
CANADA / JUDGMENT

Randall v. Boettger

2020 BCSC 802

COURT

Supreme Court of British Columbia

DECIDED

29 May 2020

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2020 BCSC 802 Randall v. Boettger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Randall v. Boettger,

2020 BCSC 802

Date: 20200529

Docket: M1617144

Registry: Williams Lake

Between:

Stewart Bliss Randall

Plaintiff

And

Tara-Lee Marie Boettger

Defendant

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for plaintiff:

Daniel T. Patterson

Counsel for defendant:

Jordon F. Thorne

Place and Date of Trial:

Williams Lake, B.C.

November 19 - 21, 2019;

November 25 - 29, 2019

Place and Date of Judgment:

Williams Lake, B.C.

May 29, 2020

- [1] The plaintiff Stewart Bliss Randall seeks damages as a result of a motor vehicle accident that occurred on May 25, 2016 in Williams Lake, British Columbia (the "MVA").
- [2] The plaintiff seeks awards under the following heads of damage:
- i. Non-pecuniary damages;
 - ii. loss of past capacity to earn income;
 - iii. loss of future capacity to earn income;
 - iv. loss of housekeeping capacity;
 - v. cost of future care; and
 - vi. special damages.

Issues

- [3] The issues on this trial are as follows:
- i. credibility of the plaintiff;
 - ii. causation of the plaintiff's injuries;
 - iii. assessment of the quantum of damages; and
 - iv. assessment of liability for the MVA.

Background

- [4] The plaintiff is 64 years of age having been born on May 28, 1956. He resides on rural property located on Spoken Lake Road near 150 Mile House with his common-law spouse Judy McLeod.
- [5] The plaintiff's brother Curtis Alexander Randall lives on the same property as the plaintiff but in a separate residence.

- [6] The plaintiff's father lives next door to the plaintiff.
- [7] The plaintiff attended school to grade 11.
- [8] The plaintiff is a self-employed carpenter and has been self-employed for approximately 30 years.
- [9] On May 25, 2016 the plaintiff was a passenger in a Toyota Tundra pickup truck driven by Anthony Brereton. The plaintiff and Mr. Brereton were travelling west near the intersection of Highway 20 and McKenzie Avenue in Williams Lake, British Columbia. They were travelling to work at a construction site located southwest of Williams Lake on Dog Creek Road.
- [10] At approximately 6:30 am the MVA took place when a vehicle driven by the defendant Tara-Lee Marie Boettger rear ended the vehicle being driven by Mr. Brereton.
- [11] Both vehicles were written off due to the damage caused by the MVA.
- [12] The plaintiff was taken by ambulance to the Cariboo Memorial Hospital in Williams Lake.

Evidence at Trial

The MVA

- [13] The plaintiff says that on a May 25, 2016 he drove to Anthony Brereton's residence to meet him before heading to work. The plaintiff drove to work in Mr. Brereton's vehicle. Mr. Brereton was driving and the plaintiff was in the front passenger seat.
- [14] The plaintiff says that sometime between 6:15 and 6:20 am he felt an impact. The plaintiff says that it was light out and they were travelling towards the stampede grounds in Williams Lake when the impact occurred.
- [15] The plaintiff says that Mr. Brereton was not speeding and it was a nice day.
- [16] Anthony Brereton testified that he met the plaintiff at his house on May 25, 2016 and they proceeded to work in his vehicle. He says that they were at the bottom of McKenzie Avenue in Williams Lake when he looked in his rear view mirror and saw a vehicle coming up at a high rate of speed.
- [17] Mr. Brereton grabbed the steering wheel and started to accelerate when his vehicle was pushed forward by another vehicle. He testified that he saw that the plaintiff's body was turned and the plaintiff's head snapped against the headrest.
- [18] Mr. Brereton said that it all happened very quickly and he almost blacked out after the collision. His vehicle was pushed forward. He said that he had a load of lumber in his truck and he thought the person in the vehicle that rear-ended his vehicle was dead because that vehicle ran into the lumber.

- [19] Mr. Brereton testified that his vehicle rolled down the hill and he, along with the plaintiff, waited in the vehicle for help to arrive.
- [20] Mr. Brereton testified that he was travelling at 55 km per hour when the collision occurred. He estimated the other vehicle that hit him was travelling at 100 km per hour.
- [21] Mr. Brereton testified that his Toyota truck was in excellent condition. He said that it was a clear day and the roads were bare and dry.
- [22] Constable Cody Staples attended the scene of the MVA on May 25, 2016. He testified that the MVA occurred on Highway 20 near McKenzie Boulevard in the westbound lane.
- [23] Constable Staples arrived at approximately 6:30 am. He noted that a small red car was completely demolished. He testified that the driver of that car was the defendant Tara- Lee Boettger. The red vehicle had extensive front end damage.
- [24] Constable Staples testified that the Toyota truck driven by Mr. Brereton had damage to the back end and the tailgate was open.

Plaintiff's Pre-MVA Condition

- [25] The plaintiff testified that prior to the MVA he was in good physical shape. He liked to be outside and ride horses, snowmobiles and quads. In addition, he liked to hunt, fish, hike and go dancing.
- [26] The plaintiff said that prior to the MVA he did have pain in his back and neck. This was because he is a carpenter and does hard physical labour.
- [27] The plaintiff while building townhouses twisted his knee which resulted in torn cartilage in his knee which required surgery. It took him 6 to 8 weeks to heal from this injury. This occurred in the 1980's.
- [28] The plaintiff testified that in 1991 he was hit on the head while at work with a fly form table. This resulted in back and neck pain. He was off work for two or three months as a result of that accident. He also had headaches for a period of time because of this accident.
- [29] The plaintiff testified that he suffers from Thoracic Outlet Syndrome ("TOS"). He first became aware of this condition in approximately 1998 when he was having neck and shoulder pain accompanied by weakness in his arms.
- [30] The plaintiff saw Dr. Bill Nelems, a specialist with regard to the TOS, who recommended surgery. The plaintiff did not have enough money to be off work at that time so he did not have the surgery.
- [31] The plaintiff said that his arms would go to sleep if he held them overhead for any length of time.

- [32] In 2004 the plaintiff testified that he was helping a friend move a fridge and as he was lifting it he felt a rib pop and he had back pain. He also had difficulty breathing.
- [33] The plaintiff also agreed in 2009 he strained his low back and he may have had a pinched nerve causing difficulties with numbness in his leg.
- [34] The plaintiff testified that he had surgery on his right shoulder for a calcium buildup in 2014. The plaintiff said that after his shoulder surgery he had no difficulties at work. He did not recall having any problems with his neck either.
- [35] Additionally, the plaintiff recounted falling when he flipped a horse and buggy, and suffering low back pain as a result of that. He also fell off a ladder and suffered some neck pain.
- [36] The plaintiff testified that he was diagnosed with a panic disorder prior to the MVA.
- [37] The plaintiff agreed on cross examination that since the fall of 2016 he had intermittent kidney problems that cause him nausea and discomfort which would last for a day or two.
- [38] The plaintiff has primarily worked as a self-employed carpenter over the last 30 years. He builds decks, barns and houses, in addition to providing window and door installation services.
- [39] In approximately 2008 he built his cousin Gerald Despres' home. This work included building footings, pouring concrete, framing the walls and shingling the roof.
- [40] In 2009 the plaintiff worked for Mr. Brereton doing renovations on schools.
- [41] In 2010 and 2012 the plaintiff worked at Gibraltar Mines doing renovation work.
- [42] The plaintiff also did work for Mr. Brereton renovating schools in Alexis Creek in 2014 and 2015.
- [43] At the time of the MVA the plaintiff was working at Canoe Creek School for Mr. Brereton. The plaintiff was pouring concrete and framing walls. The plaintiff was also packing lumber, nailing down trusses and generally doing all aspects of carpentry work.
- [44] The plaintiff testified that during this job he was moving pretty well and had no problems bending over to complete his work. He said he was working eight to ten hours a day. The plaintiff testified that he may have had a sore neck and back at the end of the work day, however he would use a topical pain reliever at night and he would be fine in the morning.
- [45] The plaintiff testified that as he was self-employed and would often do carpentry work for people in Williams Lake. If he was working on his own he charged \$45 an hour and he would make at least \$30,000 year.
- [46] The plaintiff testified that most of his work came from word-of-mouth. The plaintiff intended to work to age 70 or 75 because he did not have any employment pensions.

