
CANADA / JUDGMENT

Schaffner v. Greenbank

2021 BCSC 1603

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Supreme Court of British Columbia

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2021 BCSC 1603 Schaffner v. Greenbank

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schaffner v. Greenbank,

2021 BCSC 1603

Date: 20210817

Docket: M1810110

Registry: Vancouver

Between:

Peter John Schaffner

Plaintiff

And

Janet Marie Greenbank

Defendant

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

P.J. Butler

Counsel for the Defendant:

T.J. Decker

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 10-14, 17-21, and

June 4, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2021

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Introduction

- [1] Peter Schaffner sustained injuries in a motor vehicle accident on May 12, 2018. His motorcycle was rear-ended by a car driven by the defendant on Highway 19A in Nanaimo (the "Accident"). As a result of the Accident, Mr. Schaffner sustained injuries to his lower back.
- [2] Liability was admitted by the defendant and the matter proceeded to trial on the issue of damages only.
- [3] The issues in this case include an assessment of Mr. Schaffner's entitlement to non-pecuniary damages, loss of income earning capacity, cost of future care, and loss of housekeeping capacity.

Before the Accident

- [4] Mr. Schaffner was 55 years old at the time of the Accident. He was 58 at the time of trial. He is the divorced father of a 14 year old daughter, with whom he enjoys a close relationship.
- [5] Mr. Schaffner is a Red Seal electrician. Since 1995, he has run his own proprietorship, Pro-Light Electric ("Pro-Light"). Before the Accident, through Pro-Light, Mr. Schaffner did electrical work on commercial construction and renovation projects, with a specialization in electrical work for refrigeration units.
- [6] Pro-Light began as a small venture. Over the years, Mr. Schaffner took on employees as the business grew, and by the late 1990s Pro-Light employed seven workers. When a key employee left in 2000, Mr. Schaffner decided to downsize the business and, while he continued to work on large construction projects and heavy refrigeration work, Pro-Light became a much smaller operation and stayed that way until the time of the Accident. In the years immediately prior to the Accident, Pro-Light had no full-time employees, although Mr. Schaffner would often hire contractors to assist with larger jobs. He described his workload during this period as "steady" and consisting of mostly office renovation and tenant improvement work. From 2014-2016, Mr. Schaffner worked on the Tsawwassen Mills mall construction, installing all the temporary power to the site during the construction of the mall.
- [7] Prior to the Accident, Mr. Schaffner had a taste for adrenaline sports and a passion for the outdoors. He enjoyed dirt biking, skiing, camping, fishing, and golf. Many of the active sports he enjoyed when he was a younger man, such as dirt biking and skiing, were less regularly pursued after his daughter was born in 2007, but until the Accident he continued to waterski and wakeboard regularly in the summer, ski often in the winter, golf about ten times per year, and camp 3-4 times per year. He owns a waterski boat, a fishing boat, and

two canoes, all of which were used regularly prior to the Accident for his various recreational pursuits.

- [8] Mr. Schaffner owned a large 4-bedroom renovated home in Tsawwassen with a swimming pool (the "Tsawwassen Home"). Just before the Accident, Mr. Schaffner listed the Tsawwassen Home for sale. Mr. Schaffner testified that he did this to test the market, and because he wanted to pay some bills and achieve some financial comfort. His plan was to sell the Tsawwassen Home and move into something smaller in Tsawwassen, where he could live until his daughter graduated from high school. Following her graduation he expected to move to Vancouver Island to retire.
- [9] Unfortunately, the Tsawwassen Home did not sell as quickly as Mr. Schaffner would have liked and, after three months, he took it off the market.

After the Accident

- [10] The Accident took place while Mr. Schaffner was en route from his home in Tsawwassen to visit his mother in Parksville. He was thrown from his motorcycle and landed on his back. He felt pain in his lower back immediately. He was escorted by ambulance to Nanaimo Regional General Hospital, where he was prescribed painkillers and advised to see his family doctor when he returned home.
- [11] Because Mr. Schaffner did not have a family doctor at the time, he attended the emergency room at Delta Hospital a few days after the Accident. When his pain did not improve after a couple of weeks, but rather became worse, he attended Delta Hospital again.
- [12] Eventually, Mr. Schaffner was able to find a primary care provider, Dr. Parhar. Dr. Parhar recommended physiotherapy, and Mr. Schaffner undertook fairly regular physiotherapy appointments from July 2018 until June 2020. He also had a number of occupational therapy appointments in 2019.
- [13] At some point after the Accident, Mr. Schaffner re-listed the Tsawwassen Home for sale. It sold in July 2019 for \$1,202,000. Mr. Schaffner believes he sold the Tsawwassen Home under the worst possible market conditions and he attributes his need to sell the property to his diminished financial circumstances post-Accident. He testified that he would not have sold the Tsawwassen Home at such a low price but for the Accident.
- [14] Mr. Schaffner received lumbar epidural steroid injections and trigger point injections from Dr. Andrew Yu, an anaesthesiologist, in 2019 and 2020. These did not provide Mr. Schaffner with long-term relief from his pain.
- [15] On December 2, 2019, Mr. Schaffner saw Dr. Sajpaul, a neurosurgeon. Dr. Sajpaul opined that Mr. Schaffner was not a good candidate for surgical intervention on his lower back and recommended that he continue conservative treatment measures.

