

CANADA / JUDGMENT

Skibo v. Senkler

2020 BCSC 1687

COURT

Supreme Court of British Columbia

DECIDED

6 November 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1687 Skibo v. Senkler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skibo v. Senkler,

2020 BCSC 1687

Date: 20201106

Docket: M80173

Registry: Nanaimo

Between:

Keith Skibo

Plaintiff

And

David Harold Senkler and Gordon Senkler

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

Counsel for the Plaintiff:

I. D. McIver

B. Durvin

Counsel for the Defendants, David Harold Senkler, Gordon Senkler:

B. Boan

Place and Dates of Trial:

Nanaimo, B.C.

March 9-13, 2020

Place and Date of Judgment:

Nanaimo, B.C.

November 6, 2020

Table of Contents

Introduction.. 3

Background.. 4

The Credibility of the Plaintiff and the Lay Witnesses.. 5

The Pre-Accident Health of the Plaintiff.. 5

The Accident on January 12, 2015. 6

The Post-Accident Health of the Plaintiff.. 7

Causation Issues.. 9

Medical and Capacity Evidence.. 11

Dr. Steven Helper, Psychiatrist 11

Mr. Andrew Hosking, Physiotherapist and Capacity Evaluator 12

Dr. Alan Richardson, Orthopedic Surgeon.. 14

Summary of the Expert Evidence. 14

Non-Pecuniary Damages.. 15

Failure to Mitigate. 17

Loss of Earning Capacity.. 20

Legal Principles. 20

Past Wage Loss. 25

Future Loss of Earning Capacity. 25

Special Damages.. 27

Cost of Future Care.. 27

Conclusion.. 29

Introduction

- [1] These reasons address the appropriate quantum of damages in this personal injury action arising from a rear-end motor vehicle accident in Langley on January 12, 2015 (the "Accident"). The plaintiff was on his way to work early that morning when an insured driver struck his vehicle from behind. Liability is admitted, and the defendants do not dispute that the plaintiff suffered injuries in the Accident. There is no issue of contributory negligence. Rather, the defendants take issue with the effect of the plaintiff's injuries on his earning capacity, and they submit that any award for non-pecuniary damages ought to be reduced due to a failure to mitigate his damages.
- [2] The plaintiff, a heavy-duty mechanic, suffered soft tissue injuries to his neck and his cervical, thoracic and lumbar spine in the Accident. His lower back injuries in particular have persisted and allegedly interfered with his enjoyment of life and his earning capacity. In the past, the plaintiff was in exceptional physical shape. However, he historically suffered from occasional seizures, and it is necessary to distinguish between impairments that arise from the Accident from those that do not.
- [3] As a result of the ongoing injuries to his back, the plaintiff claims for non-pecuniary damages, past income loss, future loss of earning capacity, cost of future care, and special damages. Counsel have agreed upon the appropriate awards for past wage loss and specific damages.
- [4] Overall, the plaintiff seeks awards of \$90,000 to \$110,000 for non-pecuniary damages, \$11,899 for past wage loss, \$60,063.98 for the cost of future care, \$550,000 for the loss of future earning capacity, and \$3,311.25 for special damages. The total claim by the plaintiff amounts to \$725,274.23.
- [5] The defendants suggest awards of \$55,000 to \$65,000 for non-pecuniary damages, with a reduction for a failure to mitigate, a more modest award for future care, and either no award or a much-reduced award for the loss of future earning capacity.

Background

- [6] The plaintiff was 28 years old at the time of trial and currently resides in Princeton, B.C.
- [7] He grew up in the Cloverdale area of Surrey and graduated from Clayton Heights Secondary School in 2009.
- [8] In his youth, the plaintiff played baseball for a couple of years when he was 14 or 15. He also went snowboarding several times per year up to the time of the Accident. However, his sport of choice was hockey: ice hockey, ball hockey, and roller hockey. He was in various leagues and continued to play even into adulthood.

- [9] As for work, during high school, the plaintiff had various part-time jobs, stocking shelves at Canadian Tire and Save-On-Foods, and working at a local restaurant. As the plaintiff's brother, father, and grandfather were longshoremen, he was able to "get on the boards," as he termed it, when he was 19 years old. This involved physically demanding work at the Deltaport and the Fraser Surrey Docks. He has continued to work occasionally as a longshoreman in order to maintain his status.
- [10] Like many, the plaintiff found his calling after high school. He initially worked as a labourer at two different sawmills. But, always interested in mechanics, he chose to participate in a pre-apprentice program at Vancouver Community College. He then pursued his apprenticeship as a heavy-duty mechanic at Trico Excavating. Subsequently, the plaintiff worked for Brandt Tractor Ltd. ("Brandt"), which sponsored the plaintiff's heavy-duty mechanic's certificate. He progressed at that company from power washing duties to more labour intensive jobs and mechanical work. He was working as a third-year apprentice at Brandt at the time of the Accident.
- [11] At the time of the Accident, the then 23-year-old plaintiff lived in Langley. He subsequently moved to another property but later returned to his parents' home after having a seizure in May of 2015.
- [12] Following the Accident, the plaintiff met his future wife, Tasha Gillingham, a nurse, in December of 2015. After dating for months, they moved in together in a home in Surrey in the summer of 2016. They now have a child together, born in June of 2018, and Ms. Gillingham has a nine-year-old child from a previous relationship.
- [13] The plaintiff and his family moved to Princeton in 2017 in search of a better lifestyle and a better job. He left Brandt in May 2017 and found work with Copper Mountain Mining ("Copper Mountain") in June as a journeyman heavy-duty mechanic.

