

CANADA / JUDGMENT

Hedman v. Keykhosrowkiany

2020 BCSC 1974

COURT

Supreme Court of British Columbia

DECIDED

16 December 2020

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2020 BCSC 1974 Hedman v. Keykhosrowkiany

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hedman v. Keykhosrowkiany,

2020 BCSC 1974

Date: 20201216

Docket: M187398

Registry: Vancouver

Between:

Eric Wayne Hedman

Plaintiff

And

Farzad Keykhosrowkiany and Erfan Mohammadi Aminabadi

Defendants

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 30 - December 4, 2020;

December 7 and 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2020

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INTRODUCTION

- [1] The plaintiff, Mr. Hedman, claims for damages arising from a motor vehicle accident in the early morning of October 31, 2016. Mr. Hedman says this accident has resulted in neck pain and arm pain and numbness that effects his ability to sleep. His pain and fatigue have effected his ability to work as a water truck driver and handyman, his mood, and his relationship with his family.
- [2] Mr. Hedman claims past wage loss, loss of future earning capacity, loss of housekeeping (past and future), cost of future care, special damages, and non-pecuniary damages. He was 62 at the time of the accident, and 66 at the time of trial.
- [3] Liability for the accident is admitted, but the extent of Mr. Hedman's losses as a result of the accident are contested.
- [4] The defendants say that the plaintiff has not proven that he suffered anything more than a mild vocational disability because of the accident that does not impair his ability to earn income as a water truck driver, his daily living activities, or his mood to the point of constituting a mental injury. The defendants say that the plaintiff has proven a loss, but not to the extent that he claims.

ISSUES

- [5] I will briefly summarize the evidence before me with respect to Mr. Hedman's condition before and after the accident.
- [6] I will then discuss the issue of causation in this case.
- [7] Finally, I will turn to the question of damages and address what damages arise as a consequence of the accident, and specifically:
 - a) What is the appropriate measure of special damages?
 - b) What is the appropriate measure of damages for past wage loss?
 - c) What is the appropriate measure of damages for future loss of earning capacity?
 - d) What is the appropriate measure of damages for future care costs?
 - e) What is the appropriate measure of damages for loss of housekeeping capacity?
 - f) What is the appropriate measure of non-pecuniary loss?

FACTUAL BACKGROUND AND INITIAL FINDINGS**Prior to the Accident**

- [8] By all accounts, Mr. Hedman was a hard-working and capable man with a positive and can-do attitude prior to the accident. He socialized primarily with his family members, which include two brothers and his two adult daughters. He would see them all regularly, for pub nights and pool games with his brothers, or shopping trips, meals and walks with his daughters.
- [9] Mr. Hedman has some history of neck pain and degenerative spine disease in his neck, although it had appeared to be largely resolved by the time of the accident, needing only occasional "tune-ups" by a chiropractor. He also suffered numbness in his left hand in 2011.
- [10] Prior to the accident, Mr. Hedman worked more than full-time hours as a water truck driver/operator for the film industry, and other industrial and construction purposes. He described this work as one of the easiest jobs he could have--driving local distances, and, after some set up at the job site, requiring minimal levels of intervention from him. The film work (other than simulating rain) was the best work because the film crews usually managed the hoses. He also worked as a handyman for various property management companies and individuals for many years prior to the accident.
- [11] Mr. Hedman's water truck work was unionized, with the better jobs going to more senior employees. His T4 wages as a water truck driver and operator climbed fairly steadily, with the exception of a dip in 2014, from just over \$21,000 in 2010 to almost \$45,000 in 2015 and over \$48,000 in 2016, the year of the accident.
- [12] Mr. Hedman's handyman work consists primarily of repair work in tenanted apartment and strata units, in his own building and others, on an on-call basis when tenant's require a repair and when tenants move out and cleaning and repairs are required for the next tenant. Based on the evidence and a review of the evidence, this work included everything from fixing leaky faucets, to replacing floors and doors. Mr. Hedman provided carpet cleaning services, painting, electrical work for installing light fixtures, and small plumbing repairs. He would purchase parts and materials and bill them at cost. He accepted all of the work offered to him. For larger time-sensitive jobs he would recruit one or both of his younger brothers or his daughters who were in their 20's. His clients testified that they were happy with the quality, responsiveness, reliability and speed of his work prior to the accident.
- [13] Mr. Hedman was not able to give evidence as to his income from his handyman work prior to 2015, though it is clear from his evidence, and the evidence of two of his clients, as well as his family members, that he has been doing that work for more than a decade. His rates were in the \$20-\$30 range, though many projects were estimated and billed by project rather than by the hour. One client described using him about 30 times a year to provide as-needed repairs and tenant improvements in his 21 strata units prior to the accident. Another said he might call him a few times in a month, and then not for many months. The invoices in

evidence range from \$30 for a small repair, to over \$4,000 for more significant renovations and improvements.

- [14] Mr. Hedman had a bookkeeper prepare a tax return summary for his taxable income for the years 2015-2017, although he did not file those taxes because they showed taxes owing by him. These tax summaries are the best evidence available at trial of his income, and indicate that his gross business revenue from his handyman work in 2015 before the accident was just over \$25,000 and his net revenue was \$15,000. I find this to be the best evidence of his earning capacity for handyman work prior to the accident.