- [47] Judy McLeod testified that she has been in a relationship with the plaintiff since February 2015. Prior to the MVA they would do a lot of outdoor activities together such as fishing and canoeing. She said the plaintiff was a lot of fun and he was always laughing.
- [48] Ms. McLeod said that she liked to go dancing regularly with the plaintiff prior to the MVA. She also said that that they had a great sex life prior to the MVA.
- [49] Ms. McLeod agreed that prior to the MVA the plaintiff might have some stiffness after a day at work, however, he was usually fine after a shower. The plaintiff would do all of the outside household chores as well as some of the cleaning inside the house.
- [50] Ms. McLeod testified that she did not observe any particular pain behaviour from the plaintiff prior to the MVA.
- [51] Gerald Despres testified that the plaintiff built a barn for him in 2009. He said that this was a big job and that the plaintiff had no difficulties doing the work.
- [52] Mr. Despres also testified that the plaintiff and Curtis Randall built his home in 2007. They did all of the concrete form work, the construction of walls and the roof.
- [53] Mr. Despres testified that he did a lot of outdoor activities with the plaintiff such as riding horses, camping and going to family get-togethers prior to the MVA.
- [54] Mr. Despres testified that he did not notice any difficulties with the plaintiff doing any of the work that he had hired him for, though he agreed that he did see the plaintiff after work in the evenings.
- [55] Curtis Randall is the brother of the plaintiff. He lives on a half-acre share of the plaintiff's 10-acre parcel which he bought from the plaintiff.
- [56] Curtis Randall says that prior to the MVA he would often go fishing with the plaintiff.
- [57] Curtis Randall testified that he helped the plaintiff build Gerald Despres' residence and the plaintiff had no difficulties doing that work.
- [58] Curtis Randall testified that the plaintiff has always been a happy-go-lucky person who enjoyed outdoor activities.
- [59] Orin Weir testified that five or six years ago the plaintiff built a shop for him and he did not observe any difficulties with the plaintiff's ability to do this work.
- [60] Mr. Weir testified that he met the plaintiff through a Draft Horse Club 20 years ago. He was aware that the plaintiff had flipped a horse and buggy, however, he was not hurt. He saw the plaintiff many times after that and he did not observe any pain behaviour by the plaintiff
- [61] Martin Woldeis has known the plaintiff for approximately 20 years. He testified that prior to the MVA the plaintiff was a good hard-working guy. Mr. Woldeis testified that the plaintiff was very good with horses.

- [62] Anthony Brereton testified that currently he does mostly institutional construction work. He is self-employed. Mr. Brereton said that prior to the MVA he did a number of construction projects with the plaintiff.
- [63] Mr. Brereton testified that construction work is physically demanding and that the plaintiff was always able to do the work. The plaintiff typically was one of Mr. Brereton's better employees. Mr. Brereton testified that the plaintiff was very fast and efficient in doing construction work.
- [64] Mr. Brereton said that the plaintiff was working for him just prior to the MVA and he was paying him approximately \$40 an hour. Prior to the MVA he never noticed the plaintiff exhibit any pain behaviour.
- [65] Mr. Brereton agreed that he did not know what type of pain medication the plaintiff was on prior to the MVA.
- [66] Mr. Brereton testified that carpenters with the plaintiff's experience are earning approximately \$50 per hour currently.
- [67] Mr. Brereton testified that it was not unusual for people in the construction industry to work past age 65. Mr. Brereton has employed carpenters who are 75 years of age.
- [68] Dr. Glenn Fedor has been the plaintiff's family physician since 1991. Dr. Fedor was not called as an expert witness on this trial.
- [69] Dr. Fedor testified that he saw the plaintiff approximately two years prior to the MVA for anxiety.
- [70] Dr. Fedor testified that the plaintiff has had various injuries, including a shoulder problem in approximately 1990.
- [71] Dr. Fedor noted that the plaintiff was diagnosed with TOS in 1998 and he was seen by Dr. Nelems. He agreed that the plaintiff had some problems with his neck as a result of the TOS.
- [72] Dr. Fedor testified that the plaintiff did not have any chronic pain issues prior to the MVA.

Plaintiff's Post MVA Condition

- [73] The plaintiff testified that after the MVA his neck and back hurt instantly and he also had a headache. The plaintiff was removed by emergency personnel from Mr. Brereton's vehicle and was taken to the hospital.
- [74] At the hospital he was given an x-ray.
- [75] The plaintiff testified that he put ice on his neck and back and he stayed in bed for a couple of days until he went to see Dr. Fedor. Dr. Fedor recommended physiotherapy and prescribed the plaintiff Flexerill, Naproxen and T-3's.

- [76] The plaintiff had severe pain in his neck and back, as well as headaches a few days after the MVA.
- [77] The plaintiff went to physiotherapy two or three times a week after the MVA. In October 2016 he tried to go back to work. The plaintiff estimated he may have worked four hours a day for the two days that he was able to work. The plaintiff has not worked since then.
- [78] The plaintiff testified that he is in pain anytime he moves. He sleeps a lot of the time.
- [79] The plaintiff says that he tried to run a backhoe for his brother and was only able to do that for 3 or 3 ½ hours. He ended up in bed for the next couple of days after that. He can only ride a quad for a short distance since the MVA.
- [80] The plaintiff testified that Gerald Despres wanted a garage built so his brother Curtis Randall did that work. The plaintiff was only able to provide some advice on how to do the work. He was not able to physically do any work
- [81] The plaintiff says that he has a constant headache which sometimes blurs his vision and makes him sick to his stomach.
- [82] The plaintiff testified that prior to the MVA he might have a headache one or two times per month.
- [83] The plaintiff testified that his neck pain is pretty severe by the end of the day and it feels like it locks up. The plaintiff testified that his back pain on a scale of 1 to 10 is a 7 or 8 all of the time. The plaintiff said that his back pain stops him from getting a good night's sleep.
- [84] The plaintiff testified that he cannot wash dishes anymore and, if he vacuums, he has to be on his hands and knees to use the vacuum.
- [85] The plaintiff testified that he also has pain in his right hip and into his legs. His feet feel cold all of the time.
- [86] The plaintiff testified that he is no longer a happy-go-lucky person. He is irritable and often argues with people. He is depressed because he cannot work and he has no money to pay his bills. He says his sex life is gone.
- [87] The plaintiff says that he has tried physiotherapy, massage therapy and acupuncture.
- [88] The plaintiff testified that he would go to physiotherapy if he had the money. He wants to have surgery to help him with his pain however he does not know if he can go back to work as a carpenter, even if he has the surgery.
- [89] The plaintiff takes naproxen for his headaches as well as CBD oil for his pain.
- [90] The plaintiff agreed that he did not keep his own expenses with regard to renovations on his house separate from his business expenses when he was doing carpentry work for other people.