The Credibility of the Plaintiff and the Lay Witnesses

- [14] The plaintiff was a credible witness. I found him forthright, thoughtful and measured. He was not prone to exaggeration or embellishment, and if anything, was given to understatement. He sensibly explained his physical and work-related limitations. He admitted weaknesses where appropriate. He also provided logical explanations for the limits upon his abilities. His evidence made sense overall and fit with the observations of other witnesses whose evidence I accept.
- [15] I do find that the plaintiff, in occasional instances, had a poor recollection of specific points. I take this into account in my factual findings below.
- [16] The plaintiff's best friend Bryan Buckle, his brother Kenny Skibo, his wife Tasha Gillingham, and his father Ken Skibo testified. I find these lay witnesses to have been generally credible. There are some minor differences between the various lay witnesses, and I also take these into account in finding the relevant facts.

The Pre-Accident Health of the Plaintiff

- [17] The plaintiff was in generally good physical health prior to the Accident. He engaged in heavy weightlifting at the gym five days a week prior to the Accident, and sometimes twice per day. He did physically-demanding mechanical work, played hockey, and worked on his parents' and his friend's parents' farms. In the latter activity, the plaintiff engaged in haying in the summers and could readily carry two bails of hay, each weighing up to 100 pounds, and performed that work well into the night. As a result of all of these activities, I find that the plaintiff was in excellent physical shape and had tremendous muscular strength in his early adult years.
- [18] Since the age of 15, the plaintiff has suffered from intermittent seizures. I will address this issue further below.
- [19] Overall then, aside from his propensity for seizures, I find that the plaintiff was in generally very good physical health at the time of the Accident.

The Accident on January 12, 2015

- [20] The plaintiff was on his way to work at 7:00 a.m. on January 12, 2015. He was driving a large Ford pickup, travelling west on Highway 1 in Langley. Just after the 232nd Street exit, the plaintiff saw brake lights in front of him and slowed down to a complete stop. A vehicle that had been following him then hit from behind on the rear passenger side.
- [21] The plaintiff's truck suffered damage to the rear suspension and right rear tire area. It is some indication of the force of the collision that the collision bent the rear axel of the plaintiff's pickup truck and damaged the leaf springs and drive shaft of the truck.
- [22] The plaintiff did not recall feeling injured on the day of the Accident. But the next morning, he felt quite stiff and was in pain from his neck down to the lower part of his back. He attended a medical clinic to get checked out and reported neck, shoulder, and back pain. He later followed up with his family physician.
- [23] The plaintiff did not go to work on the day of the Accident. He remained off work for several weeks. He eventually returned to work, despite not feeling fully healed, on March 22, 2015.

The Post-Accident Health of the Plaintiff

- [24] The plaintiff injured his neck, mid-back, and lower back in the Accident. His chief complaint is the ongoing pain in his lower back, which had not been resolved by the time of trial.

- [25] The plaintiff's neck also caused him problems from time to time. He described it cracking and being sore sometimes, but the degree of pain in his neck is substantially less than his back. The plaintiff's neck pain mostly improved by the summer of 2015 and was infrequent (once per month) by the end of the summer of 2015, though I accept that it still bothered him from time to time.
- [26] In terms of treatment, the plaintiff had physiotherapy treatment during his disability period from January 12 to March 22, 2015. He also pursued massage treatment during the same period. He was given exercises and stretches to do at home, which he does every morning and sometimes in the evening if he exerts himself.
- [27] The plaintiff returned to work at Brandt on March 22, 2015. He had a flare-up of back pain on May 12, 2015, and he took a half-hour break at work due to his pain.
- [28] The plaintiff continued to work throughout 2015 as a heavy-duty mechanic at Brandt despite occasional additional pain while performing more labour intensive duties. He described his back pain as "always there," but it was also variable, with it being more tolerable some days than others.
- [29] On June 7, 2017, the plaintiff started a new job as a heavy-duty mechanic at Copper Mountain near Princeton. He initially commuted to Princeton, and his family moved there in August of 2017. His work at Copper Mountain involves repairing and moving much larger and heavier equipment parts than the equipment he worked with at Brandt. As an indication of the comparative physicality of the two jobs, the largest bolt heads the plaintiff worked with at Brandt are equivalent to the smallest bolt heads at Copper Mountain. His current duties require him to work in sometimes awkward physical positions. It also involves reaching overhead, kneeling, crouching, and heavy lifting, which poses difficulty for the plaintiff. In addition, the plaintiff works 12-hour shifts at Copper Mountain and works seven days in a row as opposed to five previously at Brandt.
- [30] It is apparent to me the plaintiff's injuries, even if less frequent in the form of flare-ups of more severe back pain, will pose a challenge to his ability to continue to perform the heavy mechanical work at Copper Mountain or elsewhere.
- [31] The plaintiff testified and I accept that his injuries have impacted his enjoyment of life. His ability to play hockey has been impaired, and he has reduced the frequency and intensity of his gym workouts. He cancelled his gym membership altogether in 2017. He is less able to participate in recreational activities with his children and has had difficulty carrying his young daughter for any significant amount of time.
- [32] The plaintiff's work productivity has been slowed, and he has had to ask for help from co-workers with tasks that he would previously have done himself. His ability to engage in yard work, clearing rocks around his Princeton property, snow removal and chopping wood at his own home, and haying at his parents' farm have all been negatively impacted due to his back pain.

