

CANADA / JUDGMENT

Resendiz v. D'Alessandro

2017 BCSC 1274

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1274 Resendiz v. D'Alessandro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Resendiz v. D'Alessandro,

2017 BCSC 1274

Date: 20170721

Docket: M154313

Registry: Vancouver

Between:

Manuel Olguin Resendiz

Plaintiff

And

Giuseppe D'Alessandro and M.L. Brown Lumber Ltd.

Defendants

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Plaintiff:

Faith E. Hayman

Counsel for the Defendants:

Kelly B. Routley

Place and Date of Trial:

May 1-5 and 8-10, 2017

Vancouver, B.C.

Place and Date of Judgment:

Vancouver, B.C.

July 21, 2017

A. INTRODUCTION

- [1] The plaintiff was injured in a motor vehicle accident on July 1, 2013.
- [2] He claims damages under the headings of special damages, past wage loss, non-pecuniary, future care, future wage loss and in-trust as a result of neck and back pain, headaches, chronic pain and Post Traumatic Stress Disorder ("PTSD"). He says these were caused by the accident.
- [3] Liability is admitted by the defendants. Some soft tissue injuries are accepted by the defendants as being causally related to the July 2013 accident but the diagnoses of PTSD and chronic pain are disputed.

B. BACKGROUND

(a) General

- [4] The plaintiff was 37 years old at trial. He was born in Mexico where he also completed high school and obtained a degree in Tourism Management from the University of Mexico.
- [5] He spent some time in the United States where he worked in retail sales and where he met his first wife, a Canadian/United States citizen. They moved to Merritt, British Columbia, in 2008. They have two children; two boys currently aged nine and ten years old. They separated in January 2012. They have a separation agreement that includes equal parenting time with the children.
- [6] The plaintiff remarried in February 2016 to Ewa Derek. They have a blended family of four children, all close in age, and a fifth child of their own, aged two years old.
- [7] The plaintiff has lived in Merritt, BC for all of his time in Canada. In 2011, he obtained work at Community Futures, an agency funded by the Government of Canada to support community economic development and promote local business opportunities. He started work doing administrative support and he testified that he had to work harder than others in the organization because he did not have the same background as they did. He took training in parts of the business (and in English) and he now works as a business analyst responsible for lending and collections.

[8] The plaintiff's income for the years 2014 to 2016 was as follows (line 101 from T4 and tax returns):

2014

\$47,440

2015

\$45,866

2016

\$59,247

[9] The increase in 2016 reflected a decision by the plaintiff's employer, Community Futures, in April 2016, to add supervisory duties to the plaintiff's responsibilities and to increase his pay by 10%, effective April 7, 2016. This followed a restructuring of the organization including reducing the number of employees from 20 to three, including the plaintiff.

[10] The plaintiff had difficulty taking on the new supervisory duties and he decided that he could not do the work properly. He testified that this was a result of trauma of the July 2013 accident and he was not able to concentrate at work. This is apparently still being worked out and, as of the date of trial, he continued in the supervisory position with the increase in salary.

[11] The defendants say any stress or problems at work were independent of the accident. Further, those problems (and others such as the plaintiff's separation from his first wife in January 2012) are the cause of any anxiety suffered by the plaintiff, not PTSD. These matters are discussed below.

[12] The plaintiff testified that he was active before the accident in July 2013. He went bicycle riding with his children and he had learned to swim. Through his employment he received a reduction for the cost of membership in a gym and swimming pool. He would use that facility three to four times per week.

[13] The plaintiff had some medical issues before the July 2013 accident that is the subject of this litigation. In 2012, he had surgery for gallstones and he had an ulcer repaired (that had been misdiagnosed as acid reflux). These caused him stomach and chest pain, respectively. The treatment of both conditions reduced the symptoms but did not eliminate them. He also saw a chiropractor in 2012. This history is discussed below.

(b) The July 2013 accident

- [14] On July 1, 2013, the plaintiff was driving with his two children to a Canada Day celebration at a local park in Merritt. The children were in the back seat in car seats. All were belted. While the vehicle was stopped to turn left, it was rear-ended by the defendants' vehicle. The force of the impact drove the plaintiff's vehicle into a vehicle in front of it and the plaintiff testified that he remembered the force of the seat belt in his left shoulder.
- [15] The plaintiff testified that he had never been in a motor vehicle accident before and he immediately "thought it was the end for my children and me". He exited the car, the children were crying, he tried to calm them down but they stayed in their car seats. He called 911 and, after answering some questions (he explained his vehicle was drivable and there were no fatalities), he was told no emergency personnel would be attending the accident. He then telephoned the children's mother (his former wife) who attended the scene.
- [16] The parents took the children to the hospital in the mother's car where they had to wait a long time. Ultimately, the children were examined, they were discharged and the parents were told that the children should be monitored for symptoms of concussion. They were otherwise all right. The plaintiff testified that his only concern at this time was his children, he was in shock and he did not think about himself. He did not ask for or receive treatment on the day of the accident for himself.
- [17] The plaintiff testified that the mother blamed him for the accident and wanted to take the children from the hospital. However, he insisted it was still his parenting time and the mother drove the plaintiff and the children back to his car. The children and the plaintiff walked a short distance to see what was left of the Canada Day celebrations and then home. He testified he did this to distract the children from the accident. They then went back to the plaintiff's residence, a two-bedroom apartment on the second floor in a building without an elevator.
- [18] The estimated cost to repair the plaintiff's vehicle was \$3,706 and he testified that he was offered \$4,000 instead of repairing it. However, the vehicle had low mileage and it was repaired at his request. There are photographs in evidence showing damage to the upper right rear of the plaintiff's vehicle and he testified that the driver's door was also sprung. It was drivable. The defendants' vehicle was a large pick-up and a photograph does not demonstrate any damage but the photograph is taken some distance from the vehicle. The plaintiff testified that the vehicle he rear-ended because of the impact of the defendants' vehicle had minor damage.
- (c) After the July 2013 accident
- [19] The morning after the accident, the plaintiff woke up with pain in his neck and back and a headache. He had not slept very well the night before and he had nightmares about the accident. At the end of September 2013 he took two weeks off work to recover from what he described as accumulating stress, including stress from his work.

- [20] The plaintiff has been under the care of a number of health and other professionals for treatment. He has been seen by a psychiatrist on a referral from his family physician and he has also seen a chiropractor. He has been working with a kinesiologist to increase his strength and confidence. He has also been seeing a physiotherapist, massage therapist and pain counsellor. He has had to travel to Kamloops to be treated by, for example, the psychiatrist and pain counsellor. He has had to use sick time from work to travel to Kamloops, which is now exhausted. The physiotherapist travels to Merritt from Kamloops. The chiropractor is in Merritt. All of these individuals testified on behalf of the plaintiff, in most cases by video.
- [21] The plaintiff testified that there has been some improvement in his symptoms. The neck pain occurs about once or twice a month. Currently he still has headaches and lower back pain but these have improved. His sleep is also improved but he requires medication to get five hours of sleep. He feels more confident about exercising as a result of the work he has done with the kinesiologist. However, he emphasizes that he is not back to the condition he was before the July 2013 accident.

C. EXPERT REPORTS

- [22] The plaintiff relies on three expert reports in the following areas:

- (a) Psychiatry: Dr. Edit Pusztai, report dated June 23, 2016.
- (b) Physical medicine and rehabilitation: Dr. Prathap Raghavan, report dated November 17, 2015.
- (c) Economics: Mr. Robert Carson, reports dated January 25, 2017 and February 2, 2017.

- [23] The defendants rely on one expert:

- (a) Orthopaedic surgery: Dr. J. Hummel, report dated January 20, 2017 and his addendum to the report dated March 12, 2017.

- [24] All experts were cross-examined.

- [25] During the trial of this matter the plaintiff sought to have admitted a report from Dr. Pusztai dated April 26, 2017. This was described as an "addendum" report to her previous report of June 23, 2016. There was no dispute that the later report was not filed 84 days before the commencement of this trial. However, sub-Rules 11-7(6)(a), (b) and (c) dispense with this requirement in specific circumstances and I set them out here:

When court may dispense with requirement of this Part

- (6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more of the requirements of this Part have not been complied with, if

(a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,

(b) the non-compliance is unlikely to cause prejudice

i by reason of an inability to prepare for cross-examination, or

ii by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or

(c) the interests of justice require it.

[26] Sub-Rule 11-6(6) permits a supplementary report of an expert to be filed if the expert's opinion has changed in a material way. That was not the case here.

