
CANADA / JUDGMENT

Maldonado v. Mooney

2016 BCSC 558

COURT

Supreme Court of British Columbia

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2016 BCSC 558 Maldonado v. Mooney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maldonado v. Mooney,

2016 BCSC 558

Date: 20160331

Docket: M133465

Registry: New Westminster

Between:

Ubaldo Erasmo Maldonado Elizalde

Plaintiff

And

Michael Steven Mooney

also known as

Michael S. Mooney

also known as

Michael Mooney

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

K. Gardner

O. Nowland

Counsel for the Defendant:

M. Kumor

Place and Dates of Trial:

New Westminster, B.C.

August 10-13 and 17-18, 2015

Place and Date of Judgment:

New Westminster, B.C.

March 31, 2016

- [1] The plaintiff Mr. Maldonado - being of Hispanic extraction, he follows the convention of his maternal surname being placed last - sustained a significant back injury in a rear-end collision on August 26, 2009. Liability is admitted. In issue at trial are pecuniary and non-pecuniary damages including loss of earning capacity and cost of future care.

Evidence

Background

- [2] Mr. Maldonado was born in Mexico. His formal education is limited to Grade 6, with a few additional months of adult high school. When in his mid-20's he began crossing the border into the United States and working as a construction labourer, primarily in masonry, where he gained some experience working with scaffolding.
- [3] In September 2008, when he was 29 years of age, Mr. Maldonado immigrated to Canada as a refugee. He settled in Vancouver. He obtained a work permit in early 2009, and in April of that year began working for Skyline Scaffold Ltd. ("Skyline Scaffold"), initially as a helper, an entry-level position. At first, his job consisted of packing gear back and forth around construction sites. He then started assisting on erecting scaffolds. He advanced quickly, and by the time of the August 26 accident, he had been entrusted by his employer with two residential scaffolding job of his own, which he completed with the assistance of a helper. Mr. Maldonado's hope was eventually to become independently employed as a subcontractor to scaffolding companies. His goal was to earn \$100,000 per year.

Impact of the Accident

- [4] The rear-end impact from the subject collision was relatively severe. Mr. Maldonado suffered headache, soreness in his neck and shoulder and between his shoulder blades, and low back pain. As discussed further below, his recovery has plateaued and these symptoms persist, particularly the low back pain. The pain from his injuries caused significant sleep disturbance. He has gained weight; pre-accident Mr. Maldonado's weight was in the range of about 200 pounds, since then it has ballooned up to as high as 245 pounds, and he is now about 20 to 25 pounds heavier than before the accident. He is also depressed.
- [5] Mr. Maldonado attempted to return to work about six weeks after the accident, but found that he was too sore to work with the scaffolding crew. For the first few weeks he served as the company's driver, mostly driving equipment to and from worksites in a small pickup truck.
- [6] Mr. Maldonado has impressed his employer with his skill, dedication and attitude, and has now worked his way into a position as shop manager for CC Equipment Sales Ltd. ("CC Equipment"), a "sister" company of Skyline Scaffold. It is unlikely he will return to work as a scaffolder, and the possibility of a future as a scaffolding subcontractor, his pre-accident dream, is now closed to him.

Current Employment

- [7] After driving for Skyline Scaffold for a few months, the general manager of CC Equipment, Mr. Gosal, saw Mr. Maldonado backing up a trailer, and was impressed with his skill. He said to the owner of the two companies, Mr. Chorbajian, "I want him working for me". CC Equipment then began to borrow Mr. Maldonado as a driver for specific jobs, a couple of times per week. When a few more months passed without Mr. Maldonado's physical condition improving to the point where he felt able to resume scaffolding, Mr. Chorbajian offered him a full-time position as a driver for the two companies, part of his salary being paid by each.
- [8] While initially Mr. Maldonado's salary was split between the two companies, by late 2013 he was working for CC Equipment exclusively. He had performed, and still performs, several different jobs within that company: he still does driving and deliveries, usually with the assistance of a helper; he does mechanical and electrical repair work on CC Equipment's products; he has trained to be a hoist technician; and, in the words of Mr. Chorbajian, he has helped out "in a pinch" on job sites. Mr. Gosal described Mr. Maldonado's current position now as being "more of a manager"; Mr. Chorbajian described him as the "service manager".

- [9] CC Equipment is the exclusive dealer in the Lower Mainland for the compact products of a large construction equipment manufacturer, Whacker Neuson, and is the repair and warranty service centre for all Whacker Neuson's other dealers. Mr. Gosal testified that Mr. Chorbajian's next step will be to undergo formal certification at Whacker Neuson's "Academy", located in Milwaukee, Wisconsin.
- [10] Mr. Maldonado's evidence was that when Mr. Chorbajian first approached him with the offer of a full-time position as driver for the two companies, he said to him, "You're pretty talented, we want to keep you". The evidence of Mr. Gosal and Mr. Chorbajian confirms that they hold Mr. Maldonado in high regard. Mr. Gosal described him as being "actually a key to our company". He described Mr. Maldonado as very knowledgeable and dedicated. He testified, "Basically, to replace Mo I'd need five people, straight up". Mr. Chorbajian testified that when he began to get feedback after the accident that scaffold work was proving too difficult for Mr. Maldonado, he was determined to find a role for him as "I don't want to lose good people". He described the plaintiff as, "really the definition of 'mechanically inclined'", with "really big intangibles". He said that despite Mr. Maldonado's disability, he would find a job for him, "no matter what".
- [11] Mr. Chorbajian described the job classifications at Skyline Scaffold. His scaffolding field staff is made up of labourers; and scaffolders, or builders. Above them are managers: foremen, field supervisors and the construction manager.
- [12] Mr. Maldonado was being paid as a labourer at the time of his accident. This, he described, is a probationary position, earning between \$15 and \$18 an hour. Scaffolders are paid between \$21 and \$31 an hour, depending on their skill and experience. He described this position as requiring a great deal of physical and mental strength, and an ability to work with others under pressure.
- [13] Foremen are responsible for day-to-day operations of a crew on site. Their hourly wage is in the range of \$25 to \$38.
- [14] His field supervisors are "a couple of guys" who have responsibility for several sites at a time. They have to plan ahead, anticipating material and labour requirements, and co-ordinate with the yard; they are also responsible for meeting with sales staff and estimators to ensure that a job is done in compliance with the contract. It is not uncommon, Mr. Chorbajian testified, for a field supervisor to make "low six figures" in annual income - he estimated, "maybe \$125,000" in salary and benefits.
- [15] Overseeing the field supervisors is a single construction manager.
- [16] The field supervisor and construction manager positions do not entail heavy physical work.
- [17] Mr. Chorbajian testified in chief that but for the accident, Mr. Maldonado should eventually have been able to assume a position in "scaffold management".