- [33] I find that the plaintiff is a stoic individual who does not often verbalize his pain. I would not characterize the plaintiff's stoicism as reflecting the minor nature of his low back issue, as the defendants contend. He has finally achieved his "dream career" as a heavy-duty mechanic, and it is not easy for him to admit that his back pain poses an impediment to his ability to perform his job. He has built a self-image around his physical capacity, and he has not readily accepted his physical limitations, which are more readily apparent to those close to him. He has been inclined, for the most part, to "work through the pain" at work and to engage in physical tasks at home to the best of his ability. However, without improvement to his back pain, the physically demanding nature of his job does not bode well for a continuing career as a heavy-duty mechanic over the long-term as he ages.
- [34] The plaintiff has not been formally accommodated at work. He has taken muscle relaxants and Tylenol as needed to make it through his workdays and has used hot baths to ease sore muscles.

Causation Issues

- [35] The plaintiff's seizures complicate the picture of his overall health. His seizures are not related to the Accident and affect the damages assessment only to the extent they impact his life and ability to earn income.
- [36] As noted, the plaintiff has suffered intermittent seizures since he was about the age of 15. His seizures have not historically affected his physical or mental capacity or limited his activities. Typically, the plaintiff will lose consciousness during a seizure, become disoriented for 10-15 minutes, and then become more alert but fatigued. After the plaintiff rests, he typically recovers well over a day or two. He sometimes experiences short-term memory loss from his seizures. He was otherwise described as "quick as a whip" when it came to mechanical issues.
- [37] The plaintiff is able to take precautions at work, such as staying away from edges, in order to maintain employment. His seizures have sometimes resulted in driving restrictions for periods of time.
- [38] Following the plaintiff's return to work in March of 2015, the plaintiff had a seizure on May 21, 2015. At that time, he moved in with his parents and was restricted from driving, but he received rides to work and did not miss any work.
- [39] In June of 2016, the plaintiff suffered another seizure and was off work for three months until September 15, 2016, as a result.
- [40] The plaintiff suffered another seizure on January 14, 2017. At that time, he remained off work from Brandt until April 17, 2017. As noted, he started work at his new position at Copper Mountain in June of 2018. He worked a continuous period of 20 months at Copper Mountain until his next seizure.

- [41] In 2019, the plaintiff had a seizure at home on February 25, 2019. He was off work as a result until November 2019. At that time, he worked for approximately ten days and was then reduced to five days at six hours a day.
- [42] The plaintiff had another seizure at a Kamloops hotel while away at a hockey tournament in November of 2019. He thought that a lack of sleep likely "provoked" this seizure. The plaintiff remained off work for three months following this most recent seizure. He has been orally told that he is cleared to return to work but remained off work waiting for his neurologist to submit the necessary approval.
- [43] In four instances since the Accident, the seizures have meant that he was unable to work in his usual occupation as a heavy-duty mechanic. In the five years since the Accident, the plaintiff missed just over 18 months of employment due to his seizures. The plaintiff has also received disability benefits while off work due to his seizures. He was on long-term disability at the time of trial, awaiting his neurologist's approval to return to work following his November 2019 seizure.
- [44] I find that the plaintiff's intermittent seizures have led to some long periods where he has been off work, and I must take this into account in assessing loss of future earning capacity. However, his seizures appear to have had no long-term effect on him physically. I also find that the plaintiff has a better understanding of the risk factors that can cause a seizure, such as fatigue, and it is likely that his risk of seizures will moderate in the future as he learns to better recognize and control the onset of the causes.
- [45] Nevertheless, the plaintiff's seizures represent a relative negative contingency in assessing his claim for loss of future earning capacity.
- [46] In addition to the issue of seizures, on November 6, 2017, the plaintiff had an incident at work wherein he slipped on ice while exiting a bulldozer. His body had a "sudden jerk," and he "tweaked" his back. He missed only one day of work and returned to his next scheduled shift. On the evidence, I accept that this was a temporary aggravation at most of his back injury and that this isolated incident did not change the trajectory of his recovery.
- [47] The plaintiff had another accident in November of 2014 wherein his vehicle clipped the back of a trailer. There was only minor damage to his vehicle and none to the trailer. I accept that he was not injured in that collision and took no time off work as a result. This incident, therefore, is not significant in the present analysis.

