
CANADA / JUDGMENT

Pistruga v. Garcia

2014 BCSC 1795

COURT

Supreme Court of British Columbia

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2014 BCSC 1795 Pistruga v. Garcia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pistruga v. Garcia,

2014 BCSC 1795

Date: 20140926

Docket: M103115

Registry: Vancouver

Between:

Vasyl Pistruga

Plaintiff

And

Ricardo de la Garza Garcia

Defendant

AND:

Docket: M127435

Registry: Vancouver

Between:

Vasyl Pistruga

Plaintiff

And

Monica Renee Brigitte Sterling

also known as Monica Moskalik Sterling

Defendant

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

Counsel for Plaintiff:

Z.P. Wiseman, E. Holden

Counsel for Defendants:

R. McCullough, M.G. Murphy

Place and Date of Trial:

Vancouver, B.C.

February 11-14, 17-20,

24-28, 2014

Place and Date of Judgment:

Vancouver, B.C.

September 26, 2014

- [1] These Trials deal with an assessment of the damages caused to Mr. Pistruga by two separate accidents. In the first accident on August 11, 2008 ("First Accident"), Mr. Pistruga seeks damages against Mr. Garcia. The liability of Mr. Garcia for that accident is admitted. In the second accident on June 7, 2012 ("Second Accident"), Mr. Pistruga seeks damages against Ms. Sterling. Liability for that accident is not admitted.

Background

- [2] Mr. Pistruga was born in the Ukraine and emigrated to Canada. His first job was as a vehicle driver where he worked for about 18-20 hours a week and was paid \$12 an hour. In 2005, Mr. Pistruga went to work for Oasis Car Wash in its detailing shop ("Oasis"). He described his work there as being a busy season in the Spring and Summer and less work in the Fall and Winter. He worked fulltime at Oasis although the income received was split on a 60% basis to him and 40% to Ms. Pistruga. The General Manager of Oasis described the work of Mr. Pistruga as being "very good - high level of detail - high interest. Did it well, quickly." At Trial, Mr. Pistruga testified that it was intention to work until the age 65 or 67. Mr. Pistruga is now 49 years old.

- [3] Mr. Pistruga detailed cars using polishing equipment for about 60 minutes at a time. At Trial, I record him as stating that this equipment produced "a strong vibration in his fingers and in his hands". Initially, his wife assisted him by answering phone calls, speaking with clients, providing invoices and, from time to time, helping him with the vacuuming of vehicles.
- [4] Mr. Pistruga was also earning \$2,500 a year as a musician, playing trombone and conducting. In addition to working as a car detailer and as a musician, Mr. Pistruga had an active social and recreational life as well as actively participating in household work.

First Accident

- [5] On August 11, 2008, the vehicle driven by Mr. Pistruga near the Lynn Valley Road Exit in North Vancouver on Highway One was hit from behind by a vehicle being driven by Mr. Garcia. After exchanging information, Mr. Pistruga went to work at Oasis, stayed until about noon, but then went home as he was experiencing what he described at Trial as being "strong" pain and a headache ("not an insane headache" but it "bothered me and I could not continue").
- [6] Mr. Pistruga was not able to see his family doctor immediately because of her schedule. Three days later, Mr. Pistruga went to Dr. Helen Vorobeychik complaining about pain in his neck, right shoulder and right knee, and headaches. Dr. Vorobeychik reported in this regard: "On physical examination, he was tender in the neck and right shoulder. The range in motion in his right shoulder was reduced." Dr. Vorobeychik recommended physiotherapy and provided Mr. Pistruga with a prescription for painkillers. Mr. Pistruga was sent for an x-ray of his shoulder. Mr. Pistruga went for physiotherapy and was taught to do exercises at home which he described as "mostly stretching exercises".
- [7] There are a number of entries in the records of Dr. Vorobeychik dealing with the pain that Mr. Pistruga was experiencing in the three years after the First Accident: August 15, 2008 - Neck and right shoulder were determined to be "tender" and there was "range of motion reduced" in the right shoulder; August 19, 2008 - Neck and right shoulder were noted as being "tender"; August 29, 2008 - There was "discomfort" as a result of the pain in the right shoulder; September 3 and 10, 2008 - Continuing shoulder pain; October 10, 2008 - Right shoulder pain; October 28, 2008 - Complained regarding "flare-ups of shoulder pain"; December 10, 2008 - Mr. Pistruga reported that the right shoulder symptoms were "getting worse with heavy lifting or after physical exertion"; April 21, 2009 - Right shoulder pain with occasion irradiation to the forearm, with the range of motion in his right shoulder reduced; May 5, 2009 - "right hand discomfort"; May 27, 2009 - "Tingling in his right arm." June 23, 2009 - Complaint about right shoulder, neck and upper back discomfort, and a physical examination showed that the range of motion in the right shoulder was reduced; August 30 and September 15, 2009 - "Discomfort in the right shoulder, neck and right wrist, as well as tingling sensation in the right hand"; December 1, 2009 - Complaint about "right shoulder and right arm pain, worse after work" and was advised to start physiotherapy; December 15, 2009 - "Neck pain radiating to the left arm" with the range of motion in his cervical spine

"reduced"; January 13, 2010 - "Pain in the right shoulder and neck, numbness in the right arm, and insomnia". Anti-inflammatory medications were devised; April 27, 2010 - Complaint about "flare-ups of pain in the right shoulder. He was unable to work for a week." June 22, 2010 - Complaint about "flare-ups of pain in the right shoulder. He was unable to work for a week." September 29, 2010 - "Pain in the right arm and the right shoulder"; December 28, 2010 - "No improvement with the right shoulder symptoms"; January 13, 2011 - Complained about "flare-ups of pain in the right shoulder. He was given two weeks off work." March 29, 2011 - "Right shoulder pain, worse after work." April 7, 2011 - "Right shoulder pain and insomnia" and sleeping medication was prescribed; May 6, 2011 - Complaints about flare-ups of pain in the right shoulder. "He was given two weeks off work." September 30, 2011 - Mr. Pistruga mentioned that "his shoulder symptoms remain unchanged".

- [8] At Trial, Mr. Pistruga testified that he was having blurriness and pressure in his right eye. Dr. Vorobeychik referred Mr. Pistruga to an eye specialist who prescribed a change of prescription. I cannot attribute these problems to the First Accident.
- [9] Mr. Pistruga testified that it was hard to "raise my arm up" and that he undertook "arm raises" for about a year. He testified that, for the first six months, he felt "sharp pains" and then after that, "the level of pain went down". He stated at Trial: "If I was more careful with myself, the pain would go down." He described the pain as being a sharp in his right shoulder but that his neck also hurt. After about a year, if he did more work, "my right shoulder would hurt more", and he found it was still painful to use his right shoulder.
- [10] Mr. Pistruga could not drive a vehicle for a month after the First Accident. It was necessary for him to be taken to medical appointments either by his son or by his son's girlfriend. After one month, he could sometimes drive himself but others had to drive him occasionally. He indicated he only used his left arm when driving.
- [11] For the first six months, his wife had to help him in the shower as he could not shampoo his own hair with his right arm and "it was hard for me to manage with my left arm". After six months, he could his right arm "but not completely".
- [12] For the first two months after the First Accident, I find that Mr. Pistruga was taking longer breaks at Oasis, was undertaking power washing as little as possible, was doing all jobs except full-cut polishing, was taking numerous breaks from work, and that, if he worked too many days in a row, the pain in his right shoulder would become worse.
- [13] I find that Mr. Pistruga was also having difficulties at home. He was not able to wash windows, do the vacuuming, change light fixtures, or undertake various repairs. As well, he had to reduce lifting while shopping with his wife and he required the assistance of his son for the activities around the home that he would ordinarily have undertaken himself. He described work in their little garden as causing him pain. Mr. Pistruga had difficulties doing anything involving raising his arm up.

- [14] Mr. Pistruga testified that, prior to the First Accident, he played volleyball, soccer and tennis and that, while he did not stop these activities immediately after the First Accident, the injuries interfered with his ability to do those activities.

Shoulder Surgery

- [15] Ultimately, Mr. Pistruga was referred to Dr. Shearer, a sports medicine specialist. Dr. Shearer then referred Mr. Pistruga to Dr. Moola, an orthopaedic surgeon, because the physiotherapy was not having the results that Dr. Shearer had expected. Dr. Moola recommended shoulder surgery and this was performed by Dr. Moola on November 9, 2011.
- [16] Before the surgery, Mr. Pistruga stated that his right shoulder was "getting worse" and that he had to take "strong pain medicine and sleep medication". Following surgery, Mr. Pistruga testified that the pain became very severe for a number of months so that he had difficulty sleeping and could not lie down. Mr. Pistruga wore a sling for six months and did not take the sling off at all for the first month so that his wife needed to bathe him and assist him getting dressed.
- [17] There are a number of notations in the records of Dr. Vorobeychik regarding the pain being experienced by Mr. Pistruga after the surgery: November 20, 2011 - "The right shoulder was painful to touch; there was numbness in digits 4 and 5 of the right hand."; February 26, 2012 - "Right shoulder pain and numbness in the 4th and 5th digits on the right hand. On physical examination, he was tender around the right shoulder. The range of motion in the shoulder was reduced. The strength of his right hand on squeeze was decreased."; May 9, 2012 - "Complained about right shoulder pain radiating to the right arm.".
- [18] Mr. Pistruga testified that, by the Spring of 2012 and up until the point of the Second Accident, he was feeling much better than he had felt after the surgery, his arm was starting to gain range of motion, but that he was still feeling pain in his right shoulder. Mr. Pistruga testified that his arm was not functioning fully, despite the fact that he was going to physiotherapy and he was doing exercises at home.
- [19] During 2012, Mr. Pistruga went to physiotherapy sessions on February 6, March 9, April 7 and May 1. At Trial, Mr. Pistruga confirmed that he stopped going to physiotherapy in May of 2012 because the pain became worse. When asked whether Dr. Vorobeychik recommended to him that physiotherapy stop, he stated, "she supported my decision", "if experiencing pain, don't do it", "I told her I'm experiencing pain, she agreed, don't go". When pressed, Mr. Pistruga could not recall when Dr. Vorobeychik stated that.
- [20] At Trial, Mr. Pistruga was asked whether he felt good mentally and physically just before the Second Accident, and he answered "probably", "yes, physically and mentally", "I felt pretty good". Under cross-examination, Mr. Pistruga stated: "I could have said I was feeling better on the way to recovery, but I cannot say I had recovered. Sometimes feeling better - sometimes worse."

