

CANADA / JUDGMENT

Stevens v. Creusot

2019 BCSC 1781

COURT

Supreme Court of British Columbia

DECIDED

17 October 2019

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2019 BCSC 1781 Stevens v. Creusot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Creusot,

2019 BCSC 1781

Date: 20191017

Docket: M178037

Registry: New Westminster

Between:

Jonathan Harold Stevens

Plaintiff

And

Martha Charlie [deceased], by her Litigation Representative,

Fidele James Henry, Sidney Robert Alex,

Marcel Creusot and Jorgelina T. Ulcnik Creusot

[aka Jorgelina T. Ulcnik-Creusot]

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Plaintiff:

S.T. Cope

Counsel for Defendants Sidney Robert Alex, Marcel Creusot and Jorgelina T. Ulcnik Creusot [aka Jorgelina T. Ulcnik-Creusot] and Third Party:

L.J. Grenier

J. Main

Place and Date of Trial:

New Westminster, B.C.

June 24-28 and July 3-5, 2019

Place and Date of Judgment:

New Westminster, B.C.

October 17, 2019

INTRODUCTION

- [1] This action concerns two motor vehicle accidents (the "Accidents").
- [2] The first accident occurred on December 15, 2014 in Langley, BC. The plaintiff, Jonathan Stevens', vehicle was struck by a vehicle, alleged to have been driven by the defendant, Martha Charlie, now deceased, and owned by the defendant, Sidney Alex (the "First Accident").
- [3] Ms. Charlie's estate has not responded to this claim. Mr. Alex denies liability for the First Accident but he has not presented any evidence at this trial disputing Mr. Stevens' account in that respect. The third party, Insurance Corporation of British Columbia ("ICBC"), is involved given allegations that Ms. Charlie was in breach of the policy.
- [4] The second accident occurred on June 2, 2015, in Prince George, BC. Mr. Stevens' vehicle was in a collision with a vehicle driven by the defendant, Marcel Creusot, and owned by the defendant, Jorgelina Ulcnik Creusot. Mr. Creusot and Ms. Ulcnik Creusot have admitted liability for this accident (the "Second Accident").

- [5] Mr. Stevens alleges that he suffered various injuries, including soft tissue injuries, arising from the First Accident and that those injuries were aggravated by the Second Accident. He claims that he remains in chronic pain and that he was unable to return to work in his previous occupation as a carpenter. The defendants and third party who have appeared at this trial acknowledge that Mr. Stevens suffered some injuries arising from the accidents; however, they dispute the extent of the damages claimed by Mr. Stevens.

BACKGROUND FACTS

- [6] Mr. Stevens was born in August 1953. He was almost 66 years of age at the time of the trial. He is married; his wife is a realtor. They have a son, now age 21, who lives at home and works part-time.
- [7] The Stevens family lives in Abbotsford, BC. on a hobby farm. The farm consists of 3.2 acres and includes a house, barn, garden and orchard areas. The family presently maintains a small herd of sheep and raise lambs.
- [8] Mr. Stevens has worked full time as a carpenter since he was 18 years old.
- [9] At the time of the First Accident, Mr. Stevens was employed as a carpenter at Bird Construction ("Bird Construction"). He had been employed at Bird Construction at that time for some 18 years. Bird Construction is a general contractor with projects throughout Canada, including the Lower Mainland.
- [10] In the years leading up to the First Accident, Mr. Stevens worked both in the Lower Mainland and outside of the Lower Mainland, the latter being typically north in such places as Fort Nelson and Hay River. From 2000-2014, he equally split his work schedule between the Lower Mainland and outside of the Lower Mainland.

LIABILITY - FIRST ACCIDENT

- [11] In December 2014, Mr. Stevens was working on a Bird Construction project at the University of British Columbia. On the morning of December 15, 2014, he left early for work, around 3:00 a.m.
- [12] Around 3:15 a.m., he was heading west on 16 Avenue in Langley in his Toyota Corolla. He stopped at a red light at the intersection of 16 Avenue and 264 Street. A tractor-trailer was turning left in front of him, which resulted in that vehicle blocking 16 Avenue in both directions. A black pick-up truck was travelling northbound on 264 Street and encountered the red light and the tractor-trailer still in the intersection. The driver of that truck swerved to the right, hitting the light pole and then hitting Mr. Stevens' vehicle.
- [13] All that Mr. Stevens remembers of this accident is that the stop light pole hit the back window of his vehicle, smashing the glass. He also believes that the other vehicle hit his vehicle on the driver side door. Photographs of Mr. Stevens' vehicle show substantial damage, including the smashed back window and a crumpled-in driver and back passenger

doors. Mr. Stevens was able to climb across the front passenger seat and exit through the passenger door. The pick-up truck was also seriously damaged on the front end, presumably where it hit the light pole and Mr. Stevens' Toyota.

- [14] Police and fire trucks attended at the scene. Cst. Gian Millette of the Langley RCMP testified and stated that he was able to identify that Ms. Charlie was the driver of the black pick-up truck that was owned by Mr. Alex. Given her behavior at the scene, Cst. Millette formed the view that Ms. Charlie was intoxicated.
- [15] Another driver who witnessed the accident stopped and called for emergency assistance. Mr. Stevens was transported by ambulance to Royal Columbian Hospital. He was found to have six broken ribs on his left side, a lacerated spleen and a collapsed lung, all acknowledged by the defence to have been caused by the accident. Mr. Stevens was released 36 hours later.
- [16] I accept the evidence of Mr. Stevens and Cst. Millette on the issue of liability for the First Accident. Ms. Charlie and Mr. Alex do not dispute this account as to how the accident occurred and that Ms. Charlie was intoxicated at the time she caused the accident.
- [17] Mr. Stevens has established that Ms. Charlie was the sole cause of the First Accident through her negligence and that she and Mr. Alex are liable for any damages arising.

LIABILITY - SECOND ACCIDENT

- [18] On June 2, 2015, almost six months after the First Accident, Mr. Stevens undertook a trip to Chetwynd, BC to visit his stepson. He indicates that he had made this trip once before and that, as with a previous trip, he had to sit on a pillow and stop often to walk and ease the pain he felt from the First Accident.
- [19] At the time of the Second Accident, Mr. Stevens was travelling north in his Toyota pick-up truck on Highway 97 just outside of Prince George. He was alone in the vehicle.
- [20] Mr. Stevens said that his truck was hit on the left doors by a 2014 Dodge truck that was leaving a gas station. The truck was driven by Mr. Creusot. Mr. Stevens estimated that his own speed at the time of the accident was 40-50 kilometers per hour. He said he was hit by flying glass when the window broke after the collision.
- [21] Mr. Stevens' truck was a write-off. It was towed to an impound lot in Prince George. He then rented another vehicle and went to the Prince George hospital at the insistence of his wife. Medical personnel at the hospital examined him, principally to allay his fears that he had reinjured his spleen (he had not).