Medical and Capacity Evidence

Dr. Steven Helper, Physiatrist

- [48] The plaintiff tendered an expert medical report from Dr. Helper, a physiatrist, who assessed the plaintiff on November 26, 2019. The defendants did not cross-examine Dr. Helper, and his qualifications and opinions were not challenged.

- [49] Dr. Helper opined that the plaintiff showed symptoms of central and bilateral low back pain at the mid lumbar spine. He attributed the cause of the plaintiff's mid-lumbar and low back pain to the Accident. He ruled out other potential causes of the plaintiff's back pain.
- [50] Of note, the plaintiff told Dr. Helper that he thought he was competent to work as a heavy-duty mechanic for the foreseeable future. Nevertheless, Dr. Helper thought the prognosis for the plaintiff achieving a complete spontaneous resolution of his low back pain was poor. He noted that the plaintiff had been suffering low back pain for nearly five years without a trend towards improvement. Further, there was "no guarantee" that the plaintiff's back pain would resolve and that any potential improvements will be partial in nature.
- [51] Dr. Helper thought that the prognosis for the plaintiff achieving moderate further improvements over his sense of fragility for low back pain flare-up was good with appropriate training. I take Dr. Helper's opinion to mean that the plaintiff's symptoms were manageable with appropriate treatment and with appropriate accommodations at work. However, to some extent, those opinions merely reflect the plaintiff's subjective and optimistic beliefs about his future career path, which are in turn affected by the plaintiff's stoicism. In his clinical opinion, Dr. Helper was more pessimistic about a full long-term recovery.
- [52] In terms of treatment, Dr. Helper recommended kinesiology, physiotherapy, MRI of the lumbar spine, and image-guided diagnostic and therapeutic injections.

Mr. Andrew Hosking, Physiotherapist and Capacity Evaluator

- [53] The plaintiff tendered expert evidence from Mr. Hosking, a physiotherapist, work capacity evaluator, and cost of future care evaluator. The plaintiff attended Mr. Hosking's office for a functional capacity evaluation in November of 2019. Mr. Hosking's report was tendered at trial, and he was cross-examined on his opinions at trial.
- [54] Mr. Hosking opined as to the plaintiff's capacity to work. In preparation for his report, he had the benefit of a physical demands list from Brandt and a checklist of physical activities the plaintiff completed in his current position at Copper Mountain. He also referred to the National Occupational Classification for a heavy-duty mechanic, which further references the physical demands of the job.
- [55] Mr. Hosking opined that in his assessment of the plaintiff, the plaintiff displayed a decline in function and increased pain in his lumbar spine region with occasional heavy to very heavy activity.
- [56] Mr. Hosking summarized the plaintiff's work capacity as follows:
5. Summary of work capacity: Based on results of this evaluation, within the context of the medical diagnoses provided, Mr. Skibo exhibits the need for workplace accommodation in order to complete his regular duties as a heavy duty mechanic. However, his overall presentation suggests that, despite accommodations, he will likely not have the capacity to

remain durably employable in this occupation. In order to complete regular duties, he requires the flexibility to take intermittent breaks to move out of static postures of bending, neck flexion or back extension. He shows signs of fatigue and breakdown of body mechanics (difficulty maintain proper use of musculature to support his body) with repeated and prolonged exposure to the movements and postures to which he is exposed in his work. He is most notably limited for reaching overhead and for bending forward while reaching to lower levels, both of which are critical job demands. In testing, when he reaches a fatigue point in work-intensive activity, he appears able to receive sufficiently to continue working after rests of two to three minutes. However, with repeated exposure to static postures he shows a decline in movement quality and indicators of more rapid fatigue. Mr. Skibo does not meet the full strength demands of his work. He shows the capacity for heavy lifting and carrying on an occasional basis. He does not meet the demands for heavy strength activity on a frequent basis. Of relevant to his competitive employability is the fact that automotive mechanics are typically required to work quickly and efficiently with minimal time available for breaks and rests. Mr. Skibo's need to pace his approach will likely reduce his probability of maintaining a competitive work speed. In the balance, the combined demands of static postures for which he is limited and frequent lifting/carrying at the upper end of his capacity indicates that he is not likely to remain durably and competitively employable in this work.

6. In consideration of alternative employment, Mr. Skibo demonstrates the capacity to complete work of a low-mid range of heavy strength requirement but with accommodation to avoid prolonged or repeated forward bending, overhead reaching, work at lower levels and tasks requiring extended intervals of kneeling or crouching.
7. From a physical abilities' perspective, it is feasible that he could work as a mechanic on lighter-duty vehicles. However, I defer specific opinion regarding his employability in other occupations to a vocational expert.

[Emphasis added.]

[57] In terms of his functional capacity, Mr. Hosking thought the plaintiff was "likely at or close to maximum physical rehabilitation, and while further treatment may assist in the management of symptoms, it is unlikely to be curative or substantially improve his functional abilities." Mr. Hosking opined that further treatment could result in "some improvement in pain management, and improved understanding of body mechanics, which may be applied to his work." However, he did not anticipate that such a program would resolve the plaintiff's symptoms.

