

CANADA / JUDGMENT

Spencer v. Duggan

2020 BCSC 1998

COURT

Supreme Court of British Columbia

DECIDED

16 December 2020

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2020 BCSC 1998 Spencer v. Duggan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Spencer v. Duggan,

2020 BCSC 1998

Date: 20201216

Docket: M119630

Registry: Kelowna

Between:

Chris Spencer

Plaintiff

And

Brittany Duggan

Defendant

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:

P. Spinks

Counsel for the Defendant:

J.M. Brown

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 2 - 6, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 16, 2020

Introduction

- [1] The plaintiff seeks damages arising out of a motor vehicle accident on June 12, 2017. Liability for the accident is in issue.
- [2] He seeks non-pecuniary damages, loss of future income earning capacity, cost of future care and loss of housekeeping capacity. His claims for special damages and past wage loss have already been agreed.

The Plaintiff

- [3] The plaintiff Chris Spencer grew up in Calgary. He completed up to grade 10 in high school and then worked in the restaurant industry, but for the past 31 years he has been involved in the traffic control business. He is certified as a traffic controller. He was working for Secure Traffic Control at the time of the accident, and had been employed by that company for many years.
- [4] He and his wife of over 28 years reside in an apartment in Kelowna. Prior to the accident, he and his wife's recreational activities included going to movies, going for drives to visit friends, including in Penticton and Kamloops. He enjoyed a little hiking, primarily adjunct to one of his hobbies, which was photography. He owned significant camera equipment that he would carry in a 40 to 50 pound camera bag on hikes in order to find locations to take photographs. His photography hobby included taking pictures of wildlife. From a physical perspective he would remain seated or crouched for up to 30 minutes while waiting for the opportunity to take the best wildlife pictures.
- [5] At home, he is and was responsible for some of the heavier chores, such as the deeper cleaning, vacuuming, and cleaning the bathrooms. He and his wife have resided in their rented apartment for over 15 years. In the past he removed the kitchen doors from the cabinets and then refinished them. He also framed and then screened-in the balcony of their apartment some years ago with the consent of his landlord.
- [6] The work of a traffic controller is physically demanding. Although the demands vary daily depending on the particular job, the crew will routinely set up metal signs and stands, cones, and delineators at the beginning of a shift and then take them down at the end of a shift. Sometimes rubber barrels are used, as are larger free-standing signs known as

windmasters. The barrels and the delineators are weighted with rubber bases. Barrels weigh approximately 25 pounds, including the base. Signs weigh 10 to 15 pounds, including the stand.

- [7] The various equipment is transported to and from a job site in the back of a pick-up truck and is moved either through the tailgate or over the sides of the truck bed. If the crew is working with a road patching crew, there may be several set ups and tear downs during a day.
- [8] When he works as a traffic controller, the plaintiff is required to stand during the day and has to keep twisting and turning in order to maintain eye contact with his work partner who will be at the other end of the area to be controlled. There are very limited opportunities for breaks.

The Accident

- [9] The accident occurred on June 12, 2017. The plaintiff was doing traffic control at a jobsite for his employer, Secure Traffic Control, in the vicinity of Westlake Road and Industrial Road in West Kelowna. He and his colleagues had finished work for the day and Mr. Spencer was going to pick up some of the signs they had placed on the road at the beginning of the day.
- [10] I will address the details of the accident later in the discussion regarding liability. There was substantial damage to the plaintiff's full size pick-up truck and also to the defendant's Honda Civic.

After the Accident

- [11] Following the accident, the plaintiff felt disoriented as he had hit his head on the window. After some time, he took off his seatbelt, got out of the vehicle and checked to see if his vehicle was drivable. One of his colleagues, Ms. Stacey, had arrived at his vehicle by this time. The vehicle was then moved over to the side of the road, out of the way of traffic. He called his wife who picked him up.
- [12] Following the accident he experienced significant difficulty in sleeping and he had constant headaches. He felt he was in a fog, his neck and shoulder were both painful on the left side, and he felt knots and pains in his low back.
- [13] He went to see his family doctor, Dr. Adam, the following day and was referred to massage therapy. Due to his inability to sleep, he was irritable and cranky. He found that he would only sleep two or three hours a night and that when he moved in his sleep, the pain would wake him up and it would take him some time to get back to sleep. He was off work for three or four weeks following the accident at Dr. Adam's recommendation. He then attempted to go back to work for a period but Dr. Adam again recommended that the plaintiff stop when he struggled. He was off work for approximately seven weeks in total in 2017. The parties agree that the amount of the plaintiff's net past wage loss is \$3,580.51. He has not missed any

work since August 2017.

Issues

[14] The issues to be decided in this case are:

- a) Is the defendant liable for the accident?
- b) If yes, what are the plaintiff's damages for:
 - i. non-pecuniary damages;
 - ii. loss of future earning capacity; and
 - iii. cost of future care;
- c) Did the plaintiff fail to mitigate his damages?

[15] I will start with the issue of liability.

Liability

[16] The parties gave very different evidence with regard to how the accident occurred. Because Mr. Spencer is the plaintiff in this action, he has the burden to prove that the accident was caused by the negligence of the defendant.

[17] The plaintiff and the defendant were the only witnesses to the accident. The plaintiff's co-worker, Brittney Stacey, also testified. Ms. Stacey did not see the collision but she heard it. She also testified about her observations of the plaintiff's vehicle before the accident, and her observations of the accident scene shortly after the accident had occurred.