- [91] The plaintiff agreed that in August 2016 his injuries did not feel too bad and he went back to work however after he started working again he began to have pain.
- [92] The plaintiff agreed that in 2017 he was doing work around his own property which included mowing the lawn, feeding the animals, carrying firewood and minor repairs.
- [93] The plaintiff also agreed that he continued trying to do things around the house in 2018.
- [94] The plaintiff testified that he asked Dr. Fedor about having a Rhizotomy, a surgical procedure that involves severing nerve roots in the spinal cord to relieve chronic back pain. He was told by Dr. Fedor to wait until he retired.
- [95] The plaintiff testified that he wanted to work with Mr. Brereton until he was age 65 and after that he would do small jobs such as building residential decks until he was about 70 years of age.
- [96] Ms. McLeod testified that, since the MVA, the plaintiff does not do as many activities. They cannot go quading or horseback riding together. Their sex life is non-existent because the plaintiff is in pain all the time.
- [97] Ms. McLeod testified that the plaintiff does some chores around the house, though he does them in a very cautious fashion. The plaintiff appears to be sad.
- [98] Curtis Randall testified that the plaintiff can only go fishing with him for very short periods of time now, since the MVA. The plaintiff no longer helps their father with chores.
- [99] The plaintiff is in pain even if he drives on a gravel road. The plaintiff did assist Curtis Randall in building a deck however all he did was screw down a few boards.
- [100] Curtis Randall testified that the plaintiff is angry all the time and he walks like an old man.
- [101] Mr. Woldeis, Mr. Weir and Mr. Despres all testified that, since the MVA, the plaintiff is no longer a happy-go-lucky person.
- [102] Dr. Fedor testified that the plaintiff has had difficulty getting his symptoms to settle down and improve since the MVA. Dr. Fedor last saw the plaintiff in September 2019 at which time he thought that the plaintiff's neck had 30% less range of motion than his pre-MVA condition.
- [103] Dr. Fedor testified that after the MVA, and up until September 2019, he observed that the plaintiff was struggling with his neck pain. He noted that the plaintiff did receive some injections in his neck from a specialist in Kamloops.
- [104] Dr. Fedor testified that the plaintiff was not interested in a Rhizotomy because of the risk involved.
- [105] Dr. Fedor testified that the plaintiff had difficulties moving his back and stiffness in his back. He said that by the fall of 2017 the plaintiff's leg symptoms appeared to settle down.

[106] Mr. Brereton testified that after the MVA the plaintiff worked for him for a short period of time however he was not able to do the work. Mr. Brereton testified that he would hire the plaintiff if he was able to work.

Expert Evidence

Plaintiff's Experts

Brian O'Rourke

[107] Brian O'Rourke was called as an expert witness in occupational therapy. Mr. O'Rourke provided a functional capacity evaluation and cost of future care recommendation report dated May 21, 2019. Mr. O'Rourke based his opinion on a review of medical records, a history taken from the plaintiff and a number of tests that he performed on the plaintiff.

[108] Mr. O'Rourke, when asked whether the plaintiff would be physically capable of returning to work as a construction carpenter, opined to the following at p. 5 of his May 21, 2019 report:

Based on the results of this functional capacity evaluation, Mr. Randall does not meet the essential job demands for this work. He does not meet the full heavy strength demands of his pre-accident job, nor does he demonstrate sufficient capacity for sustained or repetitive stooping demands, which is a significant requirement for this type of work. Similarly he is not suited for repetitive transitions into and out of low level positioning. It is also my opinion that beyond an infrequent basis, he is not suited to work requiring sustained neck flexion or extension (i.e. when attaching plywood to floors, roofs, upper walls or ceilings).

[109] Mr. O'Rourke further opined that the plaintiff is physically able to perform sedentary, light and some medium strength jobs.

[110] Mr. O'Rourke opined that the plaintiff would benefit from six sessions of physiotherapy per year for the next five years at a total cost of \$2,105.

[111] Mr. O'Rourke suggested that the plaintiff required non-prescription medications at a cost of approximately \$3,300 per year.

[112] Mr. O'Rourke further opined that the plaintiff would require a transcutaneous electrical nerve stimulator machine ("TENS" machine) at a cost of \$140 which would need to be replaced every 5 - 7 years.

[113] Mr. O'Rourke stated that the plaintiff would require assistance in automobile servicing, firewood cutting, yard work and animal care.

[114] Mr. O'Rourke testified that he was aware that the plaintiff had a history of depression and anxiety. He said he only assesses functional abilities.

Dr. Navraj S. Heran

[115] Dr. Navraj Heran was called as an expert in neurosurgery. Dr. Heran provided a medical-legal report dated April 4, 2019. Dr. Heran interviewed the plaintiff, reviewed the plaintiff's medical records and conducted a physical examination of the plaintiff.

[116] Dr. Heran diagnosed of the plaintiff as a result of the MVA:

- i. myofascial injuries involving the neck and upper torso;
- ii. myofascial injuries involving the low back;
- iii. mechanical neck pain arising from structural origin, facet joint dominant;
- iv. mechanical low back pain arising from structural origin, likely facet joint dominant;
- v. probable development of right-sided S1 radiculopathy from progression of L5-S1 disc herniation, needing further imaging for verification; and
- vi. cervicogenic headaches.

[117] Dr. Heran opined that the following diagnoses were not a result of the MVA:

- i. clinical features of carpal tunnel syndrome without recent electrophysiologic correlate;
- ii. neurogenic thoracic outlet syndrome;
- iii. raynaud's syndrome; and
- iv. arthritic changes involving the shoulders and wrists.

[118] Dr. Heran, with regard to the causation of the plaintiff's injuries, opined to the following:

The above areas of diagnoses are attributable to the factors as outlined. Clearly, Mr. Randall has had a long history of arthritic issues going on with his musculoskeletal system. He has had several traumatic events that resulted in transient episodes of neck pain and back pain prior to the subject accident. He did not have any persistent pain in his neck or his back until after the subject motor vehicle accident. Initially after the motor vehicle accident too, his back was not a major concern. There was pain, but it appeared to have settled with the dominance being his neck, then gradually he has had development of further problems in his low back. It is my opinion though given the nature of his symptoms arising in this area, that this was triggered by the subject motor vehicle accident with the propensity for such problems being present even without the subject motor vehicle accident but likely not to the same degree or even at all. The earlier onset of symptoms to his leg is as a result of this area presenting.

[119] Dr. Heran opines that the plaintiff is "definitely at increased risk for exacerbations or aggravations at sites of persisting symptoms. This includes those of accident origin as well as those of his previous constitution".

[120] Dr. Heran agreed that if the plaintiff was symptomatic in his neck prior to the MVA, that would influence his opinion as to the cause of the plaintiff's injuries.

[121] Dr. Heran agreed that if a Rhizotomy was successful the plaintiff could partially work in less pain.

[122] Dr. Heran also agreed that a medial branch ablation is a minimally invasive procedure which would give the plaintiff a 70% chance of reducing his neck and back pain by 70% - 85% for a period of 6 to 18 months.

Dr. Gerard M. McKenzie

[123] Dr. McKenzie was called as an expert witness in musculoskeletal injuries.

[124] Dr. McKenzie provided his evidence by way of video deposition. Dr. McKenzie provided three medical-legal reports dated September 19, 2017, September 17, 2018, and January 10, 2019. Dr. McKenzie took a history from the plaintiff, reviewed the plaintiff's medical records and conducted a physical examination of the plaintiff for his September 19, 2017 and September 17, 2018 reports.