- [16] Mr. Schaffner testified that his back is in constant pain. If he is in any sustained position for a long time, he feels pain, which makes prolonged periods of standing, sitting, or driving difficult. In order to manage the pain, he must be in constant motion. This limits his ability to work, and his ability to enjoy recreational activities.
- [17] Mr. Schaffner also suffers from disturbed sleep and low mood. He was referred to Dr. Buch, a psychologist, for counselling and has had approximately 16-17 sessions with him. These sessions have helped Mr. Schaffner to cope with the depression and anxiety symptoms he has felt since the Accident.
- [18] Mr. Schaffner also suffered from a lengthy, serious episode of vertigo from May to September 2020. The vertigo completely disabled him from working or engaging in most of his daily activities. Mr. Schaffner admits that the vertigo is unrelated to the Accident.

Medical Experts

Dr. Ansel Chu

- [19] Dr. Chu was qualified as an expert in physical medicine and rehabilitation. In his expert report dated December 7, 2020, he diagnosed Mr. Schaffner with chronic pain in the lower back. He opined that the source of the pain could be discogenic or that it could originate in the facet joints. He noted that the source could potentially be determined with the use of anaesthetic blocks in the area of the facet joint suspected to be engaged.
- [20] Dr. Chu opined that the Accident was most likely the cause of Mr. Schaffner's ongoing lower back pain. His prognosis was that Mr. Schaffner's lower back pain will likely not resolve, although he noted that different treatments may be available to provide some relief, depending on whether the source of Mr. Schaffner's pain was disc-related or based in the facet joints.

Dr. Parhar

- [21] Dr. Parhar has been Mr. Schaffner's family physician since June 2018. He was qualified as an expert in family medicine and he prepared an expert report dated October 16, 2020.
- [22] Dr. Parhar diagnosed Mr. Schaffner with a number of conditions that arose from the Accident. Some of those conditions resolved shortly after the Accident. However, according to Dr. Parhar's report, the following conditions continued to cause Mr. Schaffner difficulty at the time Dr. Parhar wrote his report: musculoligamentous injuries of the lumbar spine, depressed mood, anxiety, and sleep disturbance.

- [23] With respect to Mr. Schaffner's musculoligamentous injury, Dr. Parhar concluded that it was more likely than not that Mr. Schaffner had reached a plateau, or maximum medical improvement, with respect to his recovery. Dr. Parhar also opined that Mr. Schaffner's depressed mood and anxiety had reached maximum medical improvement and would, more likely than not, continue for the foreseeable future.
- [24] Dr. Parhar opined that Mr. Schaffner's future occupational opportunities are extremely limited. He opined that Mr. Schaffner would need to avoid work activities that require sustained postures of sitting, standing, prolonged walking, or repetitive bending and twisting of the lumbar spine. Due to his ongoing depressed mood, Dr. Parhar opined that Mr. Schaffner should avoid work that involves emotionally intense interactions with clients, customers, co-workers, or supervisors and, due to his anxiety, should avoid work activity that involves excessive driving to and from job sites.
- [25] Dr. Parhar also opined that Mr. Schaffner's personal, family, and social life challenges are all directly the result of the injuries he sustained in the Accident.
- [26] Dr. Parhar recommended a physical fitness program and counselling for Mr. Schaffner's depressed mood and anxiety.

Other Experts

Phil Towsley

- [27] Mr. Towsley was qualified as an expert in occupational therapy, work capacity evaluation, and cost of care analysis. He prepared an expert report dated November 5, 2020.
- [28] Mr. Towsley conducted a functional capacity examination of Mr. Schaffner for one day on October 27, 2020. His conclusions with respect to Mr. Schaffner's ability to work were as follows:
- a) Mr. Schaffner is not currently capable of working on a full-time and unrestricted basis in his occupation as an owner/operator of a commercial and residential electrician business due to his decreased tolerance for sitting, standing, walking, climbing, bending and stooping, low-level work, lifting, carrying, and pulling.
 - b) Mr. Schaffner is not currently capable of working on a full-time and unrestricted basis as a foreman or electrician, or as an employee for another electrical company. While Mr. Towsley conceded that Mr. Schaffner may be able to perform some degree of oversight or supervision, performing duties on a full-time basis would likely fall below his capacity and tolerance levels. Also, Mr. Towsley noted that Mr. Schaffner had decreased tolerance related to bending, stooping, low-level work, and even standing and walking, which would make it difficult for him to perform the work of an electrician.