- [22] After four hours, he was discharged from the hospital and he carried on with the drive to Chetwynd. At that time, he was feeling much the same as before the Second Accident, namely with the same pain intensity principally to his back and right hip. The following day he had sore arms which he thought arose from his holding of the steering wheel upon impact in the Second Accident.
- [23] As stated above, Mr. Creusot and Ms. Ulcnik Creusot admit liability for the Second Accident.
- [24] The defence agrees that the Second Accident primarily caused soft tissue injuries to Mr. Stevens' neck, upper body and lower back, which exacerbated the injuries from the First Accident to the extent that they had not healed. In addition, the defence agrees that the injuries from the First and Second Accidents are indivisible for assessment purposes.

POSITION OF THE PARTIES RE INJURIES

- [25] Mr. Stevens takes the position that, arising from the First Accident, he sustained the following injuries and that he has had the following arc of resolution of those injuries:
- a) a concussion, being a momentary loss of consciousness at the scene;
 - b) fractured left ribs, a collapsed lung and a lacerated spleen. These were resolved within six months;
 - c) cervical soft tissue injury, primarily left side. He acknowledges that this was largely resolved within two years, but he can still experience discomfort and pain as a secondary effect from ongoing back problems;
 - d) soft tissue injury to his shoulders, particularly his left one. This was largely resolved within 12-18 months, but can be aggravated when his back acts up or depending on what use he is making of his shoulders; and
 - e) soft tissue injury to his thoracic and lumbar spine, primarily the left side, which remains problematic to this time.
- [26] The defence does not take issue with respect to the immediate injuries to Mr. Stevens' ribs, lung and spleen. The defence does, however, take the position that the soft tissue injuries were significantly resolved within a year of the First Accident and that since then, Mr. Stevens has seen fit to exaggerate the continuation and severity of his symptoms.
- [27] In the alternative, the defence contends that, if Mr. Stevens continued to suffer symptoms after the first year, it was largely of his own doing in imposing restrictions on his activities that were not required and in not undertaking a more active rehabilitation program to improve his function.

PRE-EXISTING MEDICAL CONDITION

- [28] At the time of the Accidents, Mr. Stevens was 61 years old. He had been working in a full-time physical occupation in the construction industry doing carpentry for the previous 40 years.
- [29] There is some evidence about Mr. Stevens' medical history. It all arises from Mr. Stevens' own evidence at this trial, supported by some medical records, and what he told certain medical practitioners in 2015. Like many people who undertake physical jobs over years, if not decades, Mr. Stevens had dealt with various medical issues.
- [30] Mr. Stevens said in direct that he had been receiving chiropractic therapy for some 20 years prior to the First Accident, principally to deal with his right shoulder. The shoulder issues were aggravated by overhead work. Records from November 2012 indicate he had frequent aching and stiffness in his neck, shoulders and low back over the last 20 years.
- [31] He also said that he had suffered some knee problems and had undergone surgery to repair a torn meniscus.
- [32] Mr. Stevens stated that both his hands shook, principally on the right. He had suffered this condition for some ten years before the First Accident. He received treatment for this condition and, like the shoulder issues, he had persevered even in the face of them. He asserted that neither of these problems interfered with his carpentry work, although he acknowledged that the shoulder issue was aggravated by overhead work, including when he was working as a carpenter.
- [33] Mr. Stevens reported various problems with his neck prior to the First Accident, possibly due to "wear and tear".
- [34] There was also some evidence of work related injuries, such as when he walked into a beam and injured his neck in April 2012.

LAY EVIDENCE re INJURIES/TREATMENT

- [35] The lay evidence included that of Mr. Stevens himself and several friends.

Mr. Stevens

- [36] After the First Accident, Mr. Stevens was advised upon discharge from the hospital that he should attend a trauma clinic at the Abbotsford Regional Hospital. He did that twice. The personnel at the trauma clinic advised him to limit his physical activity for six months to allow his spleen to heal.
- [37] In March 2015, Dr. Michael Newton became Mr. Stevens's family doctor. At that time, Mr. Stevens visited Dr. Newton regarding his injuries from the First Accident. He saw Mr. Stevens a number of times over the following years.

- [38] In April 2015, Mr. Stevens also began seeing Dr. Viggiani for chiropractic treatments. It was solely Mr. Stevens' decision to see Dr. Viggiani. Mr. Stevens went to these treatments for pain relief that apparently was only temporary. This led initially to regular weekly attendances with Dr. Viggiani.
- [39] During the first six months after the accident, Mr. Stevens suffered pain on his left side, particularly where his ribs had been broken. He was taking pain medication. He had difficulty sleeping. He made efforts over this time to begin walking around and be more active but he was careful. He said that his son assisted him in the more physical tasks at home and on the hobby farm.
- [40] The six month anniversary of the First Accident coincided with the Second Accident in June 2015. Mr. Stevens said that he had increased pain around his hips and lower back as a result of the Second Accident. He then spoke to Dr. Newton and was referred for active rehabilitation and massage treatment.
- [41] Mr. Stevens attended at the Apollo Clinic for physiotherapy sessions seven times in August/September 2015. The first treatments were successful, but when the physiotherapist recommended more exercises, Mr. Stevens decided that it was too painful. He stopped these sessions without having raised the matter at all with the physiotherapist to see if some other treatment could be done. Nor did he seek another referral from Dr. Newton to another physiotherapist notwithstanding his complaints about the service at Apollo. That was the end of any physiotherapy sessions to treat his conditions, as decided by Mr. Stevens.
- [42] Similarly, Mr. Stevens' treatment at a local pool was very brief. In September 2015, he went to the Abbotsford Recreation Centre on the advice of the physiotherapist and did some pool walking. After some four months, he stopped going, not arising from any reason relating to his condition, but because of concern over flu season and because he was "accosted" by a woman in the hot tub.
- [43] The above treatments were the extent of Mr. Stevens' rehabilitation efforts over the year following the First Accident. Formal treatments after September 2015 consisted only of weekly or very regular attendances with Dr. Viggiani, totalling almost 150 visits from 2015-2019.
- [44] Other efforts on the part of Mr. Stevens to deal with his pain included stretching for ten minutes in the morning and using a heat pad for his back when it was sore.
- [45] Mr. Stevens said that he attempted to remain active on his hobby farm once he began to return to more physical activity after the Accidents. However, he said that he was restricted in that regard. He said that he was:

- a) Unable to take his hay crops off the field and store the hay bales. Prior to the Accidents, he would have two to three hay crops per year that he would rake and bail. He would then load them into his truck and throw them into the barn. After the Accidents, he used a tractor to load them into the barn but he had to get someone else stack them in the hayloft;
 - b) Unable to care for his sheep herd in the same manner. Prior to the Accidents, he would perform such tasks as vaccinating, deworming and shearing the sheep. After the Accidents, he had to limit how many sheep he could tend to each day. He could not shear more than one sheep per day without having sore shoulders and a sore back the next day. He was also unable to butcher his sheep for consumption by the family;
 - c) Unable to tend to his garden in the same way. Before the Accidents, he would hoe for one to two hours to keep the weeds under control. After the Accidents, he was unable to hoe his garden so he weeded it on his hands and knees for a limited time, before he was too tired and stiff to continue. He also had to change what he planted to have more maintenance free vegetables to grow;
 - d) Unable to maintain the hobby farm. Before the Accidents, he kept the surrounding lawn and grass areas well maintained. After the Accidents, he was not able to keep up with the maintenance; he had to limit his physical activity because of the pain and exhaustion. He now limits how much time he spends on maintenance and does not do tasks on consecutive days. He also has difficulty maintaining his fence, for example, by digging holes for posts;
 - e) Unable to maintain the orchard. He limits how many fruit trees he prunes at a time. He is also limited in taking in the fruit crops; and
 - f) Unable to fix things. Mr. Stevens has a tool shop on his hobby farm with various mechanical and woodworking tools in it. By all accounts, he was a very handy fellow. He would regularly fix things around the house or in the barn and repair vehicles.
- [46] Mr. Stevens also reported that his ability to sit and play the violin has been affected by his sore back such that he gets tired and needs to rest often.
- [47] Mr. Stevens determined himself that he was unable to return to work at Bird Construction after the First Accident. He made no efforts to return to any other occupation until he began a home inspection course in January 2017. He completed that course at the end of 2017 but he has yet to be qualified. He applied to be certified in January 2018. He is now attempting to complete the practical testing necessary to do that. He has made one unsuccessful attempt and, at the time of trial, he anticipated taking the examination again.
- [48] To support his contentions regarding the severity and continuing nature of his injuries, Mr. Stevens called various friends as witnesses. In the usual fashion, these witnesses gave evidence as to any differences in Mr. Stevens' physical capabilities and demeanour before and after the First Accident.

Luciano Mendini

- [49] Mr. Mendini is 65 years old. He and Mr. Stevens worked together at Bird Construction for about ten months, some 18 years prior to the trial.
- [50] Mr. Mendini is employed as a labourer. He has since moved on to another job with Beedie Construction. However, he and Mr. Stevens remained friends over the years and they visited each other from time to time.
- [51] Before the First Accident, Mr. Mendini helped Mr. Stevens with some tasks around the hobby farm, such as gardening, replacing the roof on the house, cutting the grass and baling hay. These were, however, periodic visits and not regular ones.
- [52] Mr. Mendini gave some very general descriptions of Mr. Stevens' activities after the Accidents. Mr. Mendini continued to assist Mr. Stevens after the First Accident with various tasks, including baling hay, pruning fruit trees and mending fences. He reported that Mr. Stevens is "not the same man" since he "used to be strong". He said that Mr. Stevens often quits after about an hour whereas before, they would just keep going.
- [53] Both Mr. Stevens and Mr. Mendini confirmed that, after the Accidents, Mr. Mendini suggested to Mr. Stevens that he should see someone at Beedie Construction and see if he could get employment there. Mr. Mendini even suggested that he could possibly do a supervisory job without a tool belt, meaning without that weight, suggesting that even Mr. Mendini formed the view that Mr. Stevens had some capacity for work. Mr. Stevens' response was a flat "no".

Donald Blaak

- [54] Donald Blaak is a pastor who works for the local church and at a local music store. He is familiar with Mr. Stevens as a member of the church and choir. He has known Mr. Stevens for approximately ten years now.
- [55] Mr. Blaak said that, prior the Accidents, Mr. Stevens was helpful in setting up choir practice, including carrying chairs and moving tables. His contact with Mr. Stevens was, however, minimal as Mr. Stevens was often working out of town.
- [56] Mr. Blaak described the changes he observed in Mr. Stevens after the Accidents, noting that he was more subdued and kept to himself. He also avoided some of the tasks involved in setting up the choir practice, such as setting up tables.
- [57] However, it is quite evident that Mr. Blaak's ability to observe Mr. Stevens, both prior to and after the Accidents, was very limited since he only interacted with Mr. Stevens at a weekly church service, weekly choir practice and the occasional social gathering.

Dr. Patrick O'Grady

- [58] Mr. Stevens' friend, Dr. Patrick O'Grady, spoke about Mr. Stevens' pre and post-accident abilities as they relate to his carpentry and the hobby farm.
- [59] In the 1990s and early 2000s, Dr. O'Grady hired Mr. Stevens to complete some carpentry work at his veterinary practice and his home. Other than seeing Mr. Stevens at those times, Dr. O'Grady would visit the hobby farm one to two times a year with his children when they were younger, but less so after they became teenagers in the early 2000s.
- [60] Since the First Accident, Mr. Stevens and Dr. O'Grady have spoken on the phone about 3-4 times per year. Dr. O'Grady testified that he contacted Mr. Stevens in the year following the First Accident seeking some help in remodelling his veterinary clinic; Mr. Stevens declined, citing that he was injured and could not assist.
- [61] Dr. O'Grady described that since the Accidents, Mr. Stevens has been less enthusiastic and does not seem himself.
- [62] As with Mr. Mendini and Mr. Blaak, I find that Dr. O'Grady's limited contact with Mr. Stevens in both time frames does not provide much meaningful information as to his true function before and after the Accidents.

Wife / Son?

- [63] It is significant that the two key witnesses who would have been best able to provide such lay evidence as to Mr. Stevens' day-to-day activities before and after the Accidents, and any restrictions he may have suffered since the Accidents - namely his wife and son - were not called as witnesses at this trial. No explanation was offered for their failure to testify.
- [64] The defence does not seek to have the Court draw an adverse inference by reason of that fact. Nevertheless, it leaves the Court in a position where the best evidence has not been put forward toward a comprehensive understanding of Mr. Stevens' pre and post functioning and without any explanation for their absences at this trial.

EXPERT MEDICAL EVIDENCE**Plaintiff's Experts**

- [65] Mr. Stevens called three medical experts.
- a) Dr. Michael Newton
- [66] On March 13, 2019, Dr. Newton prepared his expert report in the field of family medicine. Dr. Newton recounts the numerous visits by Mr. Stevens to him following the Accidents, beginning in March 2015. Dr. Newton did not take any pre-accident history from Mr. Stevens and he therefore makes no mention of that matter in his report beyond the unsupported statement that Mr. Stevens was "a healthy and active man".

- [67] For the first few months, Mr. Stevens reported continuing improvement to the point where in July 2015 he had regained about 75% of his pre-accident function. There appears to have been some setback in August 2015 when Dr. Newton referred Mr. Stevens for massage treatment.
- [68] By summer 2015, Dr. Newton noted that Mr. Stevens had made his own decision to "return" to seeing a chiropractor. This was not as a result of Dr. Newton's recommendation or referral.
- [69] From fall 2015 and into 2016, Mr. Stevens continued to report ongoing symptoms of stiffness and neck and back pain although he was doing some chores around the farm and also doing some self-directed exercises. Dr. Newton noted that there was "slow improvement" or "slow recovery" over this time frame.
- [70] During his 2015 visits, Mr. Stevens had reported to Dr. Newton that he was unable to return to his work as a carpenter.
- [71] By December 2016, Mr. Stevens reported that his symptoms were stable but mainly unchanged. At that time, Dr. Newton raised the matter of him returning to work. As before, Mr. Stevens said he did not feel that he could manage the physical demands of working in construction; he reported that he was looking into retraining opportunities.
- [72] In late 2016, Dr. Newton referred Mr. Stevens for a functional capacity evaluation, the results of which are discussed below.
- [73] In July 2017, Mr. Stevens reported further gradual improvement to Dr. Newton and that his tolerance for exercise was improving.
- [74] In his March 13, 2019 report, Dr. Newton's prognosis was that Mr. Stevens had recovered approximately 80% of his pre-accident functioning but that he had reached a plateau. Dr. Newton further stated:

Although he has managed to create a 2nd career and continues to operate his hobby farm, it is unlikely that he will ever regain the level of functioning that he experienced before his accident. He will continue to experience pain after physical exertion which will require ongoing chiropractic treatments and periods of rest. As he did not experience any of these problems before the accident, on a balance of probabilities, it is more likely than not that the symptoms that he experiences now on a daily bases are the result of the injury sustained in the motor vehicle collision in 2014.