[18] The accident occurred on Westlake Road in the vicinity of the intersection with Industrial Road in West Kelowna. Both vehicles were headed southbound in the direction of Highway 97. There is a traffic roundabout on Westlake Road to the north of the intersection with Industrial Road.

[19] The plaintiff had driven eastbound on Industrial Road before turning right, or southbound, on to Westlake Road. There is a right turn lane on Industrial Road for those intending to turn southbound on to Westlake Road. Although the parties referred to it as a merge lane, the lane does not actually continue on to Westlake Road, and traffic is not required to merge; rather, the lane ends at Westlake Road, and traffic using the lane is obligated to yield to southbound traffic on Westlake Road. However, I will refer to it as the merge lane for ease of reference to distinguish it from the turn lanes on Westlake Road and also because that is how it was described by the parties.

- [20] The merge lane is separated from the straight through lane for traffic on Industrial Road by a triangular concrete meridian. There is a crosswalk that traverses the merge lane from the sidewalk to the meridian. There is only one southbound lane on Westlake Road at the intersection with Industrial Road.
- [21] There is a left turn lane on Westlake Road southbound for the benefit of those who wish to turn left onto Highway 97 in the direction of the Bennett Bridge and towards Kelowna. There is also a left turn lane for vehicles northbound on Westlake Road who wish to turn westbound on Industrial Road. The two left turn lanes conjoin.
- [22] The photographic evidence depicts a bicycle lane along Westlake Road in the southbound direction. The white line for the bicycle lane is a broken line in the area where the merge lane from Industrial Road joins Westlake Road southbound. There are eight broken lines.
- [23] The parties agree that the distance from Westlake Road from the southeast point of the triangular median to the start of the left turn lane for Highway 97 is 24 meters diagonally from the point of the white line of the median to the left turn lane. The merge lane itself is five meters wide at the crosswalk and 17 meters wide at the point where it joins Westlake Road.
- [24] Although the parties described the accident very differently, there were some aspects of their evidence that were consistent:
- a) the plaintiff's vehicle had been in the merge lane of Industrial Road prior to entering onto Westlake Road;
 - b) both vehicles were heading southbound on Westlake Road;
 - c) both parties intended to move into the left turn lane on Westlake Road southbound intended for traffic turning onto Highway 97;
 - d) the defendant was travelling faster than the plaintiff;
 - e) The plaintiff's vehicle was angled to the left at the time of impact;
 - f) the right passenger side of the defendant's vehicle collided with the front quarter-panel of the plaintiff's vehicle;
 - g) the two vehicles came to a stop in the approximate vicinity of the second dotted line of the southbound left turn lane following impact; and
 - h) there was significant damage to both vehicles.
- [25] The photographs in evidence at trial indicate some debris from the accident, which includes the left headlight from the plaintiff's truck and some other unidentified smaller debris which is located in the left turn lane for traffic travelling northbound on Westlake Road (that is, in the opposite direction of travel of both parties), which is in line with the second broken line of the left turn lane for southbound traffic.

Credibility and Reliability of Evidence

[26] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC refused, 35006 (7 March 3013), as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

Plaintiff's Version

[27] Mr. Spencer and his crew were finishing their work for the day. Mr. Spencer was going to pick up their equipment from along the northbound lane of Westlake Road. He drove his truck down Industrial Road towards Westlake Road.

[28] In order to pick up his equipment the plaintiff had two options: he could either go to Highway 97, turn around, then stop in the northbound lane on Westlake Road; or, he could stop in the left turn lane for southbound traffic. On direct examination he suggested the former, but on cross-examination agreed that it may have been the latter.

[29] Traffic was busy and was backed up from Highway 97 to Industrial Road. He pulled his vehicle into the right turn lane. He drove his vehicle close to the meridian in order to maximize visibility. He signalled and waited.

[30] When traffic headed southbound on Westlake Road started moving, he moved forward slowly and the vehicle closest to him on Westlake Road allowed him to merge. He described the vehicle that stopped and waited for him as a green car. He then needed to get into the left turn lane from Westlake Road, which was only a short distance from the intersection with Industrial Road. He had just started to move his vehicle into the left turn lane when the collision happened. The distance from the right turn lane from Industrial Road to the beginning of the left turn lane from Westlake Road is approximately 80 feet.

- [31] Although I was shown a lot of photographs, and the plaintiff described where the accident happened, the plaintiff did not give any evidence as to the collision itself, other than that his vehicle was struck on the driver's side near the door. He did not see the defendant's vehicle prior to impact.
- [32] There was significant damage to his truck which cost over \$15,000 to repair. He agreed that he did not shoulder check prior to moving his vehicle in to the left turn lane, and did not see the defendant's vehicle in his mirrors. He stopped immediately on impact.

Defendant's Version

- [33] The Defendant Brittany Duggan had just finished work for the day at a local office and was driving her Honda Civic at the time of the accident.
- [34] Her intended route was to drive south on Westlake Road and then turn left onto Highway 97 by way of the left turn lane. She went around the roundabout at Stevens Road and was proceeding southbound on Westlake Road. She was just approaching the intersection when she first saw the plaintiff's truck with its flashing amber lights. It was located just prior to the crosswalk that traverses the merge lane to the meridian.
- [35] She described no one impeding her proposed route through the intersection of Westlake and Industrial and into the left turn lane. She agreed that the area can be busy with traffic, but she said it is not always backed up to Highway 97, and traffic was not backed up on the day of the accident. She has seen it backed up on other occasions, and estimated that twice per week she would have to wait for a couple of light cycles before turning left on to Highway 97.
- [36] She estimated her speed at slightly under 50 kilometres per hour. She did not see the plaintiff's truck stop as it rolled into the intersection of Westlake and Industrial. She suddenly realized the plaintiff's vehicle was not going to stop as it came towards her. She tried to take evasive action by pulling her vehicle to the left but she was unable to avoid the collision. She described the plaintiff as having merged into the passenger side of her vehicle, between the right passenger door and the mirror. The location of the initial impact was in the middle of the southbound lane right around the fourth or fifth dotted line between the merge lane and the southbound lane of Westlake.
- [37] She came to a stop after impact. She believed her vehicle came to a stop in the approximate area of the second dash that divides the left turn lane from the lane for through traffic southbound on Westlake. She then moved her vehicle off to the side of the road.
- [38] She denied that a green car or any other vehicle had stopped in front of her to allow Mr. Spencer to merge, or that she overtook another vehicle just prior to impact.