Second Accident

- [21] On June 7, 2012, Mr. Pistruga was driving his vehicle on Kingsway in Burnaby heading in a southeasterly direction and, as his vehicle was turning left, his vehicle was in a collision with an oncoming vehicle driven by Ms. Sterling.
- [22] After the collision, Mr. Pistruga testified that he felt pain in his left knee and that he was limping but had no other symptoms at the scene. He stated that he went home because he felt pain in his knee and because he was "concentrating on that". He saw Dr. Vorobeychik who arranged for an x-ray of the knee. I record him as stating that the knee bothered him "for a long time", that it "got better and then got worse", and that the pain had only stopped bothering him about six months prior to the Trial.
- [23] Regarding increased shoulder pain after the Second Accident, I record Mr. Pistruga as stating that it bothered him for two weeks or so and then returned to the same state "it was before" the Second Accident. He described the level of pain as being about three on a scale of ten, and that, if it got worse, "I take medication". He stated that he took a painkiller about once a week. Under cross-examination at Trial, Mr. Pistruga stated that the main injuries were his left knee and aggravation of his right shoulder.
- [24] After the Second Accident, Ms. Pistruga described her husband as starting "limping". In contradiction of the testimony of Mr. Pistruga, Ms. Pistruga stated that the limping lasted for about a year and a half. She was told by Mr. Pistruga that there was "some increased pain" in his right shoulder but that his "focus was on his knee". "He has to take more pain killers". "He told me he had more pain". She indicated that the increased pain lasted for two or three weeks and then returned to the pain that was present before the Second Accident. This estimate by Ms. Pistruga is in conflict with what Mr. Pistruga was reporting to Dr. Vorobeychik between the time of the Second Accident and March of 2012.
- [25] The following notations are set out in the August 3, 2013 opinion letter of Dr. Vorobeychik: June 12, 2012: "complained about feeling unstable in the left knee". "He also complained about occasional numbness in the left thigh."; July 12, 2012: "Mr. Pistruga came with the same complaints."; August 13, 2012: Mr. Pistruga was seen by Dr. Yu, who diagnosed him with possible "blunt trauma to the patellofemoral joint of his left knee". Dr. Yu identified "entrapment of the lateral cutaneous nerve of the thigh, a condition called neuralgic parasthetica" as a likely reason for numbness in the left thigh"; August 22, 2012: Complained of left hip pain and ongoing right shoulder pain. "[T]he range of motion in the left hip was normal."; August 30, 2012: Came regarding chronic left knee pain; November 6, 2012: Complained about "right shoulder pain radiating to the upper and mid back. He was advised to start Traumacet [sic]."; January 31, 2013: Right shoulder pain. "On physical examination, the range of motion in the right shoulder was reduced."; March 4, 2013: Right hand swelling and chronic right shoulder pain; March 14, 2012: Left knee pain; July 23, 2013: There was no complaint about the left knee. Mr. Pistruga was advised that the results of the July 13, 2013 MRI relating to his left knee was that the "knee MRI was unremarkable".

[26] In her August 3, 2013 opinion, Dr. Vorobeychik noted the following regarding the injuries from the Second Accident:

There was no loss of consciousness, but Mr. Pistruga developed left knee pain. In addition, his previous right shoulder symptoms were aggravated as a result of the accident. On physical examination, the range of motion in the left knee was normal; the range of motion in the right shoulder was still reduced. The patient was advised to continue on anti-inflammatory medications.

[27] Dr. Vorobeychik arranged for a further MRI of the shoulder of Mr. Pistruga. The results of the July 13, 2013 MRI were explained to Mr. Pistruga by Dr. Vorobeychik as follows: "His shoulder MRI showed 'good repair of the supraspinatus' tendon" with "no significant re-tear", and "AC joint degenerative change". However, Dr. Vorobeychik also noted that Mr. Pistruga "was still complaining about shoulder pain".

[28] Mr. Pistruga had been a member of Fitness World since 2002. He stated at Trial that he does "special exercises as a result of the injuries" at Fitness World. When asked whether he had been to the gym in the last month, he stated that he "didn't go", despite the fact that he indicated earlier that he went "several times a week".

[29] When asked what he could not do because of the problem with his shoulder, Mr. Pistruga stated at Trial: "Not working still. Not work at home. Can't play the trombone. No soccer, tennis or basketball like before." When asked why he was not working, Mr. Pistruga stated: "Because I feel pain in my right shoulder." He was asked how he was feeling now, and he stated, "not that bad", "only problem I still feel in my right shoulder", "light dull pain" and "I feel it constantly but sometimes more, sometimes less".

Analysis and Treatment of the Injuries of Mr. Pistruga

(a) Dr. Helen Vorobeychik

[30] In her August 3, 2013 opinion, Dr. Vorobeychik stated:

In November 2011, Mr. Pistruga underwent a repair surgery to his right shoulder. Most of his symptoms have improved by now, but the patient still complains about chronic right shoulder pain His prognosis is guarded. To cope with his symptoms, Mr. Pistruga should pace his activities and take frequent breaks. He will have to continue rehabilitation therapy and to follow up with Drs. Moola and Levin.

(b) Dr. Farhad Moola

[31] Dr. Moola is an orthopaedic surgeon. He first saw Mr. Pistruga on May 28, 2009. An MRI of the right shoulder was undertaken on July 9, 2010 and Dr. Moola made the following comments regarding that MRI:

Marked degeneration was present within the AC joint. Acromial osteophytes projecting inferiorly and impinging on the supraspinatus tendon were noted, as well as marked tendinopathy identified with a full-thickness tear at its insertion. The tear involved the anterior aspect of the tendon with some of the posterior tendon fibres remaining intact. The subscapularis and infraspinatus tendons demonstrated no evidence of tear. The biceps tendon appeared normal. ...

[32] In his August 23, 2013 opinion, Dr. Moola made the following statements:

Since the Medical Legal Addendum dated March 2, 2012, I reviewed Mr. Pistruga on March 8, 2012. At that point, he was four months postoperative from an arthroscopic rotator cuff repair. He had, at that stage, progressed his shoulder range of motion with therapy to full range. He was working with his therapist on strengthening the shoulder. At that stage, he was not yet ready to return back to work and I provided him with a note for his employer indicating the same.

Mr. Pistruga was next seen on July 12, 2012. He was now approximately eight months post rotator cuff repair. He had been scheduled to see me one month prior, but unfortunately, on his way to that appointment with me, he was involved in a second motor vehicle accident.

I did not obtain the full details of that accident. He did report though that he had been experiencing a setback in his recovery with symptoms of increased anterior shoulder pain since the accident of one month prior. Although initially losing some range of motion, his range of motion had now recovered. He reported increased nighttime pain initially after the accident, which was trending towards improvement.

Mr. Pistruga was next seen April 4, 2013. He reported improved range of motion and less pain in his shoulder than preoperatively.

He did have ongoing symptoms though consisting of painful motion and occasional weakness with numbness particularly in his right hand fourth and fifth digits.

Examination at that point noted a full range of motion with a mildly painful Jobe's test and painful external rotation.

I advised him to alter his sleep pattern with the elbow extended in order to help improve the numbness to his fourth and fifth digits as well as the elbow pain he was experiencing.

I reviewed Mr. Pistruga's progress and symptoms again on August 13, 2013 in preparation for this updated Medical Legal Report.

Again, he reports improvement in his shoulder symptoms from that of preoperative status. That being said, he has not had complete improvement. He continues to utilize Cymbalta for sleep disruption and also for symptoms of depression. He complains of dull, annoying pain to the right shoulder present with activity, which has not resolved. ...

Mr. Pistruga was involved in a second motor vehicle accident in June 2012. He suffered a setback in his recovery and has not recovered completely since that time.

An MRI has recently been performed, the results of which, I have tracked down. MRI of the right shoulder from July 17, 2013 has shown the rotator cuff tendon to be well healed with only some slight thinning of the tendon but no re-tear. Acromioclavicular joint degenerative changes persist but the distal clavicle has been resected during the previous surgery.

[33] At Trial, Dr. Moola described the tear of Mr. Pistruga as being "more of a medium-sized tear". Dr. Moola was of the opinion that 20% of the group who have similar surgery have an excellent response so that they do not have further complaints, that 80% "will still have some degree of reminder that they had an injury to their shoulder", and that 15% to 20% of individuals "obtain a fair to poor outcome", "same pain, same night-time discomfort, ... they wouldn't recommend it to their friends".

[34] Under cross-examination, Dr. Moola indicated that the active and passive range of motion of Mr. Pistruga was "full". As to whether degenerative changes would have resulted in any event, and the effect of the Second Accident on the physical recovery of Mr. Pistruga, Dr. Moola stated:

Q ... Would you agree that given the degenerative changes in the right AC joint that it is likely that Mr. Pistruga would have developed shoulder problems in the future, even if the accident of August 11, 2008, had not taken place?

A He - he may very well have developed them. These are not infrequently damaged tendons - may not be torn, but the trauma, or a fall, or in this case a motor vehicle accident was the straw that broke the camel's back, so-to-speak resulting in the ultimate tear of the tissue.

Q. Yes. But it could still have occurred notwithstanding the accident? We don't know the time frame.

A I suppose anything could have - any form of trauma could have resulted in the ultimate tearing of the - of the tendon.

Q And that would be because of degeneration?

A That would be - the tendon was predisposed to - to injury, yes. To failure.

Q Would you agree that the degenerative changes in the right shoulder would have affected the strength in the right shoulder in the future even if the accident of August 11, 2008, had not taken place?

A I don't know that. I don't know if that would have - would have occurred.

Q You can't exclude that?

A I cannot exclude it, you are right, i don't - I couldn't also predict that he would have had an accident resulting in tear, or done enough work - repetitive work overhead to result in a tear either.

Q Would you agree that the second motor vehicle accident of June 7, 2012, had a significant effect on his physical recovery?

A I don't know if it had a significant effect on his recovery, I think, it - it delayed, perhaps, his recovery, but I don't think it had a - at least, you know, radiographically we found that his tendon had healed. That was some of the concern, whether the motor vehicle accident that he sustained while his tendon was healing may have disrupted the - the repair, and we haven't been able to confirm that. The MRI and the ultrasound both say it was intact still.

Q Okay. You agree that the second accident affected his function?

A Again, like, I had said before, I wasn't certain how he was going to turn out, if it was - if he was going to recover fully or not, and the motor vehicle accident occurred at an unfortunate time in his recovery process for me to have a clear understanding of whether he was on his way to recovery, and the motor vehicle set him back considerably, or he was still - we were still unsure if he was going to recover completely and the motor vehicle accident had no effect on his recovery. I don't - I don't know to be honest with you how much of an effect that second motor vehicle accident had on him.

Q You cannot discount the effect of a second accident?

A I can't discount it, because he informed me that he had had a setback, that he lost some range of motion, and, I think, he had some more pain after it, so it did have a bearing for a period of time, whether it is the reason he hasn't recovered fully or not, I - I can't be certain.

[35] While he described the operation as "technically successful", Dr. Moola also stated: "... he doesn't appear to have had a clinically perfect result, or ... the fact that the tendon has healed has not resulted in a dramatic improvement in his function, pain, and his ability to work."

(c) Dr. Peter Kokan

[36] Dr. Kokan is an orthopaedic surgeon who provided an opinion to the Defendants. In his September 29, 2009 opinion to counsel for the Defendants, Dr. Kokan made this statement regarding pre-existing conditions:

In my opinion, the accident definitely precipitated the symptoms as they are but there is a strong likelihood that Mr. Pistruga would have started to develop symptoms such as he currently has given the nature of his work. The onset of symptoms may have taken 1 year or 10 years but I don't feel that he would have been symptom free for the rest of his life, mostly given the x-ray findings along with the ultrasound findings taken shortly after the accident.

[37] In his January 11, 2012 opinion, Dr. Kokan stated:

It is my opinion that the motor vehicle accident of August 11, 2008 is the single most responsible factor for producing the onset of symptoms.

I do feel that there are other factors including in a small part - this man's age, and to a greater extent also his occupation as [an] auto-body worker especially which all could have been contributing factors toward the production of the tear. However, had it not been for the motor vehicle accident I feel that symptoms would not have come on.

The probability that Mr. Pistruga would have a 1cm full thickness rotator cuff tear of the right shoulder without any other history of injury for a man of his age is well under 50%.