Accident and Post-Accident

- [15] The accident occurred early in the morning of October 31, 2016 in downtown Vancouver as Mr. Hedman was driving home. Mr. Hedman collided with the defendants' vehicle as it made an unexpected left turn in front of him. The impact was primarily to the rear door of the defendants' vehicle, but also damaged to the front of Mr. Hedman's Dodge Caravan. Both vehicles were written off. Police and first responders attended, but Mr. Hedman declined medical assistance at the time, and made his way home.
- [16] Mr. Hedman worked in the week after the accident, but as the week progressed his neck became very sore. He went to the doctor on November 7, 2016 who told him to rest, and wrote a note advising that he not go to work for two weeks, which was later extended to the end of the year, and again into the Spring of 2017.
- [17] Mr. Hedman was prescribed pain medication, and attended physiotherapy, massage and chiropractic appointments. He found the physiotherapy and massage to be painful, but the chiropractor helpful.
- [18] By December of 2016, Mr. Hedman was reporting neck pain, arm numbness, and insomnia as his symptoms on his claim form. While these symptoms mostly resolved for a time after his surgery, they are the same symptoms that he continues suffer from at trial.
- [19] I note that Mr. Hedman displayed little independent memory of events and dates in his testimony, and admitted that his memory of the years since the accident are essentially a "blur". I therefore prefer his contemporaneous reports to his doctors with respect to the timing of specific nature of his symptoms, as well as the extent of his recovery after the surgery.
- [20] At trial, Mr. Hedman described his primary complaint since the accident as chronic and deep pain in his lower arms, below the elbow, when he tries to sleep. He reported that this pain is only alleviated by sitting up in bed, interrupting his sleep multiple times a night. He also suffers from extreme fatigue and nausea, which he relates to his inability to sleep due to his arm pain at night. He also experiences numbness in his hands during the day, which is tolerable, but that he associates with a loss of dexterity. He also experiences occasional neck pain that restricts his ability to do things that require repetitive head movements.

- [21] Ultimately, Mr. Hedman was off work as a truck driver and operator until April 2017 following the accident, but appears to have started taking on handyman work commencing in January 2017. He testified that he recruited his brothers to help with these jobs due to his ongoing pain, which was confirmed by at least one of his clients. He worked through the remainder of 2017 until his surgery in November 2017.
- [22] In May 2017, a medical consultant recommended that Mr. Hedman consider surgery to his cervical spine based on medical imaging to address his ongoing neck pain and arm numbness and pain. He was able to see Dr. Nadeau, a spine surgeon, in October 2017, and obtained a surgery date in November 2017. Dr. Nadeau performed the surgery on November 14, 2017, removing two discs in his cervical spine and replacing them with bone from his hip to relieve the pressure on his spinal column and nerve roots, and fusing the affected vertebrae together.
- [23] Dr. Nadeau was qualified to and provided expert medical opinion evidence at trial. Both the plaintiff and the defendants relied upon her report, and she was the only medical doctor to give evidence. She opined that Mr. Hedman's "underlying pathology" in his cervical spine was aggravated by the accident, and that this onset of symptoms is what triggered Mr. Hedman's pain, and thus, his need for surgery in 2017. The defendants accept this evidence.
- [24] After his surgery, Mr. Hedman did not take any further trucking work until March 2018, though his handyman work appears to have restarted in January 2018.
- [25] Mr. Hedman spent a few months recovering from his surgery and benefitted from a significant resolution to his pain symptoms. In court, Mr. Hedman said this relief lasted about 6 months until he returned to his water truck work. Dr. Nadeau's evidence would seem to indicate that his recovery was more complete and lasted longer based on post-surgery consultations with Mr. Hedman.
- [26] In any event, in June 2018 when he saw Ms. Aggarwal, an occupational therapist who reviewed his functional capacity, Mr. Hedman still had some arm numbness and pain, and some mild neck pain that would worsen with repetitive neck motion. In many other respects, Mr. Hedman scored well with respect to his general mobility, and functional abilities for his age. Ms. Aggarwal concluded that Mr. Hedman was physically able to do the tasks associated with independent daily living and his work as a water truck driver and operator. However, he had some restrictions on his ability to do handyman work due to his neck pain and below average strength and dexterity for his age. He experienced pain and fatigue the day following the functional capacity testing, and after working. She found that if this lingering fatigue and pain were to persist into the future, it could interfere with both his vocations.

- [27] About a year after the surgery, and two years after the accident, in December 2018, Dr. Nadeau saw Mr. Hedman to see how he was doing post-surgery. She stated that, at that time, he felt that his arms symptoms were "90% improved." She stated that any subjective degeneration Mr. Hedman felt in his balance and dexterity was "stable and non-progressive". She concluded that Mr. Hedman "has recovered from his injuries and surgery with a good outcome."
- [28] In her February 2019 opinion report, Dr. Nadeau opined that "he is minimally symptomatic," and that that, while Mr. Hedman complained of neck pain at night, he did not complain of any neck symptoms during the day or while he was at work.
- [29] In regards to Mr. Hedman's ability to work, Dr. Nadeau opined that Mr. Hedman continued to have some neck pain at night and some arm numbness while driving, but that it did not interfere with his work "significantly." Overall, Dr. Nadeau concluded that Mr. Hedman was "currently not disabled from work, and largely recovered from his injury and surgical procedure." She did not believe "there is a real or substantial possibility that there is a future income loss arising from this injury."
- [30] In relation to Mr. Hedman's ability to perform activities of daily life and social activities in February 2019, Dr. Nadeau opined that Mr. Hedman may have been minimally to moderately disabled after the accident, causing him difficulty and pain in performing household cleaning and recreational activities. However, she concluded that because "[h]is symptoms having largely resolved post-operatively, this is unlikely to persist in the future."
- [31] Dr. Nadeau stated that "[n]o further medication, treatment or investigation is indicated at this time," as she believed Mr. Hedman's injuries had resolved after the accident. Mr. Hedman's post-operative MRI from September 12, 2018 indicated no further compression to the cervical nerves at the operated levels, those being C5-6 and C6-7. With respect to Mr. Hedman's C4-C5 cervical spine she noted some herniation and mild stenosis that had "improved from previous imaging and is of no concern".
- [32] Dr. Nadeau concluded in February 2019 that Mr. Hedman's symptoms were "90% resolved and stable," and that "his residual symptoms are minimal and unlikely to limit him significantly in any of his future endeavours," and that she did not "believe that Mr. Hedman has any true physical limitations at this time."
- [33] However, when she re-examined Mr. Hedman in August 2020, Dr. Nadeau noted that Mr. Hedman was still complaining of arm numbness and soreness, and decreased dexterity and balance since early 2019, though with less severity than before the surgery. She opined that those symptoms were caused by the "pathology at C4-5, the level above the surgical fusion" and noted the baseline pathology in this area that pre-existed the accident in 2011. In her opinion, that area had not warranted surgical intervention after the accident, but had worsened after the surgery, which was "typical". She opined that the cause of Mr. Hedman's current symptoms was "primarily" the disc degeneration at the C4-5 level, with "possible further accelerated degeneration" at this level due to the accident, and "likely further