[58] The defendants were critical of Mr. Hosking's more pessimistic conclusions in several respects. For instance, they argued that Mr. Hosking's evaluation provided only a snapshot in time, that his opinions were based on erroneous or inadequate assumptions, and that he did not accurately account for the physical demands of the plaintiff's work. I take these submissions into account in assessing the weight of Mr. Hosking's evidence. However,

overall I was impressed with the testing he conducted and, despite its imperfections, the ability of the testing to reflect the real-world working conditions of a heavy duty mechanic. The observations during functional testing across multiple physical tasks over relatively lengthier periods of time were insightful as to the plaintiff's abilities. In my view, notwithstanding the defendants' criticisms, Mr. Hosking's conclusions are sound.

Dr. Alan Richardson, Orthopedic Surgeon

- [59] The defendants tendered a report from Dr. Richardson, an orthopedic surgeon. Dr. Richardson diagnosed the plaintiff with a soft-tissue injury to the plaintiff's neck, a likely soft-tissue injury to the plaintiff's mid-back, and a soft-tissue injury to the plaintiff's low back, all resulting from the Accident.
- [60] Dr. Richardson described the prognosis for the plaintiff's neck and low back pain as moderate and said that there is no increased risk for osteoarthritis or surgery. He described the prognosis for the plaintiff's mid-back region as moderate to good. He did not indicate that he expected the plaintiff's low back pain to resolve.
- [61] Dr. Richardson characterized the plaintiff's functional restrictions as limitations based on symptom tolerance. However, his report also seemed to defer to Mr. Hosking's opinion regarding functional impairment. Based on the plaintiff's work history to date, Dr. Richardson stated that the plaintiff could "most probably" continue working in his current position.

Summary of the Expert Evidence

- [62] Dr. Richardson and Dr. Helper agree that, as a result of the Accident, the plaintiff suffered soft-tissue injuries to his neck, mid-back, and low back, and that absent the Accident, he would not be suffering from his current chronic pain.
- [63] I accept the functional capacity testing conducted by Mr. Hosking, which indicates a decline in functioning and capacity at work, a need for accommodation, and a susceptibility to fatigue as a result of his injuries. I also accept that, because of his injuries, there is a risk that the plaintiff will not be durably employable over the long term given the significant physical demands of the job of a heavy-duty mechanic. However, I find that the plaintiff demonstrates a capacity to complete work with lower physical requirements.
- [64] With respect to prognosis and future treatment, I find that the thrust of the expert opinion is that the plaintiff is competent to work as a heavy-duty mechanic but will likely continue to have long-term problems, particularly with low back pain. I accept the evidence of Dr. Helper that five years have passed without much improvement, and there is little indication the plaintiff's back pain will fully resolve in the future. I accept on all the evidence that the plaintiff's low back pain is chronic, potential improvements in his low back will be partial in nature, and the best outcome for the plaintiff is symptom management and accommodation at work where necessary, all within the context of the plaintiff's injuries presenting more

coping challenges as he ages.

Non-Pecuniary Damages

[65] In assessing the factors impacting an award of non-pecuniary damages, I would have regard to the commonly cited list of factors in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [Stapley], where the court summarized and expanded on the factors identified in *Boyd v. Harris*, 2004 BCCA 146 at para. 42:

[46] The inexhaustive list of common factors cited in *Boyd* 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).

[66] The plaintiff submits that an appropriate award is in the range of \$90,000 to \$110,000. The plaintiff relies in particular upon *Domijan v. Jeon*, 2018 BCSC 1988 (\$100,000), *Goldie v. MacLean*, 2019 BCSC 991 (\$100,000), and *Stare v. Whitehouse*, 2019 BCSC 1445 (\$120,000).

[67] The defendants submit that an appropriate award for non-pecuniary damages is in the range of \$55,000 to \$65,000. The defendants rely on the following cases: *MacDonald v. Kemp*, 2014 BCSC 1079 (\$55,000); *George v. Doe*, 2015 BCSC 442 (\$50,000); *Haroon v. Basran*, 2015 BCSC 794 (\$45,000); *Thorson v. Vandop*, 2016 BCSC 221 (\$50,000); and *Jones v. McLerie*, 2016 BCSC 763 (\$45,000).

[68] In assessing the appropriate range, the defendants note that the plaintiff has not missed significant time from work since he returned to work in March 2015. They submit that he is far from a shell of his former self. Rather, he started a relationship, took on responsibilities as a father and step-father, and purchased and improved a new home after the Accident. The defendants submit that the plaintiff has largely carried on with his pre-accident

lifestyle, and the Accident has not significantly changed the trajectory of his life. The defendants also characterize the frequency and severity of flare-ups, the level of the plaintiff's pain, and the need for treatment as falling at the lower end of the scale.

- [69] On the other hand, the plaintiff points to the Stapley factors, including the plaintiff's age, the medical diagnosis of soft-tissue injuries to the neck and back, the nature and duration of the pain, the loss or impairment of life, the impairment of physical abilities, the impact upon his family and marital relationships, and his overall loss of lifestyle. The plaintiff submits that he should not be punished for his stoicism.
- [70] Having regard to principles in Stapley and the awards and ranges established in the above cases, I would award the plaintiff \$80,000 for non-pecuniary damages.