[125] Dr. McKenzie, in his report of September 17, 2018, opined that the plaintiff has developed a chronic pain condition in his neck as a result of the MVA and the prognosis for resolution is likely poor. Dr. McKenzie opined that:

Processes are being set up in the spinal cord and brain which will tend to perpetuate his symptoms

[126] Dr. McKenzie further opined that the plaintiff's lower back and right leg pain was caused by the MVA.

[127] In the January 10, 2019 report, Dr. McKenzie provided the following opinion that was based on a review of documents that he had been provided (at paras. 25 and 26):

[25] Based on this new information it is my opinion that this man likely did not have a significant pre-existing problem in his neck. This is consistent with his history that he gave me on my prior visit. He did have some pre-existing degenerative changes on his 2013 x-rays but the literature is quite clear that pre-existing but asymptomatic degenerative changes are not predictive of future neck pain. He may have had some intermittent myofascial pain in the neck which would be not uncommon in a man who does heavy labour but would not predispose him to chronic pain in the neck following an event such as his motor vehicle accident.

[26] Following review of these new records I have no changes to make in the opinions I expressed in my previous reports to you. In my opinion the bulk of his neck issues post MVA are due to this accident with at most a minor contribution to any pre-existing condition.

- [128] Dr. McKenzie opined that radiofrequency ablation may give significant pain relief to the plaintiff.
- [129] Dr. McKenzie agreed that his opinion on causation was based on the self-reported history from the plaintiff.
- [130] Dr. McKenzie testified that, without the MVA, the plaintiff would not be experiencing the significant pain that he is now. Dr. McKenzie opined that even if the plaintiff was having pain before the MVA, and he aggravated pre-existing symptoms, the plaintiff would not be disabled to the extent he is now, but-for the MVA.

Defendant's Experts

Dr. Jozef Nowak

- [131] Dr. Nowak was called as an expert witness in Physiatry. He provided a medical-legal report dated June 18, 2019. Dr. Nowak took a history from the plaintiff, reviewed the plaintiff's medical records and conducted a physical examination of the plaintiff.
- [132] Dr. Nowak opined that it is unlikely the MVA caused the plaintiff any significant injury to his cervical or lumbar spine due to his pre-existing history of injuries.
- [133] Dr. Nowak noted that the plaintiff had a "well-documented pre-existing history of chronic neck and back pain as well as headaches".
- [134] Dr. Nowak opined that the chronic degenerative changes in the plaintiff's cervical and lumbar spine are causing his ongoing spinal pain and other symptoms, including numbness and tingling in his arms and legs.
- [135] Dr. Nowak recommended against the plaintiff having a Rhizotomy.
- [136] On cross-examination, Dr. Nowak conceded that if the plaintiff had no chronic neck pain before the MVA then his current neck pain could be a result of the MVA.
- [137] Dr. Nowak also agreed on cross-examination that if the plaintiff did not have back pain before the MVA, and now has back pain, then it would have been caused by the MVA.
- [138] Dr. Nowak said that he did not read the report of Mr. O'Rourke and that he would not have deferred to Mr. O'Rourke's opinion, in any event, as it relates to the plaintiff's functional capacity.

Dr. John Falconer

- [139] Dr. Falconer, a neurologist, was called as an expert witness in neurology. Dr. Falconer provided a medical-legal report dated June 25, 2019. Dr. Falconer took a history from the plaintiff, reviewed the plaintiff's medical records and conducted a physical examination of the plaintiff.

[140] Dr. Falconer diagnosed the plaintiff with the following:

- i. chronic neck and back strain, with exacerbation from the MVA in question;
- ii. chronic headaches;
- iii. chronic arm numbness; and
- iv. no concussion.

[141] Dr. Falconer, with regard to the plaintiff's neck and back strain, opined about causation at para. 29 of his report:

This man has had very long-standing neck and back problems which have resulted in periods of being off work in the past. I was not able to get a clear understanding of his work history from him. For example, he related to being unable to work after his MVA, but then his GP notes in 2018 that he was working. The MVA likely caused some exacerbation of his chronic neck and back pain. Mr. Randall had a slightly reduced neck ROM on examination, and no new radiologic findings post-MVA. It is my opinion that there may have been some soft tissue strain exacerbation from the MVA, but no significant neurologic injury.

[142] Dr. Falconer opined that the plaintiff's headaches and arm numbness were not caused by the MVA and that the plaintiff could have returned to work three months after the MVA.

[143] On cross-examination, Dr. Falconer indicated that he would not defer to the opinion of an orthopedic surgeon, or a neurosurgeon, on mechanical back and neck pain issues because his patients come to see him for neck and back pain. If a patient needed surgery then he would refer them to a surgeon.

Sheila Branscombe

[144] Ms. Branscombe was called as an expert in functional capacity and cost of future care evaluations. Ms. Branscombe provided a report dated September 22, 2019 which was a critique of the May 21, 2019 Functional Capacity Evaluation of Mr. O'Rourke.

[145] Ms. Branscombe did not contact Mr. O'Rourke or meet with the plaintiff in the preparation of her report, and only relied upon Mr. O'Rourke's report as the source of her information about the plaintiff.

[146] Ms. Branscombe opined that there was a lack of clarity within the report of Mr. O'Rourke as to the exact nature of the plaintiff's injuries. Ms. Branscombe also opined that she felt it was likely that the plaintiff's deconditioned physical state was a factor in the plaintiff's performance during his functional capacity evaluation with Mr. O'Rourke.

[147] Ms. Branscombe did not concur with the recommendations by Mr. O'Rourke for future care costs.

Position of the Parties

Plaintiff

- [148] The plaintiff says that the defendant is 100% liable for the MVA. The plaintiff notes that, while the defendant has not admitted liability, the defendant has acknowledged that liability is not an overly contentious issue.
- [149] The plaintiff argues this was a rear-end collision caused by the defendant. There has been no evidence from the defendant on this issue and the defendant has not given any alternative explanation as to how the MVA may have happened, aside from her negligence.
- [150] The plaintiff argues that he is a credible witness. He made his best efforts to explain what happened to him. Many of the incidents and injuries recalled by the plaintiff were from many years ago.
- [151] The plaintiff submits that there is no evidence he is fabricating his pain and other witnesses confirmed his condition.
- [152] The plaintiff argues that "but-for" the MVA, he would not have suffered the injuries he did. The plaintiff says that the evidence has established the MVA caused, or materially contributed to, the pain in his neck, back, the numbness in his right leg and his headaches.
- [153] The plaintiff notes that Dr. McKenzie opined that the MVA caused the plaintiff's pain. Dr. Heron also opines that the MVA caused his injuries.
- [154] The plaintiff submits that an award for non-pecuniary damages in the range of \$110,000 - \$120,000 would be appropriate. The plaintiff acknowledges that he had pre-existing injuries, however he argues that they were asymptomatic. The plaintiff argues that any deduction for his pre-existing injury should be minimal and 10% at the most.
- [155] The plaintiff relies on the following cases to establish the appropriate range for non-pecuniary damages: *Kennedy v. Cumming*, 2019 BCSC 983; *White v. Wiens*, 2015 BCSC 188; *Carver v. Or*, 2017 BCSC 1496; *De La Garza v. Carson*, 2018 BCSC 1858 and *Kam v. Van Keith*, 2015 BCSC 1519.
- [156] The plaintiff argues that his whole life has been changed by the MVA. He was a happy-go-lucky, hard-working individual who is no longer able to work or participate in his chosen recreational activities. His prognosis is poor.
- [157] The plaintiff argues that the thin-skull rule applies to him, as a result of his pre-existing injuries.
- [158] The plaintiff argues that he would have worked for Mr. Brereton as long as he could have, but-for the MVA. Mr. Brereton gave evidence about future work he had scheduled, and said he could have provided that work to the plaintiff if he were able to do it.