accelerated degeneration" following the surgery. In her evidence at trial, she said both factors likely contributed to Mr. Hedman's current symptoms and that it was not possible to quantify how much. Dr. Nadeau also opined that the C4-5 level had not warranted surgical intervention after the accident, but that it might now.

- [34] In her September 2020 report, Dr. Nadeau did not consider that Mr. Hedman's current physical condition disabled him from working as a truck driver or looking after himself. She opined that he appears to have a "mild vocational disability" with respect to his work as a handyman, and that painting walls and cleaning carpets was exacerbating his arm symptoms.
- [35] In terms of his prognosis in 2020, Dr. Nadeau opined in her report that his pathology at the C4-5 level would likely slowly progress, and "therefore his current arm symptoms (unless found to be caused in large part by thoracic outlet syndrome), decreased dexterity and decreased balance will most likely persist and slowly progress as well." She concluded that "it is difficult to predict if and how fact his symptoms will progress and thus to what extent they will affect his vocational pursuits in the future."
- [36] While Dr. Nadeau attributed Mr. Hedman's ongoing arm and neck symptoms to his pre-existing and accelerated disc degeneration at C4-5 in her September 2020 report, she also referred Mr. Hedman to a vascular surgeon to consider an alternate explanation for Mr. Hedman's complaints regarding arm numbness and pain: thoracic outlet syndrome (an impingement of Mr. Hedman's blood vessels near his clavicle). In her testimony at trial, she explained that she did so because the area of Mr. Hedman's current arm numbness and pain below the elbow, and the fact that it was associated with his arm position while sleeping and driving, was potentially more consistent with thoracic outlet syndrome than compression of the nerve root at C4-C5.
- [37] After writing her report, Dr. Nadeau received a note from the vascular surgeon confirming possible thoracic outlet syndrome, and her evidence at trial was that she now considered this to be the more likely explanation for Mr. Hedman's arm pain and numbness. She still considered that Mr. Hedman's loss of balance and dexterity and neck pain were more likely caused by the pathology in his cervical spine. Dr. Nadeau did not provide a medical explanation for Mr. Hedman's complaints of fatigue or nausea, but did state that some of his pain medications could have fatigue as a side-effect.
- [38] Mr. Hedman did continue to work as a water truck driver after his recovery from surgery in March 2018 through to August 2019. During this time he attended or was admitted to the hospital on a number of occasions for unrelated issues, including a pulmonary embolism in August 2018. In August 2019, Mr. Hedman fell from the cab of his truck onto the ground as he was rushing to turn off the water. He attributes this fall, in part, to his fatigue. He was off work and received Workers Compensation benefits from August 2019 through until January 2020 when he was discharged from the WCB program and deemed fit to work. However, he did not return to his water truck work in February 2020 and has not returned since then.

- [39] Mr. Hedman attributes the lack of water truck work, especially film work, in the Lower Mainland to the pandemic, and his own perception that his employer may not consider that he can safely do the work despite being approved to do so. He testified that he told his company that they should call him when the movie work becomes available again and that they said they would do so. He said he would try to do that work again, but he is concerned that he is not safe to work because of his ongoing fatigue and because the shifts are not part-time. My understanding of the evidence is that he has not been offered any type of water truck shift throughout 2020.
- [40] I am satisfied on Mr. Hedman's evidence, and the evidence of his family members and clients who testified, that Mr. Hedman has experienced a significant loss of energy and change of mood since the accident. I am satisfied that this is related primarily to deep aching pain in his lower arms that comes on when he lies down and tries to sleep, but also to neck pain and nausea. Where he was once energetic, positive, reliable and responsive, he has become exhausted, negative, unreliable and unresponsive. He turns down work he used to take, and then takes longer to do the work he does accept. He bails on plans made with his daughters, even on Father's Day. He admits he is depressed, but is reluctant to take medication for this because of its affects on him, and more importantly because he does not see it addressing the root cause of his low mood: his chronic pain and fatigue.

