

CANADA / JUDGMENT

Henry v. Fontaine

2022 BCSC 930

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Supreme Court of British Columbia

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2022 BCSC 930 Henry v. Fontaine

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Henry v. Fontaine,

2022 BCSC 930

Date: 20220606

Docket: M197153

Registry: Vancouver

Between:

Aaron Todd Henry

Plaintiff

And:

Marcel Fontaine and Yvonne Fontaine

Defendants

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.

May 9-13,16,18-20, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 6, 2022

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Introduction

- [1] The plaintiff claims damages for personal injuries arising out of a motor vehicle accident on Friday, August 25, 2017 (the "MVA"). The MVA occurred when the vehicle in which the plaintiff was a passenger was rear-ended by a vehicle owned by the defendant, Yvonne Fontaine, and driven by the defendant, Marcel Fontaine.
- [2] The defendants have admitted liability for the plaintiff's injuries.

Background

- [3] The plaintiff is 32 years old. He was 27 years old at the time of the MVA. He has always had a strong work ethic. He worked while attending high school at various jobs. While working full-time after his high school graduation at a tire store, he enrolled in a welding program at the University of the Fraser Valley, where he obtained his Level C welding certificate.
- [4] Since 2010, the plaintiff has worked as a welder for various companies. The work is intricate and physically demanding. It requires that he wear specialized safety equipment, including harnesses, face shields, and helmets.
- [5] In 2013, while working full-time as a welder, he attended courses at B.C. Institute of Technology and obtained his Level B welding certificate.
- [6] From mid-August 2016 until early November 2018, the plaintiff worked as a high-pressure sanitary welding service technician for a company called Newlands DME Limited Partnership ("Newlands"). Newlands was a specialty stainless steel fabricator for large breweries and food processing plants with operations and customers throughout Canada and the United States. The plaintiff's job required him to travel extensively to repair and

install stainless steel pipes and equipment at customers' plants. When not travelling, he worked in Newlands' shop and was paid \$30 per hour. While travelling, he was paid \$33 per hour. He worked significant amounts of overtime, earning \$45 per hour when he worked more than eight hours per day and \$60 per hour beyond 12 hours per day. In mid-2018, the plaintiff received a raise by \$4 per hour for both his regular and travel time to \$33 and \$37 respectively. His overtime pay increased correspondingly.

- [7] Josh Wolf was the plaintiff's manager at Newlands. He described the plaintiff as an exceptional employee--the "cream of the crop" and a "top tier tradesman" whose talents as a pressure welder "stood out". He testified that the plaintiff was very skilled, hardworking, and sought after. Mr. Wolf testified that the plaintiff would do whatever it took to get the job done and never missed work or needed time off.

The Plaintiff's Pre-MVA Medical and Recreational History

- [8] The plaintiff was active and in good health prior to the MVA. He had no difficulty working long hours and earning as much overtime pay as was available to him. He was extremely active and engaged in various physical activities, typically at an intense level. He enjoyed body-building in the gym, running, rigorous hiking, mountain biking, hockey, hunting, and archery. He had the endurance and capacity to perform at a high level. He slept well.
- [9] The plaintiff suffered a concussion in 2000 at age 10 when he was hit by a soccer ball. He suffered a second concussion in 2011 when he fell off a ladder while working as a welder. On that occasion, his symptoms included headaches and sensitivity to light and sound. He was off work for approximately four months, during which he attended a Workers' Compensation recovery clinic. The plaintiff testified that he fully recovered from this second concussion, although he admitted to occasional headaches, as well as some mood issues and social awkwardness arising from it. The plaintiff testified that he may have suffered a third concussion in a vehicle accident at age 17, but that it was never positively diagnosed.
- [10] The clinical records disclosed that the plaintiff attended three massage therapy sessions between March 2016 and June 2017. He testified that he did so because he was occasionally sore after heavy workouts in the gym and playing hockey, so he took advantage of the massage benefits that were available through his employer. The massage therapist's clinical records disclose that the plaintiff reported some neck pain and headaches. The plaintiff testified that any neck pain and/or headaches did not affect his functioning in any way.
- [11] The plaintiff's evidence regarding the foregoing pre-MVA recreational activities were corroborated by his wife, Aiden Rutley, and his long-time friend, Aron Carpenter. Neither Ms. Rutley nor Mr. Carpenter observed any indication that the plaintiff was in pain after his participation in these activities. Neither of them observed the plaintiff having emotional difficulties.

The MVA

- [12] At the time of the MVA, the plaintiff was the front-seat passenger in a vehicle driven by Ms. Rutley. They were stopped at a four-way stop intersection at the bottom of a steep hill. Their vehicle was hit from behind without warning by the defendants' vehicle. Ms. Rutley described the collision as a "huge impact".
- [13] The plaintiff testified that while his body was restrained by his seat belt, his head and neck snapped forward and then backwards on impact.

The Plaintiff's Life After the MVA

- [14] The plaintiff testified that he has suffered from significant neck pain since the MVA. He testified that, after strenuous physical activity at work, the pain radiates up from his neck to the back of his head causing headaches. The pain also radiates down to his shoulder girdle and results in some numbness in his fingers. He has sensitivity to light when his neck pain is more intense. He now has ringing in his ears.
- [15] The plaintiff went to work on the Monday and Tuesday following the MVA, working eight hours and four hours respectively. He took the rest of that week off. On the Tuesday, he attended a walk-in clinic where he was prescribed pain medication--Naproxen and Flexeril. The following two weeks were previously scheduled vacation time. He returned to work on September 18, 2017. The plaintiff testified that he only performed "light duties", with some reduced travel for the next several months before returning to his regular schedule and work duties. He testified that he needed to take approximately three to four days off from work each month in order to "recover" from his pain symptoms and attend rehabilitation and other appointments.
- [16] Crystal Kowalik, who at all material time was Newlands' payroll administrator, testified that according to an Excel spread sheet she prepared several years ago based upon Newlands' payroll records, the plaintiff worked and was paid for the following hours in the weeks following the MVA:
- a) September 18, 2017: 54 hours (including 12 hours of travel time);
 - b) September 25, 2017: 69 hours (out of town, including nine hours of travel time);
 - c) October 2, 2017: 37 hours (including two hours of travel time);
 - d) October 9, 2017: 52.5 hours (including 13.5 hours of travel time);
 - e) October 16/17: 48 hours (including 24 hours of travel time); and
 - f) October 23, 2017: 45 hours (including four hours of travel time).
- [17] The documents disclose that the plaintiff lost \$1,920 to \$2,112 in wages from Newlands between the date of the MVA and his return to work on September 18, 2017.