- [18] Mr. Chorbajian was asked in cross-examination why, given Mr. Maldonado's talents, he wasn't kept with Skyline Scaffolding and moved into a supervisory position after his return to work. His explanation - which I accept - was that had Mr. Maldonado spent more time in scaffolding, he would have advanced into a supervisory position, but they would not normally promote someone into that position without prior experience as a foreman.
- [19] Mr. Maldonado testified that his function in the workplace continues to be affected by his injury. For about the first five years after the accident his sleep was disturbed, and he would frequently wake up after only about three or four hours sleep with a pounding headache. The headaches have improved and lessened in frequency. However, it is still the case that his neck, the area between his shoulder blades and his low back become painful when he exerts himself doing work as a mechanic. He testified that his neck pain is "up and down", that he has learned to do stretches that help a lot, and has learned how to position himself when he sleeps to avoid irritating it. If he is driving at work and not doing anything too physical, his neck pain is alleviated but if he irritates his neck first thing in the morning, it is sore all day. He will get pain between his shoulder blades from bending over and doing heavy work, and feels that this results in him losing arm strength. His low back is also very painful; if he does not do heavy physical labour during the day he is "okay" but any heavy physical work brings on low back pain, and this often produces pain or cramping down his left leg. He has to take one or two Tylenol or Advil, mostly every day, and also relies on Naprosyn. His employer has accommodated him by providing him with a massage chair, which he rests in during the day as necessary; Mr. Gosal testified that he sees Mr. Maldonado using it for 30 or 45 minutes at a time.
- [20] Mr. Maldonado testified that he seldom has "good days". His job was easier in the year 2014 when CC Equipment had additional staff, but then they lost a young employee, leaving the plaintiff as the only mechanic, and now much of the heavier mechanical work has to be done by him. CC Equipment has hired a helper to work alongside him in the shop, and assist him with heavier delivery jobs. Even with these forms of accommodation, there are now many more "bad days" when he is in pain to the point of being irritated even at having to talk to coworkers; he regrets that there have been episodes of him exhibiting a "bad attitude" because of his pain.

Treatment and Ongoing Concerns

- [21] Mr. Maldonado has undergone physiotherapy and kinesiology treatments on referral from his doctors. He underwent 27 physiotherapy treatment sessions in September - December 2009, and another 32 sessions in May - November 2010. Special damages for those treatments are admitted in the amount of \$1,835. Thirty-eight kinesiology treatments were undertaken at Mountainview Kinesiology in July - December 2001, at a further cost, which is also admitted, of \$2,825.60. The kinesiology treatments, recommended by his GP, Dr. Mohammed, were financed by Mr. Maldonado's legal counsel.

- [22] Mr. Maldonado has also been prescribed a variety of medications, admitted to be because of the accident: NSAIDS such as Naproxen, Celebrex and extra-strength ibuprofen; muscle relaxants; stomach ulcer drugs (his stomach having been upset, by the anti-inflammatories); and antidepressants. The total cost of the prescriptions has been, as of May 2015, \$1,393.97.
- [23] Mr. Maldonado was married in November 2010 and he and his wife had a daughter. They have since separated. He attributes the failure of his marriage to the effect of his injuries. He was always tired at the end of every day and wanted to rest a lot, and his wife was unhappy when she saw that he was going to have long-term physical problems. He feels there was a specific issue over the lack of sexual activity due to his back pain. He also testified as to now being unable to play with his energetic five year-old daughter for extended periods of time, due to pain.
- [24] The plaintiff testified as to the restrictions his injuries place on his ability to undertake housekeeping activities. At the time of the accident he was sharing a house with several other persons, and his housekeeping obligation was limited to cleaning the bathroom once a week. He tried to continue to do so after the accident but believes he probably wasn't doing it properly, given the pain he experienced with bending and lifting. During his brief marriage, his wife did all of the housework. Following his separation, Mr. Maldonado had a housekeeper come in to assist him, approximately ten times over the period June 2012 to January 2014. He then moved back into another shared accommodation arrangement, and he is responsible only for light housekeeping.
- [25] Mr. Maldonado also described limitations in his recreational activities. He did attempt to start swimming on the advice of Dr. Alex, but found that he could only continue for 10 or 15 minutes before being bothered by pain between the shoulder blades. He tries to walk for exercise, but finds he can only walk a few blocks before he has to stop and rest because of low back pain. In 2013 he purchased a 14-month gym membership, but found that exercises aggravated his symptoms. He has discussed with his GP, Dr. Alex, the desirability of hiring a personal trainer to assist him in weight loss, but he has been unable to afford this.
- [26] Mr. Maldonado describes feelings of depression. These stem from the breakdown of his marriage and his frustration with his physical condition. His family physician had him on anti-depressants for approximately a year, beginning in March 2013.

Collateral Evidence

- [27] Mr. Maldonado's coworkers testified as to him exhibiting what is sometimes referred to as "pain behaviour", that is changes in facial expression, gait etc. which appear consistent with him suffering significant pain.

- [28] Mr. Chorbajian has observed Mr. Maldonado being in apparent discomfort through his facial expression, the way he "lumbers around" and the way he stoops. He does not have the impression that Mr. Maldonado is embellishing in any way. He said that Mr. Maldonado has "always got a bottle of pills with him".
- [29] Mr. Gosal testified that he can see from the expression on Mr. Maldonado's face when he bends over to lift, or when he is "pulling wrenches", that he is in pain. He said, "I know he's a tough guy - he'll work through pain".
- [30] Ms. Turner, the office administrator, testified that she has observed him grimacing in pain while working in the shop. She's sees him taking Advil three times a week on average - that, she said, has consistently been the pattern since she started working at CC Equipment in 2013. She also testified that Mr. Maldonado "gets cranky quite a bit"; he can seem irritated, which can escalate into rudeness, and then he apologizes and says that it's because he's in pain.

Medical Evidence

Physiatrist - Dr. Kleinman

- [31] Mr. Maldonado was assessed by a physiatrist, Dr. Max Kleinman, in April 2014. His report states the following diagnoses:
1. Biomechanical disorder of the cervicothoracic and lumbosacral spine with chronic spinal deconditioning - Mr. Maldonado describes symptomatology consistent with chronic myofascial sprain/strain. It is my opinion that the muscles, ligaments and capsules of the cervicothoracic and lumbosacral spine likely underwent partial tearing and strain as a result of the forces involved in the accident. Mr. Maldonado has now developed scar tissues that impacts on him in a way that is both physically painful and functionally disabling. It is important to note that Mr. Maldonado has been able to transition back to the workforce but has specific difficulties in particular while performing heavier activities. His findings from this perspective are consistent with and are the hallmark of chronic spinal deconditioning. Mr. Maldonado has been left with incomplete recovery of his accident-related injuries. The injured musculature now lacks the same endurance and strength for daily activities, resulting in a reduced pain threshold when fatigue is reached. Mr. Maldonado, as noted, has been able to return to the workforce but has plateaued, which is not an atypical recovery arc.
 2. Left lower extremity referral - Query neurogenic versus soft tissue contribution - Mr. Maldonado continues to experience referred pain into the left lower extremity. I believe he is suffering a soft tissue/sciatic, nociceptive [i.e. pain referred from the muscles] referral originating from the injuries sustained into the lumbosacral spine.
 3. Chronic pain with associated depressive symptomatology - the diagnosis of a pain or psychological disorder requires a DSM-V evaluation and is outside of my area of specific expertise. I did not get the impression that Mr. Maldonado has a true "chronic pain

syndrome" Instead, I believe that he is suffering from the incomplete resolution of chronic pain and impact on his function. Mr. Maldonado's condition has been managed by his family physician and it is important to note that there was marital discord and that he has been using an antidepressant symptomatology consistent with this rationale.