[27] I denied the plaintiff's application to submit the "addendum" report of Dr. Pusztai dated April 26, 2017. I found that none of the sub-Rules under Rule 11-7(6) were applicable. Specifically, with respect to sub-Rule 11-7(6)(a) and (b), much of the information that Dr. Pusztai discussed in her later report had been available 84 days before the trial commenced and the defendants would suffer prejudice if this new expert report were admitted mid-trial. With respect to sub-Rule 11-7(6)(c), a previous judgment concluded that it should be used sparingly and "in a disciplined way" (*Perry v. Vargas*, 2012 BCSC 1537 at para. 22). I found that in this case the plaintiff would not be deprived of presenting his case without the addendum report and interests of justice did not require having the addendum report admitted.

[28] I also applied another previous judgment that emphasized the need to prepare complete expert reports the first time to avoid disputes about reports during a trial (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 581 at para. 49).

D. ANALYSIS

[29] The parties do not dispute the underlying facts relating to the accident. They do dispute, however, the nature and scope of the injuries sustained by the plaintiff.

[30] The following are the issues to be considered:

(a) Does the plaintiff suffer from PTSD and, if so, was it caused by the July 2013 accident?

(b) Special damages

(c) Past wage loss

(d) Non-pecuniary damages

(e) Future income loss

(f) Future care

[31] My discussion of those issues follows.

(a) PTSD and chronic pain: diagnosis and causation

[32] There is a significant issue between the parties as to whether the plaintiff suffers from PTSD and chronic pain and whether those conditions were caused by the July 2013 accident. The plaintiff relies on the expert report and evidence of Dr. Pusztai to say there is a valid diagnosis of PTSD and that it was caused by the accident. With respect to chronic pain, the plaintiff relies on the expert report and evidence of Dr. Raghavan.

[33] The defendants accept that the plaintiff suffered from emotional upset and some anxiety as a result of the July 2013 accident. However, they deny that he suffers from PTSD, chronic pain syndrome, anxiety or any disorder as a result of the accident. The defendants say that other events in the plaintiff's personal life raised emotional issues which were at least as significant as the accident. In any case, a diagnosis of PTSD is challenged by the defendants.

[34] A significant issue in the evidence regarding the diagnosis of PTSD is nightmares and flashbacks. According to Dr. Pusztai the significance of these symptoms (as recorded in her report and described in her evidence) is that nightmares and flashbacks are distinguishing signs of PTSD, although sleep disturbance is generally a component of all mental illness. She relied on the DSM V diagnostic criteria for PTSD (309.81(F43.10)). They require exposure to "actual or threatened death, serious injury " in a number of ways including "[d]irectly experiencing the traumatic event(s)". The criteria also require the presence of one or more of a number of "intrusion symptoms associated with the traumatic event(s), beginning after the traumatic event(s) occurred". These include:

1. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s).
2. Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s).

[35] The plaintiff testified that the first night after the accident, July 1, 2013, he suffered nightmares. These continued including nightmares about cars crashing and accidents involving his children. He also experienced flashbacks of the actual accident which Dr. Pusztai described in her evidence as "actually going back" to the accident. The nightmares and flashbacks continue to date.

[36] The defendants question why there is no other history of nightmares and flashbacks recorded by other health professionals. The evidence is that the symptoms of nightmares and flashbacks were not investigated until the assessment by Dr. Pusztai, a psychiatrist, in June 2016. There is no prior indication of these symptoms in the chart of the plaintiff's family physician, Dr. Urbanus Bester. Nor are there references to them in the charts of other medical professionals such as a physiotherapist.

- [37] Dr. Pusztai explained this in her evidence by saying that in many cases of PTSD she sees she is the first medical professional to ask about nightmares and flashbacks. This is because PTSD is "poorly understood". It is also difficult to treat, it is persistent, responses to medication are highly variable and many cases last a lifetime. I accept this opinion and I also accept Dr. Pusztai's opinion that nightmares and flashbacks are symptoms that distinguish PTSD from, for example, anxiety and depression.
- [38] The defendants also challenge the diagnosis of PTSD and pain disorder by pointing to differences in the plaintiff's answers to questionnaires administered by Dr. Pusztai and the pain counsellor, Ms. Robinson-Weaver, for the purposes of diagnosing PTSD and depression.
- [39] The PTSD questionnaire for Ms. Robinson-Weaver was completed by the plaintiff on May 4, 2016 and the one for Dr. Pusztai on June 23, 2016. I note that Dr. Pusztai's report records that she had the records of Ms. Robinson-Weaver "dated February 25, 2016". It is possible that Dr. Pusztai had available to her the questionnaires completed by the plaintiff for Ms. Robinson-Weaver but the evidence is not conclusive on that point.
- [40] In any event, the PTSD questionnaire is one page with 17 questions or assertions such as "Repeated, disturbing memories, thoughts or images of a stressful nature from the past?" (number 1, emphasis in original) or "Feeling irritable or having angry outbursts?" (number 14, emphasis in original). The patient is to choose one of five answers: "Not at all" or "A little bit" or "Moderately" or "Quite a bit" or "Extremely".
- [41] There are some differences in answers given by the plaintiff as between the two PTSD questionnaires. In eight categories the plaintiff selected responses for Dr. Pusztai that were worse than the responses he gave to the questionnaire administered by Ms. Robinson-Weaver. In four categories he selected a response that demonstrated he was less bothered by the problem and in five categories he gave the same response on both questionnaires.
- [42] The plaintiff completed another questionnaire, the Beck Depression Inventory, for Ms. Robinson-Weaver on May 4, 2016 and the same questionnaire for Dr. Pusztai on June 23, 2016. These are different than the PTSD questionnaires although they were completed on the same days. There are 21 different categories on the Beck questionnaire and the patient chooses the statement that best describes "the way you have been feeling the past two weeks, including today".
- [43] For ten categories the plaintiff selected the same statement on both questionnaires. For example, for "Sadness", the plaintiff circled "I feel sad much of the time" on both questionnaires. For another ten categories the plaintiff selected statements for Dr. Pusztai that indicated he was worse off than the ones he chose for Ms. Robinson-Weaver. For example, for the fourth category, "Loss of Pleasure", he circled "I can't get any pleasure from the things I used to enjoy", the most severe statement, when he completed the questionnaire for Dr. Pusztai. However, when he completed the same questionnaire for Ms. Robinson-Weaver he selected the next statement above this, "I get very little pleasure from the things I used to enjoy".

- [44] In one category, "Changes in Appetite", for Dr. Pusztai the plaintiff circled the first statement that there had not been any change to his appetite but for Ms. Robinson-Weaver he selected the next statement that his appetite was "somewhat less than usual".
- [45] I am urged by the defendants to use the inconsistencies in the four questionnaires as a basis for finding that the plaintiff's claim for damages for any psychological conditions is not credible and he has been misrepresenting his symptoms.
- [46] The obvious logic of the plaintiff's selections for the four questionnaires is that he was feeling worse when he saw Dr. Pusztai on June 23, 2016 than when he saw Ms. Robinson-Weaver on May 4, 2016, as measured by ten categories. He also felt the same in another ten categories and better for one category ("Changes in Appetite"). As Dr. Pusztai explained in her evidence patients have good and bad days.
- [47] Further, as described on the Beck Depression Inventory questionnaires themselves, the respondent is to describe what he has been feeling the previous two weeks, including the day he fills out the form. There was about a six-week interval between the dates of the two questionnaires so each response is a measure of what the plaintiff felt at the relevant times.
- [48] Put another way, if there were inconsistencies between two questionnaires completed within two weeks of each other, there may be cause for further investigation. But it is of some significance that the plaintiff did not describe feeling better on one questionnaire and worse on a second questionnaire completed at around the same time. And, again, the four questionnaires are consistent with the plaintiff's explanation that he was feeling worse when he saw Dr. Pusztai than when he saw Ms. Robinson-Weaver. In any event, assuming the four questionnaires represent inconsistencies, that does not constitute conclusive evidence that the plaintiff has been untruthful about his symptoms and there is no other evidence on which to conclude that the plaintiff is manipulating his symptoms.
- [49] It is also of some significance that the different answers on the same questionnaires were not put to the person who wrote them, the plaintiff, during his evidence. They were put to Dr. Pusztai on cross-examination as representing leading questions that can result in answers that would not be given with non-leading questions. To this Dr. Pusztai responded that there is no other way to get the necessary information. She explained that mental illness is a very private matter and patients often do not understand the significance of symptoms they experience so they are not usually forthcoming about it. If there is exaggeration it will appear from a cross-check with the history of the patient. In addition, some questions on the same issue are asked in different ways as a deliberate way to identify inconsistencies.
- [50] Dr. Pusztai accepted that generally the same questionnaires conducted at about the same time should be consistent. But she pointed out that they can also be used to plot changes in a patient's condition, for better or worse. That is, differences generally have a clinical significance rather than raise any issues of credibility. In addition, her experience is that patients usually do not remember taking a previous test and, if they do, they "certainly" do

not remember the questions. And she stated that patients who see her are anxious and frightened, thus making symptoms worse. This would be accentuated by a one-time assessment for a medical-legal report (as with the plaintiff and Dr. Pusztai), where there is an absence of an established relationship and consequent trust.