- [18] The plaintiff saw his family doctor, Dr. du Toit, intermittently after the MVA, with appointments on February 1 and 9, 2018, October 15, 2019, January 20 and February 10, 2020, and January 23, 2021. During each of these consults, he complained to Dr. du Toit of neck pain and related issues. Dr. du Toit referred the plaintiff to physiotherapy and massage therapy.
- [19] The plaintiff attended 13 physiotherapy sessions from October 23, 2017 to April 11, 2018, as well as one further session in 2020. He decided that these sessions were doing little, if anything, to advance his recovery and determined that he was able to derive the same or more benefit from performing the exercises at home. He testified that he does his best to "keep on top of" the exercises.
- [20] In addition, between December 3, 2019 and May 6, 2021, the plaintiff attended 22 massage therapy treatments. He found them to be effective in providing short-term relief for his headaches and neck pain. He ended his massage treatments when his therapist moved away. He was on a waitlist for continued treatments and has only recently been able to resume them. He also found that trigger point injections, "dry needling", yoga, and stretching were all effective in reducing his symptoms. He only uses pain medications as "a last resort". On June 18, 2020, he attended a kinesiology appointment but did not find it to have been a useful experience, other than to the extent that he learned some exercises that he has been able to do at home.
- [21] The plaintiff testified that his pain symptoms are exacerbated by activity. He also testified that his sleep is now "irregular", depending on his pain symptoms.
- [22] In late 2018, Newlands was placed into receivership. Mr. Wolf left Newlands approximately three months earlier and started his own company, Foundation Mechanical, which ultimately hired many of the former Newlands welders. Foundation Mechanical continues to service Newlands' former customers. Mr. Wolf testified that he wanted the plaintiff to become one of his employees at Foundation Mechanical. However, the plaintiff decided to go into business for himself. Foundation Mechanical has retained the plaintiff as a subcontractor ever since. Initially, the plaintiff provided his services personally but, beginning in March 2019, he incorporated AHS Stainless Welding Ltd. ("AHS") and since then has been providing his welding services through AHS. Until the summer of 2021, the plaintiff/AHS was paid \$65 per hour for the plaintiff's work. Thereafter, the rate increased to \$70 per hour. Based upon AHS's invoices, approximately 88% of AHS's income is derived by way of its work as a Foundation Mechanical subcontractor and approximately 12% of AHS's income is for services the plaintiff provides to others, for which it is paid \$90 per hour.

- [23] The plaintiff testified that the amount of work AHS accepts from Foundation Mechanical and its other customers depends upon how he is feeling and the level of his pain symptoms. He testified that he has some good days when his neck pain does not impede his functioning, but also some bad days when it does. He testified that he is particularly "run down" and his symptoms tend to flare up after longer, heavier work and travel days. He testified that, since incorporating AHS, he takes five to six days off each month in order to recover on average.
- [24] The plaintiff testified that, absent the MVA, he feels he would have typically worked approximately 2,000 hours per year (i.e., 40 hours per week for 50 weeks).
- [25] Mr. Wolf testified that the plaintiff works primarily on large projects for Foundation Mechanical. He testified that the plaintiff continues to "run himself hard" and work through the job and then take time off. He testified that, to his knowledge, the plaintiff has never asked for accommodations for his MVA-related pain symptoms. On cross-examination, Mr. Wolf readily conceded that he is unaware of the plaintiff missing work due to his injuries. He testified that he believes the plaintiff may have taken a couple of days off in 2022 between jobs.
- [26] The plaintiff's income from welding for the relevant years was as follows:

Year

Income

2015

\$69,715

2016

\$43,984 (not including \$7,755 Employment Insurance)

2017

\$91,699

2018

\$105,436

2019

\$24,459 (stub year; including a \$10,000 dividend from AHS)

2020

\$71,000 (dividends from AHS)

2021

\$75,000 (dividends from AHS)

- [27] The documents disclose that the plaintiff's gross income during the 12 months immediately preceding the MVA was \$85,394.
- [28] The plaintiff's accountant, Ken Pawluk, testified. He provided the Court with a helpful explanation for the manner in which AHS's business income flows through to the plaintiff in a tax-efficient manner. Mr. Pawluk testified that AHS's total net income before taxes is the most accurate reflection of the plaintiff's earnings and earning potential. AHS's year end is February 28. Its net income (before taxes) for the 2020 and 2021 taxation years was as follows:
- a) 2020: \$58,192
 - b) 2021: \$82,819
- [29] The plaintiff testified that he plans to work as long as his is physically capable of doing so and that he has no retirement age or date in mind.
- [30] The plaintiff testified that, although he continues to engage in the activities he participated in prior to the MVA, they are not as enjoyable or satisfying for him. His gym sessions are limited to cardio workouts rather than body-building, his hockey is on a drop-in basis, his biking and hiking is significantly less strenuous, and his hunting and archery have been substantially reduced. He testified that he has become discouraged and has bouts of "lows" because of his inability to engage in activities at the level he previously enjoyed.
- [31] In January 2020, the plaintiff was prescribed Wellbutrin for his depressed mood, but discontinued his use because of its side effects. Mr. Carpenter testified that, although the plaintiff continues to go to the gym, he is not as motivated as he was before the MVA and his workouts are significantly less strenuous, less frequent, slower, and involve "calculated" movements. Ms. Rutley described the plaintiff's recreational activities as "casual" and much less strenuous. She testified that the plaintiff appears unhappy and in pain afterward these recreational activities. She often massages his neck and shoulders.
- [32] On cross-examination, the plaintiff agreed that, since the MVA, he has suffered from mood disorders, including anger and seasonal affective disorder ("SAD"). He testified that he has found high doses of Vitamin D to be effective for his SAD. During the period December 7, 2020 to January 29, 2021, he attended six counselling sessions for cognitive behavioral therapy, which he found helpful in managing his anger and teaching him how to better communicate, instead of internalizing his feelings.
- [33] The plaintiff testified that, since the MVA, his yard has become "run down" and that he "gets to it when he gets to it" because his focus is on rest and recovery to ensure he is able to function for work.
- [34] The plaintiff testified that he was "pretty much wrecked for the next couple of days" after his functional capacity evaluation by Jerica Ditson on October 25, 2021.