[38] Regarding "future disability", Dr. Kokan stated:

Mr. Pistruga was 43 years old at the time of the accident and while the orthopedic literature would certainly vary in terms of correlation of rotator cuff tears in age, most reports would suggest that an otherwise healthy man in his early 40's would have at most a 1 - 2% chance of having spontaneous tear. Certainly rotator cuff tendonitis and rotator cuff tears can occur spontaneously which is a natural degenerative history over time. In this particular case Mr. Pistruga reported pain immediately following the accident which has been documented a long time and there has been a continuity of symptoms which has not changed. For this reason I do feel that the accident did cause the rotator cuff tear.

With the assumption that Mr. Pistruga undergo surgical treatment and has an excellent or good result he would be expected to basically resume full activities. There might be some minor changes in symptoms with use of the arm but in general I would expect him fully functional.

On the other hand if Mr. Pistruga went through surgery and did not have a successful outcome or in the event that he chose not to undergo surgery I would expect a clinical situation similar to the current state. It is my understanding that Mr. Pistruga still works at his job but he is unable to do some of the heavier tasks. There appears to have been some episodes - about 2 or 3 times a year where he has had an exacerbation of pain and had to take a week off work. This certainly could be the case indefinitely.

Overall the disability would be expected to be a partial disability and again only with repetition and heavy overhead lifting type tasks or jobs.

[39] At Trial, Dr. Kokan confirmed that he had not examined Mr. Pistruga before providing his January 11, 2012 opinion and had just "reviewed the reports". During cross-examination, Dr. Kokan agreed that there was "no malingering" and that the description of pain was normal with no exaggeration or "victimization". He was prepared to predict that the tear might happen in any event "given the nature of the work".

[40] Regarding the possible surgical outcome for such surgery, Dr. Kokan stated that two-thirds of the patients do "quite well", that 15% "do at least partially better, and that 10% or 15% of patients "don't seem to enjoy any improvement at all". Recovery time "can be extensive" and take a minimum of three to six months, and for someone like Mr. Pistruga who did a physically demanding job "it might take even longer before he gets back to full physical duties". Regarding Mr. Pistruga, even "successful" surgery might result in Mr. Pistruga "not have enough strength or stamina to carry out his heavy polishing job etc. that would pay

him better".

- [41] I find that Mr. Pistruga is one of those 10% to 15% of patients "who don't seem to enjoy any improvement at all". In this regard, my review of the records of Dr. Vorobeychik allow me to conclude that, after the symptoms of the Second Accident subsided, Mr. Pistruga returned to the pain that he was feeling in the Spring of 2012 right before the Second Accident.
- [42] I also prefer the opinion of Dr. Moola and do not accept the criticisms of the opinion of Dr. Moola provided by Dr. Kokan. Dr. Moola saw Mr. Pistruga on a number of occasions and undertook the surgery on the right shoulder of Mr. Pistruga. Dr. Kokan did not see or examine Mr. Pistruga. Both Dr. Moola and Dr. Kokan agreed that a certain percentage of patients do not see any improvement so that Dr. Kokan could not state categorically that Mr. Pistruga was not in the 10% to 15% of patients "who don't seem to enjoy any improvement at all".
- [43] Under cross-examination, Dr. Moola was adamant that the degenerative changes in the right shoulder of Mr. Pistruga would not necessarily produce anything other than a predisposition to the injury suffered by Mr. Pistruga or would have affected the strength of his right shoulder. Dr. Kokan appeared to agree with that analysis as he was of the opinion that a man like Mr. Pistruga in his mid-40s would have a 1% to 2% possibility of a spontaneous tear. I accept that proposition as well as the opinion expressed by Dr. Moola that, while Mr. Pistruga may have been predisposed to the tear, it was not inevitable that the tear would occur without an incident such as occurred during the First Accident. I agree with the assessment of Dr. Kokan that there was no "malingering", "exaggeration" or "victimization".
- [44] I agree with the August 3, 2013 opinion of Dr. Vorobeychik and find that the prognosis for further recovery is "guarded" at best. I find that Mr. Pistruga will continue to suffer pain from his right shoulder and that this pain will produce insomnia problems and will restrict his activities and employability. Even Dr. Kokan was of the view that it "could be the case indefinitely" that the pain of Mr. Pistruga was severe enough that for two or three times a year it would be necessary for him to cease working.

Emotional and Anxiety Problems of Mr. Pistruga

(a) Dr. Vorobeychik

- [45] The records of Dr. Vorobeychik indicate the following: December 29, 2008: "Mr. Pistruga was scheduled to have an MRI, which had to be interrupted due to panic attack", on January 4, 2009, when Mr. Pistruga reported the incident to Dr. Vorobeychik and she provided a prescription for antianxiety medication. There are also the following notations in the records of Dr. Vorobeychik: "March 23, 2010: Mr. Pistruga became "anxious about the CT procedure and was prescribed anti-anxiety medication"; May 6, 2010: Mr. Pistruga was seen regarding "claustrophobia concerns in the expectation of an MRI test of the right shoulder. He was prescribed anti-anxiety medication to be taken prior to the test."; July 6, 2010: Mr. Pistruga came "with concerns about the forthcoming MRI"; June 10, 2011: "Mr. Pistruga

came with concerns about the forthcoming surgery and rehabilitation after it."

- [46] Dr. Vorobeychik confirmed that the first time that Mr. Pistruga brought to her attention that he had problems with his "mood" was April 19, 2012. In her August 3, 2013 opinion, Dr. Vorobeychik stated that Mr. Pistruga: "... still complains about chronic right shoulder pain and ongoing emotional and psychological problems".
- [47] Ms. Pistruga indicated that her husband had "great hopes" after the surgery but "after several months, he is sad, lost his optimism, couldn't sleep, only when sitting, unhappy with his sling". She stated that emotionally he was hoping for results but after a few months his mood changed dramatically. "He was aggressive, he was suspicious, thought I was unhappy with him. He even locked himself in the bathroom one time. He didn't talk to our children. He would go into a different room."
- [48] Mr. Pistruga testified that his mood swings started in the Spring of 2012 at the same time his family problems started. "I thought I'd feel better by Spring and would go back to work but no improvement with my shoulder."
- [49] Under cross-examination at Trial, Mr. Pistruga confirmed that he had been told by Dr. Moola that the recovery period would be four to six months: "yes - he said I couldn't work for four to six months but not talking about full recovery". "After four to six months could move my arm - not clear to what degree". He confirmed that he expected pain after the surgery. As to why he had not gone back to work in the Spring of 2012, he stated: "because I felt back pain and shoulder pain, and my whole psychological state not well". Asked whether he had seen improvement since seeing Dr. Levin, he responded, "yes, more stable - mood better - not mood swing up and down". As to whether he was "still depressed", he stated "hard to say because I am taking medication".
- [50] As a result of the anxiety and mood problems reported to her, Dr. Vorobeychik referred Mr. Pistruga to Dr. Levin.
- (a) Dr. Alexander Levin
- [51] Dr. Levin is a psychiatrist and was qualified at Trial to provide an expert opinion in that regard. Mr. Pistruga was seen by Dr. Levin on May 8, 2012, May 22, 2012, June 5, 2012, June 14, 2012, July 5, 2012, July 30, 2012, October 22, 2012, November 20, 2012, December 20, 2012, January 28, 2013, February 7, 2013, March 25, 2013, March 18, 2013, April 4, 2013, May 1, 2013, and July 4, 2013.
- [52] There are a number of references in the records of Dr. Levin to the problems being experienced by Mr. Pistruga: (a) June 5, 2012: "... still experienced fatigue but his anxiety reportedly diminished, but also reported having a more stable mood but on a low level. He said, 'I am depressed but better...'. In response to the above-mentioned medications, Mr. Pistruga's anxiety also diminished but he still experienced situational anxiety and complained of pain in his shoulder that he said diminished somewhat with Cymbalta. Mr. Pistruga said, 'My pain makes me feel depressed and anxious ... I don't know if I get back to

work ...'. Mr. Pistruga complained of having the same symptoms of pain for almost four years and said that he has worries and anxiety about losing his job"; (b) June 14, 2012: "... he expressed complaints of significant emotional distress. He appeared upset and distressed, indicating that he felt 'stressed and shaken' He said that he was very shaken by this accident and his anxiety significantly increased to the point of 'panicky feeling ...'. He said that he was afraid for his wife and had significant fear of aggravating his injuries. He has been in recovery with his previous shoulder injury and this accident reportedly 'really affected' him. He appeared very upset and described returning insomnia and low mood. He said that he has taken an increasing amount of Ativan - up to three to four tablets a day. He said that he has been experiencing headaches and feeling 'agitation'. Mr. Pistruga also described having 'nightmares'. He said that yesterday he experienced a significant panic attack and was unable to drive"; (c) July 5, 2012: "Mr. Pistruga still experiences anxiety regarding his return to work as he said that he still has left knee pain. Mr. Pistruga expressed concern regarding his recent physical injuries sustained in the motor vehicle accident on June 7, 2012. However, overall, Mr. Pistruga seemed to be improving. He noticed reduction in his anxiety and more stable mood but still on 'a low side"; Towards the end of the interview, Mr. Pistruga complained of forgetfulness and distractibility"; Mr. Pistruga also noticed fatigue and slow mental process but said that his sleep improved and he feels more energetic in the morning"; (d) July 30, 2012: "He still complained of left leg pain and discussed his recent accident. He said that he experiences anxiety and worries about the outcome of these injuries in addition to his previous accident-related shoulder pain. .."; (e) September 19, 2012: "Mr. Pistruga reported that he continued to take all of his medications regularly but still has episodes of anxiety. He noticed that his anxiety was more pronounced in the morning and late afternoon. He said that he feels that the effect of the medications wears off in the late afternoon. We then discussed his situational stressors and he said that he and his wife have been in a dispute with BC Housing regarding payments. Mr. Pistruga said that he is under significant financial stress but his pain does not allow him to return to work"; (f) October 10, 2012: "Mr. Pistruga appeared upset and anxious. Mr. Pistruga said that they were evicted. He complained of insomnia, shakiness and discussed having difficulties in coping with situational stressors in his life. He also complained of sexual dysfunction, indicating that he experiences erectile dysfunction."

- [53] In his May 8, 2012 opinion, Dr. Levin stated that Mr. Pistruga was experiencing "significant anxiety", "significant emotional problems", attributed to his pain and his prolonged and unsuccessful recovery. He included as suicidal ideation, "depression - adjustive disorder". Dr. Levin was of the opinion that the pain Mr. Pistruga was suffering caused stress, he developed anxiety so unable to adjust: "It was not a "major mental illness. Many patients deal with the condition would resolve but the pain continued the adjustment disorder continues and becomes chronic depression." Dr. Levin described that the various medications for Mr. Pistruga as follows:

Cymbalta can modify perception of pain, is long lasting, can work 24 hours if taken for long; Imovane is a sleeping aid that does not reduce anxiety; Seroquel is a mood modifier so the patient is mellow rather than mood swings; Tramacet is a sleep medication."

[54] Dr. Levin concluded as follows:

I was trying to get him to see what he actually has and to get on with this life - I felt he was struck on his self-perception of how he feels. He limited activities, gained weight and dedicated his lifestyle to pain rather than getting along with his life and rather than dealing with pain.

[55] The prognosis of Dr. Levin was:

His preoccupation with pain became so in effect on his life so he could not function adequately in home, where in job, losing motivation to fight at an adequately function. He developed a major depressive disorder and, once developed, risk a reoccurring depressive episode.

[56] The "Opinion and Recommendations" of Dr. Levin were as follows:

From a psychiatric perspective, it is most likely that Mr. Pistruga initially developed adjustment disorder with mixed depressive/anxiety symptomatology that gradually progressed in severity and, at the present time, he presents with a clinical picture consistent with a major depressive episode complicated by residual shoulder pain. ...