CAUSATION

- [41] The defendants do not take issue with Mr. Hedman's credibility, and accept that he was doing his best to tell the truth. They accept that his description of his pain and limitations was generally truthful, however, they question the extent to which he says he was injured by the accident and particularly the amounts of his losses.
- [42] Mr. Hedman must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to his current disability. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [43] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [44] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

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

[45] The plaintiff must be placed in the position that he would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (also known as the "thin skull" rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which he would have experienced anyway (also known as the "crumbling skull" rule): *Athey* at paras. 32-35. The Supreme Court of Canada articulated the "crumbling skull" rule in *Athey*, at para. 35 as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[46] The "crumbling skull" factor may be addressed in a number of ways, including through a lower award, or as a percentage reduction on damages awards, which reflects the likelihood that a pre-existing injury or condition would result in similar losses: see, for example, *Booth v. Gartner*, 2010 BCSC 471 and *Beardwood v. Sheppard*, 2016 BCSC 100.

Parties' Positions

[47] Mr. Hedman says that the accident is the primary cause of his chronic pain, exhaustion and mood disorder. He acknowledges that his 2011 imaging showed degenerative disc disease in his cervical spine in the C4-C7 area, but he says that it was asymptomatic for 5 years prior to the accident, and it was the accident that triggered the pain in his neck and his arm pain and numbness. Mr. Hedman attributes his exhaustion and low mood to the ongoing presence of this chronic pain.

- [48] Mr. Hedman says that, although the surgery provided some temporary relief to his pain and numbness symptoms in early 2018, within a few month his symptoms had returned and are now at the same level as they had been before the surgery. He says that to the extent that Dr. Nadeau's evidence at trial suggested that his current arm pain and related fatigue may be caused by thoracic outlet syndrome, that it is still open to me to find that the accident was the cause, or at least a cause, for his consistent complaints of arm pain and numbness since the accident.
- [49] Mr. Hedman says that if there was to be any reduction in his entitlement to damages caused by the accident because of his pre-existing cervical disc degeneration, it should be a de minimus amount of no more than 5-10%.
- [50] The defendants accept that the accident was the precipitating cause of Mr. Hedman's neck and arm pain in the months and years following the accident up until the point he had recovered from his surgery. They do not contest that the accident necessitated the disc surgery.
- [51] However, they say that the accident did not cause anything more beyond that surgery than a "mild vocational disability" as described by Dr. Nadeau in her September 2020 report.
- [52] The defendants say that the possibility that some of Mr. Hedman's current disability may be caused by thoracic outlet syndrome, as opposed to the slowly progressing but now accelerated disc disease in his upper cervical spine, is not of significant concern because at least some portion of Mr. Hedman's current disability is conceded to arise from the accident. However, they say that if Mr. Hedman's claim extended to seeking recovery for losses that might arise from a surgery related to thoracic outlet syndrome, the evidence does not meet the plaintiff's burden of establishing that injury or the requirement for that surgery was caused by the accident.
- [53] Overall, the defendants say that they are not responsible for Mr. Hedman's full slate of current conditions that he finds disabling. They say that there are many factors contributing to Mr. Hedman's current condition, including his cardiovascular problems that led to a pulmonary embolism in August of 2018, and his pre-existing disc degeneration. They note that thoracic outlet syndrome is a vascular issue, and that Mr. Hedman was advised to more assiduously and consistently take his blood thinner medication to address this issue. The defendants are not seeking a discount factor for these conditions, but say that they are not responsible for aspects of Mr. Hedman's current state of disability arising from his potentially more serious cardiovascular health issues, and pre-existing conditions.
- [54] The defendants do take issue with Mr. Hedman's claim that the accident has caused him a mental injury. While they accept that he has suffered from a low mood, they say that simply being unhappy does not establish a mental injury pursuant to *Sadaati v. Moorehead*, 2017 SCC 28 (at para. 37) especially given all his other health issues and the pandemic.

Determination

- [55] It is uncontentious that the accident caused an injury to Mr. Hedman that is responsible for his pain symptoms in his neck and the initial numbness in his arms at least until he was recovered from the surgery in early 2018.
- [56] Based on Dr. Nadeau's evidence, I find that the accident resulted in a further misalignment at C6-C7 and C5-C6 of Mr. Hedman's cervical spine that compressed his spinal nerve and nerve roots which initially caused pain and numbness in Mr. Hedman's arms.
- [57] Also based on Dr. Nadeau's evidence, I find that the surgery was successful and entirely relieved the nerve compression in Mr. Hedman's cervical spine after the surgery, thereby significantly addressing the arm pain and numbness related to the cervical misalignment caused by the accident. I accept Dr. Nadeau's evidence that the C4-5 misalignment was not significant prior to the surgery and actually initially improved post-surgery. I also accept Dr. Nadeau's evidence that the primary cause of Mr. Hedman's neck pain is likely this pre-existing pathology, however, I also accept her opinion that the accident, and in particular the surgery necessitated by the accident, is now likely contributing to Mr. Hedman's neck pain and loss of dexterity related to the C4-5 area of his cervical spine.
- [58] With respect to Mr. Hedman's arm pain and numbness, I am satisfied that Mr. Hedman never reported a complete resolution to these symptoms. He describes these symptoms as the main source of his current fatigue and chronic pain. However, Mr. Hedman's description of his arm pain, at least since the surgery, is that it is only below his elbow, and related to his arm position--particularly at night. Dr. Nadeau's testimony before me was that Mr. Hedman's existing and ongoing nerve pain and numbness in the arms caused by misalignment in the cervical spine at this level would not effect the lower arms, but only the upper arm. Furthermore, she testified that pain that is associated with arm position (such as while sleeping or driving) was more likely to be caused by thoracic outlet syndrome, which is why she suspected this possibility. Based on the report she received from the vascular surgeon in October 2020, that likelihood was increased, but her opinion remained that Mr. Hedman's ongoing cervical spine pathologies might also continue to be a factor in Mr. Hedman's arm symptoms.
- [59] Overall, there is a lack of evidence as to the medical explanation for Mr. Hedman's ongoing and debilitating arm pain when he lies down, and the extent to which it was caused by the accident. There is also a lack of medical evidence as to the cause of his debilitating fatigue, though his theory that it is caused, at least in part, by his arm pain while sleeping is plausible. It may also be caused by cardiovascular issues which were clearly significant in Mr. Hedman's health by August 2018, about 10 months after his spine surgery, when he was admitted to hospital for a pulmonary embolism in both lungs.