- [32] Dr. Kleinman believes that Mr. Maldonado's overall recovery has plateaued, which is predictive of a worse long-term prognosis. He notes in his report that while most soft tissue injuries generally resolve within a matter of months, there is a subset of individuals who take longer to recover, with a certain percentage that never fully recover. Dr. Kleinman believes that Mr. Maldonado falls into the latter category, particularly taking into account his psycho-emotional factors, the long-standing duration of his problems, his current presentation and the nature of his work. He described Mr. Maldonado as having a "guarded" prognosis and has increased vulnerability to further exacerbation of his chronic injuries.
- [33] Dr. Kleinman makes a number of recommendations as to future care, including an in-home assessment with a trained therapist, and including continuing supportive care as needed, including physiotherapy, chiropractic and massage.
- [34] Dr. Kleinman was cross-examined on his report. Confronted with the opinion of the defence orthopedic surgeon, Dr. Kokan, that x-rays of Mr. Maldonado's lumbar spine showed mild degenerative changes - which Dr. Kokan believed the radiologist had missed - Dr. Kleinman stated that even if there were mild degenerative changes, that would be highly unlikely to lead to him changing his opinion.
- [35] Dr. Kleinman conceded that there is no form of medical imaging that can detect the injuries he has diagnosed, but stated that his diagnosis - that Mr. Maldonado likely underwent partial tearing of the musculature of the spine as a result of the accident - was not purely derived from subjective complaints; rather, it was demonstrated by the restricted range of motion and the localized areas of tenderness on examination, in addition to the reports of pain.
- [36] Dr. Kleinman was not seriously challenged on his conclusions. He did not resile from his opinion or qualify it to any significant degree.
- [37] I was impressed with the thoroughness of Dr. Kleinman's report. He gave his testimony in a straightforward manner. I accept his conclusions as to the nature of Mr. Maldonado's injuries and the prognosis.

Occupational Therapist - Russell McNeil

- [38] Mr. Maldonado underwent a functional capacity evaluation by an occupational therapist, Mr. Russell McNeil, in May and June 2012. Mr. McNeil's conclusions as to Mr. Maldonado's overall functional capacity are stated in his report as follows:

In summary, Mr. Elizalde has demonstrated the capacity to perform activity that requires light to medium level strength. He demonstrated restrictions in his capacity for activity requiring sustained or static vertical reaching as well as restrictions in his capacity to perform below waist

work requiring bending and stooping. There were measured restrictions in his capacity to perform to two handed carrying and two handed lifting. There were restrictions in his tolerance for static standing. Overall, there were restrictions in his activity tolerance, which adversely affected his capacity to maintain a productive work pace.

[39] Mr. McNeil was cross-examined on his report. The cross-examination was relatively brief, and did not erode Mr. McNeil's opinion. I was impressed with the Mr. McNeil's testimony, and I accept his conclusions without reservation.

Psychiatrist - Dr. Rasmusen

[40] The plaintiff was assessed by a psychiatrist, Dr. Rasmusen in March 2015.

[41] Dr. Rasmusen diagnosed Mr. Maldonado as suffering from a major depressive disorder as a result of the motor vehicle accident. This diagnosis was based upon the plaintiff exhibiting five of nine "A Criteria" specified in the DSM-V. Specifically, he exhibited:

- a) Depressed mood most of the day, nearly every day, which is a distinct change from normal functioning;
- b) A decreased or loss of interest in all, or almost all, activities;
- c) Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective account);
- d) Fatigue or loss of energy nearly every day;
- e) Diminished ability to think or concentrate, or indecisiveness;
- f) Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan

[42] The latter point derives from a comment made by Mr. Maldonado during the assessment; Dr. Rasmusen writes in his report:

On occasion, he has had passive suicidal thoughts but denies any plan or intention of harming himself and states that he would not do so because of his daughter.

[43] This aspect of Mr. Maldonado's symptoms - as well as others, such as his report to Dr. Rasmusen that he becomes jumpy and possibly nauseous if anyone honks their horn while he is driving - was not mentioned by Mr. Maldonado when he gave evidence. However, Mr. Maldonado was not challenged on these aspects of his symptoms as reported to Dr. Rasmusen during cross-examination, and I do not find Dr. Rasmusen's opinion should be given any less weight as a consequence.

[44] Dr. Rasmusen testified that the level of pain experienced by the plaintiff will be a complicating factor: pain can lead to depression, and can also lead to lack of sleep which will in turn exacerbate depression and create irritability. He testified that when pain is a factor, anti-depressant medications tend not to work as well. The preferred treatment in Mr.

Maldonado's case would be cognitive therapy, and he recommended that Mr. Maldonado undergo 10 to 12 sessions with a licensed psychologist who deals with long-standing pain. An aggressive treatment program with an antidepressant medication such as Cymbalta might have a beneficial effect, as would a trial of gabapentin or Lyrica to help Mr. Maldonado's sleep, but even with such therapies Dr. Rasmusen's opinion was that the plaintiff would likely have some elements of depression permanently.

Orthopaedic Surgeon - Dr. Kokan

[45] The defence, as noted, tendered the opinion of Dr. Kokan, an orthopedic surgeon. Dr. Kokan's report provides a "Summary of Causation" which reads as follows:

Mr. Maldonado is an otherwise hard-working determined individual who is obese and does, in the writer's opinion, have very early signs of degenerative changes on x-rays at the time that he was involved in a significant rear-end collision.

He remains with a mild-to-moderate amount of mechanical low back pain at this stage which was probably going to become symptomatic at some point in his life independent of the above motor vehicle accident. However, I do feel that the motor vehicle accident has precipitated the onset of symptoms from it. Furthermore, I feel that he would have recovered better if he was in better physical condition and if he was involved with less physically demanding work.

[Emphasis added.]

[46] As to the diagnosis, Dr. Kokan believes Mr. Maldonado to be suffering from mechanical low back pain due to degenerative facet joints in the lumbosacral spine, with a possible disc bulge; and, early degenerative cervical spine spondylosis. His report concludes that when he examined Mr. Maldonado in June 2013, he found "essentially minimal to no neck pain and mild to moderate low back pain symptoms that are mechanical in nature and not neurologically-based".

[47] As to the prognosis, his report again commented on the possible contributing role of the pre-existing asymptomatic arthritis:

Again, the motor vehicle accident that he was involved in was quite high energy from the description. I do feel that his presentation is genuine and I do think that the motor vehicle accident played a part in bringing on the symptoms that we see today. However, it needs to be understood by the courts that his occupation is another factor that puts his back at strain and so is his general size as well. I think it is reasonable to assume that he may not have had back pain or, if he did, it would have been to a lesser degree at this stage had he not been in the motor vehicle accident, but I am certain that this would have come on as mentioned within the next 5-10 years and of a similar nature.