[Emphasis added.]

- [75] I conclude that this opinion comparing his pre and post conditions is without foundation. Dr. Newton conceded in his testimony that he had no knowledge of Mr. Stevens' pre-functioning. There is no mention of any history having been taken and Dr. Newton's personal involvement with Mr. Stevens was non-existent in the years before the Accidents and only began some three months after the First Accident.
- [76] Dr. Newton's current opinion that no further recovery can be expected is questionable. During cross examination, he conceded that there may be other modalities and options to bridge the remaining gap of 20%. In that event, one questions his medical judgment as to why he did not recommend any such options in the four-and-a-half years since he has been treating Mr. Stevens.
- [77] Dr. Newton's overall approach to Mr. Stevens has been a decidedly lackadaisical one. He did not recommend any treatment other than massage therapy which Mr. Stevens did not obtain. He did not provide any other recommendations to Mr. Stevens regarding treatment; instead, he allowed his patient to direct his own course of action and simply accepted Mr. Stevens' choices (such as they were). As the defence notes, this could mean either, an extremely accommodating family doctor who did not want to push his patient along or, that Mr. Stevens was not really as injured as his continual complaints would suggest and therefore, Dr. Newton had no real concerns. The responsibility for the uncertainty arising from that unanswered query lies with Mr. Stevens and raises significant red flags in terms of Mr. Stevens' true condition over the time since the Accidents.
- [78] Furthermore, I accept the defence's argument that Dr. Newton had a definite inclination to act as Mr. Stevens' advocate.
- [79] In mid-2016, Dr. Newton made various contradictory statements about Mr. Stevens' condition in documents designed to assist his patient. These documents followed from three visits by Mr. Stevens in the January-May 2016 timeframe.
- [80] In the first document, dated April 26, 2016, Dr. Newton advised Sun Life Financial (Bird Construction's benefits provider) that Mr. Stevens was not "incapacitated" by symptoms but they limited his daily activities. Dr. Newton stated that he did not believe that Mr. Stevens had reached his maximum medical recovery at that time. He anticipated further improvement and that Mr. Stevens would return to gainful employment. For unexplained reasons, Sun Life did not follow up on this conclusion and ask for further details as to how that further improvement would be achieved.
- [81] Less than six weeks later, Dr. Newton drafted two medical reports, both dated May 31, 2016, to support Mr. Stevens' application for CPP benefits.
- [82] In the first report, which was not signed, the prognosis was decidedly rosier in terms of Mr. Stevens' recovery. Dr. Newton stated that:
- a) Mr. Stevens was disabled from working as a carpenter;

- b) he was encouraged to continue his activities and light exercises to improve his strength;
- c) it was anticipated that a full recovery would be made over time;
- d) he was unsure whether there was any permanent disability; and
- e) the severe injuries were prolonged and had a significant impact on his ability to pursue financially gainful employment indefinitely.

[83] The signed CPP medical report was very different. Strangely, in this report, Dr. Newton stated that:

- a) Mr. Stevens was disabled from any work, not just that of a carpenter and that this disability was to continue indefinitely;
- b) the therapies did not produce any remarkable improvement but allowed him to meet tasks of daily living but not work;
- c) there was no mention of Mr. Stevens being anticipated to make a full recovery over time; and
- d) the severe and prolonged injuries were then said to have a significant impact on his ability to pursue employment of any kind indefinitely.

[84] Dr. Newton could not explain the significant differences between these three documents.

[85] Despite Dr. Newton's very negative prognosis in the signed CPP benefit medical report about Mr. Stevens' inability to perform any work, in December 2016, only six months later, he raised the matter of Mr. Stevens indeed returning to work. These contradictory statements and reports make me question the veracity of the medical comments and opinions in Dr. Newton's present expert medical report.

[86] As best I can determine, Dr. Newton appears to have been acting as Mr. Stevens' advocate toward supporting, in the signed report, sufficient disability so that his patient could qualify for government CPP benefits.

[87] A further example of his advocacy was Dr. Newton's statement in the March 13, 2019 report suggesting that Mr. Stevens was an active participant in his recovery; to the contrary, Mr. Stevens' recovery efforts were minimal at best and then only largely self directed.

[88] Overall, I consider that Dr. Newton's medical opinion in his report is questionable and I place little reliance on it.

b) Dr. John Viggiani

[89] On June 13, 2019, Dr. Viggiani also prepared an expert report in the field of chiropractic medicine.

- [90] Like Dr. Newton, Dr. Viggiani was not familiar with Mr. Stevens' health status in the years prior to the First Accident. Mr. Stevens' first visit with Dr. Viggiani was on April 9, 2015, some four months after the First Accident. That visit arose from Mr. Stevens' own assessment that this treatment would assist him; it did not arise from any medical referral.
- [91] From that date until the date of his report, Dr. Viggiani saw Mr. Stevens regularly every week and then reduced those visits to every two weeks or so. There were a staggering total of 142 visits. In early 2017, he recommended that Mr. Stevens do certain exercises at home. Dr. Viggiani noted that on some tests, Mr. Stevens indicated his own perception that he was "severely disabled", which was not Dr. Viggiani's own conclusion.
- [92] As with Dr. Newton, it was Mr. Stevens who reported to Dr. Viggiani that he was unable to return to his work as a carpenter as a result of his injuries.
- [93] Like Dr. Newton, Dr. Viggiani was very accommodating and not very proactive in recommending any other treatment modalities other than, of course in Dr. Viggiani's case, to continue doing the chiropractic treatments.
- [94] In his report, Dr. Viggiani diagnosed Mr. Stevens with the following most significant injuries: severe sprain and possible muscle tearing of the left side of the back; moderate to severe sprain of the right shoulder; and mild to moderate strain of the lower neck and upper back.
- [95] Dr. Viggiani's prognosis was that Mr. Stevens' was a "work in progress". He predicted: 60-70% recovery of his injuries to the left back spinal areas over a 5 year period (to June 2024); 75% recovery of his injuries to the lower back and right shoulder within a period of two to four years (2021-2023). Dr. Viggiani stated that Mr. Stevens will continue to experience pain, soreness, stiffness and reduced range of motion with varying degrees for a minimum of five years, dependent on his level of activity and other stress factors.
- [96] Dr. Viggiani acknowledged that chiropractic treatment is passive and that its purpose was to alleviate pain. Indeed, this was Mr. Stevens' experience with these treatments, having noted to Dr. Viggiani that the treatments only provided temporary pain relief.
- [97] In cross examination, Dr. Viggiani agreed that Mr. Stevens' prognosis for partial recovery would "definitely" speed up with incorporation of other treatment modalities. He agreed that the ongoing reports of pain suggest that a more active approach to treatment might be merited and that it would not hurt Mr. Stevens to undertake other treatments at this point. This would include working with a kinesiologist.
- [98] Why Dr. Viggiani waited over four years to reach this conclusion and discuss more effective modalities for recovery with Mr. Stevens remains an open question.