- c) If Mr. Schaffner continues to work in his field in some capacity, he would not be able to lift or carry items above 20 to 30 pounds and would need the amount of pushing and pulling he engaged in to be limited. As such, Mr. Schaffner would be best suited to a supervisory role or one involving inspection services, and even in those roles he would have limitations.
 - d) In terms of other fields and occupations, Mr. Towsley opined that Mr. Schaffner does not appear to be well-suited for full-time work. He would be limited in any job that requires more than 20-30 pounds of lifting and carrying, or prolonged weight bearing, bending, or low-level work.
- [29] On cross-examination, Mr. Towsley admitted that if Mr. Schaffner were not working at a job that included stooping, bending, or heavy lifting, he would be able to work durably for a longer period of time and may not be limited to part-time work.

Shannon Smith

- [30] Ms. Smith was qualified as an expert in occupational therapy qualified to express opinions on functional care needs. She did not conduct a functional capacity evaluation of Mr. Schaffner, but rather prepared a responsive opinion to that of Mr. Towsley.
- [31] Ms. Smith disagreed with Mr. Towsley's conclusion that Mr. Schaffner was better suited to part-time work. She was of the view that this conclusion was supported by neither the data Mr. Towsley obtained from Mr. Schaffner's functional capacity evaluation, nor Mr. Towsley's opinion that Mr. Schaffner was capable of improved function if aggravating physical demands were limited.

Derek Nordin

- [32] Mr. Nordin was qualified as an expert vocational consultant. His report is dated December 29, 2020. Mr. Nordin submitted Mr. Schaffner to a battery of vocational tests and made a number of conclusions about his vocational prospects, including:
- a) Mr. Schaffner's vocational barriers will likely limit his ability to continue working as a self-employed electrician on a full-time basis.
 - b) Mr. Schaffner would require a highly sympathetic employer who would be willing to provide him with significant accommodations such as a reduced work schedule, reduced demands for any heavy physical activity, reduced demands on driving to and from worksites, and avoidance of work activities that involve high stress levels. Mr. Nordin opined that such accommodations are unlikely to be offered in the competitive workforce and as a result, concluded: "I do not believe Mr. Schaffner has a realistic expectation of being hired by another employer, given his emotional and physical limitations, as well as his advancing age".

Colleen Quee Newell

- [33] Dr. Colleen Quee Newell was qualified as a vocational expert. She did not conduct a vocational evaluation of Mr. Schaffner, but she prepared a responding report to the opinion of Mr. Nordin.
- [34] Dr. Quee Newell was critical of Mr. Nordin's report for not applying any form of effort testing. She also opined that Mr. Schaffner's numerical abilities were likely higher than the results of the aptitude tests administered by Mr. Nordin would suggest. She questioned Mr. Nordin's opinion that, due to Mr. Schaffner's age, he is not a candidate for vocational retraining.
- [35] Dr. Quee-Newell was critical of Mr. Nordin's failure to consider employment options related to Mr. Schaffner's work as an electrician, such as working as an electrical estimator or project manager. She suggested that, with retraining, Mr. Schaffner may suitably pursue a new career as a building inspector.
- [36] Interestingly, while they disagree on many points, Mr. Nordin and Dr. Quee Newell both opined that Mr. Schaffner was likely best off continuing to pursue his current vocation as a self-employed electrician. Mr. Nordin opined that it is likely Mr. Schaffner will attempt to continue to operate Pro-Light to the best of his ability for the foreseeable future. Dr. Quee Newell noted that "it would be reasonable for vocational rehabilitation intervention to focus on assisting Mr. Schaffner to continue with his electrical contracting business with the goal of transitioning to a purely administrative role".

Jeff Matthews

- [37] Mr. Matthews is an accountant who testified as an expert in income loss matters. He prepared a report dated January 27, 2021, containing his opinion with respect to Mr. Schaffner's past and future loss of income earning capacity.
- [38] Mr. Matthews estimated Mr. Schaffner's past loss of income to be between \$130,000 and \$243,000, net of personal income taxes. He estimated his future income loss as being in the range of \$627,000 to \$1,441,000.
- [39] In preparing his report, Mr. Matthews made the following assumptions:
- a) But for the Accident, Mr. Schaffner would have continued to operate Pro-Light electric in the same capacity that he had prior to the Accident.
 - b) The reduction in Mr. Schaffner's gross profit following the Accident was a result of the Accident-related injuries, except for the period of May 4, 2020 to September 1, 2020, when he was disabled due to an unrelated episode of vertigo.

- c) But for the Accident, Mr. Schaffner would have earned an annual income to age 65 equal to either his 2017 income, or his average income over the five-year pre-Accident period from 2013-2017.
- d) But for the Accident, Mr. Schaffner would have worked full-time to age 65, and then gradually slowed down, with a reduction in income in each year until he turned 70 and retired.
- e) As a result of the Accident, Mr. Schaffner will earn annual income from the date of trial to age 70 equal to either: a) nothing; b) \$8,351 (10 hours per week at minimum wage); or c) \$10,296 (10 hours per week at \$18 an hour).