- [51] Dr. Pusztai also accepted that it is possible that patients can try to make their symptoms sound worse for the purposes of litigation but, again, she relied on the different checks on the assessments of patients. Similarly, when asked in cross-examination about "secondary gain" when a patient exhibits subjective symptoms, Dr. Pusztai said that malingering was a separate and distinct diagnosis under the DSM V. As well, she has interviewed a large number of patients with PTSD and she applies a number of tests and questionnaires when conducting an assessment and therefore, she claims, it is "difficult to mislead me".
- [52] By way of a summary about the plaintiff's answers to the questionnaires administered by Dr. Pusztai and Ms. Robinson-Weaver, I note the differences in the plaintiff's answers to the PTSD and Beck Depression questionnaires. However, I also note that the questionnaires are one part of the assessment of the patient, even a small part as demonstrated in the lengthy report of Dr. Pusztai. I do not take the submission of the defendants to go as far as to say that before a plaintiff's complaints are credible there has to be congruency between questionnaires completed at about the same time. In my view some inconsistencies are to be expected because, for example, the symptoms are different at different times. In fact, it seems to me that congruency between questionnaires could raise its own problems about credibility.
- [53] Finally, it is significant that the defendants' submission is based entirely on interpretation of evidence and it is not based on any expert opinion about the psychological condition of the plaintiff. Nor is there expert evidence from the defendants about the value of questionnaires or the significance of inconsistencies between answers to questionnaires close in time. In contrast, Dr. Pusztai explained that the questionnaires at issue here are routinely used, she explained how they are used, and she explained how inconsistencies between answers are assessed. I accept her evidence and prefer it to the interpretation of non-expert evidence in legal submissions.
- [54] It follows that I do not agree with the submission of the defendants that the differences between the two questionnaires here mean that there is reason to question the diagnosis of PTSD in this case. I similarly find there is nothing in the plaintiff's answers to the two sets of questionnaires that raise any issue with respect to his credibility.
- [55] As another way to challenge the diagnosis of PTSD (and to some extent chronic pain) the defendants point to the plaintiff's reaction to other stressful events in his life before and after the July 2013 accident. The defendants say these are separate from the July 2013 accident and they support a conclusion that the diagnosis of Dr. Pusztai cannot be relied on. This is also a credibility issue, according to the defendants.

- [56] As a first example of these other stressors, the plaintiff saw his family physician, Dr. Bester, on March 16, 2012 for a back problem (discussed below) and the chart note for that day states: "lots of stress related to separation". This referred to the separation between the plaintiff and his first wife. There is also reference to "also separated from wife" on September 19, 2012.
- [57] The plaintiff was not asked about this in his evidence. Dr. Bester said in his evidence in chief that this was a "pretty short note" and it was "not much of a discussion". He was not cross-examined about these statements. I accept that a marriage separation is a stressful event but it is not of any significance for the issues in this litigation and nothing in the evidence suggests that the separation from his first wife could have caused the plaintiff's more severe psychological symptoms.
- [58] In another incident, on February 26, 2014 a test for HIV was ordered for the plaintiff and on March 19, 2014 the test was recorded as normal. The plaintiff was cross-examined about this and it was suggested this caused him stress. To this the plaintiff replied "not really, I got the test and the results". Dr. Bester was also cross-examined on this chart note and he testified that the test was his suggestion after the plaintiff returned from a trip to Mexico and it was done "to be safe". Dr. Bester was not sure how anxious the plaintiff was about this incident. I conclude that this incident is of no significance to the issues in this litigation.
- [59] In late 2013 Dr. Bester's chart began to record problems the plaintiff was having at work. More than two months after the July 2, 2013 accident, on September 27, 2013 he recorded the following (the accident was on July 2, 2013):
- 3+ issues @ work
 - 3+ anxiety
 - Not wanting to work
 - feel manipulated
 - has board directors
 - Boss overrides decisions
 - Irregularities/politics/necessarily involved
 - etc.
- [60] The cost for this visit was billed to the Medical Services Plan ("MSP") rather than the insurance carrier. Dr. Bester agreed in his evidence that this was because he was not linking the stress to the July 2013 accident. The plaintiff was asked about this in cross-examination and he agreed he was having problems at work that were separate from the July 2013 accident. Dr. Pusztai testified that she did not know about these details but she knew the plaintiff was having difficulties at work. In September 2013 the plaintiff took two weeks off work because of stress.

- [61] On March 19, 2014 there is a reference in Dr. Bester's chart to increased problems at work; "severe disagreement on issues" and "feel against moral values". In different handwriting is written: "Can't bill 0120 with ICBC on same visit". Then on April 9, 2014 there is a reference to "work rel. stress ? settled - manager possibly moving on". This latter visit appears to have been billed to both the insurance carrier and MSP.
- [62] The plaintiff was questioned about this entry and he said he could not recall it. It was suggested that it was very significant because he told his doctor and the plaintiff answered he was not sure, not in an indecisive manner but as an indirect way of denying any significance. Dr. Pusztai testified that the plaintiff told her he was having some problems at work but he did not provide details and she did not ask for them.
- [63] There are other references to stress at work. On October 14, 2014 Dr. Bester saw the plaintiff for "Stress at work." The subjective comments were, "Thoughts occupied with stress at work." The objective comments were:
- Feels stressed. Physical symptoms of chest pain and reflects at times. Loose bowel movements at times. Symptoms of anxiety. Difficulty coping with work issues right now. Long - standing ongoing issues at work. Currently many people off on stress leave.
- [64] The assessment was of "Acute adjustment disorder", low back pain and non-specific chest and gastrointestinal pain. The "Problem" was "Acute reaction to stress."
- [65] At a visit to Dr. Bester on October 24, 2014 the reason given for the visit was again workplace stress. Sleep disturbance was noted. Also the plaintiff was recorded as saying, "I can not handle the stress any more" and "if things does not get better soon I'll have to quit my job".
- [66] On November 26, 2014 the reason for the visit was work stress and chronic back pain. Subjective issues included "3+ stress at work. Upcoming court case. Still want to hang in there. Back pain mid back comes and goes ." The assessment was chronic back pain "post-MVA" and chronic stress related to work.
- [67] The last record of work-related stress on Dr. Bester's chart is November 26, 2014. The plaintiff saw Dr. Bester a number of times after that date without any reference to stress at work. The last chart note in evidence appears to be March 21, 2016. The notes for that visit included "sometimes difficulty sleeping - not sure if this is related to back pain and references to headaches". There was also, "mood - pt describes some types of anxiety at time, not sure if it is related to this" and "doesn't seem to be depressed". There are also copies of two notes to ICBC dated March 25, 2016; one recommending active rehabilitation and the other referencing a prescription for medication for sleep disturbance "as a result from MVA July 2013".

- [68] Taking the above together (but excluding the marriage separation and HIV test), I accept that the plaintiff had some stress from work, perhaps some significant stress. However, judging from Dr. Bester's notes, it ended in November 2014. As well, there is no expert opinion evidence that it was significant enough to cause the symptoms Dr. Pusztai attributed to PTSD. Indeed, nightmares and flashbacks are distinctive symptoms of PTSD, not of anxiety or stress.
- [69] I also note the evidence of the plaintiff that he was coping perfectly well at work before the July 2013 accident and generally happy. In contrast, he and his family and others attribute emotional difficulties to him after the accident, before the stressful incidents at work and currently. In any event, ultimately the symptoms related to PTSD continued and in March 2016 Dr. Bester was prescribing medication for sleep disturbance as a result of the July 2013 accident and after about 1.5 years had passed without any mention of work-related stress.
- [70] The position of the plaintiff is that he was more vulnerable to stressors at work because of the PTSD and chronic pain he experienced as a result of the accident. It is true that Dr. Pusztai does not directly opine on this issue in her report. Nor is there expert evidence as to whether the plaintiff experienced PTSD and work-related stress at the same time. Nor is there expert evidence supporting the defendants' interpretation.
- [71] Dr. Pusztai knew generally about the difficulties at work and they were put to her in some detail in cross-examination. She did not resile from her opinion that the plaintiff suffered and suffers from PTSD as a result of the July 2013 accident. The opinion of Dr. Pusztai remains the best evidence of the psychological condition of the plaintiff and the only expert evidence before me. It is possible to challenge an expert opinion to the extent that it is worthy of little weight, even in the absence of a competing report. That is a far cry from the situation here.
- [72] To more fully understand the PTSD experienced by the plaintiff, I turn to the particulars of Dr. Pusztai's opinion which, again, I find is reliable and is of considerable assistance in determining the medical/psychiatric issues in this litigation.
- [73] In her written report of June 2016 Dr. Pusztai deferred to Dr. Raghavan with respect to chronic pain and then said this about PTSD:

It is clear that Mr. Olguin Resendiz developed Post Traumatic Stress Disorder as a direct result of the MVA as he developed symptoms of nightmares and flashbacks shortly after, i.e. within 24 hours of the MVA. Symptoms of PTSD are summarized in (Appendix E) DSM 5. Mr. Olguin Resendiz meets all the criteria for PTSD as per DMS 5 and this has persisted since the date of the MVA as he has not received the appropriate treatment.