From a diagnostic perspective, Mr. Pistruga's accident-related chronic experience of pain and physical discomfort initially resulted in his developing so-called adjustment disorder with mixed depressive/anxiety symptomatology. It seems that Mr. Pistruga's biological vulnerability (family history of depression and anxiety) as well as his unremitting pain and situational stressors in his life (pressure to continue working despite his pain) resulted in the development of a major depressive episode with prominent underlying anxiety symptomatology. In my clinical opinion, the severity, quality and duration of Mr. Pistruga's depressive/anxiety symptomatology reached the threshold of a diagnosis of major depressive disorder that required intensive psychopharmacological and psychotherapeutic intervention.

As often seen in clinical practice, Mr. Pistruga's psychopharmacological treatment resulted in only a limited effect and his ongoing experiences of pain perpetuated his emotional disturbances. Despite his use of Cymbalta, one of the antidepressant medications with pain modulating properties, Mr. Pistruga experienced a protracted clinical course complicated by underlying irritability, feelings of hopelessness and fear about his future earning abilities.

While experiencing depressed mood, Mr. Pistruga also developed cognitive distortions seen in patients with major depressive disorder and reported ongoing pessimism, low motivation and anhedonia. Consequently, Mr. Pistruga has gained weight and his depression further deteriorated for some time. It was not until the spring of 2013 that Mr. Pistruga started to gradually improve. However he still presents with fluctuating depressive/anxiety symptomatology and ongoing complaints of pain.

From a diagnostic perspective, Mr. Pistruga's above-described clinical presentation was complicated by significant preoccupation with pain and time-consuming activities to manage his pain that is usually seen in patients with so-called somatic symptom disorder with predominant complaints of pain as described in the new Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5) previously known as chronic pain disorder in DSM IV.

At the time of the second motor vehicle accident (June 7, 2012), Mr. Pistruga continued to experience symptoms of the above-mentioned somatic symptom disorder but his depressive/anxiety symptomatology was gradually improving. It seems, however, that the motor vehicle accident of June 7, 2012 aggravated his pre-existent anxiety and resulted in his developing new, not existent before, PTSD-like symptoms. Although Mr. Pistruga's PTSD-like symptoms did not reach the threshold for a diagnosis of post-traumatic stress disorder, he continued to experience driving anxiety, nightmares and hypervigilance. Such increased anxiety symptomatology also resulted in aggravation of his pre-existent pain. Mr. Pistruga's emotional reaction to his physical injuries sustained in the motor vehicle accident of June 7, 2012 also seems to have been excessive and most likely reflected aggravation of his underlying somatic symptom disorder (chronic pain condition); in that, Mr. Pistruga questioned and expressed significant worries about his future employability and was severely distressed. As a result of such worsening of Mr. Pistruga's psychiatric disturbances, he was prescribed an additional psychiatric agent (Seroquel), which augmented his previous psychopharmacological regimen. Consequently, Mr. Pistruga's sleep improved, his mood stabilized and his anxiety somewhat diminished. However, at the present time, Mr. Pistruga remains symptomatic and requires ongoing psychopharmacological and psychotherapeutic intervention.

It is most likely that a combination of Mr. Pistruga's depressive/anxiety symptomatology and his pervasive preoccupation with pain in the context of the above-mentioned somatic symptom disorder would warrant him psychiatric disability. From a clinical perspective, it would be difficult to identify any specific time when and for how long Mr. Pistruga was possibly totally psychiatrically disabled. However, it is most likely that at least since his shoulder surgery in November of 2012 he has been partially psychiatrically disabled due to the above-described psychiatric diagnosis.

Mr. Pistruga's prognosis for full recovery remains guarded and he most likely will require ongoing maintenance psychopharmacological treatment. Given Mr. Pistruga's cognitive distortions (as seen in patients with chronic pain condition) he would benefit from a referral to a pain management team (possible St. Paul's Hospital) and/or a registered psychologist to learn more adaptive coping strategies in dealing with his pain. It should be mentioned that Mr. Pistruga's physical injuries and his subjective perception of physical disabilities also affected his self-esteem and enjoyment of previous work as a musician. From a psychological perspective, Mr. Pistruga's inability to return to his activities as a musician seems to further aggravate and complicate his clinical presentation and prognosis for recovery.

[57] Under cross-examination at Trial, Dr. Levin was asked whether he attributed everything to the First Accident and he stated that there were a number of factors including pain, inability to work, worry about his future, financial difficulties. "He fell apart after surgery when the period of recovery did not reduce his pain."

[58] Mr. Pistruga indicates that he presently sees Dr. Levin once a month, "I have talk with him, he helps me with medication", "I have mood swings", "I complain about my shoulder", "most concern about my psychological state of mind", "often feel depressed", "trouble sleeping", "family problems (intimacy with my wife)".

(b) Dr. Kevin Solomons

[59] Dr. Solomons is a psychiatrist. At the request of the Defendants, Dr. Solomons reviewed the report of Dr. Levin and provided a number of opinions about it. While Dr. Solomons did not interview Mr. Pistruga, he also came to the conclusion that Mr. Pistruga suffered from a major depressive disorder:

Dr. Levin's May 8, 2012 diagnosis of a major depressive disorder of moderate severity seems consistent with the clinical information contained in Dr. Levin's clinical records and on those grounds, I agree with the diagnosis of major depressive disorder of moderate severity.

[60] Dr. Solomons was of the opinion that such a disorder would come "within 3 months of a stressor", and, if it was a long time after, it would be "difficult to link them to the stressor". Dr. Solomons was of the opinion that the major depressive disorder was not due to the First Accident and based his opinion on the fact that there was an "... absence of reference to depressive symptoms in Dr. Vorobeychik's or any other clinical records following the March 11, 2008 Accident until April 2012, four years after the Accident. ...".

[61] At Trial, Dr. Solomons was qualified to provide an opinion regarding psychiatry and the following opinion was in evidence:

Based on the high prevalence of major depression in the general population, (estimates of lifetime prevalence for a major depressive disorder vary from between 10 and 13 percent which means that one in every 7 to 10 people will develop a major depressive disorder) and on Mr. Pistruga's positive family history of depression and anxiety, in my opinion his psychiatric symptoms that came to attention four years after the accident would have emerged even if the accident had not occurred.

As stated in reply to question 3 above, my opinion that the March 2008 accident [sic] likely did not lead to a psychiatric disorder means that the March 2008 accident did not cause a psychiatric impediment to his ability to work.

When he first saw him in May 2012, Dr. Levin assigned him a Global Assessment of Functioning score of 50 to 60, commensurate with moderate impairment of social and occupational impairment. This score range mentions conflicts with peers or co-workers as indicative of this level of impairment.

A GAF score of 41 to 50 reflects serious impairment in social or occupational functioning commensurate with inability to keep a job, and a score of 31 to 40 reflects major impairment in several areas and includes an inability to work.

Dr. Levin's assessment of his functional level due to psychiatric symptoms indicates that Mr. Pistruga's psychiatric state has not disabled him from work.

If Mr. Pistruga remains clinically depressed at present, then the standard principles of treating depression apply, which means finding an effective antidepressant medication in a therapeutic dose and maintaining him on that treatment for a minimum of six months from the time of full recovery. I do not have sufficient clinical information to comment on Mr. Pistruga's need for ongoing psychiatric treatment beyond the six-month period of medication maintenance or for adjunctive psychotherapy. ...

There is no other reference to anxiety or mood symptoms until Dr. Vorobeychik's reference to mood problems in April of 2012, six months after Mr. Pistruga's shoulder surgery. This indicates that Mr. Pistruga's mood symptoms six months after shoulder surgery do not conform to the diagnostic requirements of an adjustment disorder to his surgery, particularly since Mr. Pistruga told Dr. Levin that his pain symptoms had improved four months after surgery.

[62] Under cross-examination, Dr. Solomons confirmed that he had never met or spoken to Mr. Pistruga and that he only did a records review. He stated that in only 2-3% of the cases he deals with does he only do a record review. I am satisfied that it is of little assistance to the Court if a psychiatrist does only a record review and does not undertake the testing and interviewing that a psychiatrist would ordinarily undertake. However, Dr. Solomons did confirm that the stress of not working, unemployment and losing a job with income loss are considered very significant stressors.

[63] I prefer the opinion of Dr. Levin over the opinion of Dr. Solomons. First, Dr. Levin has treated Mr. Pistruga since May of 2011 whereas Dr. Solomons had neither met nor spoken to Mr. Pistruga. Second, while Dr. Solomons is of the view that the major depressive disorder of Mr. Pistruga could not have been caused by the First Accident, it is clear that symptoms of depression predate the Second Accident and follow within several months of the shoulder surgery. As early as May 8, 2012, Dr. Levin stated that Mr. Pistruga was experiencing "significant anxiety" and "significant emotional problems" attributed to his pain and what Mr. Pistruga viewed as prolonged and unsuccessful recovery. This included suicidal ideation. Third, the records of Dr. Vorobeychik reveal incidents of anxiety by Mr. Pistruga which resulted in Dr. Vorobeychik prescribing antianxiety medication as early as March 2010. Fourth, I find it illogical that, merely because Dr. Solomons was of the view that a major depressive disorder might come to between 10% and 13% of the population and because he was of the view that there was "positive family history of depression and anxiety" in the family of Mr. Pistruga, that symptoms would have emerged with Mr. Pistruga even if the First Accident had not occurred and even if it had not been necessary for the shoulder surgery to be undertaken. Fifth, while Dr. Solomons was of the opinion that depression

should "flow within 3 months of a stressor" and that it would be "difficult" to link the depression to the First Accident as the stressor, I am satisfied and find that Mr. Pistruga has shown on a balance of probabilities that the stressors were the failure of the surgery to alleviate the pain in accordance with the schedule for relief anticipated by Mr. Pistruga and the ongoing concern that he would not be in a position to return to Oasis. The First Accident caused Mr. Pistruga considerable pain, led to the requirement of surgery, and led to the economic and emotional stressors which led to the major depressive disorder diagnosed by Dr. Levin and Dr. Solomons.

- [64] I find that one of the results flowing from the First Accident is the major depressive disorder diagnosed by Dr. Levin and Dr. Solomons. Accordingly, Mr. Pistruga will be entitled to the damages flowing from the major depressive disorder.

VOCATIONAL AND PHYSICAL CAPACITY EVALUATION OF Mr. Pistruga

- [65] Mr. Nordin is a vocational rehabilitation consultant and was admitted as an expert to provide an opinion in vocational rehabilitation. In his vocational testing of Mr. Pistruga, Mr. Carlin found his "Math Computation" to be "Average" at a Grade 10 level, his "Word Reading" at the "Low end" of Range or the equivalent of grade 3.9, and his "Spelling" in the "Lower Extreme", less than grade 1. Mr. Nordin came to the following conclusions regarding the educational possibilities for Mr. Pistruga: "These results strongly suggest Mr. Pistruga will not be able to cope with formal training programs in a Canadian school environment." In a test for "Non-Verbal Intellectual Functioning", Mr. Nordin states Mr. Pistruga obtained a score which placed him in the 14th percentile which translates to an I.Q. quotient of 84 "which is in the below-average range".
- [66] Mr. Nordin provided the following opinions regarding the employment possibilities of Mr. Pistruga: (a) "... The practical conclusion I am led to is that Mr. Pistruga is likely not, in his current condition, competitively employable in any capacity. The possible exception to this may be entry-level work where he made observations (i.e. security) but had no other physical requirements. However, I do not believe Mr. Pistruga stands a good chance with his present symptoms as being hired in security or other capacity." "Security guard, you can work in security probably without having a lot of English skills, but in his case the physical limitations maybe somewhat of a barrier in those types of jobs"; (b) "... absent substantial improvement is his right shoulder condition (as well as the associated psychiatric diagnosis outlined by Dr. Levin), Mr. Pistruga is unlikely to make a return to competitive employment."; and (c) "he is not a completely disabled person. But my opinion of him at the time I saw him was a combination of his physical limitation, his English, his limited work experience "make it very unlikely that he is going to be able to find work."