Sergiy Pivnenko

- [40] Mr. Pivnenko was qualified as an expert in labour economics. His report dated February 11, 2021, provided estimates of present values for the cost of future care recommendations made by Phil Towsley and for the labour market risks applicable to Mr. Schaffner.
- [41] Mr. Pivnenko estimated that, among males in B.C. in the age range of 58 to 65, who are able to work and who have completed registered apprenticeship certificate programs, labour market risks (including unemployment, limited hours, long term illness, and disability) reduce annual earnings by about 11%.

Non-Pecuniary Damages

- [42] The plaintiff seeks an award of \$200,000 for non-pecuniary damages. The defendant submits that non-pecuniary damages should be assessed in the range of \$80,000 - \$100,000.
- [43] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. In assessing non-pecuniary damages, the court may look to awards made in analogous cases. However, each case must turn on its own unique facts. No two personal injury claims are identical and awarding damages involves an exercise of judgment: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [44] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal enumerated the factors to be considered in assessing non-pecuniary damages. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism.

- [45] The plaintiff put a number of cases before the court in which the range of general damages awarded was between \$120,000 - \$200,000. In support of the submission that the court should make an award at the high end of this range, the plaintiff relied on the case of *Felix v. Hearne*, 2011 BCSC 1236. In *Felix*, the 46 year old plaintiff suffered from a pervasive emotional disorder as well as physical injuries to her neck, back, wrist, shoulder, and ankle. She was awarded \$200,000 in non-pecuniary damages.
- [46] The plaintiff also relied on *Ashcroft v. Dhaliwal*, 2007 BCSC 533 (\$120,000); *Chahal v. Righele*, 2014 BCSC 1086 (\$120,000); *Danroth v. Dufresne*, 2021 BCSC 864 (\$120,000 before reduction for pre-existing condition); *Eccleston v. Dresen*, 2009 BCSC 332 (\$120,000); *Reynolds v. M. Sanghera & Sons Trucking Ltd.*, 2014 BCSC 212 (\$120,000); *Kam v. Van Keith*, 2015 BCSC 1519 (\$125,000); *Clayton v. Barefoot*, 2018 BCSC 239 (\$130,000); *Marois v. Pelech*, 2007 BCSC 1969 (\$130,000); and *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, 2011 BCSC 762 (\$160,000 before reduction for prior condition).
- [47] The defendant relied on the following cases in support of her position on non-pecuniary damages: *Binning v. Kandola*, 2021 BCSC 157 (\$95,000); *Fedosenko v. Zahirfar*, 2018 BCSC 1297 (\$80,000 before reduction for pre-existing condition); and *Flore v. Jongkind*, 2018 BCSC 721 (\$90,000).
- [48] I have considered the cases cited by both counsel. Each case turns on its own specific facts. On the facts, I find that the most analogous cases tendered by the plaintiff are *Ashcroft* and *Danroth*. In terms of the defendant's cases, the most factually analogous is *Binning*, although in that case the plaintiff did not require counselling and appeared to have suffered lesser emotional injuries than Mr. Schaffner.
- [49] Since the Accident, Mr. Schaffner has been unable to engage in many of his favorite activities including golf, skiing, dirt-biking, waterskiing, and wakeboarding. His social relationships have been detrimentally impacted, since most of his friendships were centred around recreational activities that he can no longer enjoy.
- [50] Jim Immler described what has happened since the Accident as a "meltdown" of Mr. Schaffner's emotional state. William Farden described him as "depressed and overall not very happy" and says that Mr. Schaffner has "lost his mojo". Dr. Parhar opined that Mr. Schaffner is unlikely to experience any further improvement to his depressed mood, anxiety, and sleep disturbances. The negative emotional changes he has suffered as a result of the Accident are likely to be permanent.
- [51] Mr. Schaffner's relationship with his teenage daughter has deteriorated in recent years. Mr. Schaffner attributes this to the Accident. He has had to move to a smaller home that is less comfortable for her, and he is less able to engage in activities with her. This has made her more distant with her father, and less interested in spending time with him. The deterioration of his relationship with his daughter is very upsetting to Mr. Schaffner.

- [52] I am unable find a causal connection between Mr. Schaffner's sale of the Tsawwassen Home and the Accident, since he initially listed the property for sale in advance of the Accident. Therefore, to the extent that Mr. Schaffner's daughter no longer wants to spend as much time with him because she is unhappy with his current residence, this is not relevant to the assessment of non-pecuniary damages. However, I find that Mr. Schaffner's inability to engage in physical activities like skiing with his daughter is Accident-related, has had a detrimental impact on their relationship, and is therefore relevant when considering Mr. Schaffner's loss of enjoyment of life.
- [53] In addition to his family and personal relationships, Mr. Schaffner's working life has collapsed since the Accident. Prior to the Accident, Mr. Schaffner had always been successful in his chosen vocation. He was described by lay witnesses as a powerful person who was in control of his own destiny. His success in his business, and the affluent lifestyle he was able to build for himself, were integral to his identity.
- [54] Since the Accident, Mr. Schaffner has had to borrow money from his friend Jim Immler, and from his brother Otto Schaffner, to pay his bills and to keep his business afloat. He is not, and will never be, the success he once was. His Accident-related injuries have not just impacted his income earning capacity; they have diminished his sense of self.
- [55] In the circumstances, I assess non-pecuniary damages in the amount of \$120,000.