I will defer to Dr. Raghavan, re: his description of chronic pain but the coexistence with PTSD indicates treatment resistance unless the psychological and psychiatric issues are dealt with appropriately. Unfortunately, there was no update from Nicole Robinson-Weaver [pain counsellor], therefore I am unable to comment on the therapy that he has been receiving but

given his symptomatology and the severity and the extended period of time that has elapsed and the persistence of his symptoms he will require treatment with an antidepressant that is specifically for PTSD, i.e. either Sertraline starting at 25 mg titrated up as fast as he can tolerate it eg. 25 mg per week until a maximum of approximately 200 mg or above is reached. The other SSRI that has FDA recommendation for treatment of PTSD is Prozac i.e. Fluoxetine at doses starting at 10-20 mg and increased up to 60-80 mg. These SSRIs have specific therapeutic advantages over the other SSRIs and SNRIs for treating PTSD symptoms, specifically flashbacks and nightmares. He has not been treated with an antidepressant and after reading his GP's report there has been no questioning of any psychological comorbidity by either of his family physicians. Dr. Raghavan has identified Post Traumatic Stress Disorder symptoms, as has Dr. Kaushansky PhD registered psychologist who made the recommendation that he should travel to a larger area to receive treatment. He recommended Mr. Ged Schwartz who I believe is now retired and he is receiving CBT from Nicole Robinson-Weaver.

[74] On the issue of pain, as above, Dr. Pusztai noted that condition in her assessment but she deferred to Dr. Raghavan for any diagnosis. In his report of November 17, 2015 he opined as follows:

Mr. Olguin-Resendiz developed neck pain, mid-back pain, and lower back pain a day after the collision. There was also associated headache. I noted that he had been the [sic] under care of a chiropractor for lower thoracic (mid back area of spine) and lower lumbar (lower back) pain prior to the accident. However, he was symptom free and was not undergoing chiropractic treatment in these areas for approximately a year prior to the accident. When he was assessed by the chiropractor soon after the said accident, he presented to him with pain in the left lower neck when turning to the right, mild headaches, and pain in the upper part of the thoracic spine and lower lumbar spine. He was assessed by his family physician soon after the accident. X-rays of the thoracic and lumbar spine were carried out, which did not show any skeletal injuries. He underwent chiropractic treatment, massage therapy, and physiotherapy. His neck pain has improved, but he is left with chronic pain the thoracic area and lumbar spine.

I believe that his current musculoskeletal symptoms are an exacerbation of his pre-existing symptoms, although I noted that he was completely asymptomatic for a year before the injury. He has constant symptoms now, which have not improved with a physical therapy, chiropractic treatment, and massage therapy, over the past 2 years. He reports that most of his day-to-day activities make the pain worse. Mr. Olguin-Resendiz has also developed clinical features of chronic pain disorder [sic]. Most patients with chronic pain disorder especially in the context of post traumatic chronic pain disorder, complicated by psychological symptoms are fearful of pain and movements and therefore avoid activities which they perceive would make their pain worse. Their psychological profile also changes and catastrophic thinking is quite common. Mr. Olguin-Resendiz has developed fear of pain, fear of movements and there were some evidence of catastrophic thinking (please see pages 3 and 4 of Appendix C for details).

[75] In his later report of December 6, 2016 Dr. Raghavan said this about the plaintiff's pain symptoms:

With regard to his pain, Mr. Resendiz experiences symptoms in his lower back, which are now intermittent, as compared to constant pain involving almost all of the lower half of his spine when I assessed in 2015. Mr. Resendiz reported episodes of severe sharp pain in his lower back, which lasts typically a minute, or slightly longer. He also experiences what he described as "spasms" in his back, which appear randomly, with no apparent trigger. At times, he can alleviate these spasms by deep breathing and de-stressing. I note that Mr. Resendiz continues to experience headaches and significant sleep disruption.

[76] The expert witness of the defendants, Dr. Himmel, an orthopaedic surgeon, confirmed the plaintiff's soft tissue injuries and the continuing limitations from that condition, discussed below. However, he was frank in saying that he had no expertise in the diagnosis of PTSD and chronic pain.

[77] I conclude that the plaintiff suffered PTSD and chronic pain as a result of the 2013 accident. He continues to have symptoms from these conditions, especially the PTSD which makes having restful sleep difficult.

(b) Physical injuries

[78] There is no dispute that the plaintiff suffered soft tissue injuries from the 2013 accident.

[79] The defendants' expert, Dr. Himmel, an orthopaedic surgeon, described the plaintiff's limitations from that condition as follows:

Mr. Resendiz has minor soft tissue complaints at the present time. There are no positive clinical findings of note. The prognosis, generally, is good for the uncomplicated soft tissue injuries. However; due to the length of time that is has been since the accident, which is three and a half years, the prognosis is somewhat guarded.

Mr. Resendiz reports that prior to the accident, he was in good health and there were no similar complaints. The pain he described occurred after his accident. It is my opinion that it is likely that the current complaints he describes are related to the motor vehicle accident of July 1, 2013.

(c) Damages

[80] As above the plaintiff suffers soft-tissue injuries, PTSD and chronic pain as a result of the 2013 accident. He is entitled to the following damages for those conditions.

(i) Special damages

[81] The parties are not agreed on an amount for special damages. The plaintiff claims for \$11,688 including time taken to travel to medical appointments in Kamloops.

- [82] Generally, I accept that a person living in a small community is entitled to the same standard of medical care as a person in a larger community and this will entail additional costs in some cases. In the plaintiff's case, he used his sick time for appointments and he is entitled to be reimbursed for that time so he can re-use it for illnesses and accidents that are not related to the July 2013 accident, if they occur. Put another way, the costs for the medical care of the plaintiff that are attributable to the accident are the responsibility of the defendants and not something that should be paid out of the plaintiff's sick bank and at his expense.
- [83] The defendants accept that special damages are appropriately paid for pain medication from the July 2013 accident to the present, for chiropractic treatment and massage therapy expenses as claimed, treatment expenses for physiotherapy to December 31, 2016 and treatment expenses for kinesiology to the present. The defendants do not agree to payment for psychiatric medications or payment for pain counselling.
- [84] In light of my conclusion above that there is a valid diagnosis of PTSD causally related to the July 2013 accident the costs for medication and other matters related to those conditions are to be paid by the defendants.
- [85] I accept the plaintiff's calculation of \$11,688 for special damages.

(ii) Past loss of income

- [86] The plaintiff claims \$13,854 for past loss of earnings. This is the amount of the plaintiff's sick time he has used in 2017. The defendants say no damages are justified under this head.
- [87] A claim for past loss of earnings is for the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30).
- [88] The loss of earning capacity rather than the loss of actual income can be measured in different ways, although the loss of income is one way to measure loss of capacity. This is described in Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06 as follows:

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Emphasis in original.]

[89] At para. 32 the majority of the Court of Appeal in Rowe also adopted the following from an Australian decision (*Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649 at p. 658, [1968] H.C.A. 9):

The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[90] In addition, a claim for past (or future) lost earning capacity is an assessment rather than a calculation, it requires considerations of fairness and reasonableness and all negative and positive contingencies are to be taken into account (*Abbott v. Gerges*, 2014 BCSC 1329 at para. 165).

[91] The plaintiff has detailed records of his sick time and he was questioned about those records in cross-examination. Presumably his work has trained him to be careful in these matters and I accept his records as an accurate reflection of the time he lost prior to trial as a result of the 2013 accident. Included in these figures are the two weeks he took off of work in 2013 which the defendants' expert, Dr. Hummel, accepts as appropriate for the plaintiff's physical injuries.

[92] Damages in the amount of \$13,854 are payable for past income loss.