Evidence of Ms. Stacey

- [39] Ms. Stacey was working with the plaintiff on the day of the accident. She remained with the other crew members while the plaintiff was going to pick up their equipment from Westlake Road. She was on foot on Industrial Road where the crew had been based for the day. She was approximately half a block west of Westlake Road. As she and others were cleaning up for the day, she observed the traffic was extremely busy as the plaintiff approached Westlake Road.
- [40] She saw the plaintiff waiting to merge onto Westlake Road from Industrial Road. She noted that the plaintiff had to wait some time before he was able to drive onto Westlake Road due to the volume of traffic. When she looked again, she saw that he had fully merged on to Westlake Road. She could see some five or six vehicles southbound on Westlake Road, two or three of which were ahead of the plaintiff where he merged. She last saw the plaintiff's vehicle after he had merged from the merge lane on to Westlake Road.
- [41] Ms. Stacey did not see the impact but she heard a collision. This occurred less than a minute after she had last seen the plaintiff's vehicle and after he had merged. She went down to Westlake Road to see what had happened. She described seeing the plaintiff's truck in the area of the third dotted line of the southbound left turn lane. There was debris around the front of his vehicle.
- [42] There was also debris in the left turn lane for northbound traffic, which included the left front headlight of the plaintiff's vehicle and some other smaller debris. She marked the headlight with a traffic cone. A photograph of the headlight with the traffic cone was in evidence. She moved small pieces of glass from the southbound left turn lane with her foot with the help of the firefighters who attended the scene, but did not move the plaintiff's left front headlight before the photograph to which all parties referred was taken.
- [43] The defendant had already moved her vehicle to the side of the road before Ms. Stacey arrived at the accident scene.

Legal Framework

- [44] The Motor Vehicle Act, R.S.B.C. 1996, c. 318, s. 151 sets out the obligations of drivers on a laned roadway as follows:

151 A driver who is driving a vehicle on a laned roadway

...

- (b) must not drive it from one lane to another if that action necessitates crossing a solid line,

...

- (d) when approaching an intersection intending to turn left must drive the vehicle in the centre lane or in the lane nearest the centre of the roadway on the right hand half of the highway,

...

- (f) must not pass a vehicle on the left if that action necessitates driving on that part of the highway designated for travel in the opposite direction, and . . .

[45] Notwithstanding the provisions of s. 151, it is nonetheless permissible to cross the solid line in order to overtake another vehicle as set out in s. 155(1)(c). The driver of a vehicle overtaking another is also subject to ss. 157(1)(a) and (b) and 159:

157 (1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

- (a) must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
- (b) must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle. . .

...

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

[46] It is not disputed that vehicles using Westlake Road southbound have the right of way and that vehicles intending to turn right onto Westlake Road southbound from Industrial Road are obligated to yield to traffic on Westlake Road.

[47] The plaintiff argues that by overtaking the green car that had stopped to allow him to merge, the defendant undertook a manoeuvre that was unsafe, contrary to ss. 157(1)(b) and 159, and that she is solely at fault.

[48] The defendant argues that she was the dominant driver and the plaintiff was the servient driver who was obligated to yield. By failing to yield and causing the front left corner of his truck to strike the side of the defendant's vehicle within the southbound lane on Westlake Road, the plaintiff was solely liable for the collision.

[49] The issue is therefore whether the plaintiff has proven on a balance of probabilities that the accident occurred as a result of the negligence of the defendant.

[50] Because the plaintiff did not see the defendant's vehicle prior to impact, his theory of how the accident occurred is drawn from the surrounding circumstances. His arguments are twofold: first, there was a green car that stopped and allowed him to merge and that the defendant must have passed that car prior to hitting him; second, the initial point of contact between the vehicles, as evidenced by the location of the debris and in particular the left front headlight from the plaintiff's truck, was at the beginning of the left turn lane for traffic headed on to Highway 97. The plaintiff says that these both lead to the inevitable conclusion that the plaintiff had fully merged safely in to the southbound lane of Westlake Road and that the defendant was therefore driving on the left side of the yellow centre line just prior to impact.

[51] The plaintiff refers to the defendant Ms. Duggan's answers to questions at her examination for discovery, the evidence of Ms. Stacey, and the photographs depicting the location of the debris as evidence that supports the plaintiff's version of events. I will consider these arguments.

Discussion

[52] Although both parties were cross-examined with regard to their recollection of events, I am satisfied that neither of them changed their stories in any material way.

[53] The plaintiff suggests that the defendant's evidence at her examination for discovery about a car that stopped to allow the plaintiff to merge was unclear or uncertain. I do not agree. At her examination for discovery, the defendant was asked about the presence of a green sedan that had stopped to allow the plaintiff to merge:

178 Q And I'll suggest to you that, as you travelled southbound on Westlake Road, that there was a green sedan in front of you that stopped to allow the other vehicle in. Do you - will you agree with that?