Failure to Mitigate

- [71] The defendants submit that the plaintiff has failed to mitigate his damages, an issue relevant to non-pecuniary damages. The defendants submit that I should reduce the award of non-pecuniary damages by 10%.
- [72] The defendants suggest that the plaintiff could have mitigated his damages by seeking further treatment. Specifically, the defendants argue that despite continuing to experience pain, the plaintiff did not seek further physiotherapy and massage therapy beyond the time period before his return to work in March 2015. The plaintiff saw Dr. Pabani on March 27, 2017. At that time, which was a little over two years after the Accident, Dr. Pabani recommended he see a kinesiologist, but he did not until December of 2019. They note that Dr. Helper and Dr. Richardson later made essentially the same recommendation for kinesiology as Dr. Pabani did in March of 2017.
- [73] The plaintiff submits that the defendants have not met their burden to prove a failure to mitigate. They point out that in March of 2017, the plaintiff was restricted from driving and returned to work at Brandt in April of 2017. He then started working in Princeton in June 2017 and commuted between the Lower Mainland and Princeton.
- [74] Mr. Justice Low, writing for the court, summarized the test for mitigation of damages in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 [Chiu]:
- [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[75] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56 [Gregory], Madam Justice Garson, writing for the court, further discussed the nature of the test as follows:

[56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The *Turner* case, on which the trial judge relies, uses slightly different language than this Court's judgment in *Chiu*: "there is some likelihood that he or she would have received substantial benefit from it ...".

[Emphasis in original.]

[76] In *Senger v. Graham*, 2018 BCSC 257 at para. 80, the court added that "the defendant has the burden of proving not only that the plaintiff acted unreasonably in not attending recommended treatment but also the extent, if any, to which the plaintiff's damages would have been reduced had she received the recommended treatment".

[77] Having regard to all the circumstances, I am not satisfied that the plaintiff acted unreasonably in this case. The evidence demonstrates that the plaintiff attended physiotherapy and massage therapy in 2015 following the Accident, and he pursued various self-directed stretching and rehabilitation exercises to improve his condition. Further, the plaintiff continues to the present date to take medication regularly to alleviate his symptoms.

[78] After Dr. Pabani's recommendation in March of 2017, the plaintiff returned to his job at Brandt after his January 14, 2017 seizure, interviewed for and started his new position at Copper Mountain, and commuted between Surrey and Princeton to work at Copper Mountain. During this period of time, the plaintiff did not unreasonably refuse to pursue kinesiology; it was a busy period of time for the plaintiff who was attempting to adapt to changes to his employment and lifestyle. The plaintiff reasonably prioritized work and family ahead of pursuing a somewhat belated recommendation for kinesiology, which would likely have only partially improved his symptoms more than two years after the Accident. During the months after the recommendation, the plaintiff successfully maintained his employment, until he was forced to go off work in February 2019 as a result of a seizure.

[79] The first stage of the test for mitigation is not whether the plaintiff could have, but did not, pursue the recommended treatment. Instead, the test is whether the plaintiff unreasonably refused to do so. I find that he did not.

[80] After his move to Princeton in August of 2017, the plaintiff did not deliberately decide to not seek kinesiology treatment contrary to Dr. Pabani's recommendation. Rather, the plaintiff believed that there was no kinesiologist in town.

- [81] In the fall of 2019, on the advice of his new physician in Princeton, the plaintiff drove to Penticton for a physiotherapy assessment, a drive of up to an hour and a half. He later found a kinesiologist that came to Princeton every Tuesday from Penticton, and he was able to book 12 appointments for which he was approved despite the kinesiologist's busy schedule. He has been working with her recently doing core strengthening. It appears to me that the plaintiff was doing what he could to rehabilitate and avoid his intermittent back pain while dedicating himself to work and family as best as he could.
- [82] As for the second part of the test articulated in Chiu, I find that the defendants failed to satisfy their onus of proof. In *Forghani-Esfahani v. Lester*, 2019 BCSC 332, Mr. Justice Verhoeven reviewed the law of mitigation, including Chiu and Gregory, and concluded as follows at para. 69 with respect to the second part of the test in Chiu:
- [69] I conclude that in order to meet the second part of the Chiu test for failure to mitigate (the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably) the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.
- [Emphasis added.]
- [83] In arriving at his conclusion, Verhoeven J., at para. 65, referred to the case of *Rhodes v. Surrey (City)*, 2018 BCCA 281 in which our Court of Appeal held that "[t]he fact that a treatment might afford some relief is not sufficient" to satisfy the second part of the test in Chiu.
- [84] In the case at bar, the defendants rely on Dr. Pabani's opinion that kinesiology training is "more likely than not" to at least partially improve the plaintiff's low back pain. Considering Dr. Pabani's overall opinion with respect to the plaintiff's prognosis for and potential degree of recovery, I am not persuaded that there was a real and substantial possibility that any part of the plaintiff's losses could have been avoided with additional kinesiology training. Rather, on the whole of the evidence, I find that any potential improvement achieved through kinesiology training would likely have been temporary and insufficient to satisfy the second part of the test in Chiu.
- [85] I would therefore decline to reduce the award for non-pecuniary damages on account of a failure to mitigate.