(iii) Non-pecuniary damages

- [93] The plaintiff seeks damages for non-pecuniary loss in the range of \$100,000 to \$120,000. This is on the basis of all of the plaintiff's physical symptoms as well as PTSD and chronic pain. Cases cited by the plaintiff to support this figure include: *Dabu v. Schwab*, 2016 BCSC 613; *Lafond v. Mandair*, 2017 BCSC 523; *O'Brien v. Cernovec*, 2016 BCSC 1881; *Rutter v. Adams*, 2016 BCSC 554; *Scott v. Erickson*, 2009 BCSC 1298; *Shongu v. Jing*, 2016 BCSC 901; and *Starchuk v. Hannig*, 2016 BCSC 1655.
- [94] According to the defendants, total non-pecuniary damages in the range of \$45,000 to \$65,000 are appropriate in this case for the plaintiff's soft tissue injuries in the lower back. It is submitted that the plaintiff suffered a soft-tissue injury in his neck from the accident but this has resolved. The plaintiff is not entitled to damages for PTSD or chronic pain, according to the defendants. Cases relied on include: *Peck v. Peck*, 2012 BCSC 1617; *Bissonette v. Horn*, 2012 BCSC 518; *Helgason v. Bosa*, 2010 BCSC 1756; and *Leung v. Foo*, 2009 BCSC 747.
- [95] As described in *Dabu* (beginning at para. 20), an award of non-pecuniary damages "acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering that the plaintiff has endured and will have to endure in the future" (*ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 106). The broad framework for the assessment of non-pecuniary damages has been set out by the Court of Appeal (*Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804):
- [46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;
- I would add the following factors, although they may arguably be subsumed in the above list:
- (g) impairment of family, marital and social relationships;
 - (h) impairment of physical and mental abilities;
 - (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[96] The ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life. As explained in Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 553:

In the vast majority of cases a plaintiff is entitled to an award for loss of working capacity together with a sum for non-pecuniary loss assessed on a functional basis. The two heads of damage are designed for different purposes. The first is a replacement of what otherwise would have been received. The second is a solace to allow the plaintiff to enjoy substitute amenities to replace lost enjoyment and to counteract the negative effect of pain and suffering.

[97] As Dickson J. said in his dissenting opinion in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 368, in a passage that has been frequently quoted since:

Work is one of the most fundamental aspects in a person's life. ... A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

(See also: *Boyd v. Harris*, 2004 BCCA 146 at para. 54.)

[98] The plaintiff was 37 years old at trial. He is married with a blended family of five children: two from a previous marriage, two children are from his current wife's previous marriage and one child of his current marriage.

[99] There is no serious dispute that the plaintiff suffers from soft tissue injuries as a result of the July 2013 accident. This is accepted by the expert retained by the defendants (Dr. Hummel, set out above) and confirmed in the defendants' submissions. Dr. Hummel also opined that two weeks off in September 2013 was an appropriate time off work for his injuries, surgery was not indicated and there was no need for assistance at home. He also thought that there was no permanent disability but I note his recording of symptoms related to soft tissue injuries continuing almost four years after the July 2013 accident.

[100] Dr. Raghavan, the treating physiatrist, opined in his report dated November 17, 2015 on the plaintiff's physical injuries:

I believe Mr. Olguin-Resendiz sustained a whiplash-type injury as a result of the above-mentioned accident. He also developed aggravation of his pre-existing lower and mid-back symptoms. Mr. Olguin-Resendiz no longer experiences functionally limiting neck pain, but he has recurrent symptoms of pain and stiffness in his lower half spine both in the lower thoracic and lumbar area, as discussed in Appendix C.

[101] Dr. Raghavan's later report of December 6, 2016 also described a whiplash injury.

[102] There is some evidence of a pre-existing back issue. In 2012 the plaintiff saw a chiropractor, Dr. Colin Gage. In a form the plaintiff completed on April 12, 2012, in response to the question "What is your main health concern" he wrote "Back". When asked on the form how long he had suffered this problem he answered "a few month".

- [103] Prior to the July 2013 accident the plaintiff saw Dr. Gage about 11 times between April 12, 2012 and June 8, 2012 (he also saw Dr. Gage for the July 2013 accident). A diagram prepared by Dr. Gage at the beginning of the 2012 visits identifies a facet joint problem at T3-T10 on the left and right and at L1-L5 on the right as well as muscle spasm in the lumbar spine on the right side. By April 23, 2012 "some improvement was noted", then there are references to "getting better" on April 25 and 27, 2012. On what appears to be April 30, 2012, there is a reference to the plaintiff moving his residence and "Back all good". On May 12, 2012 the note was "only sore once in a while" and on May 15, 2012 the note was "Not Bad - started exercising a lot". On May 23, 2012 the note was "exercising two days/week" and on June 8, 2012 the note was "Back being good - exercise 1X week".
- [104] The plaintiff did not see Dr. Gage again until the July 2013 accident. The chart is not clear but this was apparently on July 4, 2013.
- [105] In cross-examination the plaintiff was asked about his treatment by Dr. Gage and he said he had some stiffness in his back in 2012. He denied having stiffness before 2012. He also referred to pain he had in the stomach area at that time and this was thought to be a problem with gallstones or acid reflux. There is a reference in Dr. Gage's chart on April 23, 2012 to gallstones. Identifying the source of the pain in the stomach took some time. Ultimately, there was surgery that had some success but some symptoms continue.
- [106] From this history it is clear that the plaintiff had some back pain in 2012 that was treated by a chiropractor, Dr. Gage. More than a year before the July 2013 accident Dr. Gage recorded the plaintiff's back as "good" and he was exercising again. Dr. Raghavan believed the 2013 problems were as a result of an aggravation of the 2012 problems but he also noted the one-year period without symptoms.
- [107] Overall, with respect to the plaintiff's physical complaints, I conclude that he currently suffers from low back pain as a result of the 2013 accident. This is soft tissue in nature. If there is a relationship between the back complaints in 2012 and now it is that the July 2013 accident aggravated the 2012 problems.
- [108] The parties differ with regard to the issues of PTSD and chronic pain. Above I concluded that the plaintiff suffers from both conditions and they are both causally related to the July 2013 accident. As context for these issues I note the following from Dr. Raghavan, a treating specialist, in his report of November 17, 2015:

Mr. Olguin-Resendiz developed symptoms of anxiety, poor quality of sleep, nightmares, flashbacks about the accident immediately after the said accident. He was fearful driving and experienced significant anxiety around driving. He continues to experience flashbacks and nightmares, poor sleep and fear of driving. Although these symptoms have improved, he continues to experience anxiety and fear whilst driving. He feels that he would die in a car. I believe that Mr. Olguin-Resendiz sustained psychological trauma as a result of the above-mentioned accident and that he continues to experience symptoms which are suggestive of anxiety and posttraumatic stress disorder.

[109] Turning to PTSD specifically, Dr. Pusttai opined as follows:

Patients with PTSD are significantly and severely effected in functioning. Mr. Olguin Resendiz indicates post-accident he was very frightened of movement and was in significant pain. He was also fearful and his psychological symptoms were not being addressed. His treatment has been Novo-Cycloprine, Cyclobenzaprine, Naproxen, and Teva-Naproxen for relief of pain and flare-ups. His physical injuries are not the reason that he has had ongoing difficulties with functioning both at home and at work. He clearly gives a history of much greater activity prior to the MVA, i.e. regular bicycling, swimming and going to the gym. Post MVA he was unable to do any of these activities and withdrew from his household chores, gardening, etc. He has slowly, over the course of the many years with advice and direction from the physiotherapist and Dr. Raghavan increased his activity level and therefore his functioning. His functioning remains suboptimal however. He indicated after the baby was born he was unable to lift the baby into the car seat. He is now able to lift his children, although it causes pain. He does some gardening but his activities are reduced. In terms of his work, he is a business analyst for Community Futures. This requires a degree of concentration and multitasking which I believe Mr. Olguin Resendiz is not capable of at present on a consistent basis. Although he complains of pain sitting in his chair for any length of time, example working or driving, this is not the major reason that he is unable to function at an appropriate level. He also feels extremely guilty about his reduced activities, re: the family and the household and has a sense of shame that he is not able to maintain his previous level of parenting and household duties. He indicates he is aggravated and his anxiety is increased by the noise caused by the children. This is typical of PTSD. He has an excessive startle reflex and is easily distractible when he is overwhelmed and anxious. These would all impair his functioning on a daily basis, irrespective of his other symptoms. His functioning will continue to be impaired until he follows the treatment plan recommended by both Dr. Raghavan and myself as above.