- [60] Given the defendants' position that Dr. Nadeau's evidence does establish causation of a mild vocational disability as described by Dr. Nadeau, I am satisfied that Mr. Hedman has established causation on a balance of probabilities with respect to aspects of his current disability, including intermittent neck pain, decreased dexterity, and some contribution to his arm pain.
- [61] However, I find that Mr. Hedman has not established on a balance of probabilities that the full panoply of his current symptoms, including his arm pain when sleeping and driving, and the full extent of his fatigue and nausea, are caused by the accident. I attribute a significant portion of these symptoms to his independently arising cardiovascular health issues, which may include thoracic outlet syndrome, and his pre-existing disc degeneration.
- [62] I would also ascribe some level (but not the full extent) of Mr. Hedman's low mood to the accident, and I find that it rises to the level of a mental injury.
- [63] I agree with the defendants that Mr. Hedman has not established through evidence that any further interventions he may require, surgical or otherwise, to deal with thoracic outlet syndrome as a cause or contributing factor to his chronic arm pain and numbness below the elbow, were caused by the accident.

SPECIAL DAMAGES

- [64] The parties admitted, by consent, a list of the costs Mr. Hedman has incurred in relation to his rehabilitation care. This list includes costs for massage therapy, physiotherapy, and chiropractic treatments. It also includes the cost of Mr. Hedman's prescription and over the counter medication. The Defendants have admitted that the charges shown at Tab E of Exhibit 2, were reasonably and necessarily incurred as a result of the accident. I therefore award Mr. Hedman \$2,714 in special damages.

PAST LOSS OF EARNING CAPACITY

- [20] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [21] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the plaintiff is entitled to recover damages for only his past net income loss. In exercising this discretion, I must keep in mind that the plaintiff is to be put back in the position he would have been in had the 2016 Accident not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185-186 [Lines].
- [65] The plaintiff need not establish earnings loss on a balance of probabilities -- since what would have happened between the date of the accident and prior to the trial is essentially hypothetical, as are predictions regarding future losses. As stated in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

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.

- [22] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; and *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Determination of Past Wage Loss

- [66] The parties are agreed that Mr. Hedman's pre-trial loss of earning capacity should be valued at \$50,000.
- [67] This is about \$8,000 less than was estimated by Mr. Turnbull in his report based on a comparison of Mr. Hedman's pre- and post- accident earnings. However, that report noted, but did not include in Mr. Hedman's post accident earnings, over \$14,000 that Mr. Hedman received from WorkSafe BC while he was recovering from the fall from his truck in 2019. The plaintiff concedes that if that amount is included, Mr. Hedman did not experience any loss of income as compared to his pre-accident earnings in 2019. Furthermore, Mr. Turnbull's calculations as to Mr. Hedman's pre-trial loss of earnings relies on that incomplete 2019 figure to attribute another approximate \$10,000 in loss to Mr. Hedman in 2020, when he did not receive any calls to work at his regular water truck employment due to the pandemic.
- [68] Had the WorkSafe payments been taken into account in Mr. Turnbull's calculations in 2019 and 2020, Mr. Turnbull's estimate of loss would have fallen well below the \$50,000 mark. However, this is an assessment not a calculation. In that respect, some loss of capacity is supported by the evidence and acknowledged by the defendant in 2019 and 2020. I would therefore award Mr. Hedman \$50,000 in past loss of earning capacity.

DIMINISHMENT OF FUTURE EARNING CAPACITY

- [69] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time?
- [70] 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. Golaiy* (1985), 26 B.C.L.R. (2d) 260 (C.A.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos]; and *Pett v. Pett*, 2009 BCCA 232. The plaintiff must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren].

- [71] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [72] Insofar as possible, a plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [73] There are two possible approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset approach" is more appropriate: *Perren* at para. 12.
- [74] The earnings approach involves a form of math-oriented methodology such as (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value, or (ii) awarding the plaintiff's entire annual income for a year or two: see *Pallos and Gilbert* at para. 233.
- [75] The capital asset approach involves considering factors such as (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: see *Brown*; *Gilbert* at para. 233; and *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 and 56 [*Morgan*].
- [76] Though the capital asset approach is not a "mathematical calculation", the court must still set out the factual basis of the award: *Morgan* at para. 56.
- [77] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 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), 84 B.C.L.R. (3d) 158,