A No. I don't recall.

179 Q Okay. So you don't recall that? Or there was not one?

A I don't recall that.

180 Q Okay. So you're not saying that there was not a green sedan travelling in front of you. Simply that you don't recall at this time?

A Yeah. I can't remember what happened of what colour the vehicle was, if there was a vehicle there. I can't recall the exact detail.

181 Q Okay. Again, I'll suggest to you that the vehicle in front of you stopped to allow the plaintiff's vehicle to enter onto Westlake Road?

A But if that's true, would - how would he hit me, then?

182 Q Well, I'll suggest to you that you were trying to skirt around and get into the left-hand turn lane when he was merging onto Westlake Road?

A But I wasn't.

183 Q Okay. So you don't recall, though, if there was a vehicle in front of you?

A No.

184 Q That -

A I recall him plowing through me into the other lane of traffic.

- [54] I am satisfied from my review of her answers to some of the questions that the defendant did not understand entirely what she was being asked. I am satisfied also that her answer, "I don't recall" was her manner of expressing that it did not happen, as opposed to that she had no recollection.
- [55] Her recollection at trial was clear and consistent with her other evidence, and her evidence did not waiver, and her version of events was that the plaintiff merged into her as she travelled within the southbound lane of Westlake Road through the intersection with Industrial Road. I conclude that her evidence from the examination for discovery was not inconsistent with her evidence at trial.
- [56] Both parties prepared written statements following the accident. The defendant's written statement was also consistent with her evidence at trial.
- [57] There was no evidence at trial of a green car, other than from the plaintiff. The plaintiff's handwritten statement prepared on the day of the accident is three pages in length. His statement makes no reference to a car having stopped to let him merge. He made no mention of a green car. He wrote, "I then proceeded onto Westlake Road when it was safe to do so". While I accept that he may not have known at the time he wrote his statement that the specific details of how he came to merge on to Westlake Road would become significant, he nonetheless found it important enough to include the conclusory statement that he did so "safely", but without describing how he came to that conclusion. He noted that he had turned on his amber warning lights in advance of making his turn, for example.
- [58] The defendant did not see a green car, and denied passing a vehicle just prior to impact. Ms. Stacey testified that she saw the plaintiff's vehicle on Westlake Road after he had fully merged, but made no observations of anyone having stopped to allow him to do so.
- [59] I conclude that if traffic had been proceeding as slowly as it was described by the plaintiff, it is highly improbable that the defendant, who would necessarily have been in the line of traffic behind the green car, would have either attempted to pass such a car or would have been going too fast to be unable to stop behind it. There was no evidence she was in a hurry.
- [60] I find that there was no green car that stopped to allow the plaintiff to merge but was then overtaken by the defendant just prior to impact.
- [61] The precise location of the first point of impact is significant because if the initial impact occurred in the southbound left turn lane on Westlake Road, it may be inferred that the plaintiff had already fully merged into the southbound lane on Westlake Road prior to impact because there are approximately three car lengths between the merge lane and the beginning of the left turn lane.
- [62] The evidence of Ms. Stacey as to her observations prior to and after the accident would tend to suggest that the accident occurred after the plaintiff had fully merged because:
- a) she saw that traffic was backed up and saw vehicles ahead of the plaintiff;

- b) she saw the plaintiff fully merged onto Westlake Road southbound; and
 - c) she did not hear the collision until some seconds had passed following when she saw the plaintiff merged.
- [63] In determining what use I can make of Ms. Stacey's evidence, I must first determine whether or not the evidence should be accepted.
- [64] An assessment of a witness's credibility involves a determination of whether a witness is honest and forthright. Reliability, on the other hand, focuses on the witness's ability to observe and recall those matters about which he or she testified. A witness may be credible, meaning that the trier of fact may find them honest, forthright and believable, yet provide evidence that is unreliable.
- [65] Ms. Stacey's evidence of what she saw immediately prior to the accident resulted from her observations while she remained with the rest of her traffic control crew on Industrial Road. There were photographs in evidence taken from the approximate location where Ms. Stacey would have been standing when she made those observations. The photographs were taken from the north side of Industrial Road; however, Ms. Stacey's evidence was that she was more towards the middle of the road than the north side of the road.
- [66] Industrial Road slopes downhill towards Westlake Road. On the southwest corner of the intersection is a grassy embankment. There is a telephone pole and a tree close to the curb. From the photographs that are in evidence, it is apparent that a person standing in the approximate location of Ms. Stacey at the time of her observations would not be able to see the traffic to the south of the merge lane. Indeed, a portion of the merge lane itself is not visible from the photographs. The evidence of Ms. Stacey is that she would have been standing closer to the middle of the road than is depicted in the photographs when she made her observations. As such, she would have been able to see even less of the merge lane than is depicted in the photographs, albeit she would have a better view of traffic to the north of the intersection.
- [67] Ms. Stacey is a friend of the plaintiff's, and she agreed that they have discussed the accident on occasion in the intervening time. While I accept that Ms. Stacey was honest and forthright, I cannot accept her evidence as reliable because she did not have the opportunity to observe any vehicles to the right (or south) of the plaintiff when he was in the merge lane.
- [68] Ms. Stacey would also not be able to see whether the plaintiff had fully merged onto Westlake Road. I accept that she could likely see the side of the plaintiff's vehicle because his vehicle would have been angled in anticipation of merging. However the plaintiff would not be fully merged until he had proceeded to a position on Westlake Road that was obscured from Ms. Stacey's view by the embankment.