Mr. Olguin has moderate to severe PTSD. He remains moderately impaired and will continue to remain moderately impaired until he receives the appropriate treatment as described above. He must commit to the therapy and usually when the therapy is being carried out appropriately with all modalities as outlined above Mr. Olguin Resendiz will properly require a period off work in order to apply himself appropriately to the program. Working full-time and caring for 5 children aged 10 and under will hinder any rehabilitation plan including CBT, exercise, etc. making it non-viable due to time limitations. He would require appropriate remuneration during this period as financial stress would also destabilize his symptoms. I am not aware of insurance companies involved and the status of any future disability claims.

The natural history of this illness is that it will either deteriorate or continue as it is. His functionality will deduce and gradually he will be increasingly unable to work. The risk of suicide is high in such patients although Mr. Olguin Resendiz does not admit to any suicidal ideation or intent.

[110] The evidence also includes improvement in the plaintiff's conditions. As above, he now has headaches and neck pain only occasionally. Pain in the lower back is now intermittent, according to Dr. Raghavan. He also noted improved functionality including sitting

tolerance. There has been improvement in terms of the plaintiff's fear of exercise and engaging in other daily activities and the evidence is that the plaintiff is steadily improving his exercise regime, including swimming. Increased activity levels have been gained with the assistance of a kinesiologist. Dr. Pusztai also noted the same improvements. Dr. Raghavan also noted symptoms of PTSD have decreased.

[111] Dr. Pusztai described the plaintiff's situation as of June 2016 as follows:

He continues to complain of ongoing headaches and occasional neck pain but this has improved since the MVA. He continues to complain of upper, mid and lower back pain which is present every day and is aggravated by activity and he has subsequently reduced his activities to attempt to compensate for this. He has ongoing difficulty sleeping, which he identifies as 2 hours approximately of initial insomnia and intermittent wakening. He is woken by the baby on regular occasions throughout the night and he is also woken by nightmares which continue approximately twice a week. Post nightmare he is agitated and not able to go back to sleep. The nightmares are about accidents often involving his children being in danger, eg. trapped or their lives are threatened. He has long-standing sleep disturbances as a result of the MVA and is only able to take medication to sleep when his wife is not working, i.e. the weekends but he could not remember what the medication was. He complains of loss of energy, loss of motivation, ongoing anxiety which is present every day to some extent. He has made some connection between the anxiety, stress and pain.

[112] Dr. Raghavan described the plaintiff's situation on November 17, 2015 as follows:

Functionally Mr. Olguin-Resendiz has difficulty to perform household chores like yard maintenance and vacuuming. Mr. Olguin-Resendiz experiences increased symptoms with prolonged sitting - be it work or whilst driving. He therefore uses a back support for this. He has been limiting activities especially gym activities, riding his bike to work due to pain aggravation or due to fear of pain. He has significant anxiety around driving. He is afraid that one day he would die from an accident. He has anxiety around other situations especially fear of movements and activities.

[113] Dr. Raghavan opined in his report of November 17, 2015 that the plaintiff suffers from a post-injury chronic pain disorder, partly driven by the PTSD and anxiety. He described chronic pain-related phenomena such as fear of pain, avoidance of physical activity and fear avoidance which results in more disability that cannot be explained by the physical impairment alone: "Therefore improvement of function and quality of life are unlikely to occur without treating the comorbid psychological issues assertively".

[114] In his second report (December 6, 2016) Dr. Raghavan noted that the plaintiff has started an exercise program but only once a week at that point. Improvement "in multiple respects" was noted, including less pain in the lower back and a decrease in PTSD symptoms. Significant sleep disruption and "some degree of headaches" were noted but "not as disabling as they used to be".

[115] With respect to prognosis, Dr. Pusztai stated in her report of June 23, 2016 as follows:

The accident was on July 1st, 2013. We are now 3 years post-MVA. This is a poor prognostic indicator. His symptoms have continued. His psychiatric symptoms may in fact have worsened since the onset of the illness. Chronic mental illness is difficult to treat and the severity of his symptoms indicate that he will require at this point a high dose of an appropriate antidepressant that he can tolerate that would effectively treat some of his symptoms of PTSD. Other adjunctive treatments such as Prazosin and an antipsychotic are also recommended. As he has not had a trial on antidepressants plus/minus antipsychotics and perhaps Prazosin to control nightmares, it is difficult to estimate his prognosis, although it remains guarded. The earlier the treatments can be applied, the better the prognosis. If treatments are not carried out as directed, he will continue to suffer and likely deteriorate in functioning and mental health. It is unlikely he would have a full recovery by this stage but treatment should be attempted to improve his functionality and understanding and reduce his symptomatology so that his functioning both at work and at home would improve. It is unlikely that he will be free of his pain symptoms and they will traditionally persist but some improvement does occur with all the treatments working together.

At best acute treatment with the best outcome, patients have some residual symptoms usually of ongoing muscular soft tissue pain when stressed. However, it is worth a trial of an antidepressant and appropriate therapy to improve functioning and reduce pain. Patients with PTSD have a poor quality of life and limited ability to enjoy. They are prone to developing comorbid Psychiatric Disorders such as Major Depressive Disorder and Generalized Anxiety Disorder. It is not clear that Mr. Olguin Resendiz has developed these Comorbid Disorders at present. Further evaluation and treatment would clarify this point. With best treatment he may be able to continue to work full time or some part-time duties. Full recovery however by this stage is unlikely.

[116] Dr. Pusztai also opined that the plaintiff's pain symptoms will not improve unless Dr. Raghavan's recommendations about stretching, exercise, increased activity as well as cognitive behavioural therapy, along with physical therapies, are completed. The combination of treatments has a "far better prognosis" than individual therapies applied alone. This has not occurred with the plaintiff and a "vital part of his treatment has been missed".

[117] In his report dated December 6, 2016 Dr. Raghavan said this about the future:

The long-term prognosis of musculoskeletal pain also depends on whether the patient is able to establish a regular exercise regimen and continue with that exercise regimen on a lifelong basis. Mr. Resendiz has been doing a stretching and strengthening program on a daily basis, but the key component of the regimen, as I discussed above, is cardiovascular exercise. I appreciate that his kinesiologist is slowly introducing this, and it is likely that more intense and frequent exercises will be introduced into his regimen once he is able to establish a daily program of exercise. I anticipate that, once he is able to exercise on a daily basis, especially the cardiovascular program, without fear of reactivation and re-injury, his pain levels will improve further, but it is unlikely that he will be able to reach pre-accident functional status. I noted that he continues to

experience symptoms posttraumatic stress, including nightmares, although the frequency of these symptoms has decreased. As noted above the functional disability from chronic pain is significantly more in patients with co-existent post traumatic stress.

- [118] The plaintiff's evidence generally accords with the above medical and psychological opinions. I am not convinced there are significant differences in the medical evidence, certainly not ones that raise serious concerns about the plaintiff's credibility. Further, the diagnoses of chronic pain and PTSD in this case are reasoned and are uncontradicted by contrary expert evidence.
- [119] The plaintiff's symptoms have improved and he is gradually increasing his exercise levels with the assistance of a kinesiologist. He does continue to have pain which has affected his home life and work. When he comes home from work he will often go to his bedroom to rest, come out for supper and then return to the bedroom. He will sometimes participate in games with the family but he will often be unable to finish them and will leave to be on his own in the bedroom. He drives the children to school but is generally restricted in what he can do with them. It is true that five young children are a handful but a healthy father of the plaintiff's age without his injuries should be able to do more than the plaintiff currently does with his children. Again, the symptoms are improving but sleep disturbance, low back pain and intermittent headaches continue as well as avoidance behaviour towards activity. He must continue in the integrated exercise and cognitive therapy programs set up for him.
- [120] The plaintiff's wife, Ms. Ebert, carries a considerable load looking after the house, the five children and to a considerable extent the plaintiff. The current family situation would not be possible without her support, organization and work around the house. This will also be discussed below under the claim for an in-trust payment; the point here is that Ms. Ebert does things that the plaintiff cannot do. She also works outside the home and sometimes at night. When she does this the plaintiff cannot take medication for sleeping because he needs to be alert for the children in her absence. The result is that he does not get a satisfactory sleep which affects his concentration at work the next day. When the mother is home at night she looks after the children if necessary during the night. She testified that the plaintiff's injuries have affected their personal relationship.
- [121] Turning to the authorities, the cases relied on by the defendants for the most part are consistent with damages awarded to plaintiffs with soft tissue injuries. Dr. Hummel accurately described those injuries in the case of the plaintiff here. However, he was very clear that he did not have the expertise to diagnose PTSD or chronic pain. As above, I have accepted that these two conditions are causally related to the July 2013 accident. The range of non-pecuniary damages proposed by the defendants is based on only the soft tissue injuries suffered by the plaintiff and, therefore, must be considered with that limitation.
- [122] The judgment in *Harvey* has some parallels and some differences with the subject case. In *Harvey* the plaintiff was younger than the plaintiff here (21 years in *Harvey* versus 37 years for this plaintiff at the time of trial and 33 years at the time of the accident in 2013). In

Harvey the plaintiff suffered a soft tissue injury to her back, fibromyalgia and PTSD attributed to the accident. There had been improvement for a period of time and then no improvement in her condition. She suffered from soreness and stiffness in her back and headaches 3.5 years after the accident. There was sleep disturbance and fatigue. Non-pecuniary damages in the amount of \$100,000 were awarded. In another decision, Lafond, non-pecuniary damages in the amount of \$100,000 were awarded for soft-tissue injuries and depression. In Dabu the plaintiff was awarded \$95,000 for soft-tissue injuries and PTSD.