Mitigation

- [56] The defendant seeks a reduction in Mr. Schaffner's non-pecuniary damages award on the basis of failure to mitigate.
- [57] A plaintiff has an obligation to take all reasonable measures to reduce their damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.
- [58] The duty to mitigate is a positive duty. However, if a defendant's position is that the plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue: *Graham v. Rogers*, 2001 BCCA 432 at para. 35.
- [59] A defendant who wishes to establish that a plaintiff has failed to mitigate their loss must prove two things:
- a) that the plaintiff acted unreasonably in eschewing the recommended treatment; and
 - b) the extent, if any, to which the plaintiff's damages would have been reduced had they acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 [Chiu] at para. 57.
- [60] The defendant argues that Mr. Schaffner failed to mitigate his loss because he did not follow all of the treatment recommendations made by Dr. Parhar. Specifically, she submits that he did not pursue massage therapy, chiropractic treatments, or kinesiology, when recommended to do so by Dr. Parhar.

- [61] With respect to massage and chiropractic treatment, it is somewhat inconsistent for the defendant to argue that Mr. Schaffner failed to mitigate his losses by failing to pursue passive therapies when, at the same time, the defendant has argued that ongoing physiotherapy should be disallowed as a cost of future care since passive therapies are of little assistance in ongoing pain management. While massage and chiropractic treatment may have provided Mr. Schaffner with some short-term relief, which is likely why Dr. Parhar recommended them, there is no evidentiary basis on which I could conclude that passive therapies of this nature would have any long-term impact on Mr. Schaffner's condition such that his failure to pursue them could be construed as a failure to mitigate his loss.
- [62] With respect to kinesiology, both Dr. Chu and Dr. Parhar recommended active rehabilitation/ kinesiology to Mr. Schaffner. Mr. Schaffner testified that he tried kinesiology once, it exacerbated his pain, and he has not gone back. He has testified that he would try kinesiology again if it helped his condition. I find that Mr. Schaffner's prior reluctance to engage in active rehabilitation was not unreasonable and does not constitute a failure to mitigate. As a result, I decline to reduce Mr. Schaffner's non-pecuniary damages award on the basis of failure to mitigate.

Loss of Income Earning Capacity

- [63] In *Falati v. Smith*, 2010 BCSC 465 at paras. 40-41, aff'd 2011 BCCA 45, this Court set out certain principles which inform the assessment of loss of earning capacity:
1. The amount of damages for loss of earning capacity may involve a consideration of hypothetical events;
 2. The standard of proof is not the balance of probabilities. The plaintiff need only establish a real and substantial possibility of loss;
 3. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong; and
 4. The court must undertake an assessment of damages for loss of earning capacity, rather than take a purely mathematical approach to the issue.

Past loss of income

- [64] Compensation for past loss of earning capacity is to be based on the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [65] The plaintiff seeks an award of \$243,000 for past loss of income earning capacity. The defendant's position is that an appropriate award for past loss of income earning capacity is between \$130,000 and \$150,000.

- [66] The difference in these two amounts results from the parties' different views of what Mr. Schaffner's business income, but for the Accident, would have been. While the parties agree that, but for the Accident, it is likely that Mr. Schaffner would have continued his business at Pro-Light until retirement, they disagree on whether his absent Accident income should be calculated with reference to his income for the last full year prior to the Accident (2017), or an average of the five years leading up to the Accident (2013-2017). The defendant submits that the plaintiff's 2017 income should be used to estimate his income but for the Accident. The plaintiff argues that his average income for the five years preceding the Accident should be used.
- [67] Mr. Schaffner's business had a bad year in 2017. Pro-Light's gross profits that year (\$125,625) were considerably lower than 2016 (\$238,146), 2015 (\$213,495), 2014 (\$209,508) or 2013 (\$145,646). Mr. Schaffner refers to 2017 as an anomaly and submits that an average of his income over the five years 2013-2017 would provide a more accurate reflection of his likely income but for the Accident. The average annual gross profit for the years 2013-2018 is \$186,484 and the average net income to Mr. Schaffner for these years, as calculated by Mr. Matthews, is \$156,832.
- [68] The success of Mr. Schaffner's business is tied to a number of factors, including his success in bidding on larger projects. His largest project, Tsawwassen Mills, completed in 2016. He had no large projects in 2017, although in late 2017 he secured a large contract with a refrigeration company called Snowcap, for work that would start in 2018. I find that, like any independent businessperson, Mr. Schaffner has good years and bad years. Sometimes the large projects he bid on did not come to fruition and sometimes they did. In this context, it would negatively distort Mr. Schaffner's income to use his worst annual income in five years, which happened to be the year before the Accident, to assess his likely future annual income but for the Accident. Rather, I find it is more appropriate in determining Mr. Schaffner's income but for the Accident to look at an average of his income for the five years before the Accident.
- [69] As a result, using the calculations provided by Mr. Matthews to determine past loss of income for the period of time from the date of the Accident to the date of trial, which include deductions for income tax, I am satisfied that Mr. Schaffner's past loss of income should be assessed at \$243,000.