[67] Under cross-examination, Mr. Nordin agreed that the purpose of adult education and ESL classes was to improve the literacy and numeracy skills of a person and agreed that, although he had not recommended retraining in his first report, he would recommend that Mr. Pistruga take additional English classes. He also agreed that the median wage for the occupations he referred to was between \$10.25 and \$14 an hour, and that the minimum wage in British Columbia is \$10.25 an hour.

[68] Richard M. Carlin is a Vocational Rehabilitation Consultant. He provided a critique of the report of Mr. Nordin. Mr. Carlin provided the following opinions and commentary:

I would agree with Mr. Nordin that with this level of literacy, Mr. Pistruga would not be able [to] cope with any vocational training program that relies on an ability to read from a textbook.

I disagree with the results that the TONI-3 give any indication whatsoever about Mr. Pistruga's ability to cope with formal studies in Canada. The fact that he completed university level studies in the Ukraine would indicate that Mr. Pistruga likely possesses at least average levels of intelligence.

[69] Regarding the potential jobs available to Mr. Pistruga, Mr. Carlin provided this opinion:

In light of the above, I am of the opinion that Mr. Nordin could have considered the possibility that Mr. Pistruga, with improved English language skills approximating a conversational level, could seek some lighter unskilled or semiskilled occupations as a means of continuing his participation in the competitive labour market. Some examples of such occupations include Retail Sales Clerk, Fast Food Attendant, Cashier, Customer Service Representative, Security Guard and the like. Given Mr. Pistruga's knowledge of music it is possible that even with limited language skills he could be successful in working in a music store selling instruments. The median wage for the occupations listed above range from \$10.25-\$14.00 per hour (Working in Canada Wage Report).

Mr. Pistruga's success in securing such employment would rely in part on the degree to which he is able to reach a more proficient ability in speaking and understanding English. Mr. Pistruga is currently 48 years of age. I would expect that with diligent effort, even accepting his self-report of difficulty in learning English, his ability should improve. I would also expect that he would benefit from such employment. The cost for such services would be approximately \$3000.

[70] Catherine Douglas was qualified as an expert to provide an opinion regarding physical strengths and limitations, employability, and physical capacity evaluation of Mr. Pistruga. Ms. Douglas was not able to find any "driving anxiety" and, regarding the right shoulder of Mr. Pistruga, Ms. Douglas reached the conclusion that: "his limitations would not impact his functional capability"; "reaching - not affect his capabilities"; and found his shoulder strength as "good" with "80% strength in right shoulder". She did not see him having any discomfort while sitting as he could "sit for two hours without pain". She also concluded that he could stand for two hours without pain before needing a break and then stand a further two hours, and that there were "No limitations on walking".

[71] Ms. Douglas provided the following opinions regarding the employability of Mr. Pistruga:

In summary then, it is my opinion that Mr. Pistruga is employable in limited and light strength occupations as described by the NOC within the limitations outlined above. Occupations that require sustained or repetitive use of the right (dominant) arm at extended reaching (45 degrees shoulder flexion to 90 degrees shoulder flexion) and overhead reaching are not suitable for Mr. Pistruga's current demonstrated level of function, and he would be considered, in my opinion, non-employable in these types of occupations.

Due to his limited physical capacity, he is not competitively employable in any NOC strength demand category.

He has the physical capacity to be employable in a very restricted range of medium strength occupations, within the limitations and restrictions outlined above.

He is non-employable in heavy strength occupations as he does not meet the baseline strength requirements for these positions.

[72] Ms. Douglas states in her report that it is her opinion that Mr. Pistruga would be unable to tolerate holding the trombone for the length of time as required for daily practices as well as for professional concert performances. She also states that in her opinion with his physical limitations with the right arm/shoulder he would not be employable as a musician or a conductor. I agree with that opinion and find that Mr. Pistruga is no longer in a position to earn income from his considerable musical abilities.

[73] I am satisfied that I should prefer the opinion of Mr. Nordin over the opinion of Mr. Carlin. First, Mr. Carlin did not interview or even speak to Mr. Pistruga and did no testing of him. Second, I am satisfied that the present English speaking ability of Mr. Pistruga plus his facility to learn sufficient English is such that ESL classes would provide some improvement of his speaking and listening skills. Third, while Mr. Carlin comments about the education that Mr. Pistruga obtained in the Ukraine, there is nothing before me which would allow me to conclude that improved English would translate into an I.Q. quotient other than in the "below-average" range.

[74] Based on the opinions received and on the testimony of Mr. Pistruga and of those providing expert opinions, I am satisfied that, with some ESL training and with a continuation of the pharmaceutical treatment of Mr. Pistruga, Mr. Pistruga will be in a position to find work in occupations such as a security guard, a fast-food attendant, or similar positions which would require only limited strength and lifting abilities. I am satisfied that positions paying at least the minimum wage in British Columbia would be available to him after an improvement of his English language skills. In this regard, the testing of Mr. Pistruga by Mr. Nordin and Ms. Douglas in English and the fact that Mr. Pistruga was conducting his work in English as an auto detailer allows me to conclude that, with some further training, his English will be sufficient to allow him to be employable in those types of positions.

Liability for the Second Accident

- [75] Mr. Pistruga testified that he was driving in the designated left turn lane on Kingsway, that it was raining, that the windshield wipers in his vehicle were on, that his wife was in the front seat as a passenger, that he was driving in his lane behind another vehicle (which we now know was driven by John Chang), that the light was green as he approached the intersection, that the vehicle ahead of him entered the intersection on a green light, that the light turned from green to yellow as he entered the intersection and that the vehicle ahead of him did not stop before entering the intersection.
- [76] I record Mr. Pistruga as stating that he did not "change his speed as he approached the intersection ("I didn't stop at all - just lowered my speed to around 15-20 kph"), that he did not stop his vehicle ("no - moving slowly"), that he was halfway through his turn when his wife screamed and he turned his head and "saw the red light", and that he had not finished his turn but was "almost to the end of my turn" when the collision occurred.
- [77] Mr. Pistruga testified that, when the vehicle ahead of him made its turn, it freed up the space in front of him so he could see ongoing traffic and that he did not see any vehicles approaching the intersection as he had an unobstructed view 20 to 30 metres down the lane of oncoming traffic. He testified that the vehicle driven by Ms. Sterling crossed the stop line on the red light and slid towards his vehicle on a "sideways angle" before coming into contact with his vehicle. The damage to the two vehicles was on the center of the Sterling vehicle and at the front right and right side portion of the Pistruga vehicle.
- [78] Ms. Pistruga was a passenger in the car that day and, when asked what the colour of the light was when they approached, I record her as stating "I don't know". She stated that the vehicle driven by John Chang was "moving slowly in front of us making the turn". Ms. Pistruga could only say about the speed of their vehicle that she did not know "slowly, that is why I was not afraid". I record her as stating that the light "switched onto red" as the Sterling vehicle entered the intersection.
- [79] Under cross-examination, Ms. Pistruga confirmed that she was not paying attention to the traffic light and did not see what light was illuminated when the car ahead of them entered the intersection. She described the Sterling vehicle as being two to three car lengths away when she first saw it and that it was "moving strange" when she first saw it. She thought that the Sterling vehicle was "closer to the curb lane" and that as she watched it "it was at an angle, not going straight". She was asked what part of the car could be seen by her and she stated, "the front part", "I saw the whole car", "I saw the front door, I think on the passenger side". When asked again what part of the car she saw, I record her as stating, "it is difficult for me to recall the parts as I am so confused", "I as looking at the driver too".
- [80] Mr. Chang was driving ahead of the Pistruga vehicle. He stated that, as he approached the intersection, the left turn arrow turned solid green so that he could not turn and had to wait. He stated that, when the light went yellow, he started his left turn and, when entering the intersection, he did not initially see the car being driven by Ms. Sterling as "other cars

obstructed my view". He stated, "I booted my car - put down on the pedal so that it (the Sterling vehicle) wouldn't hit me." He indicated that the Pistruga vehicle was "right on my bumper" when he entered in the intersection, and that he saw the Pistruga vehicle being hit as "I was looking through my rear view mirror".

- [81] Under cross-examination, Mr. Chang stated that he had been stopped about two seconds in the intersection, that the front bumper of the Sterling vehicle was in the intersection "when I saw her", that the Sterling vehicle was "in the middle lane", that he could not tell how fast the Sterling vehicle was going, and that he thought that the Sterling vehicle was "about five feet" away from his vehicle when he first saw it. He stated that he was barely out of the intersection when the accident occurred. When asked why he was looking in his own rear view mirror, I record Mr. Chang as stating, "because he followed me through the intersection". He stated that the Pistruga vehicle was "stopped behind me" when he left the intersection and "before the accident". Mr. Chang was asked why he had stopped in the intersection and I record him as stating, "because green turning light had stopped and a solid green came on. I stopped, then I crept forward". Mr. Chang stated that the light changed to yellow when he was in the intersection.
- [82] Ms. Sterling stated at her Examination for Discovery that her vehicle was approximately eight to ten car lengths from the intersection when she determined that the street that she was looking for was not 10th Avenue which she was coming up to. She stated that she observed the vehicle being driven by Mr. Chang as speeding up to turn left. I record her as stating that it "increased speed to beat me through the intersection". She stated that she was maybe three car lengths back when it was turning and that it was halfway through the turn. She stated that she "tapped my brake as a reaction" and that, as she reached and was at the crosswalk, the light turned amber. I record her as stating: "I proceeded through, once it cleared. I noticed the plaintiff's vehicle closest to the centre line. It was moving, no turn signal on." She stated that the collision occurred just after she crossed the centre line.
- [83] Ms. Sterling described the vehicle driven by Mr. Pistruga as "going fast but I can't estimate". She stated that she first saw the vehicle driven by Mr. Pistruga "when I was two to four car lengths from the intersection and that the Pistruga vehicle at the time was "three to five car lengths back of the intersection in that lane". She stated that the light went yellow "at about the crosswalk", and that she was going 30-40 kph at the time. When asked why she did not stop when the light went yellow, I record her as stating "because I was in the intersection", "if I had stopped, I would be in the intersection". Ms. Sterling was of the belief that the light was red at the time of the impact and that "it was changing from yellow to red - split second it changed". When asked whether the light was red immediately before the accident, I record her as stating, "I don't believe so - only after the collision".