[123] Based on my findings above and these authorities I conclude that non-pecuniary damages in the amount of \$100,000 are appropriate in this case.

(iv) Future loss of earning

[124] According to the plaintiff, the loss of his future earning capacity from the July 2013 accident justifies damages in the amount of \$119,361 on a loss of a capital asset basis. Authorities relied on by the plaintiff include Dabu, Lafond, O'Brien and Rutter. The defendants submit that no damages for loss of future earning capacity are justified.

[125] As described in Dabu (beginning at para. 70), the general approach to the assessment of future earning capacity can be summarized as follows:

[71] The following sets out the general approach to the assessment of future earning capacity (Tsalamandris v. McLeod, 2012 BCCA 239, at para. 31):

[31] The appellants do contest how the trial judge then went about assessing that loss [of future earning capacity]. The trial judge set out to apply the principles canvassed in Rosvold v. Dunlop, 2001 BCCA 1, saying at para. 259:

The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in Rosvold v. Dunlop, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:

1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
2. a plaintiff is entitled to be put in the position she would have been but for the accident;
3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;

6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[126] Loss of future earning capacity can be quantified on an earnings approach or a capital asset approach (*Perren v. Lalari*, 2010 BCCA 140 at para. 32). The two approaches were summarized in another judgment as follows (*Hosseinzadeh v. Leung*, 2014 BCSC 2260):

[126] The earnings approach is generally appropriate where the loss is more easily measured, such as where the plaintiff has some earnings history or where the court can otherwise reasonably estimate what the plaintiff's likely future earning capacity will be: *Perren*, at para. 32; *Clemas v. Gabrlik*, 2013 BCSC 1412 at para. 170. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Clemas*, at para. 170. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment not mere calculation.

[127] The capital asset approach, typically used in cases where the plaintiff has no clear earnings history, involves consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8.

[127] The capital asset approach is not restricted to cases where the plaintiff has no clear earnings history. It is more appropriate than the earnings approach in any case "where the loss, though proven, is not measurable in a pecuniary way" (*Perren*, at para. 12). One example is *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), which was discussed in *Perren* at para. 11 as follows:

... In *Kwei*, where it was not possible to assess damages in a pecuniary way as was done in *Steenblok* [(1990), 46 B.C.L.R. (2d) 133 (B.C.C.A.), *Taggart J.A.*, speaking for the Court, held that the correct approach was to consider the factors described by *Finch J.*, as he then was, in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353. Mr. *Kwei* had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice *Taggart* cited the *Brown* factors with approval:

[25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in *Brown v. Gola*. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:

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.

[128] In the subject case I repeat the plaintiff's income for the years 2014 to 2016 as follows:

2014

\$47,440

2015

\$45,866

2016

\$59,247

[129] The increase in 2016 reflected a decision by the plaintiff's employer, Community Futures, to add supervisory duties to his responsibilities and to increase his pay by 10%, effective April 7, 2016. This followed a restructuring of the organization including a reduction in the number of employees from 20 to three, including the plaintiff. The actual increase from 2015 to 2016 is more than 10% but this is not explained in the evidence.

[130] On its face, the plaintiff has actually received an increase in his income since the July 2013 accident. For this reason, if there is a loss of future earning capacity, it is difficult to assess that on a loss of earnings or strict pecuniary basis.

- [131] With respect to the capital asset approach, the plaintiff says that his ability to earn income in the future has been impaired by the July 2013 accident. He describes problems with stress, concentration and sleep disturbance as well as headaches and low back pain. As above, the evidence is also that the plaintiff's symptoms have improved and he is increasing his activities. On the other hand, Dr. Pusztai is concerned that the plaintiff will never recover from all of his PTSD symptoms.
- [132] It is appropriate to discuss two incidents in the context of the future earning capacity of the plaintiff.
- [133] First, he took two weeks off work in late September 2013 for health reasons. While some symptoms such as sleep disturbance related to the July 2013 accident were likely at play at the time, the evidence indicates that the plaintiff was also dealing with stress at work. Dr. Bester, the family physician, billed MSP for a visit at this time rather than the vehicle insurance carrier because he believed the stress was related the plaintiff's work rather than the 2013 accident. I conclude that it is probable that the plaintiff would have handled the stress at work better without the ongoing symptoms of the accident but the evidence is also that work-related difficulties and stress were independent of the accident.
- [134] In any case, the expert doctor for the defendants accepts the two weeks off work was an appropriate recovery period for the soft-tissue injuries by themselves. Overall, I can find nothing in the two weeks off in September 2013 that lessens any entitlement the plaintiff has to damages for the loss of future earning capacity.
- [135] A second incident relates to the additional duties and pay increase the plaintiff received when he took on supervisory duties in April 2016. He testified that he told his supervisor (the chair of Community Futures) that he could not manage the stress and somebody else should take on the supervisory role. According to the plaintiff, the chair told him there was no budget for someone else to take over as supervisor and he then said that he could not do it past the end of the fiscal year, March 31. The plaintiff testified that he was having headaches, sleep disturbances including nightmares, muscle spasms, back aches and anxiety. He considered quitting. As above, there are references to these difficulties in Dr. Bester's chart. The plaintiff also said he could have done the additional supervisory work but for the July 2013 accident.
- [136] The plaintiff testified that the supervisory duties were only for about one year. However, another employee of Community Futures testified that the plaintiff was her supervisor at the time of the trial in May 2017. The evidence is also that the increase in salary has continued.

- [137] What appears to have happened is that the work of the remaining three employees was re-organized so that there was minimal supervision required. The plaintiff testified that he organized this change, with the apparent result of reducing his stress and improving the efficiency of the organization. This is to the plaintiff's credit as an employee and supervisor. Another result is that, if the plaintiff currently has supervisory duties, they are minimal.
- [138] In the result, thus far the change to the plaintiff's work is not a "lost opportunity" as he describes it. He apparently enjoys his work and he is good at it. Further, his employer values his work as demonstrated by his promotion and increase in pay. I nonetheless accept that the medical and psychiatric reports record ongoing problems with concentration and problems with sleeping (including nightmares) related to the PTSD and the pain as well as difficulty sitting at a desk all day at work.
- [139] I also accept as a negative contingency that the plaintiff works for a small organization and there were major reductions in the staff previously. There may be more reductions in the future. Further, he lives in a small community, his work is somewhat unique and it is not clear there would be alternative employment he could readily access in Merritt. His family has strong roots in the community and moving someplace else would be very disruptive. The plaintiff's wife works and is very involved in various activities there and their five young children are also active in various activities. They have built a successful life in Merritt and it provides the plaintiff with strength and support.
- [140] Overall, I accept that the plaintiff has been rendered less capable of earning income from all types of employment because of the July 2013 accident. He is less marketable or attractive as a potential employee, he has lost the ability to take advantage of all job opportunities that might otherwise have been open, and he is less valuable to himself as a person capable of earning income in a competitive labour market. This should not be exaggerated since, again, the plaintiff's symptoms and activity levels are improving, he remains at work, he is valued by his employer (albeit in a small market) and he has received an increase in pay since the July 2013 accident.
- [141] But without his current position and in a competitive market place, there is a real and substantial possibility that his employment opportunities would be reduced by his limitations caused by the July 2013 accident. These limitations are primarily the PTSD, chronic pain and some lower back pain. The neck pain and headaches are now intermittent and not significant according to the plaintiff's doctors.
- [142] As noted in the authorities, quantifying this loss is not an exact exercise, especially in cases where the plaintiff continues to work. In *Dabu* a medical expert recommended reducing the 54-year-old plaintiff's work by one day a week and that resulted in a conclusion that there was a 20% loss of future income. In *Lafond* there was evidence that the 57-year-old plaintiff's income would be reduced by 20-33% as a result of an accident. In *O'Brien* a number of contingencies were reviewed including the ability to work overtime in the future and restrictions on the ability to advance to a higher position. These were balanced with

the possibilities of the 23-year-old plaintiff working uninterrupted and being promoted to a less physically demanding position. A figure roughly equivalent to 18 months income' was used in O'Brien.