[Emphasis added.]

[48] Dr. Kokan qualified the latter statement to a considerable degree under cross-examination. He acknowledged that the evidence is clear - "there is no question" - that his back is hurting because of the injuries sustained in a motor vehicle accident; The accident, he said, was "almost the straw that broke the camel's back", "the match that ignited everything". As to his comment that he is "certain" that low back pain would have come on in any event, he acknowledged that the wording in his report comes across as strong, and that "high likelihood" would probably be a better choice of words. Furthermore, in saying that Mr. Maldonado would in any event have experienced low back pain of a "similar nature", Dr. Kokan testified what he meant to say was that the location of the back pain would be the same, not the severity. In his view, there is a high likelihood that the plaintiff would have had back pain within another five or 10 years, given the degenerative changes, but Dr. Kokan acknowledged that he cannot say that the back pain would likely have been so severe that it would have prevented the plaintiff from engaging in heavy physical work.

Family Physician - Dr. Alex

[49] Mr. Maldonado's family physician, Dr. Alex, wrote a report for the plaintiff's counsel dated March 6, 2015. In this report, she purported to summarize the clinical notes of Mr. Maldonado's previous GP, Dr. Mohammed, who treated him from January 2011 to January 2013, as well as her own clinical notes from when she assumed responsibility for his care in March 2013. Dr. Alex's opinion did not fully support Mr. Maldonado's claim, and her report was tendered by the defence.

[50] The conclusion to Dr. Alex's report states:

In conclusion - Mr. Maldonado has mostly recovered from his MVA related cervical and shoulder strain. The soft tissue burning in his shoulder blades is due to muscle fatigue, now that Mr. Maldonado has started working as a mechanic and will get better with endurance. Mr. Maldonado continues to be disabled from mechanical low back strain and needs to be on Naprosyn BID on bad days. This low back pain is mainly related to his weight and poor core strength. There does not appear to be any need for surgery at this time or in the near future. The prognosis is guarded.

[51] She elaborated on this opinion in her testimony in-chief, saying that due to his physical attributes he now may be prone to low back strain.

[52] I found Dr. Alex's conclusion to be remarkably superficial in that it did not address whether, or to what extent, Mr. Maldonado's weight and poor core strength might be attributable to his injuries, e.g. the possibility of his inability to exercise vigorously being due to pain, or the possibility of his muscles lacking the ability to regain their pre-accident strength due to scarring.

[53] On cross-examination by Mr. Maldonado's counsel, Dr. Alex acknowledged that she would defer to the opinion of a physiatrist or an orthopaedic surgeon as to Mr. Maldonado's prognosis.

[54] Through cross-examination, it emerged that Dr. Alex, in her report, had not simply recounted the notes of Dr. Mohammed, but also interpolated her own conclusions into her summary; for example, her report stated a diagnosis of "mechanical low back pain improving" as of November 2011, when no such opinion is expressed in Dr. Mohammed's notes. There were numerous other errors and incorrect assumptions made by Dr. Alex in her attempt to summarize the course of Mr. Maldonado's recovery, during the period prior to her assumption of responsibility.

[55] One glaring example is that Dr. Mohammed's February 27, 2012 notes indicate:

Low back problems

- doing mechanical work

- worse after [illegible]

[56] In her report, however, Dr. Alex inserted into her summary of this note:

On examination Normal back exam.

[57] It appears that Dr. Alex simply fabricated this comment.

[58] This tendency of Dr. Alex was also seen in her report's summary of her own treatment of Mr. Maldonado; for example she stated in her report that on July 19, 2013 (the visit in question was actually on July 9th):

Back exam was normal. No Motor weakness.

However, in her clinical notes the only notation as to examination findings is:

O/E: - wt = 225 pounds.

Dr. Alex could not provide the court with any explanation as to why she had included the "no motor weakness" finding in her report.

[59] I found Dr. Alex's preparation of the report to have been so careless and slipshod as to seriously call into question her competence, at least as an expert witness. I give her opinion no weight whatsoever.

Damages

Non-Pecuniary Loss

[60] In summary, I find that at the time of trial, six years post-accident, the plaintiff's recovery from soft tissue injuries to his cervicothoracic and lumbar sacral spine has plateaued. He experiences significant low back pain and thoracic pain when his spine is subject to the

stresses of his physically demanding occupation. His prognosis is, in the words of Dr. Kleinman, "guarded". He is unlikely ever to fully recover and the likelihood is that he will continue to have significant back pain for the rest of his life, with increased vulnerability to future injury. There is some significant possibility that Mr. Maldonado would have gone on to experience some degree of low back pain, but for the accident, but it is not probable that this would have been disabling, or to the same degree that Mr. Maldonado now experiences.

- [61] Mr. Maldonado is also suffering from depression. Although Dr. Rasmusen believes there is a causal connection between the major depressive disorder and the motor vehicle accident, from Mr. Maldonado's own testimony his reaction to the break-up of his marriage must be a significant causal factor as well. It is clear from Mr. Maldonado's testimony that he relates the break-up of his marriage to the effect of his injuries. I am unable to draw that conclusion. We heard no testimony from Mr. Maldonado's wife. There is rarely a single cause to the break-up of a relationship; I do not dispute genuineness of Mr. Maldonado's perception that the accident was a factor, but there is simply not sufficient evidence for me to make that finding on a balance of probabilities.
- [62] Nevertheless, I do conclude that Mr. Maldonado's psychological reaction to his injuries has undoubtedly complicated his emotional reaction to his divorce. In this respect the two causal factors are best viewed as one tortious and one non-tortious cause. The injuries continue to contribute to the depression as a causal factor and the defendant is fully liable for the consequences.
- [63] The prognosis for the depression, I find, is not so grave as with respect to his physical injury. There is a reasonable prospect that Mr. Maldonado may experience at least some degree of recovery from his depression, although as Dr. Rasmusen concluded some degree of permanent depressive symptoms will likely continue.
- [64] The plaintiff relies on five case authorities for non-pecuniary damages. In ascending order with respect to the awards, they are: *Thompson v. Choi*, 2015 BCSC 1283 (\$90,000); *White v. Wienes*, 2015 BCSC 188 (\$100,000); *Benson v. Day*, 2014 BCSC 2224 (\$110,000); *Chahal v. Righele*, 2014 BCSC 108 (\$120,000); and *Easton v. Wolovets*, 2015 BCSC 210 (\$125,000).
- [65] The situation of the plaintiff in *Thompson* has some similarity to that of Mr. Maldonado. The plaintiff in that case was a 44-year-old male construction labourer, who primarily worked constructing and installing sheet metal flashings for roofing companies. His injuries were primarily to the soft tissues around the neck and shoulders. Seven years post-accident he was continuing to suffer significant symptoms including pain on a daily basis - to judge from the amount of medication he took, perhaps more severe pain than that suffered by Mr. Maldonado - and in addition, symptoms of numbness and tingling in his arm when working on a sustained basis with his arms lifted above shoulder level. He could not perform tasks requiring him to look upwards without taking frequent breaks; this eliminated working on soffits from the job function he was able to undertake. Crouching and kneeling were also difficult for him. He had some depressive symptoms, and underwent some counselling,

which was beneficial. There was medical evidence that his symptoms could worsen because of a pre-existing asymptomatic disc bulge in the cervical spine. The trial judge concluded there was a reasonable chance the plaintiff would experience improvement, though he would never fully recover his former level of function.