- [69] The plaintiff argues that the location of the debris, and in particular, the left headlight from the plaintiff's truck confirms that the initial point of contact was in the southbound left turn lane on Westlake Road, consistent with the evidence of the plaintiff. The plaintiff says the location of that debris some 20 to 25 meters south of the merge lane is inconsistent with the defendant's evidence that the initial impact occurred adjacent to the fourth or fifth broken line outlining the bike lane adjacent to the merge lane.
- [70] The plaintiff argues that the location of the headlight debris, which was photographed in the northbound left turn lane, confirms the plaintiff's version of events and is inconsistent with the defendant's testimony. I do not agree.
- [71] The evidence does not establish that the point of contact was where the headlight debris is depicted in the photographs, for the following reasons:
- a) Neither party's evidence was that the first point of contact was in the northbound left turn lane where the plaintiff's headlight is shown in the photographs. As such, the headlight must have physically moved following impact, whether due to the forces of the collision, or human intervention;
 - b) Ms. Stacey's evidence was that she may have moved some of the debris in order to reopen the road. Although she testified that she did not move the headlight before she took the photograph that shows it in the northbound left turn lane, her evidence was somewhat confusing on the point;
 - c) Ms. Stacey testified that some accident debris was moved by the firemen who attended the scene. However, the photographs showing the headlight with the traffic cone appear to have been taken before the firemen arrived;
 - d) the photographs depicting the headlight were taken after the road had been reopened for traffic; and
 - e) The defendant testified that she saw the plaintiff's co-worker moving debris immediately following the accident, albeit she could not say whether the headlight was moved. The co-worker would have been Ms. Stacey.
- [72] The defendant estimated her speed at a little under 50 kilometers an hour, which equates to 13.8 meters per second. The parties agree that the distance from the northerly tip of the merge lane to the beginning of the left turn lane is 23 meters, or 24 meters if measured diagonally. While the plaintiff was travelling at a lower speed than the defendant, he would nonetheless have accelerated when he started to merge. The damage to the vehicles as evidenced by the photographs and also the cost to repair them is consistent with a collision involving significant forces.

- [73] I conclude that the headlight came to rest in the very approximate vicinity of where it can be seen in the photograph, simply because I do not accept that it would have been moved other than perhaps a short distance to remove it from the southbound left turn lane in order to allow for the flow of traffic. However, I cannot draw any other conclusions or inferences, including the location of the first point of contact, from that finding.
- [74] For instance, there was no evidence from an engineer or accident reconstruction expert in this case. There is therefore no evidence about the forces applied to the headlight, in which direction it may have travelled after impact, how long it might have remained attached to the plaintiff's truck before falling to the ground, whether or how far it might have been projected forward following impact.
- [75] I conclude that the location of the headlight debris does not assist in determining where the vehicles first collided, nor does it assist in determining how the accident occurred.
- [76] I conclude that the most likely explanation for the accident is that the plaintiff activated his amber hazard lights as he approached the intersection, and having done so he expected that drivers on Westlake Road would allow him to go ahead of them. The defendant testified that when she went to check on the plaintiff immediately after the collision, he told her that the accident was her fault because his amber lights were flashing and that she should have yielded to him. I accept her evidence. I conclude the plaintiff either failed to notice the defendant's vehicle as she approached the intersection, or that he assumed that she would stop, even though she had the right of way.
- [77] Finally I need to determine if the defendant was at fault to some degree. I have concluded that she was not. The defendant was there to be seen. There was no evidence that she was driving at an unsafe speed, and there was also no evidence that would suggest that she should or could have done anything differently. She first saw the plaintiff near the crosswalk of the merge lane, and next saw him as he merged towards her front passenger door. She was slightly ahead of the plaintiff at the time of impact, and she had no reason to believe that he would not yield as he was obligated to do.

Conclusion

- [78] It follows that the plaintiff has not established that the accident was caused by the negligence of the defendant, and the claim is dismissed.
- [79] However, I will determine the plaintiff's damages in the event I am incorrect on the issue of liability.

Damages

Non-Pecuniary Damages

Facts

- [80] The plaintiff had pain in his neck, low back and shoulder immediately following the accident. He had constant headaches and had difficulty sleeping.
- [81] His family doctor, Dr. Adam, referred him to massage therapy. He found the treatments beneficial but because he had to go back to work after only a few weeks, the benefits were short-lived. He returned to work in the fall in 2017, even though he found it painful, due to his financial circumstances. At one point, he and his wife consulted with a bankruptcy trustee.
- [82] Because he was working at the time of the accident, the cost of his treatments, or at least a portion of the cost, was covered through WorkSafeBC. However, his file was closed once he returned to work and he had no source of funds to pay for treatments. He paid for a handful of treatments by himself but otherwise could not afford them. He contacted ICBC but because liability was an issue, they were not prepared to assist.
- [83] Throughout the rest of 2017, his days were spent working and then resting in order to be able to work the next day and he was unable to pursue any of his usual recreational activities. By early 2018, his headaches had resolved but he continued to suffer neck pain on a daily basis and had a stiff shoulder aggravated by movement and by holding a traffic flagging sign. His low back was also painful because he had to stand and turn and twist throughout his working day.
- [84] He was unable to do his usual activities around the home and the burden fell primarily to his wife. While his marriage has not been affected, their relationship suffered a little because he felt he was unable to do the things that he was obligated to do as part of the marriage partnership.
- [85] Mr. Spencer's employer at Secure Traffic, Ms. Paula Jameson, was aware of Mr. Spencer's injuries following the accident, and kept him on smaller jobs until early 2018 to accommodate his injuries.
- [86] Throughout 2018, he continued on a daily routine of working and then recovering from the day's activities. His recreational activities were curtailed and although he and his wife would drive to Penticton to see a friend from time to time, he was unable to pursue his usual activities such as short hikes or photography. They no longer had people over to visit the home because they felt it was not cleaned to the level where they would feel comfortable having company over.
- [87] The plaintiff's employers and co-workers invariably testified that he was an excellent worker: committed, reliable, and thorough and an all-around hard worker. His former employer, Ms. Paula Jameson, described him in glowing terms, as did his former supervisor, Ms. Shirley Tary. He enjoys his work and enjoys the interactions with both co-workers and clients.