- [159] The plaintiff argues that "but-for" the MVA he would have worked for Mr. Brereton until the spring of 2017 and then likely he would have been employed to construct Mr. Brereton's son's home for the remainder of 2017.
- [160] The plaintiff's evidence is that he was charging \$45 an hour when he was directly billing customers. The plaintiff argues that if he worked 40 hours per week, and 48 weeks per year, he would have a gross business income of \$86,400.
- [161] The plaintiff concedes that there must be deductions for business expenses from his income. The plaintiff acknowledges that he was not the best bookkeeper and would often deduct personal expenses from his business income.
- [162] The plaintiff argues that he has not been able to work since the MVA. The plaintiff argues that, even taking into account deductions from his business income, he would have earned at least \$50,000 net income per year in the year that the MVA occurred. The plaintiff argues that he would likely have earned \$40,000 net income annually after that and up until the date of the trial.
- [163] The plaintiff submits that the past loss of income due to the MVA is \$156,666.67. The plaintiff proposes a reduction of 20% for income tax and other mandatory deductions leaving a past wage loss of \$125,333.33
- [164] The plaintiff gave evidence that he would have worked as a carpenter until age 65 and then would likely have worked on smaller jobs until he was 70 or 75 years of age.
- [165] The plaintiff argues that his loss of future income should be calculated on the earnings based approach. The plaintiff suggests that this should be based upon \$30,000 net income, with a 5% deduction for each year after the age of 65 until the age of 70. The plaintiff reduced his estimated earnings to \$15,000 at age 70, with a 50% reduction to all income earned between the age of 70 and 75.
- [166] On this basis, the plaintiff says that the total amount of future wage loss would be \$220,000. The plaintiff says the present value of this loss is \$202,899.80. Rounding that number down, the plaintiff says \$200,000 would be an appropriate award for his loss of future capacity to earn income.
- [167] The plaintiff argues that he should also be awarded \$60,000 for loss of housekeeping capacity, automotive servicing, yard work, fire wood cutting and animal care.
- [168] The plaintiff argues that he should be awarded \$45,000 for the cost of future care. This would include \$43,000 for medications, as well as the cost of TENS machines.
- [169] The plaintiff seeks special damages which have been agreed upon at \$4,097.56.
- [170] The plaintiff also seeks his costs and court ordered interest.

Defendant

- [171] The defendant requires the court to make a determination of liability, though the defendant did not call evidence and had no specific submissions to make in this regard.
- [172] The defendant argues that the credibility and reliability of the plaintiff is in issue. This is because of the subjective nature of the plaintiff's injuries. The defendant argues that the reliability of the plaintiff's evidence relating to medical and employment evidence, which goes back many years, requires careful scrutiny.
- [173] The defendant argues that the plaintiff would routinely describe his pre-MVA condition as better than it actually was.
- [174] The defendant notes that the plaintiff was disabled in the past for significant periods of time. Dr. Fedor noted that the plaintiff was completely disabled as a carpenter for a minimum of 4 to 6 months as a result of a shoulder injury in 2013.
- [175] The defendant argues that the plaintiff's evidence that he would charge anywhere from \$30 - \$45 an hour does not match up with the amounts that he claimed on his income tax returns.
- [176] The defendants argue that the plaintiff, while acknowledging he had TOS, did not acknowledge that he had neck pain in the past. However, this is reported in the medical records.
- [177] The defendant accepts that the plaintiff's pre-existing neck and low back symptoms were exacerbated as a result of the MVA. The defendant also argues that there is a realistic possibility that his pre-existing neck and low back symptoms would have worsened in the future, regardless of the MVA.
- [178] The defendant argues that there should be a 10% to 15% deduction for the contingency that his neck and back pain would become more significant in the future in any event.
- [179] The defendant argues that the plaintiff had pre-existing headaches. The defendant also says the plaintiff had a long-standing history of neurological symptoms which included numbness and tingling in his arms and hands.
- [180] The defendant argues, based on the evidence of Dr. Fedor, that the plaintiff did not have an acute increase in his anxiety or depression after the MVA.
- [181] The defendant argues that the opinion of Dr. Heran indicates that the plaintiff could experience significant improvement in his pain if he underwent a radiofrequency ablation.
- [182] The defendant argues that an appropriate range for non-pecuniary damages is \$60,000 - \$75,000.

- [183] The defendant relies on the following cases to establish an appropriate range for non-pecuniary damages: *Hajikolai v. Lewis*, 2015 BCSC 980; *Fedosenko v. Zahirfar*, 2018 BCSC 1297; *Mandra v. Lu*, 2014 BCSC 2199; *Yannacopoulos v. Cronk*, 2015 BCSC 1154; *Hoy v. Williams*, 2014 BCSC 234; *Flore v. Jongkind*, 2018 BCSC 721 and; *Karst v. Foster*, 2019 BCSC 1043.
- [184] The defendant accepts that the plaintiff was unable to return to work in any capacity for a period of three months after the MVA. The defendant says the plaintiff has had some residual ability to earn income since August 2016. Additionally, Mr. O'Rourke opined that the plaintiff is physically able to perform secondary, light and some medium strength jobs.
- [185] The defendant argues that the plaintiff's employment history must be considered in assessing a loss of income earning capacity award.
- [186] The defendant notes that the plaintiff gave evidence that he would often help his family and friends free of charge, in exchange for favours.
- [187] The defendant argues that the plaintiff's 2015 income of \$33,598.76 is a fair representation of his earning capacity going forward.
- [188] The defendant also argues that the plaintiff's kidney illness, which is not related to the MVA, would have caused him to lose several weeks of work since 2016.
- [189] The defendant argues that \$25,000 per year is an appropriate amount to use in a calculation for loss of income. The defendant argues that the appropriate award for loss of income would be \$87,000, before deductions for taxes and business expenses.
- [190] The defendant argues that there is a realistic possibility that the plaintiff would have been limited in his ability to work even absent the MVA.
- [191] The defendant argues that the plaintiff should be awarded one or two years of annual income for his future loss of income, which would result in an award of between \$25,000 - \$50,000.
- [192] The defendant argues that the plaintiff had a TENS machine prior to the MVA and thus he would have incurred these costs in any event.
- [193] The defendant argues that any claim for loss of capacity to perform rural chores should be treated as a loss of housekeeping capacity.
- [194] The defendant argues there is a realistic possibility that the plaintiff would have become unable to do these chores because of his pre-existing condition.
- [195] The defendant also notes, with regard to the plaintiff's assistance to his father, that his father may not have remained living on the property next to the plaintiff because his father had recently gone through a divorce and there is no evidence regarding any property settlement.

[196] The defendant says there should be reductions made to any award for farrier services and firewood gathering.

[197] The defendant agrees that special damages should be assessed at \$4,097.56

Decision

Liability

[198] Generally, the following driver in a rear-end collision has a higher onus to show that the collision was not their fault, but determination must still be based upon the facts: *Skinner v. Fu*, 2010 BCCA 321, at paras. 8 and 23. Where the plaintiff is not the rear driver, the onus to prove negligence still lies with them, however, the defendant may have more difficulty negating it where they hit another driver from behind.