- [66] The plaintiff in White was a 49-year-old male who was injured in a motor vehicle accident in December 2009. At the time of trial, 4 ½ years later, he was suffering intermittent neck and back pain. He had continuing sciatica. He developed headaches that were triggered when he looked to the right. An initial symptom of tingling in his hands had resolved fairly quickly after the trial.
- [67] The trial judge found that the plaintiff's continuing back pain was due to ongoing aggravation of pre-existing degenerative disc disease. However, the trial judge rejected the plaintiff's evidence, and that of the plaintiff's witnesses, as to the degree to which he was physically disabled by pain. Non-pecuniary damages were assessed in the amount of \$100,000. This was after the trial judge made a deduction for the measureable risk that the pre-existing disc disease would have become symptomatic in the future in any event, however the reasons for judgment do not disclose the amount of the deduction made.
- [68] The plaintiff in Benson was a 57-year-old male with chronic neck and back pain. The court accepted that this condition was chronic, but stable. The plaintiff also suffered an adjustment disorder - although the trial judge concluded that the plaintiff's anxiety level was less dramatic than had been portrayed - and there were also minor but significant cognitive issues. He was employed in house construction, and had been able to return to work post-accident, though modification of his activities was necessary to avoid aggravation. He was awarded damages of \$110,000. The reasons of Mr. Justice Skolrood helpfully summarize the damages authorities relied upon by the plaintiff and defence, at paras. 92-93.
- [69] The plaintiff in Chahal was a 46-year-old woman. She developed serious headache, left shoulder, upper and lower back pain, and pain and stiffness in her neck. The trial judge concluded that the plaintiff's life had drastically changed for the worse as a result of the accident. Any improvement she had experienced had only been episodic; a return to her previous condition was unlikely and she would probably live for many years with chronic pain and depression. The injuries had a major effect on her social life. She was awarded \$120,000.
- [70] Lastly, the plaintiff in Easton was a 33-year-old male. He sustained a thoracic outlet syndrome injury, leading to myofascial pain and chronic pain. He underwent surgery for the thoracic outlet syndrome - first rib resection - and was then injured in two subsequent actions. He was unable to return to work in the carpentry trade, and at the time of trial was only able to work at a reduced workload, and reduced salary, with a small contracting company which made substantial accommodations for his disabilities. His damages were awarded in the amount of \$125,000.

- [71] Emphasising the transformative impact of the collision on Mr. Maldonado, and using these cases as a guide, plaintiff's counsel submits that damages for pain and suffering ought to be awarded in the range of \$90,000 to \$110,000.
- [72] The defendant contends that before making substantial deduction for failure to mitigate, Mr. Maldonado's damages should be assessed in the range of \$30,000 to \$40,000. The defendant places reliance on three decisions of this court in which general damages were awarded in the amount of \$40,000: *Haines v. Shewaga*, 2009 BCSC 340; *Olynyk v. Turner*, 2012 BCSC 1138; and *Mothe v. Silva*, 2015 BCSC 140.
- [73] In my view, the injuries suffered by the plaintiffs in each of these three cases are so dissimilar from those in the present case that the decisions provide no guidance at all.
- [74] In *Haines*, the trial judge found that the plaintiff had exaggerated the effects of his injuries, misrepresented the intensity, frequency and duration of the pain and the extent and duration of the impairment of his ability to perform work and also misrepresented the impact on his recreational activities. Most of the effects of his injuries had, it was found, "dissipated" before trial. Damages were awarded on the basis that the plaintiff would continue to experience episodes of mild to moderate pain in his mid-back on an intermittent basis.
- [75] The trial judge in *Olynyk* assessed damages on the basis of the plaintiff having suffered a mild soft tissue injury to the neck and a moderate injury to the low back. The frequency and intensity of pain symptoms had improved significantly before trial; he was left with some residual pain that would likely be permanent, but it was found that he would be able to engage in recreational activities in the future if he lost weight and committed to a program of core strengthening and stretching; for example, the trial judge stated at para. 86 of the judgment:
- [86] He will likely still experience some pain if he plays golf, but I am not persuaded that he will be unable to play or that playing will cause so much pain and discomfort that it would not be worth the effort.

That is not Mr. Maldonado's situation.

- [76] Likewise, the plaintiff in *Mothe*, a 44-year-old longshoreman, initially suffered headaches and soft tissue injuries to his neck, back and shoulder areas, and was left with ongoing chronic neck and shoulder pain and related headaches at the time of the trial. The injuries, as found by the trial judge, contributed to fatigue and a "discouraged, pessimistic outlook", and reduced the plaintiff's enjoyment of recreational activities and family life. They were not, however, so serious as to completely prevent the plaintiff from engaging in recreational activities; one of the plaintiff's collateral witnesses gave evidence that he and the plaintiff would go running at noon along the dyke at Tsawwassen, for a distance of three to five kilometres, though he noted that at times Mr. Mothe "struggles". Again, this does not approach the severity of Mr. Maldonado's injuries and functional limitations.

- [77] I am persuaded by the plaintiff's submissions, and I award Mr. Maldonado non-pecuniary damages in the amount of \$110,000.
- [78] Lastly, the defendant, as noted, argues for a 20% to 40% reduction in the plaintiff's non-pecuniary damages by reason of what is argued to have been a failure to mitigate his loss, in several respects: the plaintiff's failure to take advantage of personal trainers who may have been available at the gym he joined; failure to follow advice from Dr. Alex in 2015 to try further physiotherapy or massage therapy; and failure to undertake a course of treatment with Viagra or Cialis to treat erectile dysfunction.
- [79] There is no evidence that a personal trainer would have been available at the gym in question, had he made inquiries, at a cost he would have found affordable.
- [80] Dr. Alex's recommendation to undergo further treatment was only made relatively recently; there is no evidence that such treatments would have provided anything more than temporary symptomatic relief. The plaintiff is in the best position to judge when that is needed. In any event, his testimony on cross-examination, which I accept, was that such expenses are not covered by his extended health provider, and are simply beyond his means at present.
- [81] As for medication to treat erectile dysfunction, Mr. Maldonado testified that he is not in a relationship.
- [82] I do not find these issues support a claim of failure to mitigate sufficient to justify discounting of the damages award. The onus is on the defendant to demonstrate that the plaintiff's conduct was unreasonable, and to demonstrate that the foregone course of action would have made a material difference to the plaintiff's condition. The defendant has failed to satisfy this onus.