Expert Evidence

Opinion Evidence Tendered by the Plaintiff

Dr. Rhonda Shuckett, Rheumatologist

[35] Dr. Shuckett assessed the plaintiff on August 17, 2021. Her report is dated January 10, 2022. She was qualified, without debate, to give opinion evidence in her field of Rheumatology, the specialized study of musculoskeletal disorders and pain conditions.

[36] Dr. Shuckett opined that the plaintiff likely suffered the following injuries as a result of the MVA:

- a) whiplash associated disorder class 2;
- b) zygapophyseal joint (facet injury) to both sides of his neck; and
- c) left shoulder rotator cuff tendinopathy and impingement.

[37] Dr. Shuckett opined that, given the length of time that the plaintiff's symptoms have lasted, he has likely reached maximum medical improvement, that his prognosis for further improvement is "guarded and diminished", and that he will likely have to deal with his pain symptoms long-term.

[38] Dr. Shuckett recommended that the plaintiff:

- a) be referred to a multi-disciplinary pain clinic;
- b) be considered for trigger point injections or guided facet/medial branch blocks in his neck, although she acknowledged that such treatments would likely be ineffective if they have been tried previously;
- c) have an MRI of his neck and an MRI or ultrasound of his left shoulder;
- d) continue exercising; and
- e) have massage therapy twice per month to help relieve his symptoms short term.

[39] Dr. Shuckett acknowledged on cross-examination that exercise is important to the rehabilitation of a person suffering from chronic pain and that one visit to a kinesiologist does not constitute an "active rehabilitation program".

Jerica Ditson, Occupational Therapist

[40] Ms. Ditson conducted a functional capacity evaluation of the plaintiff on October 25, 2021 ("FCE"). Her report is dated January 24, 2022. She was qualified without objection to give evidence on the plaintiff's functional capacity and the cost of future care modalities.

- [41] The FCE was conducted over a period of seven hours and consisted of a clinical interview, a musculoskeletal assessment, repeat physical and functional testing, and welding simulation testing. Ms. Ditson opined that the plaintiff put forward a consistent and high level of physical effort throughout. She found that the results of her assessment are a reliable indicator of the plaintiff's functional capacity, despite his tendency to overestimate his functional strength capacity.
- [42] Based on her assessment, Ms. Ditson stated that the plaintiff demonstrated significant functional limitations in forward reaching, combined with sustained positioning of the head, neck and/or upper spine, which in her view were a critical demand for welders. She opined that these functional limitations--as well as the plaintiff's difficulty wearing his welding helmet--have reduced his overall ability to compete for work in an open job market.
- [43] Ms. Ditson also opined that overtime work was not sustainable for the plaintiff. However, during her cross-examination, she clarified this opinion, stating that working overtime itself was possible, but that it would likely affect the plaintiff's ability to function in non-work-related aspects of his life.
- [44] Ms. Ditson opined that in order to remain functional, the plaintiff will require accommodations, including assistance with handling loads beyond his sustainable functional strength capacity, provisions for taking breaks, removal of his welding helmet, and shifting and changing positions to help manage his neck symptoms. She opined that he is not well suited to work in an environment that requires sustained high productivity.

Darren Benning, Economist

- [45] Mr. Benning is an economist with expertise in calculating the present values of future losses and expenses. He provided a report dated February 14, 2022, and was qualified without debate as an expert capable of estimating the value of the plaintiff's income loss, as well as the present value of the cost of future care. Mr. Benning attended as a witness for cross-examination.
- [46] Mr. Benning's calculations are based on the following assumptions:
- a) absent the MVA, the plaintiff would have continued working as a welder to age 70;
 - b) as a result of the MVA, the plaintiff missed 3-5 days of work per month in 2017-2018 and 5-6 days per month thereafter; and
 - c) the plaintiff may suffer ongoing earnings capacity reduction in the future.
- [47] Despite those assumptions, the tables Mr. Benning provided can be used to determine the value of the plaintiff's income loss and cost of future care resulting from whatever factual determinations the Court makes.

Opinion Evidence Tendered by the Defendants

Dr. Hernish Acharya, Physiatrist

- [48] Dr. Acharya is a specialist in physical medicine and rehabilitation. He assessed the plaintiff on February 7, 2022. His report is dated that same day.
- [49] Dr. Acharya opined that the plaintiff likely sustained a whiplash associated disorder as a result of the MVA. He continues to exhibit positive facet loading manoeuvres. Explanations for his ongoing symptoms of non-specific neck pain and headaches include cervicogenic headaches and chronic pain syndrome.
- [50] Dr. Acharya opined that the likely cause of the plaintiff's complaints of numbness in his hands is carpal tunnel syndrome resulting from repetitive heavy lifting, not the MVA. He recommends that the plaintiff have an MRI of his cervical spine and an electrodiagnostic study in order to identify the cause of his symptoms.
- [51] Dr. Acharya opined that the plaintiff has "functional intolerances", as opposed to functional limitations. He stated that, although he has not seen any medical evidence suggesting that a medical restriction on the plaintiff's day-to-day activities should be imposed, he does not rule it out pending the results of a cervical spine MRI and electrodiagnostic study.
- [52] Dr. Acharya deferred his prognosis for recovery as well as recommendations for further physical treatment pending the outcome of an MRI and electrodiagnostic study. He suggested that "hurt vs. harm" counselling, psychological intervention, and various medications including gabapentin, pregabalin, amitriptyline and/or duloxetine may be of assistance to the plaintiff.

Credibility and Reliability

- [53] The following quote from *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, 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. 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. 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.

[Citations omitted.]