c) Dr. Gabriel Hirsch

- [99] On January 16, 2019, Dr. Gabriel Hirsch prepared his independent medical assessment of Mr. Stevens at the request of the plaintiff's counsel. Dr. Hirsch was qualified to give expert medical opinion evidence in the field of physical medicine and rehabilitation, also known as physiatry.
- [100] Dr. Hirsch's report arose from a 95-minute assessment of Mr. Stevens on January 16, 2019, together with a review of relevant medical documentation, such as pre and post-accident records of treatments.
- [101] His diagnosis was that, in addition to the broken ribs, and spleen and lung injuries which had fully healed, Mr. Stevens suffered soft tissue injuries in the First Accident that still persisted at that time. He considered that any soft tissue injuries arising from the Second Accident were, at best, minor.
- [102] On the issue of causation, Dr. Hirsch's opinion was that Mr. Stevens' residual chest wall pain/discomfort and the left sided spinal pain and lower back pain are all attributable to the First Accident.
- [103] As for treatment, Dr. Hirsch recommended a regular and active exercise program, and the involvement of a more structured and time limited program supervised by a kinesiologist. He also recommended a few treatment sessions with a psychologist to advise Mr. Stevens on cognitive behavioral pain management strategies.
- [104] Given the clinical course of treatment and the time elapsed, Dr. Hirsch's prognosis was that:
- I think it reasonable to conclude that he will be left with persistent discomfort/pain affecting his chest wall, thoracic spine, and lumbar spine which will continue to negatively impact on his level of function.
- I am of the opinion that Mr. Stevens will not be able to resume his pre-subject motor vehicle accident full-time employment as a carpenter or an occupational therapy of similar physical demands.
- [105] Finally, Dr. Hirsch stated that, in his opinion, Mr. Stevens could perform all domestic tasks as well as reasonable yard-related activities, home maintenance work and light renovation projects. He noted Mr. Stevens self-report that he needed assistance for more physically taxing projects on his property into the future.

Defence Expert

- [106] Dr. Marc Boyle was retained by the defence to conduct an independent medical examination of Mr. Stevens. On February 23, 2019, Dr. Boyle prepared his expert report. His experience was in the field of orthopedic medicine and specifically, the diagnosis, prognosis and treatment of musculoskeletal injuries. This report arose from an examination of Mr. Stevens on January 31, 2019.

- [107] Dr. Boyle's diagnosis was essentially confirmatory of that of Dr. Hirsch; namely, that Mr. Stevens had suffered soft tissue injury to the cervical and lumbar spine. Dr. Boyle also agreed that there was some left side pain in the thoracic area. With respect to his soft tissue injury to the cervical spine, Dr. Boyle concluded that it was more than likely that Mr. Stevens would undergo a significant resolution of his symptoms arising from the soft tissue injuries, although some limitations were likely to occur for tasks involving prolonged extension of the neck or overhead activity. Any other limitations would be minimal, if any.
- [108] Dr. Boyle recommended conditioning and strengthening type programs, with the observation that a proper rehabilitation program could improve the thoracic and lumbar region complaints.
- [109] Dr. Boyle agreed that Mr. Stevens was not capable of medium to heavy work. He did, however, state that Mr. Stevens could do light to moderately medium work and that a rehabilitation program would increase Mr. Stevens' ability to work in a job like home inspection, as well as his ability to perform day-to-day chores at his farm and home.
- [110] Dr. Boyle opined that an earlier active rehabilitation program would have likely greatly assisted Mr. Stevens in a quicker recovery:

Had an active rehab program been carried out early on and extended over a significant length of time it is felt that his symptom complex would be less and his function would be greater. It is felt that his participation in work as a home inspector would be greater and that his participation in the outside chores on the acreage would be greater.

- [111] On cross-examination, Dr. Boyle stated that around 85-90% of patients experience improvement in low back or similar soft tissue injury symptoms with a proper graduated rehabilitation programme. Further, he stated that it is impossible to determine if Mr. Stevens is within the 10-15% cohort who never improve since he has never undertaken a proper rehabilitation program.
- [112] I accept that there is no evidence that Mr. Stevens is within that small cohort of injured persons who will never improve, for the reason identified. I also accept the evidence from all four medical practitioners now that, with a proper and active rehabilitation program, including kinesiology treatments, some improvement is likely.

CONCLUSIONS RE INJURIES

- [113] Mr. Stevens must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the de minimis range. Further, causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.

- [114] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [115] Causation must be established on a balance of probabilities before damages are assessed. In this regard, McLachlin C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:
- [78] Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey v. Leonati*].
- [116] Here, the defence does not dispute that Mr. Stevens suffered the immediate injuries to his ribs, lung and spleen arising from the First Accident. In addition, it is not contested that Mr. Stevens suffered soft tissue injuries to his neck, back and right shoulder arising from the First Accident, as confirmed by all the medical experts. Finally, it is not disputed that the Second Accident caused an aggravation of Mr. Stevens' soft tissue injuries.
- [117] The course of Mr. Stevens' recovery is a more fraught question.
- [118] Mr. Stevens' subjective complaints of ongoing injury remain the most significant foundation for his claim. There is little, if any, objective evidence from the medical professionals who have given opinions in this matter in support of his claim. The medical experts have all relied on Mr. Stevens giving an accurate account of his recovery and his pain levels in formulating a proper diagnosis, prognosis and treatment recommendations. Accordingly, I agree that the medical opinions largely rely on there having been an accurate account by Mr. Stevens as to his injuries.
- [119] In addition, at least over the three years until late 2016 when the functional evaluation was completed, Mr. Stevens' own assertions of physical limitations as to his work related ability were the sole basis upon which he said he could not return to employment.
- [120] In light of these circumstances, it is necessary to carefully consider Mr. Stevens' subjective evidence as to the extent of his injuries and limitations.
- [121] The factors to be considered when assessing credibility and reliability were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal refused [2012] S.C.C.A. No. 392. In essence, that assessment involves a variety of factors, including an assessment as to whether a witness' testimony is in accordance with the preponderance of all the evidence.