Loss of Earning Capacity

Legal Principles

- [86] In *Grewal v. Naumann*, 2017 BCCA 158, Mr. Justice Goepel writing in dissent (with the majority agreeing with his analysis) summarized the proper analysis of past and future diminished earning capacity at paras. 44-50:
- [44] With respect, I cannot agree. The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, [1996] 3 S.C.R. 458:
- [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*, *Cooper-Stephenson*, *supra*, at pp. 67--81.
- [29] This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:
- The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to

establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).

- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] ... What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [47] I note that neither Reynolds nor Ostrikoﬀ referenced Smith. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[Emphasis added.]

- [87] In *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-60, Mr. Justice Kent described the two approaches to assessing loss of earning capacity as follows:
- [156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

- [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff 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.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53& 56.
- [159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [160] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the 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: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, 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: *Milina v. Bartsch*, *supra*, at 79.

- [88] In *Perren v. Larlari*, 2010 BCCA 140 at para. 12, Garson J.A. noted the capital asset approach may be more appropriate for a young plaintiff whose career path is uncertain. Additionally, in *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17-21, the Yukon Court of Appeal discussed the two approaches to assessing loss of earning capacity:

- [17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity. However, in my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.
- [18] It can be helpful under either approach for the judge to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case. . . .
- [19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors.
- . . .
- [21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either [sic] involves hypotheticals, proceeding in this manner involves moving from something generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity).

[Citations omitted; emphasis added.]

- [89] Finally, I repeat and adopt the summary of the legal principles applicable to the assessment of lost earning capacity set out by Voith J. (as he then was) in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;

- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; Perren at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; Westbroek v. Brizuela, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; Jurczak v. Mauro, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.

Past Wage Loss

- [90] The parties have agreed to \$11,899 as the appropriate amount for past wage loss during the January to March 2015 period when the plaintiff was off work as a result of the Accident. I would award this amount.

Future Loss of Earning Capacity

- [91] I find on the basis of the medical evidence that the plaintiff has shown a real and substantial possibility of impairment of his ability to work as a result of the Accident. In coming to this conclusion, I find that there is a real and substantial possibility of the plaintiff having future difficulty maintaining employment as a heavy-duty mechanic due to functional limitations stemming from the Accident.
- [92] I also accept the plaintiff's evidence that he continues to experience chronic pain in his neck and lower back, and the lay evidence from those close to him that the plaintiff has struggled in the past with tasks requiring endurance and strength. I find that these problems will continue to beset the plaintiff in his working life as a heavy-duty mechanic on an intermittent basis and that they are unlikely to resolve over the near or mid-term.
- [93] The plaintiff has other options to work at a less physically demanding level. However, those options do not carry the same earning capacity as his chosen career as a heavy-duty mechanic. Therefore, whether the plaintiff works at a sub-optimal level as a heavy-duty mechanic, or eventually pursues other career opportunities, there is a real and substantial possibility that his earning capacity will be impaired.
- [94] In order to assess the plaintiff's loss of earning capacity, I turn to both the capital asset approach and the earnings approach.
- [95] The plaintiff's T4 income in 2018 was \$129,330.88. The plaintiff points out that the present value of this income projected through to retirement at age 65 is \$3,676,972.08. The use of a retirement age of 65 is a reasonable assumption.

- [96] I must account for the negative contingency that the plaintiff's seizure disorder will cause him to miss work in the future. The plaintiff suggests an allowance for missing work 40% of the time due to his seizure disorder. I agree with the reasonableness of this suggestion, which would yield a future residual income stream of \$2,206,183.25 after applying the negative 40% contingency due to the seizure disorder.
- [97] The plaintiff suggests that a reasonable assumption is that the plaintiff would lose 25% of his earning capacity as a result of the Accident, or \$551,545.81 based upon his 2018 salary.
- [98] The plaintiff's estimates do not include potential overtime that might be available to him, as was the case in the past. Nor do they account for increases in remuneration in ensuing years. Therefore, I view the plaintiff's figure as conservative.
- [99] I do view the 25% reduction in earning capacity as somewhat high in light of the plaintiff's past ability to work through his pain and enlist accommodations. As the defendants submit, except for the initial ten-week period, the plaintiff has not taken time off work because of his accident-related injuries in the approximate time since March 22, 2015.
- [100] However, the Accident occurred when the plaintiff was at a young age and in his physical prime. While a good rehabilitation program may assist, I view the plaintiff's chronic pain as posing ongoing, and likely increased, difficulty for him as he ages, especially his lower back pain. Even with accommodations, the physical demands of his position will likely pose a consistent and increasing challenge for him over time.
- [101] In my view, a more reasonable estimate of the future loss of earning capacity is 15%, resulting in a lifetime loss of future earning capacity of \$330,927.49.
- [102] Turning to the capital asset approach, I accept that the plaintiff's neck, and more significantly, his back injuries have impaired his ability to earn income, take advantage of job or promotional opportunities, and work more overtime shifts. Without significant education to fall back on, employment as a heavy duty mechanic has fulfilled his highest potential for earning. Yet, he has been rendered less competitive in the labour market because he is less marketable and attractive as an employee due to his accident-related injuries. His impairments are likely to continue, with perhaps only limited potential for partial improvement in management of symptoms. Given that the plaintiff was only 28 at the time of trial, he still has a substantial length of time left in his career as a heavy-duty mechanic. His chronic back injury is therefore likely to create a significant toll on his earning capacity over time. Using the capital asset approach, I would arrive at a similar figure and estimate the plaintiff's loss of earning capacity on the order of \$350,000, which is between two and a half and three years of his 2018 salary.
- [103] Taking into account all the evidence, I view a fair and reasonable award for future loss of earning capacity to be \$340,000.