Future income loss

- [70] Mr. Schaffner seeks an award of \$1,441,000 for future loss of income earning capacity. The defendant submits that a future loss of income earning capacity award should be in the range of \$350,000 - \$400,000.

- [71] A plaintiff may prove the quantification of loss of future earning capacity on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Either way, this Court must endeavour to quantify the financial harm accruing to the plaintiff from his injuries over the course of his working career, taking into account relevant and realistic negative and positive contingencies.
- [72] With respect to an award for loss of future income earning capacity, the court must consider overall fairness and reasonableness, taking all the evidence into account. The process of assessing damages on the basis of hypothetical future events may be characterized as an art, as opposed to an exact science: *Shapiro v. Dailey*, 2012 BCCA 128 at para. 40.
- [73] A plaintiff is entitled to be compensated for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The valuation of loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the Accident with what he will probably earn in his injured condition. Since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.
- [74] There are two primary disputes between the parties that impact their differing positions on future income loss: Mr. Schaffner's likely retirement age but for the Accident, and Mr. Schaffner's residual future income earning capacity post-Accident.
- [75] With respect to his likely retirement age, Mr. Schaffner submits that, but for the Accident, he would have gradually decreased the amount he worked, starting at age 65, by 5% per year, and fully retire at age 70. This is not consistent with Mr. Schaffner's own evidence. Mr. Schaffner testified that he had intended to stay in Tsawwassen until his daughter, now 14, graduated from high school, at which point he planned to move to the island and only work for "fish bait and golf fees".
- [76] I find that prior to the Accident, it was Mr. Schaffner's plan to work until he was approximately 65 before retiring to Vancouver Island, and that any income earning work he did after age 65 would have been nominal. As a result, I have used a retirement age of 65 in assessing Mr. Schaffner's probable future income but for the Accident.
- [77] The other significant area of dispute is Mr. Schaffner's likely vocational prospects post-Accident.
- [78] Mr. Schaffner testified at length about his diminished ability to perform his work as a contractor electrician on large projects. He estimates that he is only capable of working approximately 10 hours per week due to his ongoing back pain, and he states that he is simply unable to do much of the heavier work that he previously performed in his job, such as running heavy cables, lifting, and crouching. Most of his current business consists of service and maintenance work for ongoing "bread and butter" clients. This involves light

work that is not particularly time-consuming, and therefore not particularly remunerative.

- [79] In his functional capacity evaluation, Mr. Towsley concluded that Mr. Schaffner was not capable of working full-time on an unrestricted basis. While Mr. Towsley's vocational assessment was the subject of considerable criticism by the defendant's occupational expert, his conclusion that Mr. Schaffner is not functionally capable of working full-time as an electrician is supported by a number of lay witnesses.
- [80] Doug Gosselin, Mr. Schaffner's former employee who now runs his own electrical contracting business, reached out to Mr. Schaffner in March 2020 about a potential partnership. He was renovating a restaurant and offered Mr. Schaffner the opportunity to do the electrical work with him and split the fees. Mr. Schaffner attended the job site, looked at the work involved, and turned the project down on the basis that his injuries disabled him from being able to do the required work.
- [81] Sean Murphy, who works as a superintendent for Houle Electric, a large electrical contracting company, has worked with Mr. Schaffner a number of times over the years. He testified that he approached Mr. Schaffner to work for Houle on multiple occasions before the Accident. After the Accident, Mr. Schaffner approached Mr. Murphy about the possibility of him working for Houle as an employee electrician. Mr. Murphy testified that he "couldn't in good faith give him the job" because he was not confident that Mr. Schaffner was capable of doing the work involved.
- [82] In 2019, Mr. Schaffner's brother, Otto Schaffner, offered to hire Mr. Schaffner to do all the electrical work on a house he was building in Whistler. Mr. Schaffner had to turn him down because he couldn't do the work.
- [83] Richard Prokop runs a collision shop in South Vancouver. Before the Accident, he hired Mr. Schaffner approximately 12-14 times per year to do electrical jobs around his shop. After the Accident, he hired Mr. Schaffner to do some work on one of his signs. However, Mr. Schaffner was unable to complete the job due to his back pain.
- [84] I am satisfied, on the basis of these witnesses, Mr. Schaffner's own evidence, and the medical and functional capacity evidence, that Mr. Schaffner is no longer able to do most of the heavy work involved in being an electrician on a full-time basis. He is, however, capable of continuing to run his business on a limited, part-time basis as he has done since the Accident.
- [85] Given his age and his physical and emotional impairments, I cannot find a real and substantial possibility that Mr. Schaffner will pursue a career in retail at a big box store, as suggested by Mr. Nordin, nor that he will requalify to work as a building inspector, as suggested by Dr. Quee Newell. Rather, it appears that the only real and substantial possibility is that Mr. Schaffner will continue to operate Pro-Light as a not particularly profitable business for the foreseeable future. Indeed, the vocational experts and Mr. Schaffner himself all agreed that the most likely vocational outcome for him was that he would

continue to run his business until retirement. This means that in order to assess Mr. Schaffner's future income loss, it is necessary to look to the likely future net income of Pro-Light from now until Mr. Schaffner's retirement.