[199] Madam Justice Matthews in *Dorsett v. Sahib* 2018 BCSC 1884 discussed the concept of inference of negligence at paras. 8 - 9:

[8] In *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424 at paras. 23- 24, the Supreme Court of Canada revised the law previously known as the doctrine of *res ipsa loquitur*. The Supreme Court of Canada ruled that in negligence cases, the burden is always with the plaintiff to prove negligence. In certain cases, the court may draw an inference of negligence from all of the evidence both circumstantial and direct. If the inference is drawn and the defendant does not provide a non-negligent explanation, the plaintiff is successful. If the inference is not drawn, or if the defendant provides a non-negligent explanation, the plaintiff must prove negligence in the normal way.

[9] Mr. Sahib argues that *Fontaine* does not change that the legal burden of proof is on the plaintiff throughout and the defendant does not bear the burden of proof to show how the accident did happen. It is true that the burden does not shift, but if the plaintiff shows a *prima facie* case of negligence, and the defendant does not provide a non-negligent explanation, the plaintiff succeeds. In *Fontaine*, Major J. said, at para. 27, that if the plaintiff establishes a *prima facie* case, the defendant must negate that evidence, failing which the plaintiff will succeed. See also *Nason v. Nunes*, 2008 BCCA 2003 at para. 8.

[200] In the case at bar the only direct evidence for the MVA is from the plaintiff and Mr. Brereton. It is clear that the MVA occurred on a highway which was bare and dry with good visibility. Mr. Brereton was not driving erratically or even speeding when his vehicle was rear-ended by the defendant's vehicle which was travelling at a high rate of speed.

[201] The evidence of Constable Staples, as well as the photographs in evidence, confirm that this was a high-impact rear-end collision.

[202] The only inference I can draw from the evidence is that the defendant's vehicle rear-ended Mr. Brereton's vehicle, likely because of inattention on the part of the defendant.

[203] The defendant has not provided a non-negligent explanation for the MVA.

[204] I find that the defendant was 100% at fault for the MVA.

Credibility of the Plaintiff

[205] In discussing the credibility assessment of a witness in *Bradshaw v. Stenner* 2010 BCSC 1398, Madam Justice Dillon stated the following at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S. (R.D.)*, [1997] 3S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

[206] Given the subjective nature of the plaintiff's injuries a careful examination of the evidence is required: *Chappell v. Loyie*, 2016 BCSC 1722 at para. 66.

[207] Based on the evidence at trial it is clear that the plaintiff is a hard-working and talented carpenter who is well-respected within his community.

[208] The plaintiff clearly had a number of pre-existing injuries that he sustained through years of hard physical labour. Many of these injuries occurred years before the MVA and, as would be expected, the plaintiff's recollection has diminished over the years.

[209] The defendant points to the fact that the plaintiff, who acknowledges being diagnosed with TOS, does not specifically recall suffering from neck pain as a result of that condition. Dr. Fedor's medical records indicate that the plaintiff reported suffering from severe neck pain at times prior to the MVA. Dr. Fedor also recorded observations that the plaintiff had a limited range of motion and swelling in his neck.

[210] The defendant also says that the plaintiff gave contradictory evidence because he reported having no ongoing pain in his neck or back prior to the MVA, but also said that he experienced intermittent pain after work that required him to use his Dr. Ho (TENS) machine, or to take a hot shower and relax.

- [211] I agree with the defendant that being stoic does not mean the plaintiff was not experiencing pain. However, being stoic does not mean the plaintiff is not credible. The plaintiff has worked his whole adult life doing hard physical labour, and he clearly is able to tolerate physical discomfort.
- [212] The defendant is sceptical about the plaintiff's assertion that he is unable to work on the basis that there are references in Dr. Fedor's clinical records indicating that in September 2016 the plaintiff was working, and that on several occasions in 2018, he reported that the plaintiff was able to work or was still working.
- [213] The plaintiff's evidence is that he did attempt to go back to work in 2016 unsuccessfully and, from time to time, assisted his brother and friends on construction projects by giving his advice.
- [214] I found the plaintiff to be a particularly straightforward and honest witness. The plaintiff made appropriate concessions about his pre-existing injuries when asked about them. The plaintiff was vague on some details of injuries from years ago but he would adopt and accept the notations in his medical records when they were put to him. In addition, his evidence relating to his injuries from the MVA, his change in personality, as well as his inability to work have been corroborated by a number of other witnesses whom I found to be credible.
- [215] I do agree with the defendant that some of the plaintiff's recollections with regard to prior injuries have faded, which does affect his reliability. However, overall, I accept the plaintiff's evidence, and those of the other lay witnesses, that prior to the MVA the plaintiff was able to work full time as a carpenter despite some previous injuries.
- [216] I do agree with the defendant that the plaintiff's evidence with regard to his employment income was not particularly reliable, however, I do not find that this was a deliberate attempt to mislead the court or obfuscate a determination of his earnings. I can also rely upon income tax documents and the evidence of other witnesses, such as Mr. Brereton, to assist me with determining the plaintiff's work capacity.

Causation

- [217] In *Chappell v. Loyie*, 2016 BCSC 1722 Madam Justice Fisher (as she then was) summarized the law of causation at paras. 4 - 7:
- [4] Causation is established where the plaintiff proves on a balance of probabilities that the defendant caused or contributed to his injury. This general "but for" test is set out in *Athey v. Leonatti*, [1996] 3 SCR 458 and confirmed in *Resurface Corp. v. Hanke*, 2007 SCC 7 this test does not require scientific precision; causation is a question of fact that may best be answered by applying ordinary common sense: *Snell v. Farrell*, [1990] 2 SCR 311 at 328. Moreover, the plaintiff does not have to establish that the defendant's negligence was the sole cause of the injury. At para. 17 of *Athey*, the court stated:

There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[5] Therefore, even where there are other potential non-tortious causes of an injury, such as degenerative changes, the defendant will still be found liable if the plaintiff can prove that the accident caused or contributed to the injury. The contribution must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimis* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

[6] In *Blackwater v. Plint*, 2005 SCC 58, McLachlin C.J.C. discussed the difference between causation as the source of the loss and the rules of damage assessment in tort, at para. 78:

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

[7] In short, the essential purpose of tort law is to restore the plaintiff to the position he would have enjoyed but for the negligence of the defendants.

[218] The plaintiff had pre-existing conditions, including TOS, carpal tunnel syndrome, arthritic changes in his shoulders and wrists and pre-existing degenerative changes in his neck and low back.

[219] In this case the principles of "thin skull" and "crumbling skull" must be considered. In *Athey v. Leonatti*, [1996] 3 SCR 458 the Court said the following:

[34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The

defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-778 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J.C. Hutton Proprietary Ltd.* *supra*; Cooper-Stephenson, *supra* at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[220] Dr. McKenzie and Dr. Heran opined that the plaintiff's injuries and physical state were caused by the MVA.

[221] It is also clear from the evidence of Ms. McLeod, Mr. Brereton, Curtis Randall, Gerald Despres, and Dr. Fedor that the plaintiff appeared to be in pain, his moods changed and he was not able to engage in his usual work or recreational activities after the MVA.

[222] Prior to the MVA the plaintiff acknowledged that he would have numbness in his arms as a result of the TOS, and that after work he may have intermittent stiffness in his neck and back, however these problems were asymptomatic at the time of the MVA.

[223] Dr. McKenzie testified that, in his opinion, asymptomatic degenerative changes are not predictive of future problems.