- [54] 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.
- [55] A plaintiff who accurately 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.
- [56] The plaintiff was an honest and credible witness, but he gave his evidence in a largely vague, imprecise, and generalized fashion. He was unable to provide specifics of the time he was unable to work due to his MVA-related injuries and offered little more than "guesstimates" in that regard. Accordingly, while I accept his evidence that he lost work-hours as a result of his MVA-related injuries, I am not satisfied that his evidence regarding average lost work days per month is reliable.
- [57] Mr. Carpenter was an assertive, forthright, and responsive witness, although his evidence was limited to his general observations. I accept his evidence as credible.
- [58] Ms. Rutley was a forthright and credible witness. I accept her evidence.
- [59] Mr. Pawluk was a careful witness who provided the Court with a helpful understanding into AHS's financial statements and the plaintiff's income and income-earning circumstances. I accept his evidence in its entirety.
- [60] Both Mr. Wolf and Ms. Kowalik were outstanding witnesses. Their respective demeanours were down-to-earth and exuded common sense. They were articulate, knowledgeable, and embodied credibility. As lay witnesses go, they were a breath of fresh air. I have no hesitation accepting their evidence in its entirety.
- [61] Dr. Shuckett was, by any measure, an impressive witness who was well prepared, articulate, and helpful to the Court. I have no hesitation accepting her opinions and recommendations, as modified during her oral testimony, to the extent set out below.
- [62] Ms. Ditson was an impressive witness who gave her evidence in an objective and helpful manner. Her FCE was obviously thorough and well thought out. I accept her evidence regarding the plaintiff's demonstrated functionality on the day of the FCE. However, as set out below, I give her opinion evidence regarding the plaintiff not being competitively employable and unlikely to be able to work overtime as a welder little weight because it is contrary to the factual evidence before me.
- [63] Mr. Benning was an excellent witness who provided the Court with valuable economic expertise. I have no hesitation accepting his opinions and calculations in their entirety.
- [64] Dr. Acharya was an impressive witness who gave his evidence in an objective and forthright manner.

Causation

- [65] 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.
- [66] Causation need not be determined with scientific precision: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328. Rather, it is a practical question of fact that can often be answered by ordinary common sense. The plaintiff needs 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 para. 9.
- [67] There is no necessary connection between the force of impact and the severity of injury: *Newman v. Johal*, 2021 BCSC 65 at paras. 22-23. Rather, each case must be determined on its own facts. However, courts should exercise caution where there is little or no objective evidence of injury or continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.). In such circumstances, a plaintiff is not entitled to compensation without some convincing evidence. The evidence can be from the plaintiff himself or herself if the surrounding circumstances are consistent with the complaints of pain and are true reflections of a continuing injury: *Price* at 397.
- [68] The opinions of Drs. Shuckett and Acharya are largely medically consistent. Both opined that the plaintiff suffered whiplash during the MVA. Dr. Acharya's opinion regarding the plaintiff's chronic neck and shoulder pain and headaches differs from that of Dr. Shuckett, only insofar as Dr. Acharya is of the view that a cervical spine MRI and/or an electrodiagnostic study needs to be performed before a diagnosis of chronic pain can be made, as opposed to a diagnosis of chronic pain syndrome. In contrast, Dr. Shuckett was able to reach her diagnosis of chronic pain in the absence of such diagnostic testing. On balance, I accept Dr. Shuckett's opinion.
- [69] I find that the MVA caused the plaintiff to suffer the following injuries:
- whiplash associated disorder class 2, which has now become chronic;
 - zygapophyseal joint (facet injury) to both sides of his neck;
 - left shoulder rotator cuff tendinopathy and impingement; and
 - cervicogenic headaches from his neck pain.
- [70] I accept Dr. Acharya's opinion that the plaintiff's hand numbness is unrelated to the MVA.

Assessment of Damages

Non-pecuniary Damages

[71] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out a non-exhaustive list of common factors which influence an award of non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* 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] B.C.J. No. 163 (QL), 2005 BCCA 54).

[72] Where the MVA-related injuries have caused significant ongoing pain and an inability for the plaintiff to carry on a previously active lifestyle or physical vocation, non-pecuniary damages awards have been assessed at well over \$100,000: *Rizzolo v. Brett*, 2010 BCCA 398 at para. 37.

[73] Counsel for the plaintiff submits that an award of \$90,000 to \$100,000 for non-pecuniary damages is appropriate in this case, relying on the following decisions:

- a) *Block v. Schmitt*, 2019 BCSC 1575 (\$85,000, \$101,700 adjusted for inflation): the plaintiff was physically active and healthy prior to the accident. She had some ongoing low back, neck, and shoulder pain before the Accident but they did not restrict her recreational or employment activities. After the accident, the plaintiff suffered moderate-to-severe soft tissue injuries to her neck, upper back, both shoulders, and low back. She also suffered an aggravation of a pre-existing degenerative condition in her cervical spine. The plaintiff was diagnosed with right shoulder rotator cuff tendinopathy and, because of the accident, she has been rendered more vulnerable to further injury. The overriding pain was in her neck and upper back, which extended into her shoulders and arms from the base of her skull to her back. The pain was daily, though it varied in intensity. The pain interfered with her sleep. She would experience headaches that were associated with flare-ups of her neck pain.

Her injuries continued to interfere with her home and recreational life up to the trial. The plaintiff's working life was an enormous part of her identity and her injuries from the accident impacted her ability to work pain free. She was also unable to participate in the outdoor activities she had previously engaged in with her family.

- b) *Larson v. Bahrami*, 2017 BCSC 2308 (\$80,000, \$91,900 adjusted for inflation): the plaintiff was in his 40s at the time of trial. He was a highly skilled tradesperson holding interprovincial red seal tickets in four trades (iron worker, welder, millwright, and heavy duty mechanic). Before the accident, the plaintiff was working as a heavy duty mechanic. The plaintiff also enjoyed physical activities outside of work including cycling, snowboarding, and fishing. He also spent his free time working on his garden. The court found that the plaintiff suffered soft tissue injuries to his cervical, thoracic and lumbar spine as a result of the accident, leaving him with stiffness in his neck and back. The court accepted that the plaintiff's neck pain was chronic. By the time of trial, the plaintiff had achieved "maximum medical improvement": *Larson* at para. 113. Moreover, the symptoms would continue to be exacerbated by activities such as twisting, crouching, bending, and reaching--all of which were regular features of the plaintiff's work.
 - c) *Lauriente v. Schoonhoven*, 2017 BCSC 2246 (\$100,000): the court found that the plaintiff's life was adversely impacted by the accidents in many respects. The plaintiff struggled with daily neck and headache pain and the court found that she was likely to continue to do so for the foreseeable future. The pain affected the range of her physical activities and impacted her mood and sleep. While the plaintiff finished her nursing degree and continued to work full-time following the accidents, the court noted her pain limited the pleasure she derived from her work. She also was unable to continue with the recreational activities she had enjoyed before the accidents in the same way.
- [74] Defendants' counsel submits that an award of \$40,000 to \$50,000 is appropriate, relying of the following decisions:
- a) *Findlay v. Sun*, 2020 BCSC 1330 (\$55,000): a 31-year-old laser technician continued to suffer neck and back pain and experience flare-ups after exertion. She avoided certain activities but was able to enjoy most others she had engaged in prior to the accident.
 - b) *Ludwiczak v. Nguyen*, 2020 BCSC 1202 (\$50,000): a 35-year-old suffered injuries leading to headaches and neck pain that resolved within 18 months. However, the plaintiff's chronic low back pain persisted and was exacerbated by prolonged physical exertion.
 - c) *Dennison v. Jensen*, 2019 BCSC 725 (\$50,000): a 36-year-old suffered shoulder, neck, and back pain that persisted at trial, more than four years after the accident. The injuries affected her relationship with her husband, as well her ability to participate in the recreational and social activities she had previously enjoyed.