[143] The plaintiff here is 37 years old. He submits that he should be compensated for a 10% loss of future income because he could not work at the supervisory position in April 2016 and that would have given him a 10% increase in pay. There was some confusion in terms of the total amount that the plaintiff says he is entitled to based on a 10% loss. According to my calculations it would add up to \$168,000 between now and the time the plaintiff reaches the age of 65. As above there is reason to question that calculation because the plaintiff continues to do some supervisory duties and he continues to receive the pay increase from 2016. According to the plaintiff there are discussions underway to relieve the plaintiff of his supervisory responsibilities. That may be a negative contingency but it has not occurred and no evidence was presented to suggest that the plaintiff's salary is expected to decrease as a result.

[144] Bearing in mind all of the positive and negative contingencies, I conclude that damages for loss of future earning capacity as a result of the July 2013 accident should be calculated at 7.5% loss of earning capacity and not 10% as the plaintiff claimed. Based on the plaintiff's 2016 income level at \$60,000 and assuming retirement at age 65 this amounts to a total of \$126,000 for the loss of his earning capacity as a result of the accident.

(v) Cost of future care

[145] The plaintiff seeks damages for future care in the amount of \$78,642. The judgment in Dabu and the authorities cited therein are relied on. The defendants say only damages for access to exercise facilities for an additional 12 months and kinesiology services are justified.

[146] A summary of the approach to be taken when considering the cost of future care is also summarized in Dabu (at paras. 88-92). As described by McLachlin J. (as she then was) in a previous decision of this court (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, at p. 83-84 (S.C.)),

... In *Andrews* [*Andrews v. Grand & Toy (Alta) Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577], *supra*, Dickson J. (as he then was) distinguished damages for cost of future care from damages for non-pecuniary loss in the following terms at p. 603 [W.W.R.]:

The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the [plaintiff's] injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries.

The physical arrangements to be used in assessing cost of future care are based on what is required to preserve and promote the plaintiff's health. In *Andrews*, *supra*, Dickson J. said at p. 586:

... to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim. [emphasis added]

In Thornton [Thornton v. School Dist. No. 57 (Prince George), [1978] 2 S.C.R. 267, [1978] 1 W.W.R. 607], supra, the court, in defining "optimal care" stated at p. 609 [W.W.R.]:

... it is clear from the medical evidence that the term merely connotes an ongoing practical level of orderly care in a home environment. [emphasis added]

If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by MacDonald v. Alderson, [1982] 3 W.W.R. 385, 20 C.C.L.T. 64, 14 M.V.R. 212, 15 Man. R. (2d) 35 (C.A.), leave to appeal to the Supreme Court of Canada refused [17 Man. R. (2d) 180n, 45 N.R. 180]. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of "autonomy, privacy, financial stability and pride of ownership ... and greater opportunities for gardening, owning a pet, and more space for hobbies". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in Andrews at p. 586:

An award must be moderate, and fair to both parties But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

This then must be the basis upon which damages for costs of future care are assessed.

It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

[147] The expert evidence on the issue of future care is from, primarily, the experts of the plaintiff.

[148] The specific items of future care at issue are:

Counselling

- [149] The plaintiff seeks 36 counselling sessions for coping with his pain and psychological symptoms over the next two years at a cost of \$210 for each session. I accept that counselling for the plaintiff's psychological and pain issues is medically justified. However, I also conclude that the duration of two years is not justified.
- [150] The cost of pain counselling over 18 months is justifiable with a cost of \$3,780 for 18 sessions. Ten further sessions after two years are also appropriate for flare-ups and review at a cost of \$2,100.
- [151] Total cost for counselling is \$5,880.

Kinesiology

- [152] Clearly kinesiology sessions have been of benefit to the plaintiff, albeit with slow improvement. The defendants accept this cost.
- [153] The plaintiff's calculation is of 90 kinesiology sessions over the next two years and another ten sessions later in life, at \$90 per session. The plaintiff has the benefit of reduced fees for access to a gym and swimming pool through his work.
- [154] I accept the plaintiff's calculation and damages of \$9,000 are payable by the defendants.

Medication

- [155] The plaintiff seeks the cost of Sertraline and Amitriptyline for life, or \$10,387. A further \$250 is sought for flare-ups and dealing with important work assignments.
- [156] I accept that the cost for some medication is justified to assist the plaintiff with his PTSD and pain, particularly to help with his sleep. There is also a suggestion by Dr. Pusztai that the PTSD will be life-long but, on the other hand, as above the plaintiff has improved and he is expected to continue to improve.
- [157] I assess the cost of medication to be \$7,500.

Physiotherapy

- [158] The plaintiff seeks physiotherapy treatment once a month over two years for pain relief. Dr. Raghavan opined that symptomatic measures like this "may be required for periodic flare up which is likely to occur in the initial stages of his workout program". There is medical justification for physiotherapy. I would concentrate the sessions earlier than proposed by the plaintiff but the number of sessions is the same.
- [159] I conclude that 36 physiotherapy sessions over two years, as proposed by the plaintiff, is justified. The cost for this is \$1,680.

Childcare

- [160] The basis for this claim is that the plaintiff has trouble sleeping and he uses medication for sleep. However, his wife sometimes works at night and he cannot take the medication in order to be alert if any problem arises with the five children. On those nights he does not sleep properly and he then has problems with concentration at work and also increased pain symptoms.
- [161] The plaintiff claims childcare costs for nine hours per week, 50 weeks a year, for five years, at \$20 per hour. The total claimed is \$42,705.
- [162] There is no specific medical support for childcare although there is medical support for the problems with sleep and with the need for medication for sleep. The evidence is that the wife works irregular nights and there is no evidence how many nights she works in, for example, a month. I conclude some childcare expenses are justified but not with the frequency and duration claimed by the plaintiff.
- [163] I conclude that \$5,000 is an appropriate amount for childcare in these circumstances.

Travel

- [164] The plaintiff travels to Kamloops for pain counselling and also to see specialists such as Dr. Raghavan. That is reasonable because a number of medical services are not available in Merritt. As above, the time period is 18 months for 18 sessions. Using the plaintiff's cost figures, the total cost is \$1,484 (85 kilometres x 2 (round trip)) x 18 trips (counselling) x .485 cents/kilometre).
- [165] Total damages for future care is \$30,544.

(vi) In-trust claim

- [166] The plaintiff claims \$7,500 to compensate for his wife looking after him, the children and the family home in the three-year period between the accident and the trial. The defendants make no submissions on this issue.
- [167] In Rutter an in-trust claim was allowed for payments to the plaintiff's husband and mother for taking care of the plaintiff's needs during the first three to four months following a first accident (at para. 307). As I understand this head of damages it is for past care, prior to trial, rather than the category of housekeeping services that is often included under future care (as allowed in, for example, Lafond, at paras. 134-136).

[168] There is no real dispute that the plaintiff's wife, Ms. Derek, has made a major contribution to the plaintiff's partial recovery from the 2013 accident. Apart from emotional support, she has managed the house, done much of the work required to maintain the house and looked after the five children. As discussed above, she has done a significant amount of the work the plaintiff would do but for the 2013 accident. This situation commenced at around June 2014 when the plaintiff and Ms. Derek moved in together.

[169] I conclude that an in-trust claim is appropriate here. Valuing it is not a precise exercise but I accept the plaintiff's approach that this should be calculated as one hour per day of extra work by Ms. Derek at a rate of \$15.00 per hour. There was some confusion regarding the calculations suggested by the plaintiff on this point, but at the end of the day the plaintiff claimed a total of \$7,500 under this heading.

[170] Based on the plaintiff's submissions the total amount payable for the plaintiff's in-trust claim is \$7,500.

F. SUMMARY

[171] The plaintiff was injured in a motor vehicle accident on July 1, 2013 caused by the negligence of the defendants.

[172] The plaintiff suffers from the following conditions that are causally related to the July 2013 accident: PTSD, chronic pain, sleep disturbance, and low back pain. These conditions continue to improve but the plaintiff continues to deal with these issues and is likely to continue to do so in the foreseeable future.

[173] The plaintiff is entitled to the following damages:

(a)

Special damages:

\$11,688

(b)

Past income loss:

\$13,854

(c)

Non-pecuniary damages:

\$100,000

(d)

Future income loss:

\$126,000

(e)

Future care:

\$30,544

(f)

In-trust claim:

\$7,500

TOTAL:

\$289,586

[174] The plaintiff has been substantially successful and, subject to any application made within 60 days of this judgment (or appeal judgment), he is entitled to his costs against the defendants at Scale 3.

"The Honourable Mr. Justice Steeves"

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