- [84] Under cross-examination, Ms. Sterling indicated that she "was not one hundred percent sure where I was going" when she was travelling on Kingsway, that she estimated that she was going 35-40 kph and, when she saw that it was not Edmonds Street which was the street that she was looking for, she was about 12 car lengths away from the intersection. She stated that she then increased her speed to about 40 kph.
- [85] There are a number of inconsistencies in the evidence of the witnesses. I resolve those inconsistencies in favour of the witnesses other than Mr. and Ms. Pistruga. I am satisfied that Mr. Pistruga has not proven on a balance of probabilities that the collision was caused by Ms. Sterling. Mr. Pistruga states that he did not stop his vehicle as it entered the intersection. On the basis of the testimony of Mr. Chang, I am satisfied that this could not have been the case as Mr. Chang was adamant that he stopped in the intersection when the left turn light turned to solid green. I find that it was necessary for Mr. Chang to stop in the intersection for several seconds until the light turned yellow. I also find it impossible to support the testimony of Mr. Pistruga that he could see 20 to 30 metres down the incoming lane. His view would have been at least partially obstructed by the vehicle of Mr. Chang. The vehicle driven by Ms. Sterling was there to be seen. I conclude that her vehicle could not have travelled 20 to 30 metres between the time when it was first seen by Mr. Pistruga and when the collision occurred. It is more likely that the estimate of two to three car lengths given by Ms. Pistruga was more accurate as to where the Sterling vehicle was when it was first seen by her. As well, I find that it was only after Ms. Pistruga screamed that Mr. Pistruga saw the Sterling vehicle. I also accept the evidence of Mr. Chang and Ms. Sterling that the light was yellow when Mr. Chang made his hurried turn and as the vehicle of Ms. Sterling entered the intersection.
- [86] I find the testimony of Ms. Pistruga not particularly helpful. First, she stated that she could see the passenger side of the Sterling vehicle. I find that this would be impossible. Second, I am satisfied that she was paying very little attention to the traffic, the traffic lights in the area, and the oncoming traffic.
- [87] I accept the evidence of Mr. Chang that, as he approached the intersection, the left-turn arrow turned solid green, that he made his left turn when the traffic light went yellow, that his vehicle barely escaped the vehicle of Ms. Sterling, and that, because the Pistruga vehicle was "right on my bumper" when it entered the intersection, the Pistruga vehicle was struck because Mr. Pistruga did not yield the right-of-way to the oncoming vehicle of Ms. Sterling, followed the vehicle of Mr. Chang when it was unsafe to do so, and entered and proceeded into the intersection when the traffic light had already turned yellow.
- [88] Taking into account all of the evidence, I am satisfied that Mr. Pistruga was 100% at fault in the collision between his vehicle and the vehicle driven by Ms. Sterling.

NON-PECUNIARY DAMAGES

[89] Both counsel rely on the non-exhaustive list of factors to consider when assessing non-pecuniary damages as set out in *Stapley v. Hejslet* (2006), 263 D.L.R. (4th) 19 (B.C.C.A.): (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; (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, 2005 BCCA 54).

(a) Submissions of Mr. Pistruga

[90] In submitting that the non-pecuniary damages should be awarded at between \$100,000 and \$120,000, Mr. Pistruga relies on the following decisions: *Hanson v. Yun*, [2013] B.C.J. No. 2772; *Wong v. Hemmings*, [2012] B.C.J. No. 1252; and *Dycke v. Nanaimo Paving and Seal Coating Ltd.*, [2007] B.C.J. No. 2961.

[91] In *Hanson*, the plaintiff suffered soft tissue injuries to the neck and back, exacerbation of pre-existing depression and anxiety, and permanent right shoulder injury which would significantly deteriorate with arthritis in the future, including partial rotator cuff tear, disruption of the anterior glenoid, disruption of the biceps anchor, and persistent secondary capsulitis. The plaintiff had undergone two surgeries to correct the shoulder injury but neither were effective. The plaintiff was suffering permanent pain and restricted function in his right shoulder and his ability to do physical tasks at work and at home were limited, with reliance on prescription pain medication to manage the pain that he was suffering. (\$120,000)

[92] In *Wong*, the plaintiff underwent arthroscopic subacromial decompression surgery on her left shoulder in addition to an arthroscopic procedure designed to reduce pain associated with her biceps tendon. Despite the surgery, the plaintiff continued to experience pain over the biceps tendon which was likely to be aggravated by her work duties. The plaintiff also suffered continuing pain associated with an injury caused by the first accident to her peroneal nerve. The view expressed was that the plaintiff's recovery would be prolonged and that she might be left with chronic pain in the left side of her neck in the trapezius, levator scapula and paraspinal muscles in her neck and back. (\$100,000)

[93] In *Dycke*, the plaintiff suffered a pain in her right shoulder, arthroscopic surgery was performed, and, when the first surgery resulted only in minor relief for the pain that she then described as being eight out of ten, a second surgery was performed. After the second surgery, the plaintiff was never free of pain and described the pain level as 3 out of 10 on a good, but 5 or 6 out of 10 on a bad day. (\$125,000)

(b) Submissions of Mr. Garcia

- [94] In submitting that the non-pecuniary damages of Mr. Pistruga should be assessed at between \$45,000 and \$50,000, the Defendants rely on the following decisions: Bhadlawala v. Baxter, [2012] B.C.J. No. 507; Burtwell v. McCaffrey, [2013] B.C.J. No. 1042; Antonishak v. Piebenga, [2012] B.C.J. No. 991; Hauer v. Clendenning, [2010] B.C.J. No. 497; and Romanchych v. Vallianatos, [2009] B.C.J. No. 996.
- [95] In Bhadlawala, the plaintiff complained of pain in his neck, right shoulder and lower back, finding it difficult to perform some of the heavier duties associated with his job. It was the finding that some of the difficulty of the plaintiff in lifting was caused by left shoulder bursitis which was not caused by either of the two accidents. (\$40,000)
- [96] In Burtwell, the plaintiff suffered a tear in her wrist that caused considerable pain but was substantially resolved within 18 months, leaving an ongoing loss of strength and mild restriction in flexion, joint arthritis that continued to be painful and would likely progress and limit the use of her hand, a shoulder injury that caused considerable pain but was significantly resolved within three years, with a good possibility for more complete recovery, soft tissue neck and back injuries with pain that resolved within four months, and depression that was well controlled and likely to improve. The tear was repaired by surgery with positive results. While finding that the depression and anxiety was not "a major disorder", nevertheless there was a finding that depression and anxiety affected the plaintiff significantly. (\$80,000)
- [97] In Antonishak, the plaintiff had soft tissue injuries to the neck, arm and shoulder which resulted in chronic pain and fatigue, with a guarded progress of future improvement and a curtailing of recreational activities. (\$60,000)
- [98] In Hauer, the plaintiff sustained soft tissue injuries but was able to continue to work at her pre-accident income level due to changes made at her workplace, and, while orthopaedic surgeons had suggested that she receive injections and undergo surgery, the plaintiff had not pursued those treatments as she preferred natural remedies. (\$35,000)
- [99] In Romanchych, the plaintiff suffered significant neck and shoulder pain for a month, constant headaches which eventually decreased in frequency to once every third week, jaw pain, neck and shoulder pain treated by massage and physiotherapy. (\$45,000)
- (c) Finding Regarding Non-Pecuniary Damages
- [100] Mr. Pistruga is now 50. I find that he has suffered and continues to suffer both physically and emotionally as a result of the negligence of Mr. Garcia. I am also satisfied that his pain and suffering has resulted in an impairment of his family life - a restriction of his household duties and a deterioration of his relationship with his wife and son. I find that Mr. Pistruga suffered severe pain for about three months after the First Accident and for about four months after the shoulder surgery. Mr. Pistruga has had and continues to have pain in his shoulder. As a result of the First Accident and the operation that was necessary as a result of the injuries suffered in the First Accident, he continues to suffer and I find

that he will continue to suffer emotionally from the injuries caused by the First Accident and that his symptoms can only be partially lessened by prescription and non-prescription medicine. While medication appears to have eased his mood swings, I find that he remains suspicious and moody from time to time as well as being subject to panic attacks.

[101] As a result of the First Accident and the necessary operation, Mr. Pistruga has seen an impairment of his recreational activities as well. Regarding his physical situation, I accept the opinion of Dr. Vorobeychik that the prognosis is "guarded". Regarding the emotional health of Mr. Pistruga, I accept the opinion of Dr. Levin that the prognosis for full recovery relating to his chronic major depression disorder "remains guarded and he most likely will require ongoing maintenance psychopharmacological treatment".

[102] In the circumstances, I am satisfied that non-pecuniary damages of \$110,000 should be awarded.

IN TRUST CLAIM

[103] *Bystedt (Guardian ad litem of) v. Hay*, [2001] B.C.J. No. 2769 (S.C.); *aff'd* 2004 BCCA 124, sets out the considerations to be made when assessing a claim for an in trust award:

From a review of these authorities [*Crane v. Worwood* (1992), 65 B.C.L.R. (2d) 16 (S.C.); *DeSousa v. Kuntz* (1989), 42 B.C.L.R. (2d) 186, and *Hall v. Miller* (1989), 64 D.L.R. (4th) 369; *McCloskey v. Lymn* (1996), 26 B.C.L.R. (3d) 118 (S.C.); *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178] one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

(at para. 180)

[104] On this question, evidence at Trial provided by Mr. and Ms. Pistruga, their son Philip Pistruga and Kate Karamychev, the girlfriend of Philip Pistruga, was that Mr. Pistruga was helped by his family in a number of ways since the First Accident. Mr. Pistruga was driven to medical appointments by Philip and by Kate on numerous occasions. Philip has also purchased groceries for his parents because his father inability to go grocery shopping. Services have been provided in cleaning and maintenance in the home. Following the surgery that Mr. Pistruga had in November 2011, Ms. Pistruga had to bathe him, take care of his food needs so he could eat without using a knife and fork, help him get dressed, and care for his other daily needs.

[105] The services that were provided were over and above what might ordinarily be expected from the family and friends of Mr. Pistruga. I am satisfied that an award of \$5,000 is appropriate in the circumstances and fair to the parties.

PAST INCOME LOSS

[106] The income tax returns for Mr. and Ms. Pistruga were in evidence. The evidence regarding income is:

Total Income from Commissions

Income as a Musician

Total of all Income of Mr. Pistruga

EI or Social Assistance

2004

\$26,969

\$1,100

\$28,069

-

2005

\$46,864

\$450

\$47,314

-

2006

\$36,304

\$5,400

\$41,704

-

2007

\$37,512

\$3,200

\$40,712

-

2008

\$28,704

-

\$28,704

-

2009

-

-

\$24,873

-

2010

-

-

\$20,668

-

2011

-

-

\$18,654

-

2012

-

-

-

-

2013

-

-

-

\$10,300

2014

-

-

-

\$3,061.94

[107] It was conceded that the income of Ms. Pistruga from Oasis was for income splitting purposes. Accordingly, the total income of the family is represented in the calculations of income from commissions. I find that the auto detailing business of Mr. Pistruga was seasonal, that the income of the family was based solely on commissions and gratuities, and that the income would fluctuate considerably from month to month. I also find that Mr. Pistruga was earning income both from his musical career and from his work at Oasis.

(a) Musical Income

[108] While Mr. Pistruga claimed that he was no longer in a position to earn income from his considerable musical talents, he also testified that he had not done any music work in 2008 prior to the First Accident. Ronald Tidball is a chartered accountant. He was qualified as an expert to determine income loss. In his July 22, 2012 Report, Mr. Tidball averaged the earnings of Mr. Pistruga as a musician for 2005 through 2007 at \$3,000 annually. However, Mr. Pistruga was reporting income of \$2,500 a year on a four year average basis.

[109] I accept the evidence of Mr. and Ms. Pistruga that Mr. Pistruga would formerly practice one or two hours a day but cannot use his trombone now because it is too painful to play. I also accept the evidence of Mr. Pistruga that he is not in a position to conduct an orchestra as a result of the ongoing pain in his shoulder. It is the submission of the Defendants that income from music-related work is not guaranteed and that, if any award is made for income loss, allowance should be made to allow for negative contingencies. While I agree with that submission, I am satisfied that Mr. Pistruga is no longer in a position to earn

income as a musician so that the \$2,500 a year has not been available since the time of the First Accident.