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

Parties' Positions

- [78] Mr. Hedman seeks \$250,000 in future loss of earning capacity on the basis that he has been disabled from all forms of work, and his ability to work to the age of 75 has been affected by the accident.
- [79] He relies on the calculations of Mr. Turnbull which extend his estimated gross loss of capacity in 2020 (based on Mr. Hedman's loss in 2019 excluding his WorkSafe payments) of \$15,300 in 2020 dollars to the age of 70 or 75.
- [80] One calculation provided by Mr. Turnbull is just under \$59,000 on the assumption that Mr. Hedman would have worked at this full overtime pre-accident capacity to the age of 70 but for the accident, and that the impairment to his ability to work valued at \$15,300 annually caused by the accident would neither improve nor diminish. Mr. Hedman says that this is not a realistic possibility, and that I should rely on the other scenarios provided by Mr. Turnbull.
- [81] The second calculation provided by Mr. Turnbull reflects a scenario where Mr. Hedman would have worked at this full overtime pre-accident capacity to the age of 75 but for the accident, and that the impairment to his ability to work valued at \$15,300 annually caused by the accident would neither improve nor diminish for that 9 year period. With no other negative contingencies factored in, Mr. Turnbull estimates a loss of just under \$116,000.
- [82] The third calculation provided by Mr. Turnbull contemplates a scenario where Mr. Hedman would have worked at this full overtime pre-accident capacity to the age of 75 but for the accident, with an income loss of \$15,300 per year until he turned 70, and that the accident was then the cause of his inability to work between the ages of 70 and 75. Again, with no factors to account for any negative contingencies between now and 2030, Mr. Turnbull estimates that loss to be \$318,000.
- [83] Mr. Hedman says that I should find that he has established that his loss of capacity is reflected by a scenario somewhere between the second and third amounts calculated by Mr. Turnbull, such that his loss should be valued at \$250,000.
- [84] The defendants say that Mr. Hedman's losses should be evaluated using the capital asset approach, but say that the evidence does not support more than a mild vocational impairment, and does not support any claim based on the proposition that the accident has or will in the future prevent Mr. Hedman from working as a water truck driver.

- [85] They say that the objective expert evidence led by Mr. Hedman all indicates that he is currently able to do this work, and that it is only his handyman work that is in jeopardy if his accident-caused symptoms persist. They concede that his handyman work has been affected, but say that he has shown since the accident that he is able to continue this work, albeit by recruiting help from his brothers, and to still earn a significant portion of his pre-accident net earnings from this work.
- [86] With respect to Mr. Turnbull's calculations of future loss of earnings, the defendants argue that those calculations expressly do not account for the negative contingencies ordinarily associated with Mr. Hedman's age of 66 in terms of his likelihood of retirement or partial retirement regardless of the accident, his entitlement to a pension (which he has but there is no evidence as to its value), and his other health issues, including his cardiovascular health. They say the \$116,000 figure provided by Mr. Turnbull assumes Mr. Hedman would have had an uninterrupted ability to work at his full pre-accident 62 year old capacity without any other interruptions until the age of 75, and that this is not reasonable. They say the \$318,000 figure requires not only the above finding, but also that the accident may cause Mr. Hedman to be unable to work as a truck driver. They say there is no evidence to support such a conclusion. The defendants say the 59,000 figure based on a retirement age of 70 at his 2019 level of disability is the most supportable on the evidence.
- [87] The defendants suggest a total award of \$65,000 as an appropriate compensation for Mr. Hedman's future loss of capacity, in light of his ongoing ability to work, his cardiovascular health, his pre-existing conditions and his age.

Determination

- [88] I will first address the question of how much longer Mr. Hedman would have been likely to work, and at what pace, but for the accident.
- [89] Mr. Turnbull did not provide any statistical information or negative contingencies related to workplace participation for Mr. Hedman beyond his current age of 66. My understanding is that he did not do so because these figures could be very significant, but not very reliable, as they would not take into account Mr. Hedman's specific circumstances.
- [90] Mr. Hedman says that I should find on the evidence that his specific circumstances would have compelled him to take all the work he was offered through his trucking employment and handyman work such that he would not have had any loss of earnings but for the accident before the age of 75. Also implicit in the plaintiff's position is that I should find there are no other negative contingencies such as his health or family circumstances that might have affected Mr. Hedman's ability or desire to work at a more than full-time pace to the age of 75, or that if they do exist they are off-set by the possibility that he would have worked at this pace beyond the age of 75.

- [91] However, I find Mr. Hedman's evidence did not establish that he felt compelled to work full-time to 75 or even 70. To the extent that he revealed his financial circumstances at all, it was that he lived a modest life with modest expenses. He has not paid his income taxes for many years because he did not have the money. He is entitled to a pension through his union work as a truck operator of an amount he has not yet determined.
- [92] Mr. Hedman stated that before the accident he intended to work until he was too old to work. He did not testify as to what that meant, for example that he had intended to work to the age of 70 or 75 before the accident. He did testify that he was going to continue to work as long as he could, but I am not satisfied that, absent the accident, Mr. Hedman has established that he would have continued to work to the age of 75. Nor am I convinced that he would have continued to work at the same overtime pace he was working at the age of 62 up to the age of 70, but for the accident.
- [93] Furthermore, I find that the evidence indicates that Mr. Hedman has cardiovascular health issues independent of the accident, and slowly progressing degenerative disc disease that was affecting him before the accident on occasion, and was likely to have further effects on this ability to work independent of the accident. I am also not satisfied that the full extent of Mr. Hedman's current fatigue and low mood, which is the primary source of his current disability, was caused by the accident. As a result, I am not satisfied that Mr. Hedman was likely to work to the age of 75, and I find that it is more likely that he would have begun working at a slower pace before the age of 70, regardless of the accident.
- [94] The expert evidence led by the plaintiff as to Mr. Hedman's physical capacity to work indicates, and I find, that the accident has not materially affected Mr. Hedman's ability to work as a water truck operator or the age to which he may continue to do that. To the extent that the accident has contributed to Mr. Hedman's fatigue and low mood, together with other non-tortious factors also independently contributing to this condition, I consider this to be a factor in terms of his loss of capacity, but not one that affects his ability to earn his employment income in a significant way.
- [95] I do find that Mr. Hedman's ability to work as a handyman was affected by the accident, and continues to be affected by his chronic pain, and that this pain was contributed to by the accident.
- [96] However, I cannot accept Mr. Turnbull's calculations as to how to measure this loss. Mr. Turnbull's evidence as to Mr. Hedman's overall projected income disparity in 2020 of \$15,300 is based on an estimated loss in 2019 that did not account for Mr. Hedman missing work that year due to falling out of the cab of his truck in August and not returning to work. It also does not account for the WorkSafe contributions he received as a result that workplace injury in place of his wages that more than made up any shortfall in Mr. Hedman's income that year.