[224] Dr. Nowak was of the opinion that chronic degenerative changes in the plaintiff's cervical and lumbar spine were causing his ongoing problems. I had difficulty with Dr. Nowak's evidence because he stated that he put greater reliance on medical documents than on the plaintiff's self-reports to him, and further that he did not discuss those documents with the plaintiff.

[225] Dr. Nowak also testified that he would have been interested to see a functional capacity report that had been commissioned by the defence in this case. He stated that he would have, in fact, relied on a report commissioned by the defence, as these types of reports tend to vary.

[226] In my view, this comment alone shows that Dr. Nowak was an advocate for the defendant and, as such, I am putting no weight on his evidence.

[227] Dr. Falconer opined that the MVA did not cause any permanent damage to the plaintiff. He based his opinions on the clinical records of the plaintiff and testified that he prefers these records over the evidence of the plaintiff.

[228] During cross examination, Dr. Falconer was asked to assume that the plaintiff did not have chronic pain prior to the MVA and then asked whether this would change his opinion. He simply replied "no", without offering any explanation or giving any consideration to the hypothetical.

[229] I prefer Dr. McKenzie and Dr. Heran's opinions with regard to causation over Dr. Falconer's because Dr. Falconer was not prepared to entertain a different opinion if for instance the plaintiff was asymptomatic prior to the MVA. I also accept the evidence of the plaintiff, Ms. McLeod, Mr. Brereton, Curtis Randall, Gerald Despres and Dr. Fedor as to the onset of the plaintiff's injuries.

[230] I accept that there is a substantial connection between the defendant's conduct and the plaintiff's injuries, based upon the evidence. The plaintiff has established, on a balance of probabilities, that, but-for the MVA, he would not have neck pain, back pain, headaches and right leg numbness. I accept the diagnosis made by Dr. Heran.

[231] The evidence establishes that the plaintiff had some pre-existing conditions prior to the MVA, as outlined in Dr. Hernan's report. However, I do not find that there is a measurable risk that these pre-existing conditions would have detrimentally effected the plaintiff in the future. There will be no deductions from the plaintiff's award for his pre-existing conditions.

Non-Pecuniary Damages

[232] Non-pecuniary damages are meant to compensate the plaintiff for his pain and suffering, loss of enjoyment of life and loss of amenities.

[233] The British Colombia Court of Appeal in *Stapley v. Hejslet* 2006 BCCA 34 (Stapley) provides a non-exhaustive list of factors that influence an award of non-pecuniary damages which can be summarized as follows:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;
- d) disability;
- e) emotional suffering;
- 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) plaintiff's stoicism (as a factor that should not, generally, penalize the plaintiff)

- [234] In this case, the plaintiff's injuries have affected almost every area of his life. He has ongoing and constant pain which restricts his ability to work as a carpenter. The evidence establishes that his mood has changed significantly since the MVA and his personal and romantic life has been negatively impacted.
- [235] I have had an opportunity to consider the cases provided to me by the plaintiff and the defendant which have been helpful. None of the facts of the cases are exactly similar to the plaintiff's situation however the decisions of De La Garza, Flore and Karst were particularly helpful.
- [236] Taking into account all of the evidence, as well as the factors as set out in Stapley, I assess the non-pecuniary damages of the plaintiff at \$100,000.

Loss of Past Capacity to Earn Income

- [237] At the time of the MVA, the plaintiff was working for Mr. Brereton. Mr. Brereton gave evidence that the job that the plaintiff was working on finished up in the spring of 2017 and the plaintiff could have worked until that time. Mr. Brereton also gave evidence that the plaintiff likely could have worked on Mr. Brereton's son's house which would have been completed in December 2017.
- [238] The evidence suggested that the plaintiff was earning up to \$45 an hour and working full-time for Mr. Brereton. Over the course of one year, the plaintiff therefore had the potential to earn \$86,400.
- [239] The plaintiff gave evidence that he wished to continue to work for Mr. Brereton as well as doing construction jobs on his own.
- [240] The plaintiff's business income for the period 2008 through 2018 is as follows:

Gross Business Income

Net Business Income

T4 Income

WCB Income

CPP Income

Line 150 Total Income

2008

\$29,920.00

\$12,720.88

\$12,720.88

2009

\$29,673.95

\$14,856.69

\$14,856.69

2010

\$32,482.50

\$10,378.87

\$10,378.87

2011

\$50,418.50

\$16,862.86

\$16,862.86

2012

\$42,895.00

\$10,890.58

\$10,890.58

2013

\$13,673.22

-\$ 6,700.68

\$10,577.49

\$ 3,876.81

2014

\$ 7,783.00

\$ 4,962.81

\$9,285.12

\$ 6,819.62

\$21,067.55

2015

\$33,598.76

\$26,046.35

\$26,046.35

2016

\$24,867.67

\$12,233.87

\$ 2,217.48

\$14,451.35

2017

\$ 4,497.00

\$ 4,497.00

2018

\$18,066.33

\$18,066.33

[241] In 2015 the plaintiff's gross business income was \$33,598.76. His net business income was \$26,046.35. The plaintiff, by his own admission, did not keep accurate business records.

[242] Despite the plaintiff being a skilled carpenter who would charge \$40 or more per hour for his labour, he never earned \$86,000 in a year. His best year in terms of net business income was 2015.

[243] The plaintiff had gross business income of \$24,867.67 and a net business income of \$12,233.87 at the date of the MVA. Extrapolating these numbers to the end of 2016 the plaintiff could have earned a gross business income of approximately \$60,000 that year.

[244] It is clear that the plaintiff enjoyed a number of recreational activities and would take time off work after he completed a job. That was the lifestyle the plaintiff chose. I am prepared to accept that the plaintiff would have worked for Mr. Brereton until the spring of 2017. I also accept that the plaintiff's business expenses would have been less if he was working for Mr. Brereton.

[245] I do not accept that the plaintiff would have worked full time for Mr. Brereton during that period of time. I also do not have the benefit of any accounting evidence to assist me in determining the plaintiff's lost income. It is difficult to reconcile the evidence as to what the plaintiff was paid per hour with his actual reported income.

- [246] I assess the plaintiff's net business income for the period from June 1, 2016 until June 1, 2017 to be \$50,000. I accept the plaintiff may have made more money working for Mr. Brereton than he historically would have during that period of time.
- [247] In my view after June 1, 2017 it is probable that the plaintiff would have earned income in accordance with his previous-years earnings. Based on those earnings, and taking into account that the plaintiff may have had some increased hours if he continued to work for Mr. Brereton, I find that the plaintiff's annual loss from June 1, 2017 until the date of trial is \$30,000 net business income per year.
- [248] I assess the plaintiff's loss of past capacity to earn income as \$50,000 for the period June 1, 2016 until June 1, 2017 and \$75,000 for the period June 1, 2017 until December 1, 2019.
- [249] The plaintiff's total loss of past capacity to earn income is \$125,000, from which I will deduct 20% for income tax and other mandatory deductions.
- [250] The plaintiff's award for past loss of income is \$100,000

Loss of Future Capacity to Earn Income

- [251] The plaintiff testified that he hoped to continue working until he was 70 or 75 years of age, albeit in a limited capacity.
- [252] The plaintiff for most of his working career was a self-employed carpenter who could do all aspects of any construction job. He however regularly took time off or was not working on a full-time basis, as is reflected in his previous years' income.
- [253] I accept that the plaintiff is not able to work on a full-time basis as a carpenter. However, based on the opinion of Mr. O'Rourke the plaintiff has the ability to do work in the sedentary, light, and some medium strength jobs subject to limited postural tolerances.
- [254] The evidence establishes that there is a realistic possibility that the plaintiff will suffer negative economic consequences as a result of his injuries from the MVA and is entitled to an award for loss of future capacity to earn income.
- [255] The plaintiff submits that an award for loss of future capacity to earn income should be based on the earnings approach. The defendant argues that any award in this area should be based on the capital asset approach.
- [256] In *Karim v. Li* 2015 BCSC 498 Mr. Justice Abrioux (as he then was) explained the two possible approaches to assessing a loss of future earning capacity:
- [148] There are two possible approaches to assessing a loss of future earning capacity: (i) the earning approach (Pallos), or (ii) the capital asset approach (Brown). Both approaches are correct and their appropriateness in the circumstances depends on whether the loss can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140.