[110] I assess the loss of income from the music career of Mr. Pistruga for the years 2008 through 2014 at \$15,000, representing six years at \$2,500 a year.

(b) Income from Oasis

[111] In addition to the reported income from Oasis, Mr. Pistruga testified that he was earning about \$10 each week for gratuities. In this regard, Mr. Pistruga stated that he could not remember how many tips he would ordinarily receive but he estimated sometimes it would be five or sometimes seven or sometimes six to nine during some days. I am satisfied that these amounts are not reflected in the income tax returns that were in evidence. I am also satisfied that the gratuities received would have been far in excess of \$10 each week which would represent only \$0.50 or \$1 for each job undertaken. Because Mr. Pistruga was not in a position to advise with any accuracy the gratuities he was receiving, I will not take into account any alleged loss of gratuity income when calculating past and future income.

[112] Mr. Pistruga did not have any employment income 2012 through 2014. During 2012, he received EI payments of \$2,744 and Social Assistance payments of \$7,556. During 2013, Mr. Pistruga received Social Assistance payments of \$3,061.94.

[113] In cross-examination, the Defendants referred Mr. Pistruga to his 2007 and 2008 Pay Period/Revenue Summaries. The Defendants compared the revenue of \$38,361.97 for the period December 28, 2006 to August 6, 2007 to the revenue of \$29,891.92 for the period December 25, 2007 to August 4, 2008. The Defendants suggested to Mr. Pistruga that his revenue for the period January 2008 to August 11, 2008 was down about 20% when compared to the same period in the previous year. Mr. Pistruga answered "probably" and did not dispute that revenue was down around 20%. It is the submission of the Defendants that the records support a finding that revenue was down 20% for the period January to August 2008 as compared to revenue in the same period in 2007 and that, when determining what the income in 2008 onwards would have been but for the First Accident, regard should be had to the comments of the General Manager of Oasis regarding increased competition for auto detailing, the comments of Mr. Tidball regarding an economic crisis in 2008 onwards, and the 20% decline in revenue in 2008. It is the submission of the Defendants that the appropriate revenue figures to use as a guide are the figures for the period January 2008 up to August 4, 2008 as set out in Mr. Tidball's report, being \$2,363 per month for an annual revenue of \$28,356.

- [114] It is the submission of the Defendants that the calculation of past Gross Income Loss related to Oasis income up until June 2012 based on an Annual Estimated Income of \$28,356 (\$2,363 times 12 months) should produce the following losses: (a) 2008: \$800-\$1,000; (b) 2009: \$3,473 (difference between \$28,356 and his actual earnings of \$24,873); (c) 2010: \$7,688 (difference between \$28,356 and his actual earnings of \$20,668); and (d) 2011: \$9,702 (difference between \$28,356 and his actual earnings of \$18,654).
- [115] Regarding the income loss after the Second Accident, it is the submission of the Defendants that they are only responsible for income loss up to June of 2012 as June 2012 represents a reasonable recovery period of eight months post-surgery as Mr. Pistruga was, by April 2012, both physically and mentally in a position to undertake some form of employment. The Defendants point out that Mr. Pistruga stated that the pain level in his shoulder was at a level of 2-3/10 and even less sometimes by April 2012. The Defendants also submit that, if there was any loss of income after June 7, 2012, this loss of income was caused by the Second Accident and not by the damages resulting from the First Accident. The Defendants submit that the income loss for the period January 2012 to June 2012 is \$14,178 (\$2,363 times six months). The Defendants also submit that Social Assistance income of \$2,319.12 (\$436 in April 2012, \$941.56 per month in May and June 2012) should be deducted from that amount.
- [116] In the alternative, the Defendants submit that, if the Court finds that Mr. Pistruga suffered income loss beyond June 2012, then Social Assistance income should be deducted from that amount. (*M.B. v. British Columbia*, [2003] 2 S.C.R. 477) and that any award for loss of past income should be net of Income Tax. (Section 95 and 98 of the Insurance (Vehicle) Act, RSBC 1996, c. 231).
- [117] I accept the view that the average monthly income of \$3,025 per month for 2006 (\$36,300 in total) and \$3,126 per month for 2007 (\$37,512 in total) might not have been sustained in 2008 and thereafter. However, I do not accept the submission of the Defendants that the anticipated total revenue in 2008 would have been \$28,356. For the reasons set out above, I also do not accept the proposition advanced by the Defendants that the income loss should only be calculated to and including June 2012 when the Second Accident occurred. The major depressive disorder was caused by the shoulder surgery and the failure of Mr. Pistruga to recover from it as he had expected. The surgery was necessary as a result of the First Accident. Accordingly, the past wage loss of Mr. Pistruga must be calculated to and including the date of Trial and not just to June of 2012.
- [118] The average income between 2004 and 2007 was \$36,912.25. The average income for 2006 and 2007 was \$36,908. I am satisfied that it is appropriate to assume that income from Oasis would have diminished somewhat. Accordingly, I discount the likely income below the averages for 2004 through 2008 and find that the income for Mr. Pistruga would have been \$30,000 per year for the years 2008 through 2014 (or \$2,500 on average each month).
- [119] I assess the past income loss from Oasis as being made up as follows:

Projected Income

Actual Oasis Income

Social Assistance Received

2008

\$30,000

\$28,704

2009

\$30,000

\$20,668

2010

\$30,000

\$18,654

2011

\$30,000

2012

\$30,000

2013

\$30,000

\$3,778

2014

\$5,000

(2 mos. @ \$2,500)

\$1,530.97

\$185,000

\$68,026

\$5,308.97

Difference

\$116,974

Loss of Music Income

\$15,000

\$131,974

[120] I find that the total loss of income as a result of First Accident is \$131,974. I have used the loss of \$30,000 a year after the Second Accident as I am satisfied that Mr. Pistruga was not in a position to earn income from Oasis in the Spring and Summer of 2012 and beyond, and that the effects of the Second Accident did not result in any further inability to earn income but only resulted in further factors which added to the inability of Mr. Pistruga to earn income from Oasis or from any other source.

[121] The amount of social assistance received in 2012 was \$7,556. The amount received in 2013 was \$3,061.94. However, this was the total amount being paid to Mr. and Ms. Pistruga so that only \$5,308.97 should be subtracted from his income loss. Additionally, any award for loss of past income should be net of income tax. In this regard, I have used a 15% income tax rate for Mr. Pistruga as this was the income tax rate used by Mr. Tidball given the income of Mr. Pistruga. Accordingly, I find that the past wage loss is \$107,665.28 made up as follows:

Total Loss of Income \$131,974.00

Less Social Assistance \$5,308.97

\$126,665.03

Less Tax Payable

(15% on \$126,665.03) \$18,999.75

Net Past Wage Loss \$107,665.28

LOSS OF FUTURE EARNING CAPACITY

[122] In *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353 (S.C.), Finch J. (as he then was) set out the following considerations dealing with a loss of future earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

(at para. 8)

[123] The test to establish this loss is set out in *Perren v. Lalari* (2010), 3 B.C.L.R. (5th) 303 (C.A.): there must be a "real and substantial possibility of a future event leading to an income loss" (at para. 32). The basic principles to be applied in assessing damages for loss of earning capacity were summarized in *Rosvold v. Dunlop* (2001), 84 B.C.L.R. (3d) 158 (C.A.):

The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate*, 1995 CanLII 1971 (BCCA), (1995), 12 B.C.L.R. (3d) 248 (C.A.). 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: *Ryder (Guardian ad litem of) v. Jubbal*, [1995] B.C.J. No. 644 (C.A.) (Q.L.); *Parypa v. Wickware*, *supra*. The overall fairness and reasonableness of the award must be considered taking into account all the evidence."

(at para. 11)

[124] The Defendants concede, that as a result of the First Accident, Mr. Pistruga suffered an injury to the right shoulder which has affected his ability to work as an auto-detailer. Whether or not the Defendants concede it, I am also satisfied that the injury to his shoulder has affected and, in fact, has eliminated the ability of Mr. Pistruga to earn income from his music. In view of the fact that Mr. Pistruga is physically unable to return to his job as an auto-detailer combined with the evidence of the General Manager of Oasis that he intended to find a replacement if Mr. Pistruga did not return to work by May 2014, the Defendants concede that there is a "real and substantial possibility of a future event leading to an income loss."

[125] However, the Defendants submit that it is not the case that Mr. Pistruga will never work again. They submit that he is physically able to return to work, albeit not as an auto detailer. The Defendants also submit that Mr. Pistruga clearly has a reasonable understanding of English and that, with his current level of English, he is in a position to apply for employment in the fast food or security industries and that, in coming to an assessment of damages, the Court should have regard to the residual earning capacity of Mr. Pistruga as well as his income level before the First Accident. The Defendants submit that an award equivalent to two years past income is appropriate.

- [126] I am satisfied that Mr. Pistruga would have worked until age 65. I am also satisfied that there has been an impairment of his earning capacity. Mr. Pistruga is less capable overall from earning income from any type of employment and is less valuable to himself as a person capable of earning income in a competitive labour market. I am satisfied that Mr. Pistruga has proven that there has been an impairment of his earning capacity. Accordingly, it is necessary to value that impairment.
- [127] In his report, Mr. Tidball applied a discounted present value factor per \$1,000 from the Date of Trial to age 65 to be 12.97%. Applying the multiplier of 12.97% against \$30,000 would produce a future loss of income of \$365,910. While I am satisfied that there is a real and substantial possibility that Mr. Pistruga will not be in a position to return to his former income level as a result of the injuries suffered directly and indirectly as a result of the First Accident, I am not satisfied that Mr. Pistruga is incapable of earning any income. I am satisfied that overall fairness and reasonableness of an award requires me to substantially reduce the award to be made.
- [128] Taking into account the yearly loss of income from Oasis which I have calculated to be \$30,000 and the yearly loss of income from music which I have calculated to be \$2,500, I am satisfied that an overall award of \$125,000 should be made. I am satisfied that this is an appropriate amount using either an earnings approach as was used in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.) or a loss of capital asset approach as was used in *Brown*, supra.
- [129] I am satisfied that there are a number of positions which should be available to Mr. Pistruga, whether or not he enhances his abilities in English and even more positions if he does. These minimum wage positions can go a long way to replace the income that he was formerly able to obtain from his music career and from Oasis. In the circumstances, I am satisfied that \$125,000 is a fair and reasonable award.

LOSS OF HOUSEKEEPING CAPACITY

- [130] The evidence establishes that Mr. Pistruga was a very active housekeeper and performed most of the cleaning and housekeeping tasks around the family home prior to the First Accident, including vacuuming, washing the windows, laundry, light repairs. I find that Mr. Pistruga was doing approximately 3/4 of the cleaning, floors, windows, dusting, meal preparation, grocery shopping and work in the small backyard garden. I also find that he cleaned the windows inside and out two times a year, that cleaning took eight hours minimum, that their apartment was 1,300-1,400 square feet, that he vacuumed the floors twice a week, that it took him a couple of hours to dust two times a week, and that he would wipe the tiles in the washroom twice a day. Regarding the cooking, I find that Mr. Pistruga did 30% of the cooking. I also find that Mr. Pistruga did most of the laundry along with his daughter and that he did most of the grocery shopping. While he previously did yard work, Mr. Pistruga at Trial confirmed that they no longer have a garden.

- [131] Mr. Pistruga and his family members have testified to the Plaintiffs inability to perform household tasks: he can no longer vacuum, clean, perform small repairs, wash the windows, or clean his car. I award \$20,000 for loss of housekeeping capacity.