- [86] In the three years since the Accident, Mr. Schaffner has continued to operate Pro-Light, and the success of the business provides some indicia of Mr. Schaffner's likely future income if he continues to run Pro-Light until age 65. While Mr. Schaffner began working on the Snowcap contract prior to the Accident in the spring of 2018, he continued to work on that contract with some assistance from subcontractors after the Accident. He also did work for other customers during this time. In 2018, his net income was \$87,530.
- [87] 2019 and 2020 were considerably less prosperous years for Mr. Schaffner. He continued to operate Pro-Light, but in 2019 his net income was only \$3,326. In 2020, Mr. Schaffner was disabled from working at all between May and September due to a vertigo condition unrelated to the Accident. He had a net income loss of \$17,917 in 2020.
- [88] Unfortunately, the possibility of Mr. Schaffner continuing his business at Pro-Light was not one of the scenarios that Mr. Matthews was asked to consider in his income loss calculations. However, I am satisfied that there is sufficient evidence to make a fair assessment of the probable future earnings of Pro-Light.
- [89] Before and after the Accident, Mr. Schaffner has had good years and bad years. He remains a highly experienced and skilled electrician whose expertise is valued in the industry. While he has not been successful in securing large contracts since the Accident, he was able to complete a large portion of the Snowcap contract after the Accident with the assistance of subcontractors. I am satisfied that it is probable that Mr. Schaffner will be able to secure some larger contracts in the future. However, because of his physical limitations arising from his injuries, Pro-Light will likely never be as profitable as it was pre-Accident. There may be some years, like 2020, where Pro-Light is not profitable at all.
- [90] At first blush, the most indicative post-Accident year in terms of assessing Pro-Light's likely future profitability would appear to be 2019. It is the first full year that Mr. Schaffner worked following the Accident. It is also the only full post-Accident year in which Mr. Schaffner's ability to work has not been inhibited by a health condition unrelated to the Accident.
- [91] However, given the vast difference from year to year in Mr. Schaffner's income, and the fact that his swings in income are mostly attributable to his ability to secure larger projects in a particular year, I am not satisfied that it would be fair or reasonable to assume that Mr. Schaffner's income from 2019 is indicative of Mr. Schaffner's likely future income. Rather, I find that it is more likely than not that he will have some years in the future that resemble 2018, insofar as he will likely be successful in bidding on some larger projects that, with the assistance of subcontractors, he will be able to complete and earn a better income than he would doing service and maintenance for his long-term customers.

- [92] Keeping in mind that this determination is an assessment and not a precise calculation, I have assessed Mr. Schaffner's likely future net income at \$40,000 per year to age 65.
- [93] If Mr. Schaffner's absent Accident annual net income is to be assessed with reference to the average of the years 2013-2018 (\$156,832), in order to assess his future income loss, the assessed with accident annual future income of \$40,000 must be deducted. I have also deducted from this amount the 11% labour market risk proposed by Mr. Pivnenko (\$17,252), on the basis that there is a real and substantial possibility of various future contingencies that would negatively impact Mr. Schaffner's future income irrespective of the Accident.
- [94] This leads to an assumed annual loss of \$99,580. Applying Mr. Matthews' multiplier of 5.767 for determining loss from date of trial to age 65, this results in the sum of \$574,277. I therefore assess Mr. Schaffner's loss of future income earning capacity claim in this amount.

Special Damages

- [95] The plaintiff and defendant have agreed on the sum of \$8,000 for special damages.

Cost of Future Care

- [96] The purpose of an award for future care is to compensate a plaintiff for costs which reasonably may be expected to be incurred to preserve and promote the plaintiff's mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30.
- [97] The test for assessing future care costs is well-settled and asks (i) whether the costs are reasonable and (ii) whether the items are medically necessary: *Tsalamandris v. McLeod*, 2012 BCCA 239 at para. 62.
- [98] In assessing what is reasonably necessary to promote the plaintiff's health, the Court should also consider whether the plaintiff would likely use the items or services in the future: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.
- [99] The quantification of damages for the cost of future care is an assessment and not a precise accounting exercise. Adjustments must be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 108.
- [100] Where there is an evidentiary link between (i) a physician's assessment of a plaintiff's level of pain and injury incurred and (ii) the treatment and care recommended by an occupational therapist, the evidence of an occupational therapist may be used to establish the future care needs of a plaintiff without the need for a physician to testify to the necessity of every item of care claimed: *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.) at para. 18, quoted with approval in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 36-39.