- [88] In April 2019, he changed employers when he accepted a job with Domcor Traffic. The move was primarily for financial reasons. Although he was making \$19 per hour at Secure Traffic and went to Domcor for \$18 per hour, he was no longer required to supply his own vehicle and he said that when he did the calculations, he would actually be ahead with the move notwithstanding the slightly lower hourly wage.
- [89] For the first couple of months or so, the Domcor work was much easier because he was primarily following a road sweeper around on the night shift work. From time to time he would need to hold up traffic while the street sweeper turned, but for the most part spent his time driving.
- [90] The plaintiff was hired by Domcor in the position of traffic control supervisor. In the fall of 2019, he was given the position of Acting District Manager when the incumbent took a leave. Once he took the Acting District Manager job, his work was less physical and more administrative in nature. Prior to that change, he estimated that 60% of his time was administrative and 40% was doing traffic control work.
- [91] The busy time for outdoor traffic control work is in the summer months from approximately May until the end of October or so. The outdoor work gets particularly busy in the fall because customers are endeavoring to complete the various projects before winter.
- [92] Mr. Marko Myatovic is the regional manager for Domcor and has been with them for approximately 1.5 years. Mr. Spencer reports directly to Mr. Myatovic, but he has only worked closely with him since February 2020. Mr. Spencer's duties as area manager include communicating with clients and employees including other traffic controllers, and also doing traffic control duties in the absence of other employees.
- [93] The plaintiff is currently spending a lot more time doing traffic control work than would normally be the case for a manager due to a shortage of staff. Domcor presently has approximately 15 traffic controllers, and Mr. Myatovic would prefer to see that number increased to 25 to 30 traffic controllers. As such, the plaintiff is now doing approximately 80% traffic control and only 20% administration work. Although Domcor has almost doubled its workforce in the region since early 2020, the amount of work has also increased. Mr. Myatovic expects the plaintiff will spend a third to a half of his time doing traffic control work once Domcor reaches its full staff complement.
- [94] Mr. Spencer described a worsening of his symptoms during the summer of 2020 to the point where they were similar to what he was experiencing shortly after the accident. He has neck pain that increases from low to more severe at the end of the day, aggravated by the twisting and turning required in his day-to-day traffic control functions. His left shoulder is sore and is swollen by the end of the day and requires icing. His low back is stiff and sore in the morning and becomes more inflamed through the day. His headaches, which had previously largely resolved are now daily and last up to an hour or so when he gets home. He finds they settle down with Advil but on occasion takes extra strength Advil and even a Tylenol 3. However, he has not missed any work on account of his injuries since the summer of 2017.

- [95] The only expert medical evidence was from the parties' physiatrists. Their evidence is largely identical. The plaintiff's physiatrist Dr. Rajasekaran opines that as a result of the accident, Mr. Spencer suffered the following:
- a) Moderate whiplash associated disorder grade II (left greater than right):
 - i. Left scapular dyskinesia;
 - ii. Upper trapezius myofascial pain; and
 - iii. Lower cervical facet joint mediated pain;
 - b) Lower lumbar facet joint mediated pain;
 - c) Left knee patellofemoral pain syndrome;
 - d) Right arm intermittent neuropathic symptoms;
 - e) Neurocognitive symptoms; and
 - f) Post-traumatic headaches.
- [96] Mr. Spencer told Dr. Rajasekaran that he had a prior history of intermittent low back pain. His admission in this regard is significant because there was nothing in the medical records that had been provided to Dr. Rajasekaran that made any mention of low back pain. As such, he would not have been aware but for the plaintiff's candid disclosure.
- [97] However, the plaintiff also told Dr. Rajasekaran and the defendant's physiatrist, Dr. Giantomaso, that he had changed jobs to one that involved lighter duties on account of his injuries, while his evidence at trial was that he moved to Domcor for financial reasons.
- [98] Notwithstanding the reference to knee pain in Dr. Rajasekaran's report, the plaintiff did not say at trial that he had knee pain related to the accident, and it is of note that knee pain was not reported to Dr. Adam following the accident.
- [99] Dr. Rajasekaran described the plaintiff as having pain related limitations, including neck pain with heavy lifting, neck movements or use of his shoulders; lower back pain with flexion, sitting or standing; increased back pain with driving; difficulty standing for long periods or walking up hills; difficulties with heavy household cleaning and cleaning bathrooms and exacerbated pain with computer work requiring frequent breaks.
- [100] Dr. Rajasekaran opines that Mr. Spencer should limit any activities that exacerbate his symptoms that persist into the following day that can affect his ability to work full time. In terms of prognosis, Dr. Rajasekaran opined "Given the severity and chronicity of his symptoms related to Diagnosis 1-3, I feel his prognosis is at this point is poor where the likelihood of him achieving significant recovery with treatment is low".
- [101] Dr. Giantomaso was retained by the defendant. Unlike Dr. Rajasekaran, Dr. Giantomaso was not required to testify at trial. He described Mr. Spencer's current status as follows:

Currently his maximal area of discomfort is in the left low back. He notes this increases with lifting, repetitive flexion/extension maneuvers and prolonged sitting. He notes he has to change position frequently while at work or at home. He notes his left shoulder, neck and upper back regions also bother him regularly. At this point, he notes pain with prolonged static positioning, prolonged driving, as well as sometimes with household chores such as vacuuming or scrubbing.