COST OF FUTURE CARE

- [132] In *Gregory v. Insurance Corporation of British Columbia*, 2010 BCSC 352, Kloegman J. stated: "It is trite law that a court cannot award damages for costs of future care without medical justification (*Milina v. Bartsch* (1985), 40 B.C.L.R. (2d) 33 (S.C.), at para. 30).
- [133] Catherine Douglas provided an opinion regarding cost of future care. Ms. Douglas was of the opinion: (a) that a pain management program would be justified as it would allow Mr. Pistruga to "... have the opportunity to learn active ways to manage his pain and his mood as well as strengthen his right shoulder and improve his function in preparation for a return to work"; (b) that Mr. Pistruga would require an interpreter to attend the pain management program; and (c) that Mr. Pistruga would benefit "... from input from a kinesiologist to set up and habituate his exercise routine from the pain management program in a local fitness facility"; and (d) that a gym membership would be warranted.
- [134] The Defendants submit that six to eight sessions of kinesiology are appropriate to ensure that Mr. Pistruga establishes an appropriate exercise routine but, in this regard, the Defendants note that Mr. Pistruga had a gym membership before the First Accident.
- [135] The Defendants note that Dr. Levin was not supportive of the attendance of Mr. Pistruga at a pain clinic and, instead, suggested psychotherapy with a psychologist. While the Defendants submit that they are not responsible for any psychological issues that are being experienced by Mr. Pistruga, I reject that submission.
- [136] Ms. Douglas estimates that the cost of participation in a pain management program would be between \$2,500 and \$13,600, and that Mr. Pistruga would require the services of an interpreter at the program so that the cost of the interpreter would be between \$2,685 to \$5,025.
- [137] Regarding occupational therapy, Ms. Douglas was of the view that Mr. Pistruga would benefit from input from an occupational therapist "... to assist him in implementing skills learned at the pain management program within his home environment" and that the occupational therapist would focus on "improving his capacity for housekeeping chores and light home maintenance tasks, using skills such as pacing and task adaptation". The Defendants also submit that six sessions of occupational therapy will assist Mr. Pistruga in implementing skills for improving his capacity for housekeeping chores.
- [138] Ms. Douglas was also of the opinion that Mr. Pistruga "... would benefit from input from a vocational consultant to determine his options for future career options". The Defendants agree that Mr. Pistruga should attend with a vocational consultant.

- [139] In view of his reduced capacity for household maintenance tasks which would require over-shoulder reaching or sustained low level work, Ms. Douglas recommends the cost of providing "handyman services". Ms. Douglas recommends two hours of housekeeping assistance every one to two weeks, and that those services can be continued until Mr. Pistruga's limitations are as a result of age rather than as a result of the First Accident. In doing so, Ms. Douglas also acknowledged that "... with good progress in the pain management program, kinesiology sessions and occupational therapy sessions, Mr. Pistruga may not require the amount of services as he does currently". Regarding the recommendation of Ms. Douglas that handyman services of between 34 and 39 hours a year at \$50 per hour and housekeeping services of between 40 and 50 hours a year at a rate of between \$24 and \$30 per hour, the Defendants submit that there is no evidence to support the number of hours recommended by Ms. Douglas and, in any event, Ms. Douglas recognized that this level of assistance may not be needed as the function of Mr. Pistruga improves.
- [140] Ms. Douglas's recommends installation of "bath safety rails" "to make the transfer in and out of the bath easier and safer for Mr. Pistruga, thereby reducing the risk of a new or repeat injury; the provision of a cryo-cuff, based on the report of Mr. Pistruga that he found a "cold sauna" helpful to reduce his shoulder pain significantly so that a "cryo-cuff" "may provide him with some pain relief"; and that number of medications should be available. In these regards, the Defendants submit that the bath safety rails may be required as a result of the knee pain caused by the Second Accident and that there is no medical recommendation for a cryo-cuff. The Defendants submit that they are not responsible for "psychotic medications".
- [141] Regarding the non-prescription and prescription medications for Mr. Pistruga, Ms. Douglas sets out the following: (a) Non-Prescription Medications: the cost for Mr. Pistruga's current non-prescription medication, consisting of Advil, and based on costs provided by London Drugs, is approximately \$78.81 to \$118.21 monthly; and (b) Prescription Medications: the future costs for prescription medications based on his current use, and based on information provided by MacDonald's Pharmacy is \$4,128.46.
- [142] In her November 8, 2013 letter to counsel for Mr. Pistruga, Ms. Douglas provided this summary of the present-day costs of what she recommended:

Item

Replacement

Time

Present

Day Cost

Services:

1. Pain Management Program

Interpreter

Once

Once

\$2,500.00 - \$13,600.00

\$2,685.00 - \$5,525.00

2. Kinesiology

Gym membership (adult)

Gym membership (senior)

Kinesiologist admission

Once

Yearly

Yearly

Once

\$450.00 - \$900.00

\$370.81 - \$588.00

\$278.61 - \$588.00

\$0.00 - \$45.68

3. Occupational therapy assessment

Occupational therapy treatment

Once

Once

\$470.00 - \$475.00

\$1,560.00 - \$2,200.00

4. Vocational services

Once

\$500.00 - \$1,000.00

5. Handyman

Yearly

\$1,190.00 - \$2,691.00

6. Housekeeping

Yearly

\$1,248.00 - \$3,120.00

Equipment:

1. Personal Care

Bath rails

Installation

Unknown

Unknown

\$53.98

\$35.00 - \$58.00

2. Cryo-cuff

Cuff replacement

Once

Unknown

\$210.00

\$130.00

Supplies:

1. Non-prescription medication

Yearly (based on current usage)

\$78.81 - \$118.21

2. Prescription medication

Yearly (based on current usage)

\$4,128.46

[143] Taking into account the recommendation of the various consultants who have analyzed the future needs of Mr. Pistruga, I assess the cost of future care as totalling \$22,900 made up as follows: (a) a Pain Management Program (\$7,500). I am satisfied that the English of Mr.

Pistruga is sufficient to allow him to absorb the instructions received without an interpreter; (b) advice from a kinesiologist (\$900); (c) occupational therapist assessment and treatment (\$2,500); (d) vocational services (\$1,000); (e) non-prescription medicine (\$1,000); and (f) prescription medication (\$10,000).

- [144] I am satisfied that the following expenses need not be borne by the Defendants: (a) gym membership as Mr. Pistruga was already undertaking that expense; (b) cost of a handyman and a person to do housekeeping as I am satisfied that the pain management program will assist Mr. Pistruga in allowing him to undertake household tasks in a way which will not aggravate his shoulder pain; and (c) the equipment costs totalling \$451.98 which I find not to be warranted or recommended by the medical advisors of Mr. Pistruga. As well, the purchase of a "cryo-cuff" appears to be related to the view of Mr. Pistruga that his pain was assisted by "cold sauna treatment".
- [145] Mr. Pistruga testified that "cold sauna treatment" had been recommended by Dr. Vorobeychik. Mr. Pistruga described the cold sauna treatment as being conducted in three separate rooms - there was minus 20C in the first room; minus 60C in the second room and minus 110C-115C in the third room. He would spend one minute in each of the first two rooms and then three minutes in the third room. In the third room, he would move slowly but make little circles with his arms. After exiting, he would do "some exercise to get the temperatures back to normal". He indicated that there would be four treatments a day and that he'd only be wearing a swimming suit, ear muffs, gloves, socks and runners when taking the treatment.
- [146] Mr. Pistruga stated that he undertook the treatment four times in total - two times before the shoulder surgery and two times after. Regarding the effect of it, he describe it as "pain would become less", "improved sleep quite a lot", "I feel better - no ups and downs in my moods", "lasts for a year if not additional troubles".
- [147] Mr. Pistruga stated that he "learned about it from internet", that he asked Dr. Vorobeychik about it and, sometime later, "she told me it was available". In the records of Dr. Vorobeychik, there is this notation: "On February 23, 2011, Mr. Pistruga informed me that he tried cold sauna treatment of his shoulder and found it beneficial." In the August 3, 2013 report from Dr. Vorobeychik, the following was noted: "On April 25, 2013, Mr. Pistruga reported feeling better after cold sauna."
- [148] There is no evidence to support the assertion that Dr. Vorobeychik recommended this treatment. Rather, I am satisfied that Mr. Pistruga suggested it and that Dr. Vorobeychik left it to Mr. Pistruga to decide whether he would undertake the "treatment" or not. While Mr. Pistruga is satisfied that the cold sauna treatment was of assistance to him in dealing with his pain, I cannot conclude that it is appropriate for the cost of what I will refer to as self-medication to be visited on the Defendants.

SPECIAL DAMAGES

- [149] Mr. Pistruga claims special damages of \$8,913.95. The Defendants dispute all but \$1,076.87 of this amount. Included within the amounts claimed is \$421.65 for what the Defendants refer to as "psychotic medications", \$63.75 for "parking", \$2,721.04 relating to "mileage - to and from medical appointments", and \$4,555.64 for "cold sauna" treatments at two hotels.
- [150] In reviewing the special damages claim by Mr. Pistruga, it is clear that a number of them do not flow from either accident. Dr. Vorobeychik referred Mr. Pistruga for an eye examination and a new prescription for eye glasses was provided. However, there is no evidence that the First Accident caused the blurring that was being experienced. Accordingly, the \$75 claim for an eye examination is not allowed. The sum of \$4,555.64 for the "cold sauna" treatments is not allowed. Not only am I satisfied that this cost should not be borne by the Defendants, I also note that the cost of the two hotels involved not only the cold sauna treatment but room fees, restaurant charges and gratuities.
- [151] A number of claims are made for drugs such as Ativan and Cymbalta. While the Defendants submit that they should not be responsible for "any psychiatric or psychological conditions requiring medication", I have come to a different conclusion. The sum of \$421.65 for those drugs and for the drug easing the irritation of the stomach lining are allowed.
- [152] Mr. Pistruga claims \$63.75 for parking. I am satisfied that these are appropriate charges relating to the medical treatment that was sought. Regarding the "mileage" claimed at \$0.40 per kilometre (\$2,721.04 in total), the Defendants submit that Mr. Pistruga "has not proven that the mileage claimed relates to injuries arising from the First Accident" or that the mileage is an accurate reflection of the distance travelled to attend medical appointments. \$1,363.20 of the amount claimed relates to driving 3,408 kilometres to Sparkling Hill Resort and Fairmont Hot Springs for the cold sauna treatment. I find that any claim for this mileage should not be allowed. However, I find that the remainder of the mileage is appropriate even though no expert evidence was called to measure the distance between the Pistruga residence and the various trips for physiotherapy, vocational consulting, and medical visits. I allow the sum of \$1,357.84 from the amount claimed by Mr. Pistruga for Parking.
- [153] Special expenses of \$2,920.11 are allowed.

SUMMARY

- [154] The claim of Mr. Pistruga against Ms. Sterling is dismissed. In the action against Mr. Garcia, the Plaintiff is awarded \$393,485.39, made up of:
- (a) Non-Pecuniary Damages \$110,000.00
 - (b) In Trust Claim: \$5,000.00
 - (c) Past Wage Loss \$107,665.28

(d) Loss of Income Earning Capacity \$125,000.00

(e) Loss of Housekeeping Capacity \$20,000.00

(f) Cost of Future Care \$22,900.00

(g) Special Damages \$2,920.11

[155] The parties are at liberty to speak to the question of costs.

___ "Burnyeat J." ___

Burnyeat J.

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