- d) *Johal v. Bhullar*, 2021 BCSC 427 (\$25,000): a 28-year-old suffered, at most, mild soft tissue injury to her neck, shoulder, and lower back in one minor accident which resolved within 15 months. She suffered a mild traumatic brain injury during a later second minor accident. Her complaints of persistent debilitating pain were disbelieved.
- e) *Jansson v. Malone*, 2021 BCSC 585 (\$55,000): a 45-year-old suffered neck, shoulder, upper back, and low back pain that persisted to the date of trial five years after the accident. Her pre-existing headaches had increased in frequency, duration and intensity. She suffered from somatic symptom disorder and driving anxiety/adjustment disorder. The court found that her myofascial pain would improve if she accessed appropriate treatments, but would not resolve entirely. She continued to have restrictions in her upper body movements and required assistance with heavier tasks. She had difficulty performing household and gardening work. She required accommodations as manager of legislative services for a City. She was no longer able to enjoy the recreational activities she had participated in prior to the accident. However, her prognosis for some level of recovery was good.
- [75] The plaintiff is a young man of 32 years. He was 27 at the time of the MVA. Prior to the MVA, he was healthy, active, and energetic, and engaged in numerous recreational activities. His occasional headaches and neck pain were never functionally debilitating. His previous concussions were, for all intents and purposes, resolved.
- [76] As a result of the MVA, the plaintiff has constant pain in his neck and upper shoulders that also manifests into headaches. He is not able to enjoy his recreational activities to the extent he did prior to the MVA. His sleep is now poor and non-restorative. His symptoms are unlikely to improve.
- [77] In my view, an award of \$80,000 is appropriate, and I assess the plaintiff's non-pecuniary damages in that amount.

Past Loss of Income-Earning Capacity

- [78] The value of a plaintiff's capacity to earn is equivalent to the value of the earnings that he would have received over time, had the tort not been committed: *M.B. v. British Columbia*, 2003 SCC 53 at para. 50. The loss of income-earning capacity is the difference between the value of what the earnings would have been and what they are, or will be, as a result of the tort: *Johal* at para. 158.
- [79] A claim for past loss of income-earning capacity must be assessed in the same manner as a claim for future loss of income-earning capacity. The plaintiff must demonstrate a real and substantial possibility that the income would have been earned: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48. This is a lower standard than a balance of probabilities, but higher than that of something that is merely possible or speculative: *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

- [80] The overall fairness and reasonableness of the award must be considered by taking into account all the evidence: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured, in part, against awards made in comparable cases: *Trites* at para. 189. It requires an assessment of the plaintiff's past loss of income-earning capacity, not a calculation according to some mathematical formula: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19.
- [81] There is no question that the plaintiff's work as a welder is intense and physically demanding. Prior to the MVA, he was able to fully function in his job without the influence of pain. He was a hard working, driven, and motivated individual who was focused on maximizing his earnings. He worked almost all of the overtime that was available to him.
- [82] I am satisfied on the whole of the evidence that, despite the MVA, the plaintiff continues to be a highly skilled, hardworking and sought-after welder. I have no difficulty finding that, when working, he "runs himself hard" as he did before the MVA. I also have no difficulty finding that, but for the MVA, he would likely have worked more hours than he has--both at regular and overtime rates. Accordingly, the question to be determined is how many hours of work he has lost.
- [83] Instead of uncorroborated generalities regarding hours lost, it would have been helpful to have been provided with cogent evidence of the work the plaintiff missed--for example, in the form of a diary that could easily have been maintained. In the absence of such evidence, what would otherwise have been a relatively simple exercise for assessing the plaintiff's past wage loss has been made much more difficult.
- [84] I find that the spreadsheet prepared by Ms. Kowalik accurately records the hours that the plaintiff worked for the period between the date of the MVA and October 29, 2017. The plaintiff worked a full shift on the Monday following the MVA, a half shift the following day, was off work for the next four working days, was on vacation for the following week and returned to work full-time thereafter. There is no indication in the spreadsheet that the plaintiff missed any other days of work prior to October 30, 2017, with the possible but unexplained exception of October 20, where it appears he apparently received "holiday pay".
- [85] There are no records regarding the plaintiff's work schedule between October 30, 2017 and November 2018, when Newlands closed down. However, given the plaintiff's demonstrated actual work schedule--as set out in Ms. Kowalik's spreadsheet--together with a consideration of his T4 income for 2018, I am unable to accept the plaintiff's evidence that he missed between three to five days of work each month on average while working at Newlands after the MVA. If that was the case, a simple arithmetic exercise reveals that he would have had to work approximately 13 hours per day for every day he worked in 2018.
- [86] I am also unable to accept as reliable the plaintiff's evidence that, on average, he has missed five to six days each month since then until trial when working as a sole proprietor or through AHS. AHS's invoices for the period January 1, 2019 to December 31, 2021 reveal that the plaintiff charged for a total of 1,552.5 hours in 2019, 1,998 hours in 2020, and 1,507.25 hours in 2021. The invoices do not disclose the number of days that were worked to generate

those hours. Moreover, the plaintiff's explanation for 17 missing invoices that were identified--that they were allocated to welding jobs he had bid on but did not result in a contract--was mere speculation. Nevertheless, counsel argues that the plaintiff's demonstrated work ethic is sufficient proof that he would have worked 50 hours per week for at least 47 weeks (at total of 2,350 hours) in each of those years, and that the difference between that total and what he actually billed equates to his lost income.