[102] He went on to summarize his opinion as to the plaintiff's prognosis as follows:

It is now over two and a half years post-trauma. The vast majority of improvement through natural history and rehabilitation would have been expected to have occurred in the first 6 to 12 months post-trauma or earlier. Thus, in my opinion on a balance of probabilities, he will likely continue to experience chronic pain to some degree long term in the future. By following my recommendations, he may experience decreased pain and increased function in the future, however this should be considered part of a long-term pain management strategy and should not necessarily be considered curative.

[103] As such, both physiatrists are of the opinion that significant improvement is improbable, and that the plaintiff's focus will be on pain management rather than recovery.

Law

[104] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[105] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No 163 (QL), 2005 BCCA 54).

[106] The assessment of non-pecuniary damages must be done with reference to the individual plaintiff's personal experiences in dealing with his or her injuries.

Conclusion

- [107] The parties each provided a number of authorities to support their positions on an appropriate amount for non-pecuniary damages. The plaintiff says an appropriate award is between \$80,000 and \$100,000, whereas the defendant argues the range is \$40,000 to \$50,000.
- [108] Assessment in this case is not assisted by the fact that the plaintiff has not reported his ongoing issues during the recent months to his family doctor. I accept that it is not necessary to continue to go to the doctor to confirm that nothing has changed. However, the plaintiff's evidence at trial was that his symptoms have returned to the levels similar to what he was experiencing shortly after the accident. He has not reported any accident-related concerns to Dr. Adam since early 2018, some two and a half years prior to trial. Both of the psychiatrists saw him before 2020, before his recent aggravation of symptoms.
- [109] While I accept that the plaintiff's return to frequent traffic control duties has aggravated his symptoms, the fact that he has not sought medical advice and has not missed any time from work would suggest that he considers his pain to be manageable. He testified that he uses Tylenol 3 from time to time, but since he has not filled a prescription since July 2017, his use is seldom.
- [110] Of the authorities provided, I consider Justice Douglas' decision in *Horne v. Goglia*, 2020 BCSC 122, to be the closest on the facts, albeit the plaintiff's symptoms were slightly more severe than those in the present case. In that case, the plaintiff was awarded \$80,000 for non-pecuniary damages.
- [111] I conclude that an appropriate award for non-pecuniary damages for this plaintiff would be \$75,000.

Duty to Mitigate

- [112] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

- [113] Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.
- [114] The duty to mitigate includes an obligation on the plaintiff to take reasonable steps to minimize any loss relating to injuries. The defendant bears the onus of establishing that the plaintiff failed to mitigate his damages on a balance of probabilities. It must be established that:
- a) there was a course of treatment available to the plaintiff that would have reduced or eliminated the effect of the plaintiff's injuries;
 - b) a reasonable person would follow that course of treatment;
 - c) the plaintiff unreasonably failed to pursue the treatment; and
 - d) the damages to the plaintiff would have been reduced if he or she had pursued that course of treatment: *Morgan v. Allen*, 2017 BCSC 1958 at para. 46.

Defendant's Position

- [115] The defendant argues that the plaintiff failed to mitigate his damages because he did not pursue physiotherapy when it was recommended to him and that had he done so, some of his symptoms would have improved. I do not agree.

Discussion

- [116] The plaintiff attended a handful of registered massage therapy treatments shortly after the accident but only ever pursued two physiotherapy treatments, both in 2019. The plaintiff admitted on cross-examination that he did not like the physiotherapy treatments, and that he found them invasive. It would therefore be fair to characterize him as reluctant to pursue physiotherapy as a course of treatment.
- [117] Dr. Rajasekaran's opinion was that the upper trapezius myofascial pain may have been improved through physiotherapy. However, his diagnosis regarding the low back and neck was that the plaintiff had facet joint mediated pain, which would not be improved by physiotherapy. It does not necessarily follow that the plaintiff's pain and function would have improved had he pursued physiotherapy.
- [118] However, the evidence also does not establish that the plaintiff failed to follow a recommendation for physiotherapy shortly after the accident. The plaintiff's general practitioner, Dr. Adam, testified that his general practice for treatment for soft tissue injuries arising out of motor vehicle accidents is to begin with passive therapies including physiotherapy and massage, and if symptoms continue, that he would then consider other options such as a referral to a pain clinic that may involve injections. However, Dr. Adam

agreed on cross-examination that although he provided a referral for massage therapy shortly after the accident, he was unable to confirm that he provided one for physiotherapy, even though there was a reference to physiotherapy in his notes.

