad litem of) v. Beazley*, 2004 BCCA 290 at para. 19, quoting *Krangle v. Brisco*, 2002 SCC 9, at para. 22; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.

[154] The plaintiff must demonstrate an evidentiary link between his pain symptoms and the recommended treatment and care.

[155] The plaintiff seeks an award of \$120,000 under this head as follows:

a) Season cleaning:

\$2,700.00

b) Homemaking:

\$3,588.00

c) Gym pass:

\$431.00

d) Physiotherapy (12 times/year):

\$1,080.00

e) Massage therapy (12 times/year):

\$1,080.00

f) Medications:

i. Hydromorphone:

ii. Gabapentin:

iii. Diclofenac:

iv. Duloxetine:

v. Cyclobenzaprine:

\$496.40

\$54.75

\$189.80

\$189.80

\$47.45

Total annual cost:

\$9,857.20

[156] The present value of these costs over the next 20 years until the plaintiff reaches the age of 75 is $\$9,857.20 \times 16.3514 = \$161,179.02$. Applying a 25% reduction for contingencies results in the plaintiff's claim of \$120,000.

[157] Again, the plaintiff has failed to show an evidentiary link between his Accident-related injuries and the need for these future care costs. As previously stated, I find that the plaintiff has failed to prove on a balance of probabilities that his Accident-related injuries persisted after December 2013.

[158] I decline to make an award for future care costs.

Special Damages

[159] The plaintiff and the defendants have reached an agreement that the plaintiff should be awarded special damages in the amount of \$6,700.06. There will be an order to that effect.

Conclusion

[160] The plaintiff will have judgment against the defendants, jointly and severally, in the following amounts:

a) Non-pecuniary damages:

\$30,000.00

b) Past loss of earning capacity:

\$10,000.00

c) Future loss of earning capacity:

\$0.00

d) Cost of future care:

\$0.00

e) Special damages:

\$6,700.06

Total:

\$46,700.06

[161] The plaintiff is entitled to court ordered interest on the awards for past wage loss and special damages, in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

costs

[162] Subject to any submissions counsel wish to make, the plaintiff is entitled to his costs of this action at Scale B.

"G.C. Weatherill J."

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