- [87] I reject this simplistic analysis as based on nothing more than mere speculation. It is also contrary to the evidence. The invoices show that the plaintiff regularly worked long hours over extended periods. The analysis also fails to consider significant time that was lost during 2020 due to the COVID-19 pandemic and the plaintiff's honeymoon holiday to Mexico in November 2021.
- [88] I find that, despite his MVA-related injuries, the plaintiff has been able to work--albeit, with pain--at close to the pace he did prior to the MVA. This included overtime hours when he was feeling up to it. Although Ms. Ditson found that the plaintiff's functional limitations are limited to sustained use of his upper extremities for forward reaching, combined with sustained positioning of his head, neck and upper spine, the plaintiff did not lead any evidence as to what portion of his welding day involves such sustained positioning. Moreover, the plaintiff led no evidence as to how much longer it takes him to perform his welding tasks because of his neck pain. The uncontroverted evidence from the plaintiff himself is that he continues to have as much work available to him as he wants.
- [89] Nevertheless, I am satisfied on the evidence as a whole that the plaintiff has demonstrated a real and substantial possibility that he has had to forego some days of work due to his MVA-related injuries. I assess that loss, on average, at one day each month of work commencing November 2017 when Newlands shut down. Assuming the plaintiff earned his reported income over an average of 22 work days per month while at Newlands (allowing for some overtime), and a rate of \$80 per hour for 9 hours per day thereafter (inclusive of overtime potential), his daily income (and hence his loss, net of variable expenses that were not incurred) can be calculated as follows:

Period

Method of Quantification

Amount

MVA to September 15, 2017

ICBC Certificate of Earnings midpoint

\$2,016

November 2017-December 2017

$(\$91,699 \div 12 \text{ months}) \div 22 \text{ days} \times 2 \text{ months}$

\$695

January 2018-October 31, 2018

$(\$105,436 \div 12 \text{ months}) \div 22 \text{ days} \times 10 \text{ months}$

\$3,994

November 2018-May 9, 2022

$(\$80/\text{hour} \times 9 \text{ hours}) \times 42.5 \text{ days}$

\$30,600

Total Gross Income Loss:

\$37,305

[90] Adjusting for applicable income taxes/EI premiums as set out in Mr. Benning's Table 2B, the plaintiff's net past income loss is:

Period

Method of Quantification

Amount

MVA to September 15, 2017

$(\$2,016 \times .579)$

\$1,167

November 2017-December 2017

$(\$695 \times .579)$

\$402

January 2018-October 31, 2018

$(\$3,994 \times .587)$

\$2,344

November 2018-May 9, 2022

$(\$30,600 \times .617)$

\$18,880

Total Net Income Loss:

\$22,793

[91] Although the plaintiff's income from March 2019 on was derived by way of dividends from AHS, he was and is the sole shareholder of that entity. There is no suggestion that the plaintiff's income would have been less because it was derived through AHS.

[92] I assess the plaintiff's past loss of income earning capacity at \$22,793.

Future Loss of Income-Earning Capacity

[93] Our Court of Appeal recently released the following three decisions dealing with the assessment of claims for loss of future income earning capacity:

- a) Dornan v. Silva, 2021 BCCA 228;
- b) Rab v. Prescott, 2021 BCCA 345; and
- c) Lo v. Vos, 2021 BCCA 421.

[94] In these decisions--all written by Justice Grauer on behalf of unanimous divisions--the Court of Appeal clarified the approach to be taken when assessing damages for future loss of future income-earning capacity. The three-step approach varies depending upon the circumstances of each case and was recently summarized by Grauer J.A. in Steinlauf v. Deol, 2022 BCCA 96:

[52] In Rab v Prescott, 2021 BCCA 345 at para 47, this Court referred to a three-step process for considering claims for loss of future earning capacity, "particularly where the evidence indicates no loss of income at the time of trial". The first step was an evidentiary one: "whether the evidence discloses a potential future event that could lead to a loss of capacity". In cases like this one, where the event giving rise to a future loss is manifest and continuing at the time of trial, that evidentiary step is a given.

[53] The second step, which in practical terms may prove to be the first, is whether, on that evidence, the plaintiff has established entitlement by demonstrating that there is a real and substantial possibility of an event giving rise to a future loss: see, for instance, Perren v Lalari, 2010 BCCA 140 at para 32. As this Court explained in Rab at para 29, establishing that threshold question, too, is less challenging in some cases than others:

In cases where, for instance, the evidence establishes that the accident caused significant and lasting injury that left the plaintiff unable to work at the time of the trial and for the foreseeable future, the existence of a real and substantial possibility of an event giving rise to future loss may be obvious and the assessment of its relative likelihood superfluous. Yet it may still be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies. Dornan [v Silva, 2021 BCCA 228] was such a case.

[54] As in Dornan, the existence in this case of a real and substantial possibility of an event giving rise to a future loss was obvious, and the assessment of its relative likelihood superfluous. There was no doubt that the respondent would suffer a significant loss of future earnings. Where the appellants say the judge erred here is in failing to go on to assess the possibility and relative likelihood of future hypothetical events that may affect the quantification of the loss, as discussed in the above passage from Rab.

[55] As for the quantification, this Court described the process in *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32:

An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8 .

[56] Accordingly, as discussed in Dornan at para 156, it became necessary to assess the respondent's without-accident earning potential, and what the respondent was likely to earn as a result of the accident. At the same time, as discussed in *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251: "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made".

[Emphasis in original.]

[95] In Rab at para. 28, Justice Grauer quoted Justice Goepel (dissenting, but not on this point) in *Grewal*, who said:

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

[96] This is consistent with the Court of Appeal's previous statements about the different standard of proof applicable to past facts versus past and future hypothetical events. As cited in para. 94 of Dornan, the Court in *Gao*, at para. 34, held:

[34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[97] After having completed this three-stage assessment, the trial judge must then determine if the proposed damages award is fair and reasonable: Lo at para. 117.

Does the Evidence Disclose a Potential Future Event that Could Lead to a Further Loss of Income-Earning Capacity as a Result of the MVA?