- [119] The plaintiff's evidence was that he did not continuously re-attend at his doctor's to repeat his pain complaints because he found that he was able to manage his symptoms with a combination of rest, heat pads and medications, primarily Advil. I accept his explanations and I agree with plaintiff's counsel that it is not necessary to continue to attend at a doctor's office to repeat the same complaints unless the complaints are not manageable or unless the plaintiff has been advised to re-attend in the future.
- [120] The defendant has not established on the evidence that the plaintiff was recommended to re-attend to discuss his symptoms at any particular point, that it was ever explained to the plaintiff that other alternatives could be pursued in the future, or that he failed to follow recommendations.
- [121] It follows that the defendant has failed to prove on a balance of probabilities that the plaintiff's symptoms and function would have improved had he not failed to take reasonable steps as recommended to him.

Loss of Income

Past Income Loss

- [122] The parties have agreed that as a result of his accident injuries Mr. Spencer missed approximately 30 days of work and suffered a gross past wage loss of \$4,475.64. Net past wage loss is agreed at \$3,580.51.
- [123] The defendant does not agree that the plaintiff suffered a loss of future earning capacity as a result of the accident.

Loss of Future Earning Capacity

Law

- [124] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time. The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at paras. 7-8 (S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232.
- [125] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [126] 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. 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.
- [127] 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.
- [128] 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 at para. 8 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.
- [129] 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.
- [130] 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.

Discussion

- [131] The defendant argues that Mr. Spencer has not proven that there is a real and substantial possibility of a future event that would lead to a loss of income. I do not agree.
- [132] Mr. Spencer has continued to work since the accident and has not missed time from work other than in the weeks following the accident. However, he changed employment to a position that was more supervisory or administrative in nature. While his motivation for so doing was financial, the reduction in the physical work on a daily basis was also of benefit to him.
- [133] The plaintiff has done more traffic control work during the past several months, primarily because his employer's expansion of its business has exceeded its ability to higher other traffic controllers. I accept that if Domcor is able to hire as Mr. Myatovic, the plaintiff's supervisor hopes, the plaintiff will return to a preponderance of more sedentary work. However, there is no certainty that more sedentary work will be available to him in the future, and while he is clearly regarded very highly by all of his employers, both past and present, I am satisfied that the realities of the traffic control business are that it is highly unlikely that he would be able to find a different position in the same industry that did not include a significant portion of traffic control work.
- [134] The fact that the plaintiff has not yet lost any work is no bar to a recovery for loss of future earning capacity: *Day v. Nicolau*, 2011 BCSC 490. The evidence satisfies me that the plaintiff would not be suited to full time traffic control work, should his supervisory position cease to be available to him. In all of the circumstances, I conclude that an appropriate award of damages for loss of future earning capacity would be approximately one year's wages, consistent with the loss of capital asset approach in other cases. An appropriate award of compensation would be \$50,000.

Costs of Future Care

- [135] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him or her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.).
- [136] The test for determining the appropriate award under the heading of cost 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 cost of future care and (2) the claims must be reasonable: *Milina v. Bartsch* at 84.

- [137] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award.
- [138] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

Conclusion

- [139] The plaintiff tendered in evidence a cost of future care report from Ms. Christina Peters, an occupational therapist. The parties have agreed on the various multipliers that would apply in the event that some or all of the expenses are found to be justified.
- [140] In order to be recoverable, the court must be satisfied that the plaintiff would actually take advantage of the various recommendations that form the basis for the cost of future care claim. It is not intended to simply top-up other damages.
- [141] The preponderance of the plaintiff's claim for cost of future care is significant amounts for ongoing physiotherapy and gym passes, which are extrapolated for much of the remainder of the plaintiff's life. However, the difficulty with these claims is that the plaintiff's own evidence would suggest that he is highly unlikely to make use of those services. He testified that physiotherapy provided him with no tangible benefit and that he found the treatments both painful and intrusive. He has never used a gym, and expressed little interest in doing so. The plaintiff was given exercises to do at home, but did not follow through with them.
- [142] On the issue of mitigation, the plaintiff argued that the defendant's argument that the plaintiff had failed to mitigate his damages for failing to follow recommendations for physiotherapy should be rejected because it is unlikely that he would have derived much benefit from the treatments. Having accepted his argument in that regard, it would not be appropriate when assessing the plaintiff's claim for the cost of future care to provide compensation for an extended regimen of physiotherapy treatments. While the plaintiff said he would be prepared to try more physiotherapy, I conclude that the benefit would be speculative and that he is unlikely to pursue it further unless the benefits are immediate. I would only be prepared to make a nominal award for these items.
- [143] I accept that better work boots and heating pads that need to be replaced from time to time are appropriate in the plaintiff's circumstances, as is an allowance for Advil which he uses regularly for relief at the end of the work day.

[144] I accept that the plaintiff has experienced and continues to experience some pain when doing housework, including vacuuming and cleaning the bathrooms. Although the plaintiff and his wife had used a cleaning service from time to time prior to the accident, they have not done so since the accident and the plaintiff testified that they would not be comfortable with a cleaner unless they were also home. Unless an expense is actually going to be incurred, compensation is more properly addressed as a component of non-pecuniary damages which are intended to compensate the plaintiff for the impact the accident has on the daily activities of life.

[145] In the circumstances, I would award the plaintiff \$2,500 for cost of future care.

Special Damages

[146] Special damages were agreed in the amount of \$13,649.46 plus over the counter medications as proven. The plaintiff does not have receipts for his Advil that he deposed he uses regularly, but said it costs \$15 to \$17 per bottle and that a bottle lasts approximately one month. He claims \$500 for this expense.

[147] I accept he uses Advil regularly and would award him \$400 in addition to the special damages as agreed.

Costs

[148] If the parties are unable to agree on costs, they may contact Scheduling within 21 days to arrange to speak to the issue.

"Wilson J."

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