- [122] If a plaintiff's account of his or her change in physical, mental, or emotional state as a result of the accident is not convincing, then the hypothesis upon which an expert's opinion rests will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 49.
- [123] The defence does not take issue with Mr. Stevens' credibility or reliability as a whole, but says that the Court should be cautious in accepting his evidence in its entirety when reviewed in the context of other evidence or documentary records. I agree that such caution is warranted in the circumstances.
- [124] Having considered the entirety of the evidence, I conclude the following in relation to the injuries asserted by Mr. Stevens:
- a) Mr. Stevens was an elderly man in reasonable condition at the time of the Accidents. He suffered regular aches and pains and stiffness arising from his work and hobby farm activities. These were no doubt exacerbated over time by his advancing age;
 - b) Mr. Stevens sustained significant and painful injuries as a result of the First Accident, including fractured left ribs, a spleen laceration and a collapsed lung. These healed over the short term and were resolved within six months of that date;
 - c) Mr. Stevens sustained soft tissue injuries to his neck, back and shoulders arising from the First Accident. These injuries were ongoing and slightly aggravated as a result of the Second Accident in June 2015;
 - d) I find that Mr. Stevens' soft tissue injuries and symptoms were significantly resolved by the end of 2015. Since then, he has improved slightly and continues to do so. I reject Mr. Stevens' evidence as to the severity of his remaining symptoms. I do not accept that he is in constant or "chronic" pain at this time. I consider a more accurate description of his condition to be that he often experiences daily and moderate discomfort which is exacerbated by greater physically demanding tasks;
 - e) I find that Mr. Stevens has purposefully not undergone an active rehabilitation program; instead, he has chosen to chart his own course, largely by engaging in passive therapies that did not require him to push himself physically toward greater function; and
 - f) I find that, if Mr. Stevens had undertaken more activity, or engaged in an active rehabilitation program, he would have achieved less symptomology and greater function since the Accidents. Mr. Stevens is now aware of the recommendations of the medical experts who, in 2019, have recommended kinesiology along with other treatments to improve his condition. He is prepared to undertake those treatments.

DAMAGES - DISCUSSION / ANALYSIS

- [125] Mr. Stevens claims under the following heads of damages.

Non-Pecuniary Loss

- [126] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, disability, inconvenience, loss of enjoyment of life and loss of amenities: *Dikey v. Samieian*, 2008 BCSC 604 at para. 139. 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 unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [127] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal refused [2006] S.C.C.A. No. 100, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages. The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.
- [128] Mr. Stevens argues that his life prior the Accidents was focussed on his work at Bird Construction and that his injuries have now "burst his bubble" in terms of his future plans. He is no longer able to work as a carpenter, a job he enjoyed throughout his whole working life. He says he now lives with pain and has been hampered in his ability to earn a living and also, to enjoy certain personal activities, particularly on his beloved hobby farm. He now anticipates having to sell the hobby farm when he turns 70 years of age.
- [129] He seeks an award of \$120,000 for non-pecuniary loss. In support, Mr. Stevens relies on: *Karlsson v. Noormohamed*, 2015 BCSC 911 (\$120,000; para. 74); *Hanger v. Shin*, 2019 BCSC 99 (net \$120,000; para. 88); and *Goldie v. McLean*, 2019 BCSC 991 (\$100,000; para. 73).
- [130] The defendants submits that a more appropriate amount is \$60-75,000. They rely on *Anderson v. Rizzardo*, 2015 BCSC 2349 (\$60,000; para. 205); *Rabiei v. Oster*, 2019 BCSC 733; (\$70,000; para. 151) *Szymanski v. Morin*, 2010 BCSC 1 (\$75,000; para. 144); and *Trites* (\$75,000; para. 197).
- [131] I find the comments of Justice Ballance in *Anderson* as particularly apt with respect to Mr. Stevens:
- [203] In prior cases I have said that enduring pain, even when it becomes intermittent and mostly low-grade, can compel unwelcome adjustments to one's work life and lifestyle and cloud the pleasures of life, as it has in the case at hand. Taking care to not aggravate his residual symptoms and trying to manage his pain has become part of Mr. Anderson's everyday life and will continue for many years to come, although, in all likelihood, on an ever-declining scale.

- [132] This analysis in terms of the impact of the injuries on Mr. Stevens' personal life and work are, of course, informed by my conclusions as to the severity of his injuries and the continuation of his symptoms. I do however agree that Mr. Stevens' injuries have very negatively affected the remaining years of his working life as a carpenter and his ability to fully enjoy the hobby farm which was a major source of joy for him.
- [133] In my view, the cases cited by the defence are more in line with Mr. Stevens' injuries, the effects on his life and the extent of his recovery, as per my findings above. I award the sum of \$85,000 for non-pecuniary damages, subject to my analysis regarding issues of mitigation below.

Loss of Past Earning Capacity

- [134] Regarding loss of past earning capacity, I adopt the summary of the principles to be applied as set out by Justice Saunders in *Falati v. Smith*, 2010 BCSC 465, aff'd 2011 BCCA 45:
- [38] The plaintiff is entitled to be restored to the position he or she would have been in but for the defendant's negligence, so far as that can be done with a monetary award. This may involve "a comparison of the likely future of the plaintiff if the accident had not happened with the plaintiff's likely future after the accident has happened" - *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8.
- [39] Though pre-trial losses are often spoken of as if they are a separate head of damages, e.g. "past loss of income" or "past wage loss", it is clear that both pre-trial and future losses are properly characterized as a component of loss of earning capacity - *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141. The principles governing the evaluation of capacity claims have been articulated most clearly in judgments dealing with future losses, that is to say, loss of future earning capacity: for example, the recent decision of the Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140, in which the alternative "real possibility" and "capital asset" approaches to assessment are reviewed and discussed.
- [40] The full assessment of damages for such losses may involve, at least to some extent, consideration of hypothetical situations and contingencies - what might have happened, or what might yet happen, had the accident not occurred, as distinct from what actually has happened. However, particularly where the claimed losses are derived from something other than a measurable, conventional income stream, the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity: "The only difference is that knowledge of events occurring before trial takes the place of prediction" - Prof. Waddams, *The Law of Damages*, Looseleaf Ed. (2008) para. 3.360. When considering hypotheticals and contingencies in the context of a pre-trial loss, the same general principles which govern the assessment of lost future earning capacity may be equally applicable - Waddams, *ibid.* As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 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."

[41] Those general principles involved in the process of assessment include the following:

- The task of a court is to assess damages, rather than to calculate them mathematically - *Mulholland (Guardian ad litem of) v Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43;
- The standard of proof is not the balance of probabilities; the plaintiff need only establish a real and substantial possibility of loss, one which is not mere speculation, and hypothetical events are to be weighed according to their relative likelihood - *Athey v Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, at para. 27;
- Allowances must be made for the contingencies that the assumptions upon which an award is based may prove to be wrong - *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.);
- Any assessment is to be evaluated in view of its overall fairness and reasonableness - *Rosvold*, at para. 11.

[135] These principles, particularly from *Smith v. Knudsen*, 2004 BCCA 613, cited in *Falati* at para. 40, were recently confirmed by Justice Goepel in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 45-49.

a) Propositions

[136] Mr. Stevens' argument with respect to past wage loss is based on two central propositions: 1) in the two years after the First Accident, he was unable to return to carpentry work at Bird Construction or to any other occupation; and 2) if Mr. Stevens had continued at Bird Construction, he would have been promoted to a more senior and higher paying position.

[137] The first proposition has not been entirely proven at this trial. Firstly, there is no evidence to support Mr. Stevens' complete lack of employability in the first two years after the First Accident, save for his own assessment in that regard. No medical evidence exists to support that proposition; no medical doctor told Mr. Stevens that he could not or should not work during that time. For the reasons expressed above, I am not prepared to accept Mr. Stevens' assertions without further support.