[98] It is a matter of common sense that constant and continuous pain takes a toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations are made: Morlan v. Barrett, 2012 BCCA 66 at para. 41.

[99] In my view, the event giving rise to a future loss in this case is manifest and continuing at the time of trial. The plaintiff has demonstrated a real and substantial possibility of a capacity reduction in the future. This evidentiary step is a given.

Is there a Real and Substantial Possibility that the Plaintiff's Chronic Pain will cause him a Pecuniary Loss?

[100] "Real and substantial possibility" is the expression used to refer to threshold likelihood. It is the standard of proof for admitting hypothetical events, both past and future, into the evidentiary record as if they already happened. It is a lower threshold than a balance of probabilities but a higher threshold than something only possible and speculative: Dornan at para. 94; Gao at para. 34. The onus of showing a real and substantial possibility is not a heavy one, but it must be met: Kim v. Morier, 2014 BCCA 63 at para. 7.

[101] Commonly encountered risks over the course of everyday activities will generally not suffice to pose a real and substantial risk of event or outcome leading to a pecuniary loss: Dornan at para. 77. While every case depends on its facts, among such possibilities are: vehicle or bicycle accidents, tripping and falling, being hit by falling branches, being knocked over by pedestrians, skaters, drivers or cyclists, wrenching a knee while playing recreational sports, hurting one's back while working out or digging one's garden: Dornan at para. 77.

[102] Factors relevant to determining whether there is a real and substantial risk of pecuniary loss include:

- a) the plaintiff's intention to keep working and what they intend to do for work;
- b) where the potential event precludes income from a particular occupation the plaintiff does not intend to pursue, there will not be a real and substantial possibility, because that income would never have been earned;
- c) inability to devote the same energy or hours to her pre-accident occupation;
- d) work history;
- e) medical condition; and

- f) the plaintiff's intentions concerning their future lifestyle, and the risk inherent in those plans.

See e.g.: Dornan at paras. 67, 119-120; Rab at paras. 60-62.

- [103] The fact that the amount by which the plaintiff's income may be reduced by a future event is speculative does not mean there is no real and substantial possibility of that future event leading to pecuniary loss for the plaintiff. It is a question of the relative likelihood of a loss: Rab at para. 62.
- [104] Prior to the MVA, the plaintiff was, by all accounts, an exceptionally hardworking, energetic, and competitive person. The uncontroverted evidence is that he intended to keep working long hours as a welder for the foreseeable future.
- [105] The evidence--particularly that of Dr. Shuckett and Ms. Ditson--establishes that the MVA caused a whiplash injury to the plaintiff, that his pain is chronic and he has probably reached his maximum medical improvement. Accordingly, he will likely continue to miss work days (and thus income) for the rest of his working life because of his injuries. I conclude that there is a real and substantial possibility that the plaintiff's chronic pain condition will lead to a future income loss.

What is the Relative Likelihood of a Future Pecuniary Loss?

- [106] There are two equally valid approaches to the determination of the relative likelihood of the pecuniary loss as a result of the risk. They have traditionally been referred to as the "earnings approach" and the "capital asset approach".
- [107] Under the earnings approach, the court determines the plaintiff's without-accident future earning capacity. The court then assesses the difference between the without-accident earning capacity and the with-accident earning capacity. That amount may be further adjusted based on applicable contingencies.
- [108] The capital asset approach is used in circumstances where the plaintiff continues to earn income at or close to his pre-accident level, but has suffered an impairment that may affect his ability to continue doing so at some point in the future, or where the evidence (or lack thereof) is such that his post-accident future earning capacity cannot be determined. The court's award is based on the plaintiff's pre-accident annual income over one or two years to calculate the without-accident future earning capacity.
- [109] Under both approaches, the amount arrived at must be adjusted to account for the relative likelihood of the pecuniary loss occurring, taking into consideration relevant contingencies. Factors relevant to determining what the relative likelihood of the risk is include:
- a) history and nature of the sources of past income;
 - b) profitability and nature of the plaintiff's intended future economic activities;

- c) plaintiff's pre-existing limitations concerning capacity to work due to age or health;
- d) strength of the evidentiary basis for the amount whereby the plaintiff's income is alleged to have been reduced; and
- e) level of continuing exposure to risk given the plaintiff's intentions concerning their future activities, and the risk inherent in those plans.

See e.g.: Rab at para. 80; Dornan at para. 135.

[110] In my view, this is an appropriate case to apply the capital asset approach. Although the plaintiff's income since the MVA exceeds his pre-accident level, that is because he has formed his own company and has gone into business for himself, earning a substantially higher hourly wage than he was earning prior to the MVA. However, there is no question that he has suffered an impairment that will likely affect his future earning capacity.

[111] Plaintiff's counsel submitted that the evidence supports a finding that, but for the MVA, the plaintiff would have worked 50 hours per week for 50 weeks per year until age 70. When the reasonableness of this assertion was questioned by the Court, he initially steadfastly maintained his position, then equivocated, then prevaricated and ultimately conceded it was devoid of common sense. He changed his position to suggest that a work schedule of 50 hours per week for 47 weeks per year until age 70 was supported by the evidence.

[112] It is the plaintiff's burden to demonstrate a real and substantial possibility that he would have maintained that work schedule for that length of time. Plaintiff's counsel's bald assertions that there is a real and substantial possibility the plaintiff will miss five to six working days per month until age 70 due to his MVA-related injuries not only defies common sense, but is not borne out by the available evidence as to his actual hours worked between the date of the MVA and trial.

[113] Finally, it is necessary to assess the possibility and likelihood of other future hypothetical events occurring that may lead to an increased or reduced earning capacity affecting the quantification of the loss. Possible events include positive or negative contingencies and the possibility that the plaintiff's MVA-related injuries improve or worsen: Rab at paras. 29, 48.

[114] There is no evidence of any measurable risk that the plaintiff's pre-existing history of concussions would have detrimentally affected him regardless of the MVA. To the contrary, the evidence is uncontroverted that his condition was resolved at least to the extent that it did not interfere with his functioning. Any suggestion that his previous concussions may have possibly led to future debilitating symptoms would be pure speculation.