[149] The earnings approach involves a form of math-oriented methodology such as (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value, or (ii) awarding the plaintiff's entire annual income for a year or two: Pallos at 271; Gilbert at para. 233.

[150] The capital asset approach is employed when future loss cannot be measured in a pecuniary way. Finch J., as he then was, described the factors to consider in Brown at 356:

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.

See also Perren at para. 32; Gilbert at para. 233.

[257] The plaintiff's income fluctuated over the years. The plaintiff's income is not readily calculable because of the state of his business records and the fact that he intermingled personal expenses with business expenses in determining his income.

[258] In my view the capital asset approach is the appropriate way to determine the plaintiff's loss.

[259] The plaintiff testified that he would try to make \$30,000 a year. The evidence also establishes that an income of \$30,000 per year was probable for the plaintiff. Based on the age of the plaintiff, his residual capacity to work and his history of employment, the appropriate award for loss of future capacity to earn income is the equivalent of two years of income which is \$60,000.

Future Cost of Care

[260] The plaintiff seeks damages for the cost of future care for physiotherapy, medications and a TENS machine.

[261] The test to establish an award for the cost of future care is objective. There must be a medical justification for the claim and the claim must be reasonable: De La Garza v. Carson, 2018 BCSC 1858 at para. 65.

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

- [263] Mr. O'Rourke recommended that the plaintiff be awarded six sessions of physiotherapy per year for the next five years at a treatment rate of \$75 for initial assessment and \$70 for subsequent assessment. This is a total of \$2,105.
- [264] Mr. O'Rourke noted that the plaintiff was not currently taking any prescription medications however calculated the cost of over-the-counter medications, which the plaintiff is taking, as between \$3,301 and \$3,578 per year.
- [265] Mr. O'Rourke noted that the cost of a TENS machine was approximately \$140 to purchase and would have to be replaced every five or seven.
- [266] The plaintiff testified that when he initially took physiotherapy it provided a benefit to him. Dr. Heran opined that therapy would be of benefit to the plaintiff.
- [267] Prior to the MVA, the plaintiff owned and used his own TENS machine. It is clear on the evidence that the plaintiff would have used his TENS machine even if the MVA had not occurred.
- [268] I am not satisfied that it would be reasonable to compensate the plaintiff for a TENS machine given he required it before the MVA.
- [269] The plaintiff is also seeking the cost of his medications to age 90. I only have anecdotal evidence from the plaintiff that other members of his family lived long lives. The evidence also establishes that radiofrequency ablation and surgical intervention, such as a Rhizotomy, may significantly alleviate the plaintiff's pain.
- [270] In my view the appropriate award for the cost of medication for the plaintiff would be \$15,000.
- [271] The total award for future cost of care is \$17,105.

Loss of Housekeeping Capacity

- [272] The plaintiff seeks damages for the loss of the value of housekeeping services that he would have performed. In this case the plaintiff also seeks damages for automotive servicing, firewood cutting, yard work and animal care.
- [273] In Chappell the Court in discussing loss of housekeeping capacity stated the following at para. 254:

A claim for loss of housekeeping capacity is for the loss of the value of work that a plaintiff would have performed, but which because of his injuries, he can no longer perform. The basis for such a claim is the loss of the ability to work in a manner that would have been valuable to himself and to others. Because it is the loss of a capacity (an asset) that is compensated, such an award does not depend on whether replacement housekeeping costs are actually incurred. An award may be quantified by assessing the cost to replace the plaintiff's services, but damages are typically modest, and care must be taken not to compensate for more than can reasonably be said to have

been lost: *Kroeker v. Jansen* (1995), 4 BCLR (3d) 1978, leave to appeal to SCC refuse (1995), 11 BCLR (3d) xxviii; *McTavish v. MacGillivray et al.*, 2000 BCCA 164. The same principles apply to past and future claims of this nature.

- [274] The plaintiff seeks an award of \$60,000 under this head of damage. The defendant argues that there is a realistic possibility that the plaintiff would have become disabled from doing these chores in the future in any event. The defendant does not agree that it would be appropriate for the replacement of services until age 85.
- [275] The defendant also argues that, with regard to gathering firewood for the plaintiff's father, there is not enough evidence regarding the plaintiff's father's personal circumstances to establish this claim and in any event they say the claim is too remote.
- [276] The defendant also argues that there should be a significant reduction of 50% for the cost of firewood replacement because of the cost of owning equipment necessary to obtain the firewood.
- [277] Mr. O'Rourke opined that the cost for automotive servicing would be \$400 a year for the plaintiff until he is age 74. That amount reduces as the plaintiff becomes older.
- [278] Mr. O'Rourke opined that the yearly cost of a replacement for firewood is \$1,435 until the plaintiff reaches 74 years of age and then that amount reduces.
- [279] Mr. O'Rourke calculates the plaintiff's support of his father's firewood costs at between \$600 and \$840 per year for a period of five years. Mr. O'Rourke also calculates the plaintiff's yard work support for his father at between \$300 and \$420 per year for a period of five years.
- [280] Mr. O'Rourke calculates the cost for animal care to be approximately \$960 per year until age 74 and it reduces after that.
- [281] The plaintiff also seeks a modest amount for housekeeping chores.
- [282] I have difficulty with any calculation regarding services provided by the plaintiff to his father because of the lack of evidence relating to his father's personal circumstances. For instance, the plaintiff's father is involved in a divorce proceeding and it is not clear whether his father will remain living in the home he currently resides in.
- [283] The plaintiff also does have a residual capacity to assist in the gathering of firewood because he has a residual capacity to do light to medium work.
- [284] I am also not satisfied that the plaintiff's physical condition would prevent him from doing the type of automobile servicing that he did in the past.
- [285] The plaintiff has some capacity to do yard work as well as housekeeping.
- [286] The loss of housekeeping capacity is an assessment. In my view the appropriate award under this head of damage is \$15,000.

Special Damages

[287] The parties have agreed that the special damages are \$4,097.56.

Conclusion

[288] I find that the defendant was 100% at fault for the MVA.

[289] In summary, damages are awarded to the plaintiff as follows:

- i. non-pecuniary damages - \$100,000
- ii. loss of past capacity to earn income - \$100,000
- iii. loss of future capacity to earn income - \$60,000
- iv. future cost of care - \$17,105.00
- v. loss of housekeeping capacity - \$15,000
- vi. Special Damages - \$4,097.56

Total: \$296,202.56

[290] The plaintiff is entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[291] Subject to any submissions the parties may wish to make concerning costs, the plaintiff is entitled to his costs for this trial. If the parties wish to make submissions regarding costs, they may do so in writing within 30 days from the date of the reasons.

"The Honourable Mr. Justice Tindale"

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