Loss of Earning Capacity

- [83] The plaintiff's claim for loss of earning capacity is framed in terms of loss of a capital asset - his pre-accident endowment of physical strength and stamina, which permitted him to exercise his learned skills as a scaffolder. This, it is maintained, resulted in loss of opportunities to advance with Skyline Scaffold into higher-paying positions on scaffolding crews, and loss of the opportunity to pursue a lucrative career as a scaffolding subcontractor. Furthermore, it is submitted that the plaintiff is now less valuable to his present employer, and to other potential future employers.
- [84] However, in terms of evidence, the plaintiff relies on the expert evidence of an accountant. The accountant has analyzed the past and future losses in terms of the loss of income, by comparing the plaintiff's "with accident" projected earnings, adjusted annually at an assumed rate of 2.5%, to potential "without accident" earnings based on data for B.C. males employed in construction trades.

Past Loss of Earning Capacity

- [85] Prior to the accident, when still formally classified as a helper with Skyline Scaffold, Mr. Maldonado had been earning a wage of \$16 an hour (slightly more than the base "helper" range of \$14 to \$15 attested to by Mr. Chorbajian), working 40 to 50 hours a week. When he began driving upon his return to work, his wage increased to \$17 an hour, though his hours were limited to between 28 and 35 hours per week. In his permanent position as a driver for the two companies, he was paid \$24 an hour on a straight 40 hour week commencing in January 2011, with some modest annual bonuses. He has continued to be paid at that rate.
- [86] The plaintiff's expert accountant, Mr. Lakhani, compared estimated with- and without-accident earnings, and opined that the past income loss, net of income taxes and E.I. premiums, is \$37,412. This is the sum of losses during three periods of time: a gross loss of \$5,484, derived from earnings at his pre-accident wage rate, until Mr. Maldonado returned to full-time work, according to Skyline Scaffold's records, in the beginning of December, 2009; earnings at higher assumed hourly rate of \$17.00, from December 2009 to the end of February, 2010; and thereafter, to trial, earnings as a scaffolding subcontractor to Skyline Scaffold, at a salary Mr. Lakhani bases, as noted above, on statistics of earnings for full-time, full-year B.C. male employees working as construction contractors.
- [87] The plaintiff concedes a point made in cross-examination of Mr. Lakhani, that he failed to take into account the loss of employer CPP contributions that would result if Mr. Maldonado had become an independent sub-contractor. With the plaintiff having to make such contributions on his own account, this would have lowered the past loss of \$37,412 by approximately \$11,000, to a net loss of about \$26,000.
- [88] On the other hand, the plaintiff submits that the data relied upon by Mr. Lakhani provided for construction contractors earning income of approximately \$60,400 in 2011, escalating to \$72,700 in 2014, whereas Mr. Chorbajian testified that a scaffolding subcontractor who runs his business properly can earn what Skyline Scaffold pays its field supervisors, i.e. \$125,000. Given Mr. Maldonado's drive, energy and talent, it is submitted that he would probably, as a subcontractor, have earned well in excess of the statistical figures relied upon by Mr. Lakhani, and the plaintiff contends for a past earnings capacity loss in the range of \$40,000 to \$50,000.
- [89] The defendant takes the position that there is at least the possibility that the plaintiff would still, but for the accident, have transitioned into the driving and mechanical work that he does now, as his natural talents likely would have come to the attention of his employer. I do not view this as a realistic possibility. All of the evidence points to the likelihood of Mr. Maldonado returning to work on the scaffolding crews, had he been physically able to do so. Further, to voluntarily move over to CC Equipment Mr. Maldonado would have been sacrificing, at least, the opportunity to earn a wage at the upper end of the \$21-\$31 range for scaffolders - higher than his present wage rate - and the opportunity to work more than a 40-hour week. There is nothing in the evidence to suggest a real possibility of him making such

a sacrifice.

- [90] The defence also argues that Mr. Lakhani did not account for the months off work the plaintiff took because of a knee injury in 2014 that resulted in a WCB claim. In fact, however, Mr. Lakhani's calculations do account for that loss, in that he only used Mr. Maldonado's actual earnings for 2013-2014, and - presumably because of a lack of information - assumed full employment during 2014 year under the "with accident" scenario. This criticism, I find, has no merit.
- [91] The contention that Mr. Maldonado would have become a scaffolding subcontractor is based entirely on the plaintiff's own assertion that this was his goal, and his evidence that he advised Mr. Chorbajian that this was his goal in one conversation, when he joined the company. Mr. Chorbajian, however, gave no evidence in support of this scenario. He did not testify as to having any memory of that conversation. He gave no evidence as to the likelihood of Mr. Maldonado being employed by Skyline Scaffold individually as an independent contractor. He did say that Skyline Scaffold has used subcontractors in the past, but he was referring to subcontracting companies with their own crews, not individual workers. As I have noted, he did say that a subcontractor could make as much as Skyline Scaffold's field supervisors, but that is through controlling the labour costs of their work crews. Moreover, he testified that Skyline Scaffold has moved away from the use of subcontractors, as safety and compliance requirements have "ratcheted up".
- [92] The only other basis upon which I could conclude there being a real, significant possibility of Mr. Maldonado becoming a subcontractor is a letter in evidence - submitted as part of the plaintiff's Skyline Scaffold employment records - from Skyline Scaffold's business manager, a Ms. Nicholls, in which she says:

It was the intent that Mr. Maldonado would begin to sub-contract with Skyline Scaffold Ltd and he would move from payroll and run his own crews independently. Those discussions were happening in the summer of 2009, my recollection would be early August, but may have been in July.

Ms. Nicholls, however, did not testify, and there is no provision made in the parties' document agreement under which the statements made in the letter could be admitted for their truth. I also note that Ms. Nicholls does not indicate that she had first-hand knowledge of these "discussions", and her memory of the timing and use of the plural, "discussions", does not accord with Mr. Maldonado's evidence of their having been one conversation with Mr. Chorbajian shortly after he commenced employment. The plaintiff's counsel, I note, placed no reliance on this letter in closing argument.

- [93] Mr. Maldonado clearly has drive and ambition that, but for the accident, would have augmented his physical strength and work skills. However, there is no evidence as to whether he has the entrepreneurial and organizational skills that would reasonably be viewed as necessary to success as owner of a subcontracting company. There is no evidence that individual workers are hired in this trade on a subcontracting basis. And, as I have said,

there is no evidence that Mr. Chorbajian would have subcontracted individually with Mr. Maldonado. The evidence does not support a finding that this was probably a real, substantial possibility.