- [97] Therefore, I find I cannot rely on Mr. Turnbull's base assumption that Mr. Hedman had a gross loss of approximately \$14,000 in 2019. Rather, the evidence supports a finding that, but for falling from the cab of his truck in 2019 and the pandemic in 2020, Mr. Hedman was able to perform his truck operation work, and that he had no loss of income in 2019 attributable to the accident.
- [98] Overall, I am not satisfied that Mr. Turnbull's base figure of Mr. Hedman's gross loss of income in 2019 is accurate or that it can then be used to extrapolate future losses of income in 2020 or beyond. Were I to rely on these calculations, I would also have to apply a significant discount figure to reflect the negative contingencies affecting Mr. Hedman's ability and likelihood to work at an overtime pace to the age of 70, and certainly to the age of 75.
- [99] However, I do find that, Mr. Hedman's net handyman income was down about 1/3 in 2019 and 2020 from approximately \$15,000 to closer to \$10,000, and that this was most likely due to his increased expenses in getting his brother's assistance, and his turning down work due to his pain and fatigue.
- [100] A \$5,000 loss per year in the last two years, plus some residual loss to his capacity in relation to the increase in pain and fatigue involved in his full-time trucking work, does not support the plaintiff's claim of \$250,000. It does not even support a loss of \$59,000 posited by Mr. Turnbull on the assumption that Mr. Hedman would have worked at his pre-accident pace to the age of 70. If I were to use the earnings approach employed by Mr. Turnbull and apply Mr. Hedman's proven loss of earnings since he recovered from his surgery, the amounts would be approximately 1/3 of those calculated by Mr. Turnbull over the next 5-10 years in the first and second scenarios, and negative contingencies would apply. Such an award would not exceed \$50,000.
- [101] The defendant argues that on a capacity based approach, \$65,000 is an appropriate award, which is roughly one year of Mr. Hedman's projected gross earnings based on his 2015 earnings and an inflationary factor as calculated by Mr. Turnbull.
- [102] Such an award would reflect a 10% reduction in Mr. Hedman's earning capacity over a period of 10 years to the age of 76, or a 20% reduction over 5 years to the age of 71. I consider that these formulations are a good reflection of Mr. Hedman's vocational loss of capacity caused by the defendants over this period, and I make that award.

COST OF FUTURE CARE

- [103] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-2016 Accident condition insofar as that is possible. When full restoration cannot be achieved, the court must strive 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), 49 B.C.L.R. (2d) 33 (S.C.)

[Milina]; Williams v. Low, 2000 BCSC 345; Spehar v. Beazley, 2002 BCSC 1104 at para. 55; and Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 29-30.

[31] The test for determining the appropriate award under the heading of cost 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 at 84; and Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63.

[104] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be able to be rejected in the future, the plaintiff can recover for such services: Izony v. Weidlich, 2006 BCSC 1315 at para. 74; O'Connell v. Yung, 2012 BCCA 57 at paras. 55, 60 and 68-70.

[105] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.

Parties' Positions

[106] Mr. Hedman seeks to recover \$6,480 for the costs of future care, primarily on the basis of Ms. Aggarwal's 2018 recommendation that he undertake an active physiotherapy rehabilitation program:

- a) 20 sessions of physiotherapy at a cost of \$79 per session;
- b) Gym membership to allow for independent exercise at an annual cost of \$404.50;
- c) 20 sessions of massage therapy at a cost of \$80 per session; and,
- d) \$300 in medications, representing approximately the same amount spent on medications in the year after his 2017 surgery.

[107] Appropriately, he does not seek funds for recovery from a further surgery, as the evidence at trial did not support that likelihood.

[108] The defendant argues that \$5,000 is a more appropriate amount given Mr. Hedman's own evidence that he has not done any of the physiotherapy or exercise therapy recommended in 2018.

Determination

[109] Mr. Hedman's evidence at trial was that he had not undertaken any of the recommended therapies recommended by Ms. Aggarwal. He did not find them helpful. I consider the defendant's position of \$5,000 to cover Mr. Hedman's costs of future care to be generous, and I would make that order.

LOSS OF HOUSEKEEPING CAPACITY

- [110] Mr. Hedman claims in damages for loss of housekeeping capacity. The defendant says that this is better addressed as part of the award for non-pecuniary damages.
- [111] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal considered the various approaches to valuing a loss of housekeeping capacity:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [112] In *Verjee v. Dunbrak*, 2019 BCSC 1696, I found the plaintiff had experienced a true loss of capacity with respect to her ability to maintain her home. This was an important aspect of her identity.
- [113] In this case, however, the evidence tends to support the alternative basis noted by the Court of Appeal "[w]here the plaintiff suffers a loss that is more in keeping with a loss of amenities." The evidence establishes that Mr. Hedman used to keep his home clean and organized, but has not done so since after the accident. It does not go much beyond that. The evidence of his functional capacity and the medical evidence of Dr. Nadeau indicates that Mr. Hedman is capable of organizing and cleaning his home. His failure to do so is not related to physical limitations on his part. I infer that it is more related to and indicative of his fatigue and low mood, which I have found to be caused in part by the accident and in part by factors not proven to have been caused by the accident. Overall, I consider that this loss is best addressed through the award for non-pecuniary damages.