[101] In this case, Mr. Towsley made a number of care recommendations. The defendant agrees with the following cost of care claims:

- a) Initial physiotherapy treatment: \$1,425;
- b) Kinesiology: \$1,500;
- c) Recreation centre pass: \$550 per year (to age 65, then \$300 per year);
- d) Occupational Therapy: \$1,085.60; and
- e) Medications: Trazodone (\$21.90 per year) and Duloxetine (\$386.90 per year), plus dispensing fee (\$80 per year).

[102] The defendant disputes the following recommendations of Mr. Towsley:

- a) Ongoing physiotherapy: \$760 per year;
- b) Chronic pain management program: \$13,600;
- c) Counselling: \$2,000 initially, then six sessions a year at \$200 a session;
- d) Vocational assessment counselling: not quantified; and
- e) Equipment allowance and back support: \$620.

[103] I agree with the defendant that the claim for ongoing physiotherapy and ongoing counselling for the rest of Mr. Schaffner's life is not reasonable. There was simply no medical evidence to support the notion that Mr. Schaffner would benefit from indefinite ongoing physiotherapy or counselling.

[104] I agree with the defendant that an initial course of physiotherapy to make Mr. Schaffner independent in his pain management is reasonable. With respect to counselling, I am satisfied that there is an evidentiary basis for finding that Mr. Schaffner would benefit from counselling in the short to medium term. Dr. Parhar suggested that Mr. Schaffner would benefit from 8-10 sessions of counselling. The plaintiff's initial claim of \$2,000 for counselling is appropriate.

[105] The defendant's occupational therapy expert, Ms. Smith, testified that chronic pain management programs are multi-disciplinary treatment programs that encompass physiotherapy, kinesiology, psychological counselling, and occupational therapy. She opined that it would be duplicative for a patient to engage in a clinic-based pain management program and multi-disciplinary community-based rehabilitation. Ms. Smith was cross-examined on this point and she was firm in her view that most patients do not require both a chronic pain program and community-based therapies. I accept her views on this and, as a result, I find that the chronic pain management program is not a reasonable cost of care expense.

[106] The defendant does not oppose Mr. Schaffner obtaining a vocational assessment and counselling, but notes that very little evidence has been advanced about the actual cost of these items. Mr. Towsley estimated that a vocational assessment would cost between \$0 and \$5,500, while vocational counselling would cost between \$0 and \$1,200. The defendant suggests an allowance of \$2,000. In my view, a more reasonable amount to allocate for vocational assessment and counselling would be something closer to the middle of Mr. Towsley's range, and therefore I find \$3,500 is a reasonable amount for vocational assessment and counselling.

[107] I agree with the defendant that the claims for an equipment allowance and back support are not supported in the evidence and I do not allow them.

[108] The present value of the allowed cost of care claims, as calculated by Mr. Pivnenko, is as follows:

- a) Initial physiotherapy treatment: \$1,407;
- b) Kinesiology: \$1,481, plus tax of \$74;
- c) Recreation centre pass to age 65: \$3,150 plus tax of \$157;
- d) Recreation centre pass age 65 onward: \$4,038 plus tax of \$202;
- e) Occupational therapy: \$1,072;
- f) Counselling: \$1,974;
- g) Vocational assessment and counselling: \$3,500 x present value multiplier of .987 = \$3,454; and
- h) Medications: \$9,378.

TOTAL: \$26,387.

Loss of Housekeeping Capacity

[109] Loss of housekeeping capacity may be compensated by a pecuniary award, or it may be considered as part of the assessment of non-pecuniary damages: *McTavish v. MacGillivray et al.*, 2000 BCCA 164 at para. 73.

[110] Where a plaintiff suffers an injury that would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work, a pecuniary damages award may be appropriate. Where the loss is more in keeping with a loss of amenities, or increased pain and suffering, the loss may be more appropriately addressed as part of a non-pecuniary damages award: *Quigley v. Cymbalisty*, 2021 BCCA 33 at para 72.

[111] In this case, Mr. Schaffner testified that he does most of his own housework such as laundry and light cleaning, but he requires his daughter to assist with heavy work such as vacuuming.

[112] As noted by Justice Huddart in *McTavish* at para. 63:

When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

[113] The services presently performed by Mr. Schaffner's daughter to assist him with housekeeping have an economic value. No evidence was tendered as to the value of these services. Assuming that the housekeeping work Mr. Schaffner is unable to do is limited to vacuuming and other heavy work, I assess the loss of housekeeping capacity claim at \$10,000.

Conclusion

[114] In summary, the damages are assessed as follows:

Non-pecuniary damages

\$120,000

Past Income Loss

\$243,000

Future income loss

\$574,277

Special Damages

\$ 8,000

Cost of Future Care

\$ 26,387

Loss of Housekeeping Capacity

\$ 10,000

TOTAL

\$981,664

[115] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to appear before me to speak to the issue, but they must make such arrangements within thirty days of the date of these Reasons for Judgment.

"Madam Justice Francis"

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