- [94] What I am able, however, to conclude from the evidence is that but for the accident, there is a very high probability that Mr. Maldonado would have continued to work for Skyline Scaffold, and that he was so skilled and so highly regarded that he would most likely have received a wage increase to at least the base rate for scaffolders, \$21 per hour, by the fall of 2009, with an additional 13 hours of work a week on average (45 hrs/wk as a scaffolder, less an average of 34hr/wk worked with-accident). I further conclude that he would have relatively quickly earned a wage increase or increases bringing him up to his present actual wage level of \$24 with, on average, an additional 5 hours a week of work (45 hr/wk without-accident, vs. 40 hrs/wk with-accident commencing January 2011). Thereafter, there is a good probability of his hourly wage increasing to at least the mid-range of a scaffolder, or the lower end of a foreman - slightly more than the \$24 wage he is currently earning. This range of probable results could easily yield a gross income loss, up to the date of trial, of \$60,000 to slightly more than \$100,000.
- [95] This range, in my view, represents the maximum of Mr. Maldonado's gross income loss - in other words, the most plausible "best case scenario" - and would be subject to negative contingencies for the possibility of what I judge to be these most probable outcomes not coming to fruition.
- [96] There is further, in my view, the need to make a significant deduction for the contingency of workplace injury as a scaffolder, reflecting the marginal increased risk of injury over his present position. (Mr. Lakhani did not apply any negative labour market contingencies to Mr. Maldonado's past employment because he assumed that Mr. Maldonado had worked on a full-time, full-year basis after the initial absence immediately following the accident. This assumption, we know, is incorrect; Mr. Maldonado was paid more than \$22,000 in worker's compensation benefits in 2014.) I would find, on the evidence as to the demanding, physical nature of the job, that Mr. Maldonado would have faced a greater risk of injury under the without-accident scenario, again justifying some downward adjustment.
- [97] Applying a marginal income tax rate of 28%, I value the past loss of earning capacity as a net loss of income of \$45,000.

Future Loss of Earning Capacity

- [98] The plaintiff presents Mr. Lakhani's opinion as evidence of the minimum future loss sustained by the plaintiff. Mr. Lakhani, again, took as his starting point in the "without accident" scenario, the available 2010 full-time, full-year age-earnings data for B.C. males working as construction contractors. With the raw data organized in five-year age cohorts, Mr. Lakhani derived single-year values by simple mathematical interpolation, and then applied a formula to increase each year's income, to anticipate changes in average weekly

wage rates. The results were then subject to deduction for labour market contingencies, including the participation rates for B.C. males who have not completed high school.

- [99] Mr. Lakhani arrived at a "without accident" present value of cumulative future income, to age 65, of \$1,475,186; and, using the methodology referred to above, a "with accident" future value of \$1,252,451. The difference, \$272,735, is his best estimate of Mr. Maldonado's future loss.
- [100] The plaintiff submits that this likely grossly understates Mr. Maldonado's actual loss. If it were found that Mr. Maldonado would be working for Skyline Scaffold as a field supervisor by this point in time, but for the accident, earning \$100,000 annually, the economic multiplier used by Mr. Lakhani would yield cumulative future losses with a present value of \$2,268,500, and an estimated future income loss of \$1,016,049.
- [101] The plaintiff submits a further alternative analysis, based on Mr. Chorbajian's evidence that because he has had to hire a helper to assist Mr. Maldonado with deliveries and heavier repair work, the plaintiff is being paid "a good \$7.00 or \$8.00 an hour" less than would otherwise be the case, a mechanic with no journeyman credentials being typically paid in the "lower \$30's". That difference in pay, it is submitted, could result in an income loss of \$15,000 per year, or \$420,000 cumulatively over the next 28 years of Mr. Maldonado's working life; a loss with a present value of \$319,219.
- [102] Given these possible scenarios, the plaintiff submits that a fair, reasonable assessment of the loss of future earning capacity is in the range of \$400,000 to \$500,000.
- [103] I do not find there is any substantial likelihood of Mr. Maldonado being employed as a field supervisor by this point in time, but for the accident. Mr. Chorbajian testified that there are only a "couple" of such positions with Skyline Scaffold; there is no evidence that such a position would have opened up, and no evidence that there were not others who were more likely or as likely to be promoted into that position. Mr. Chorbajian only testified to the likelihood of Mr. Maldonado eventually attaining a supervisory position - i.e. as a field supervisor, or as a foreman. Having said that, there is a real and substantial possibility that Mr. Maldonado has lost the opportunity to be appointed into a field supervisor's position, at a salary in the "low six figures", at some unknown point in the future.
- [104] There are difficulties in applying Mr. Lakhani's analysis to Mr. Maldonado's circumstances. The "without accident" income Mr. Lakhani postulates for the year 2015, \$78,062, would be equivalent to slightly more than \$33 an hour on a 45-hour week, well into the upper range of \$25-\$38 paid to foremen. Whether Mr. Maldonado would have been able to obtain merit-based raises to that level over the course of less than six years is at least questionable, and Mr. Chorbajian gave no explicit evidence to that effect.
- [105] Moreover, I see Mr. Lakhani's analysis being particularly problematic in respect of its use of participation rates for construction contractors generally. Tradespersons such as electricians, plumbers, carpenters and drywallers do not typically engage in physical

labour nearly as arduous, nor as potentially hazardous, as scaffolders. The "without accident" scenario of Mr. Maldonado remaining employed doing physical labour with Skyline Scaffold - i.e. anything short of a field supervisor's position - would be subject to the negative contingencies of increased absences from the workforce due to injury, and earlier retirement or transfer into less remunerative work due to age-related declines in stamina and capacity.

- [106] There is also, for Mr. Maldonado in particular, the negative contingency of his physical work capacity being adversely impacted by the possibility of pre-existing degenerative changes in his lumbar spine becoming manifest.
- [107] The defendant submits that Mr. Maldonado is in fact more marketable as an employee than he was at the time of the accident, due to having obtained certification as a hoist technician and having been trained in repair of CC Equipment's line of construction equipment. I see this factor as having mitigated Mr. Maldonado's loss. It remains the case that notwithstanding this training, there are real possibilities of future employment in more lucrative positions that are now permanently closed off due to his injuries.
- [108] Undoubtedly the most difficult factor in quantifying Mr. Maldonado's loss is a piece of evidence I have not yet referred to, which bears on the prospects for a significant increase in his income in the immediate future. Mr. Chorbajian testified that he wants to hire another mechanic and have the plaintiff formally become manager of CC Equipment's shop. To provide the plaintiff with an incentive, Mr. Chorbajian offered him, "in the past few months", profit sharing of the shop's revenue. Mr. Chorbajian said that he intends to put this in place "definitely sooner rather than later", and that in the next few months following the trial he expected that he would start generating data and sharing it with Mr. Maldonado. He said that the shop is a "work in progress", that it was "tough to say" how a profit-sharing arrangement would impact his income. It would be structured as a bonus, a percentage of profit on top of Mr. Maldonado's regular salary.
- [109] There was no further testimony offered or elicited as to how profitable the shop has been, what its projected profits might be, or what share of profits Mr. Maldonado might be offered.
- [110] Mr. Gosal confirmed in his testimony that earlier in 2015, as he recalled, he overheard Mr. Chorbajian making a proposal for Mr. Maldonado's "part ownership" of the shop, something that to his knowledge had never previously been offered to a CC Equipment employee.
- [111] Mr. Maldonado made no mention of this offer in his testimony, either in chief or in cross-examination. I find this disturbing. His failure to disclose this leads me to draw an adverse inference that he has an expectation that his loss of income will be significantly mitigated as a result.
- [112] The process by which a loss of earnings is to be quantified was summarized by the Court of Appeal in *Jurczak v. Mauro*, 2013 BCCA 507:

- [35] Quantifying a loss may be aided by some mathematical calculation, but there is no particular formula. As stated in *Rosvold v. Dunlop*, 2001 BCCA 1:
- [8] The most basic of those principles is that a plaintiff is entitled to be put into the position he would have been in but for the accident so far as money can do that. An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away. Where a plaintiff's permanent injury limits him in his capacity to perform certain activities and consequently impairs his income earning capacity, he is entitled to compensation. What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider.
- ...
- [11] The task of the court is to assess damages, not to calculate them according to some mathematical formula. Once impairment of a plaintiff's earning capacity as a capital asset has been established, that impairment must be valued. The valuation may involve a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened. As a starting point, a trial judge may determine the present value of the difference between the amounts earned under those two scenarios. But if this is done, it is not to be the end of the inquiry. The overall fairness and reasonableness of the award must be considered taking into account all the evidence.
- ...
- [18] The assessment of damages is a matter of judgment, not calculation. ...
- [Emphasis added; citations omitted.]
- [36] This process is "an assessment rather than a calculation" and "many different contingencies must be reflected in such an award": *Barnes v. Richardson*, 2010 BCCA 116 at para. 18. "Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable": *Parypa v. Wickware*, *supra*, at para. 70.
- [37] With that said, if there are mathematical aids that may be of some assistance, the court should start its analysis by considering them .
- [113] The following year, the Court of Appeal held in *Schenker v. Scott*, 2014 BCCA 203, that the trial judge had failed to provide adequate reasons justifying the future earnings award, had misapprehended material evidence and had made an award that could not be supported by the findings of fact. The trial judge, it was said, appeared simply to have "plucked a number from the air", with the only justification provided being "a testing of the award's reasonableness against somewhat similar cases" (para. 56). The failure to analyze the evidence, assess probabilities and the implications that the findings of fact had for the loss

assessment were held to be errors of principle, sufficient to engage appellate review.

[114] Elaborating on the deficiencies in the trial court's analysis, Mr. Justice Harris said:

55. There is no clear analysis of whether Ms. Schenker proved a substantial possibility of future income loss derived from her diminished marketability. There is no explicit analysis of the general level of earnings Ms. Schenker would have realistically achieved, but for the accident, taking into account her intentions and the probabilities of achieving them. There is no projection of her likely earnings taking into account her injuries and other relevant contingencies.

[115] I do not read Schenker as standing for the proposition that such explicit, detailed analyses of expected earnings under the "without accident" scenario and projection of likely earnings under the "with accident" circumstances are now a required component of reasons for judgment in cases dealing with lost earning capacity. Such a requirement could be seen as inconsistent with the Court of Appeal's admonition in Rosvold that the process of determining damages for loss of capacity is an assessment, not a calculation. The factual matrix in many cases - and this is one of them - can be so complex and there can be so many unknowns that the range of possible earnings under each of the many alternative with- and without-accident possible outcomes precludes specific projections being made. The object is to arrive at a fair result, supported by the evidence, after weighing the positive and negative contingencies, with the path of reasoning being sufficiently articulated to allow meaningful appellate review.

[116] Given the evidence I have summarized above and the concerns I have expressed as to the weight to be given the expert report and the relative likelihood of various scenarios, I assess Mr. Maldonado's future loss of earning capacity at \$175,000.

Cost of Future Care

[117] The plaintiff seeks a substantial award under this heading, in the range of \$50,000-\$100,000. It is based on recommendations made by the occupational therapist Mr. McNeil, and the physiatrist Dr. Kleinman. The present value of these future costs is analyzed in a separate report from Mr. Lakhani.

[118] The chief components of the claim, and their claimed present values, are as follows:

a)

Pain Management Devices:

\$

2,090

b)

Vocational Consultant:

\$

1,575

c)

Kinesiology and Physiotherapy Consultations:

\$

1,086

d)

Fitness Pass:

\$

18,392

e)

Work-Hardening Program:

\$

7,500

f)

Job-side Ergonomic Assessment:

\$

405

g)

Job Shadowing/Coaching:

\$

1,440

h)

In-Home Assessment:

\$

1,440

i)

Physiotherapy, Chiropractic and Massage:

\$

78,903

(\$900 annually each)

TOTAL:

\$

112,831

[119] I find some justification in the evidence for the pain management devices.

[120] I also find some justification for allowing the cost of a personal trainer to work with Mr. Maldonado to find ways he might be able to exercise, increase his cardiovascular fitness and stamina, increase his core strength and lose weight, while minimizing the degree to which his symptoms are aggravated. Given the nature of the plaintiff's injuries, however, there is no justification for basing such an award on a certainty that a consultation would be successful and would likely lead Mr. Maldonado to incurring annual expenses of the magnitude claimed. There is also the likelihood that as Mr. Maldonado aged he would, but for the accident, have found it beneficial to exercise regularly at a gym, as many of us do.

[121] Given Mr. Maldonado's work situation and the degree to which he has already found ways to accommodate and make adjustments for his injuries, I do not see that the expense of consultations with experts is justified.

[122] Some substantial allowance may be appropriately made for Mr. Maldonado incurring the cost of adjunct health therapies on an as-needed basis, but the amount claimed is not supported medically and is clearly excessive.

[123] In addition, Dr. Rasmusen has recommended 10 to 12 sessions with a psychologist with training in chronic pain issues. The projected expense is \$180 per session. I find this claim justified and reasonable.

[124] Some allowance should also be made for the plaintiff's continuing use of over-the counter medication and Naprosyn. No particular quantification of this expense has been given in the evidence.

[125] I award Mr. Maldonado \$30,000 under this head.

Loss of Housekeeping Capacity

[126] The plaintiff's evidence as to the impact of his injuries on his ability to undertake normal housekeeping activities is as stated above. Mr. McNeil's functional capacity evaluation confirms restrictions in his ability to engage in bending, lifting and vertical reach. The plaintiff submits that an award under this heading in the range of \$10,000 to \$20,000 is appropriate.

[127] Although he currently lives in a shared accommodation setting in which the demands on him are minimal, I find there is a real and substantial possibility of Mr. Maldonado's living arrangements changing in the future such that his injuries will have a material impact on his ability to undertake normal yard work and housekeeping tasks. I award \$10,000 under this head.

Special Damages

[128] These are agreed at \$6,054.57.

Summary

[129] Damages are awarded as follows:

Non-Pecuniary Damages:

\$

110,000.00

Past Loss of Earning Capacity:

\$

45,000.00

Future Loss of Earning Capacity:

\$

175,000.00

Cost of Future Care:

\$

30,000.00

Loss of Housekeeping Capacity:

\$

10,000.00

Special Damages:

\$

6,054.57

TOTAL:

\$

376,054.57

[130] The plaintiff is presumed to be entitled to his costs at Scale B. If there are factors unknown to me that should be considered in awarding costs, counsel make arrangements through Supreme Court Scheduling - New Westminster for further oral submissions to be made at 9:00 a.m. on a mutually convenient date.

"A. Saunders J."

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