NON-PECUNIARY DAMAGES

- [114] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [115] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

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).

[116] 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: Dilello v. Montgomery, 2005 BCCA 56 at para. 25.

Parties' Positions

[117] Mr. Hedman says that in the over 4 years since the accident, he has participated in numerous rehabilitation endeavours, including surgery, physiotherapy, massage therapy, chiropractic treatments, home exercises, extensive medical imaging sessions, and pharmacological treatments. He says that his current difficulties may be permanent, and will likely cause more problems into the future. He also says that his personal relationships and recreational activities have been negatively affected, and that he suffers from a mental disorder.

[118] Mr. Hedman relies on a series of cases decided in the last three years involving plaintiffs of a similar age that he says are comparable, and where the awards varied from \$110,000 to \$140,000: Debou v. Besemer, 2014 BCSC 1766; Sommerville v. Munro, 2018 BCSC 457; Kriedemann v. Banas, 2019 BCSC 629; and Sdrakas v. Dawe-Cook, 2017 BCSC 2276. He says these cases support a non-pecuniary award in the \$120,000 - \$140,000 range.

- [119] The defendants say that an appropriate award for non-pecuniary damages in this case would be \$100,000. The defendants rely on a trio of cases involving surgery or anticipated surgery, two with much younger plaintiffs, some with injuries that were arguably more permanent and life-altering than those Mr. Hedman is faced with: *Chenier v. Szili*, 2015 BCSC 675; *Ozeer v. Young*, 2015 BCSC 542; *Gormick v. Amenta*, 2013 BCSC 1128. The awards in these cases were in the \$90,000 - \$95,000 range.
- [120] They say that significant factors in this case are Mr. Hedman's other health conditions, including his ongoing cardiovascular issues and his pre-existing cervical spine disc degeneration and stenosis, that also contribute to his current symptomology and his future quality of life. The defendants acknowledge that the requirement for surgery is a significant factor supporting non-pecuniary damages in this case, but say that this is a more significant factor than any long-term effect of Mr. Hedman's physical capacity or daily life.
- [121] They note that the functional capacity expert called by Mr. Hedman, Ms. Aggarwal, noted that in June 2018 Mr. Hedman scored 97% on the "Reintegration to Normal Living Index" based on his own answers. Ms. Aggarwal described this as likely a "slight overestimation" of Mr. Hedman's ability to return to his pre-accident normal life because it did not account for his fatigue and pain after doing activities and his recovery time. Nevertheless, the report finds that the accident has not significantly impinged on Mr. Hedman's ability to participate in the activities of daily life, although it had negatively affected his social and recreational activities.

Determination

- [122] The cases and awards relied upon by the plaintiff generally reflect findings of more severe and permanent disability than Mr. Hedman has established in this case. *Kriedemman* was a case involving a brain injury that affected the plaintiff's memory and concentration and fractures to the plaintiff's ribs, vertebrae and a separated shoulder for which he underwent two surgeries. In *Sommerville*, the plaintiff had fractured his lumbar and cervical spine and was hospitalized for 16 months after the accident for back pain, was bed-ridden for a time, and required a mobility aid for several weeks. In *Debou*, the plaintiff did not require surgery, but his chronic pain and impairment was found to be more extensive than the evidence supports in Mr. Hedman's case.
- [123] I consider the *Sdrakas* case to be the more comparable of the plaintiff's cases, where soft tissue pain and numbness were both factors, and there was also a pre-existing asymptomatic degenerative condition in the plaintiff's injured shoulder. Surgery in that case was discussed but had not been performed as of the date of trial. That accident did, however, have a greater impact on the plaintiff's vocational and physical capacity than is the case in Mr. Hedman's case. The non-pecuniary damage award in that case was \$110,000.

[124] On the other hand, the cases relied upon by the defendants with awards in the \$90,000 - \$95,000 range indicate lower awards for more significant or permanent injuries, with fewer complicating factors and younger plaintiffs, all of whom had to undergo surgery.

[125] Overall, taking into consideration Mr. Hedman's surgery and the objective evidence as to the relatively mild nature of Mr. Hedman's physical disability post-surgery, Mr. Hedman's pre-existing and concurrent health issues that also affect his quality of life, and his low mood which I have found to be partially attributable to the accident, I consider that an award of \$100,000 in non-pecuniary damages is appropriate in this case.

CONCLUSION AND COSTS

[126] In conclusion, Mr. Hedman is entitled to \$222,714 in damages from the defendants as follows:

- a) Non-pecuniary Damages: \$100,000
- b) Past Wage Loss: \$50,000
- c) Loss of Earning Capacity: \$65,000
- d) Cost of Future Care: \$5,000
- e) Special Damages: \$2,714

Total: \$222,714

[127] Mr. Hedman is also entitled to his costs, subject to any offers or other matters that may require an adjustment to his costs entitlement. If the parties wish to address costs, they may arrange with the Registry in the next 30 days to make submissions before me for this purpose.

"Marzari J."

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Prepared on 27 October 2026 · Esheria