Special Damages

[104] The parties have agreed on \$3,311.25 as an appropriate amount for special damages, and I would award this amount.

Cost of Future Care

[105] Voith J. (as he then was) conveniently summarized the principles applicable to an award for future care costs in *Brewster v. Li*, 2013 BCSC 774 at paras. 157-60:

[157] The test for determining the appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for costs of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, while addressing the assessment of costs of future care, Chief Justice McLachlin confirmed that courts rely on "evidence as to what care is likely to be in the injured person's best interest", and that the measure of such care is "objective, based on the evidence". That same test was recently reaffirmed in *Shapiro v. Dailey*, 2012 BCCA 128 at para. 51, 31 B.C.L.R. (5th) 78.

[158] The following additional legal principles govern an award for future care costs:

- a) Awards for costs of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur; see *Loepky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109.
- b) The weight to be given to an opinion on future care will depend on the extent to which recommendations for items like psychological counselling and physiotherapy are supported by the evidence of experts within the relevant field of expertise: see, for example, *Frers v. De Moulin*, 2002 BCSC 408 at para. 191, 1 B.C.L.R. (4th) 131; and *O'Connell v. Yung*, 2010 BCSC 1764 at para. 98, costs of future care award varied on appeal 2012 BCCA 57; the trial judge erred in concluding that "future care costs are payable whether or not they may be incurred in the future" (para. 68).
- c) An award of future care costs should be reasonable and the award must be moderate and fair to both parties; see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241 - 242.
- d) Common sense should inform claims for the costs of future care, however much they may be recommended by experts in the field; see *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, 17 B.C.L.R. (5th) 244.
- e) In considering any particular item of future care, the test is whether a reasonable person of ample means would incur the expense; see *Brennan v. Singh*, 1999 CanLII 6932 at para. 78, [1999] B.C.J. No. 520 (S.C.).

- [159] There are numerous decisions of this court where, absent objective evidence of what future care items might cost, the court has declined to make any award, see *McGough v. Keuhn*, [1998] B.C.J. No. 1361 at para. 42 (S.C.); *Cumpstone v. Johnson*, 2012 BCSC 386 at para. 109, 7 C.C.L.I. (5th) 292; and *Chan v. Kao*, 2009 BCSC 626 at para. 85.
- [160] Notwithstanding the foregoing authorities, there are also some cases where, on being satisfied that some item was necessary for the future care of the plaintiff, the court was willing to "ball park" that figure or "do the best it can" see, e.g. *Chaban v. Chaban*, 2009 BCSC 87 at paras. 65-73; and, *Loewen v. Bernardi* (1994), 45 B.C.A.C. 190, 93 B.C.L.R. (2d) 242 at paras. 24 - 27.
- [106] The court must be satisfied only that the future care is medically justified as opposed to medically necessary: *Gregory* at para. 39.
- [107] The plaintiff seeks an award of \$60,063.98 inclusive of future kinesiology (\$3,750), physiotherapy (\$1,200 to \$1,280), and firewood purchases totalling \$55,033.98 over 37 years. The defendants do not dispute the kinesiology or physiotherapy claims.
- [108] I agree that the plaintiff will likely have some difficulty splitting and stacking firewood due to his back pain, but as the defendants point out, that problem can be reduced with appropriate planning and pacing. I view the claim for firewood as overstated and would reduce it to a more reasonable estimate.
- [109] In all, I would award the plaintiff \$20,000 for his cost of future care.

Conclusion

- [110] In summary, I would make the following orders in accordance with the reasons above:

Non-pecuniary damages

\$80,000

Past loss of Income

\$11,889

Future loss of earning capacity

\$340,000

Special Damages

Future Cost of care

\$3,311.25

\$20,000

Total

\$455,200.25

[111] Subject to submissions to the contrary, the plaintiff is entitled to costs.

[112] I wish to express my appreciation to counsel for their well-prepared submissions and the professional manner in which they conducted themselves at trial.

"Brundrett J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/16/2020BCSC1687.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/skibo-v-senkler-2020>

Prepared on 25 October 2026 · Esheria