[138] Having said that, there is some limited support that Mr. Stevens was unable to return to carpentry in November 2016. This lends credence to the assertion that, even prior to that time, his recovery did not permit his return to work to happen. This support arises from the functional capacity evaluation completed by Russell McNeil in late 2016, as set out in Mr. McNeil's report dated January 2, 2017. The defence also acknowledges that it was not realistic for Mr. Stevens to return to his carpentry position in the first year or so after the First Accident.

- [139] In his January 2, 2017 report, Mr. McNeil found that Mr. Stevens had various limitations in terms of his work capabilities. Mr. McNeil found that Mr. Stevens was restricted in his capacity to obtain and sustain the full strength requirements of medium work. He found restrictions in Mr. Stevens' ability to perform certain activities, such as bending, pushing, pulling, carrying, lifting and sitting and, to some extent, standing. These findings were based on examination supported by Mr. Stevens' self reports of pain. Mr. McNeil was of the opinion that Mr. Stevens was not capable or working either part-time or full-time as a carpenter.
- [140] As noted by the defence, given Mr. Stevens' lack of any active rehabilitation program to November 2016 and his limited activities since the date of the Accidents, it is not surprising that Mr. McNeil reached the conclusions he did.
- [141] What is uncontested from both sides is that, by at least late 2016, while Mr. Stevens may have been unable to return to carpentry, he was employable in some capacity. Mr. McNeil's first report confirms this and Mr. Stevens himself disclosed this to Dr. Newton in December 2016 when Dr. Newton raised the possibility of him in fact returning to carpentry at Bird Construction. This confirmation of him having some work capacity no doubt led to Mr. Stevens, in January 2017, embarking on a career training as a home inspector, as I will discuss below.
- [142] In January 2019, Mr. McNeil completed a follow up assessment of Mr. Stevens. Mr. McNeil's second report from that visit is dated January 13, 2019.
- [143] Mr. McNeil's second report similarly concluded that Mr. Stevens was able to work at and sustain sedentary and light work but that he was restricted in doing medium work. The second report confirmed his inability to work as a carpenter. As for home inspections, Mr. McNeil opined that he was capable of working part-time, but not full-time, as a home inspector and that he could do that only with accommodation given his reduced stamina and capacity.
- [144] Mr. McNeil did not express any concerns about Mr. Stevens' ability to perform tasks around the hobby farm and garden.
- [145] As I set out above, both Dr. Hirsch and Dr. Boyle agreed with Mr. McNeil's conclusions about Mr. Stevens being unable to return to carpentry work after the Accidents. Dr. Hirsch stated:

I am of the opinion that Mr. Stevens will not be able to resume his pre-subject motor vehicle accident full-time employment as a carpenter or an occupational therapy of similar physical demands.

- [146] The second proposition was that Mr. Stevens would have been promoted to the position of deficiency superintendent at Bird Construction, following the death of Ted Brecht. Mr. Brecht held the position until he died in late 2015.

- [147] This proposition was not proven at this trial.
- [148] Anthony Maida is the construction manager of Bird Construction for British Columbia. He is responsible for overseeing operations and personnel in the province.
- [149] Mr. Maida considered that Mr. Stevens was a skilled carpenter who was a very versatile worker. Mr. Maida stated that he had started to groom Mr. Stevens to take over the position of deficiency superintendent in the event of Mr. Brecht's retirement. To that end, he said that Mr. Stevens had begun to shadow Mr. Brecht as a form of introducing him to the duties and responsibilities of the superintendent position. That position enjoyed greater income than that of Mr. Stevens' carpenter position, and also enjoyed other benefits such as a company vehicle, gas and a share purchase plan.
- [150] As it happened, Mr. Stevens was taken out of the equation by the First Accident in December 2014. In 2017, Michael Hincks took over the position.
- [151] The difficulty with this evidence, and Mr. Stevens' assertions of income loss arising from the supervisory position, is that it was not mirrored or supported by the evidence of Mr. Stevens himself. He made no mention of working with Mr. Brecht at all, let alone in 2014 just before the First Accident.
- [152] Mr. Maida agreed that the position had not been offered to Mr. Stevens before the First Accident and it was entirely possible that Bird Construction would have determined him to be an unsuitable candidate for the position. Even if Mr. Stevens had been offered the position, there is no evidence that he would have accepted the position in any event.
- [153] In my view, Mr. Stevens would have been disinclined to accept the position since it involved consistent out of town work that would have taken him away from his hobby farm.
- [154] Particularly without Mr. Stevens having made any mention whatsoever as to his working with Mr. Brecht, his knowledge of a potential promotion and his interest in pursuing that promotion, I find that he has failed to establish a real and substantial possibility that he would have been offered the promotion to the superintendent position and that he would have accepted that position after Mr. Brecht's death.
- [155] I find that Mr. Stevens has met his burden in establishing that, but for the Accidents, he would have remained working as a carpenter at Bird Construction to at least the time of the trial.
- b) Assessment of Past Income Loss
- [156] The parties agree that an earnings approach is appropriate in respect of Mr. Stevens' loss from the time of the First Accident to trial.
- [157] This assessment of past income loss involves an assessment by weighing possibilities and probabilities of hypothetical events. It is not a mathematic analysis, but economic and statistical evidence can be helpful in that regard: Grewal at para. 49.

- [158] In the years prior to the First Accident, Mr. Stevens reported earnings on his tax returns arising from his employment at Bird Construction as follows: 2008 - \$75,065; 2009 - \$73,473; 2010 - \$78,232; 2011 - \$107,196; 2012 - \$114,530; 2013 - \$101,233; 2014 - \$74,974. The higher numbers from 2011-2013 arose because Mr. Stevens was working out of town and enjoyed higher hourly rates and other benefits. Even so, Mr. Stevens sometimes worked overtime when working in the Lower Mainland. In the year prior to the First Accident, the overtime pay was approximately 4.5% of his overall pay.
- [159] The assessment of loss is assisted by the report and evidence of Darren Benning of PETA Consultants Ltd. In his report dated March 28, 2019, Mr. Benning applied such negative contingencies as non-participation in the workforce (but not for voluntary retirement), unemployment part-time and part-year work and mortality.
- [160] Mr. Benning's Table 3A provides a basis upon which to consider the matter. He calculated the loss to the trial at \$261,934, although this assumes a 10% overtime factor. I accept that Mr. Stevens would have earned overtime over this period, particularly when he was working out of town, as he did many years before the First Accident, and that this is a reasonable estimate of the overtime.
- [161] Other negative contingencies must be considered. These include the possibility that Mr. Stevens would have voluntarily withdrawn from his employment at Bird Construction earlier than this time, including to spend more time at home on his hobby farm that he very much enjoyed.
- [162] The defence has argued in favour of other negative contingencies on the basis that Mr. Stevens had some residual ability to earn income from medium or light strength work from the end of 2016 at the latest (the date of Mr. McNeil's first report). They argue that if Mr. Stevens had been motivated, he would have been able to find some paying work prior to trial. I will address these arguments in the context of mitigation in the section below.
- [163] Having considered the entirety of the matter, I assess Mr. Stevens' past income loss to the time of trial at \$250,000. This amount is of course, subject to income tax.