[115] On the whole of the evidence, I find that the plaintiff is capable of continuing to work full-time as a welder but will likely continue to lose one day of work per month (on average) as a result of his MVA-related injuries. I conclude that, on the evidence, there is no reasonable and substantial risk of any non-MVA-related future hypothetical event occurring that warrants the application of a positive or negative contingency in this case beyond those set out in Mr. Benning's tables.

Quantifying the Loss

- [116] Quantifying a plaintiff's loss of future income earning capacity is always a challenging task. However, the mere fact that quantifying the loss is difficult is no reason for not making an award. Rather, the court must simply do the best it can with the evidence it has: Rab at para. 76.
- [117] As already mentioned, the evidentiary basis for the amount the plaintiff submits his income earning capacity has been reduced is less than optimal.
- [118] Following the "Pallos Approach" (Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.)), and taking all of the foregoing into account, I assess the value of the plaintiff's future loss of income-earning capacity in the same fashion as for his past loss of income-earning capacity. That is, his future loss of income-earning capacity is best assessed by determining the present value of the loss of income for one day per month until he reaches age 65. For the past several years, the plaintiff has derived approximately 88% of his income at the rate of \$70 per hour and 12% of his income at the rate of \$90 per hour. Those rates increase when he works overtime. For the purpose of quantifying the plaintiff's loss, I have concluded that a rate of \$80 per hour, for 9 hours per day, is an appropriate rate (inclusive of overtime potential). Using these figures, the plaintiff's annual loss (through AHS) is $\$80 \times 9 \text{ hrs} \times 12 \text{ days/year} = \$8,640$.
- [119] Mr. Benning provided future income loss multipliers that take into consideration negative labour market contingencies of non-participation in the labour force, unemployment, part-time work, part-year work and expected survival rate, all of which are based on broad statistical averages applicable to B.C. males of the plaintiff's age and level of education.
- [120] The cumulative economic multiplier value to age 65 is 21.444. Accordingly, the lump sum present value of the plaintiff's loss is $\$8,640 \times 21.444 = \$185,276.16$, rounded to \$185,000.
- [121] In my view, the foregoing provides a rational and principled basis for valuing the plaintiff's loss of future earning capacity in this case.

Cost of Future Care

- [122] In Peters v. Ortner, 2013 BCSC 1861, Justice Harris outlined the general principles to be considered when assessing a plaintiff's cost of future care:

- [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. 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.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
- [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [143] 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 or 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, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [145] 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.
- [123] Medical justification "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact: *Harrington v. Sangha*, 2011 BCSC 1035 at para. 151. Evidence from a rehabilitation expert as to the type of care that should be provided may well be sufficient if there is an evidentiary link drawn between the assessment of pain and the care recommended by a qualified health care professional: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 38-39.
- [124] Reasonableness is assessed in light of whether a reasonably-minded person of ample means would incur the expense and whether the plaintiff is likely to actually incur the cost in the future: *Brewster v. Li*, 2013 BCSC 774 at para. 158.

[125] I find that the plaintiff has provided a sufficient evidentiary link between his chronic MVA-related injuries and the need for (i) a one-time MRI, (ii) massage therapy for the next 5 years, and (iii) an annual prescription for cyclobenzaprine (Flexeril). Using Mr. Benning's Tables 4 and 5, I assess the plaintiff's entitlement to the cost of future care at \$18,732, calculated as follows:

a) MRI:

\$890

b) Massage therapy (\$1,980/1,000 x 4,742):

\$9,389

c) Prescription medication:

\$22

Total:

\$10,301

Loss of Housekeeping Capacity

[126] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal discussed circumstances wherein pecuniary damages may be available to compensate for a loss of housekeeping capacity:

[33] [W]here 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 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

[127] It is clear on the evidence as a whole that Ms. Rutley performed the vast majority of the housekeeping. The plaintiff has led no evidence of the amount of time he spent doing yard work or the cost of performing it in the future. I conclude that the plaintiff's housekeeping and yard work challenges are more in keeping with a loss of amenities and increased pain and suffering. Accordingly, I have taken his loss of capacity to perform homemaking chores into account in my award for non-pecuniary damages above. This includes a global assessment for all facets of his pain, suffering, and loss of enjoyment of life, including loss of amenities and housekeeping capacity. A segregated award for loss of housekeeping capacity is not warranted.

Special Damages

[128] The parties have agreed that the plaintiff is entitled to an award for special damages in the amount of \$381.57.

Mitigation of Damages

[129] In assessing whether the damages award ought to be reduced on the basis of the plaintiff's failure to mitigate, the onus is on the defendant to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of his loss. In this regard, the defendant must prove (1) the plaintiff acted unreasonably, on a subjective/objective standard, in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: *Gill v. Lai*, 2019 BCCA 103 at para. 26.

[130] In determining the first prong of the test, the plaintiff's personal circumstances can be taken into account in terms of (a) whether the plaintiff understood, appreciated, and was capable of following the advice given and (b) whether a reasonable person in the plaintiff's circumstances would have done so: *Gill* at para. 26.

[131] The evidence in this case is clear that the plaintiff took meaningful steps towards rehabilitation of his MVA-related injuries. He continued his best to be active and engage in exercise. There is no evidence that his symptoms would have improved any more than they have had he engaged in additional kinesiology or physiotherapy sessions. It is speculation that the plaintiff's continued involvement in kinesiology and taking of prescribed medication would have made any difference. There is certainly no expert evidence supporting the defendants' submissions in that regard.

[132] I cannot find on the evidence that a reasonable person in the plaintiff's position would have been more aggressive in his rehabilitation efforts. Indeed, during her submission, defendants' counsel conceded this was not a case warranting such a finding.

Conclusion

[133] The plaintiff is entitled to judgment against the defendants, jointly and severally, in the amount of \$298,475.57, calculated as follows:

a) Non-pecuniary damages:

\$80,000.00

b) Past loss of income-earning capacity:

\$22,793.00

c) Future loss of income-earning capacity:

\$185,000.00

d) Cost of future care:

\$10,301.00

e) Loss of housekeeping capacity:

\$0.00

f) Special damages:

\$381.57

TOTAL:

\$298,475.57

[134] The foregoing award is subject to tax gross-up and any statutory deduction, including those under s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.

Costs

[135] Subject to any submissions the parties may wish to make, the plaintiff is entitled to his costs in this action at Scale B.

"G.C. Weatherill J."

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