Loss of Future Earning Capacity

- [164] Mr. Stevens has the burden of establishing a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. As noted with respect to past loss issues, the assessment of this loss may be assisted by economic and statistical evidence: *Grewal* at para. 49.
- [165] One of the major considerations in terms of assessing future income loss is to consider when Mr. Stevens would have retired from his employment at Bird Construction but for the Accidents.

- [166] In his direct evidence, Mr. Stevens confirmed that he had, prior to the First Accident, planned to work there "until they asked me to leave". When pressed in cross-examination, he indicated that he did not have any particular plan to retire on a specific date. He was not shaken in his assertion that he had no set plans to retire at age 70.
- [167] Mr. Stevens now asserts that he would have worked as a carpenter until age 75.
- [168] I reject that it is probable that Mr. Stevens would have worked as a carpenter until age 75. I think the more realistic scenario is that he would have worked in that position until age 71 at most and likely even an earlier date. I do not consider that Mr. Stevens was what I would describe as passionate about his job. Mr. Stevens' love of his hobby farm would have been a constant pull toward spending time on that endeavour rather than the daily grind of a long commute to a job or even working out of town. I also think an earlier retirement age is more in keeping with the realities of keeping up a full-time physical job as a carpenter with the health issues that Mr. Stevens had already exhibited before the Accidents.
- [169] Mr. Benning's tables are again of some assistance. He calculates loss from the carpentry job to age 71 (with 10% overtime) at \$348,439.
- [170] What must also be considered is the possibility of Mr. Stevens earning income from his home inspection occupation, assuming that he achieves the necessary certification later this year. Based on Mr. McNeil's report, I consider it likely that Mr. Stevens will not be fully employed in that endeavour if he is eventually certified. I acknowledge that it is a competitive business and that it would take time to obtain assignments and earn income. In addition, there are the physical limitations noted in Mr. McNeil's report that will likely restrict Mr. Stevens to doing this work on a part-time basis.
- [171] Mr. Stevens' counsel suggests an estimated income of \$20,000 per year, which I consider is certainly achievable by Mr. Stevens if he puts his mind and effort into it. This yields a calculated income of approximately \$114,000 to age 71.
- [172] There also remains the distinct possibility that Mr. Stevens can achieve greater income, albeit with more effort than he has shown to date.
- [173] In all the circumstances, I assess Mr. Stevens' future income loss at \$175,000.

Cost of Future Care

- [174] Dr. Hirsch's opinion was that Mr. Stevens had the ability to perform all domestic tasks as well as reasonable yard-related activities, home maintenance work and light renovation projects. He considered that Mr. Stevens may require assistance with respect to the more physically taxing activities on his property in the years to come.
- [175] Dr. Hirsch made a number of comments regarding possible future care for Mr. Stevens. He mentioned over the counter analgesic/anti-inflammatory medication, although Mr. Stevens indicated that he was averse to taking it. Dr. Hirsch also referred to possibly retaining a

clinical psychologist for cognitive behavioral therapy. Finally, Dr. Hirsch referred to Mr. Stevens undertaking a more structured exercise program, possibly involving Tai Chi, Yoga, Pilates or aqua exercises, with a specific recommendation for "time-limited" treatments by a kinesiologist.

[176] No evidence has been put forward as to the specific costs for these matters.

[177] Mr. Stevens seek \$5,000 for all of the above matters. The defence suggests that a more appropriate figure is \$1,500 for the kinesiologist costs.

[178] I agree with the defence that the specific recommendation by Dr. Hirsch and the cost of that time-limited program can be reasonably estimated based on past treatments obtained by Mr. Stevens, particularly from his previous physiotherapy and chiropractic sessions.

[179] I award the sum of \$1,500.

Special Damages

[180] Mr. Stevens and the defence have agreed that special damages totalling \$17,286.32 should be awarded in respect of various matters, including: most of the chiropractic treatments, the physiotherapy, parking costs, gym fees, some vehicle maintenance, retraining costs, medical travel and miscellaneous matters.

[181] The remaining and disputed damages claimed are certain vehicle maintenance costs to repair his wife's vehicles in the amount of \$3,682.81. It is appropriate to consider this claim, along with another of Mr. Stevens' claim, in the context of what his counsel refers to as the "handyman claim".

Handyman Claim

[182] Mr. Stevens asserts that, prior to the Accidents, he had the tools and experience to do anything that may have been required to keep his property, farm equipment, vehicles and buildings in proper condition and repair. What he did not own he could rent or borrow for specific purposes. I accept that Mr. Stevens was very able to perform these types of tasks.

[183] Mr. Stevens asserts that his injuries prevented him from taking on tasks that he would otherwise have done in the past and that they would continue to impact his ability to complete these tasks in the future. His evidence is that he has or will incur the following expenses in hiring other persons to do this work:

Description

Cost

Taking hay off the field (\$100-150 per year)

\$600.00

Butchering sheep (\$200 per year)

\$1,000.00

General home repairs (next 5 years to age 71)

\$1,000.00

Vehicle maintenance (5 years at \$1,000)

\$5,000.00

Exterior house painting

\$7,000.00

Cut down cottonwood tree

\$800.00

Removal of cut wood and stump grinding

\$2,200.00

Fence repairs

\$3,000.00

Vehicle repairs (past expense)

\$3,682.81

TOTAL

\$24,282.81

[184] The past vehicle repair costs were incurred, not for Mr. Stevens' vehicle, but for vehicles owned by his wife. The defence has already agreed that special expenses will include some of the repairs that Mr. Stevens would have done on his own vehicle.

[185] However, the remaining claim is not appropriate since it was his wife who was responsible for repairing her own vehicles. It is not a loss borne by Mr. Stevens, save to the extent that he gratuitously agreed to pay for it. It is not a recoverable cost with respect to the defendants.

[186] The remaining amounts claimed by Mr. Stevens for future expenses suffer from many difficulties.

[187] Firstly, these are largely only estimated amounts based solely on Mr. Stevens' educated guesses at trial unsupported by any documentation. Many of these types of charges, such as the cutting down of the tree and the house painting, could have been supported by other means.

- [188] Secondly, as noted in Szymanski at paras. 145-146, albeit with respect to a separate head of damages for "loss of housekeeping capacity", such claims may also be reflected in the award of general damages. I confirm that my award for non-pecuniary damages to Mr. Stevens' does reflect the impact that his injuries have had on his ability to complete these types of tasks.
- [189] Finally, I do not accept Mr. Stevens' assertions that he is completely unable to do these tasks himself. In direct, he confirmed that he can do most tasks by taking more time and resting more, if need be. Frankly, I conclude that the more arduous tasks would have been beyond Mr. Stevens' physical abilities in any event given his pre-accident health and aging issues.
- [190] I decline to make any award in respect of the handyman claim.

Investment Loss

- [191] Mr. Stevens claims the sum of \$55,333, which he asserts represents the projected loss of an increase in the value of his RRSP that will accrue over the next ten years (when Mr. Stevens will be age 75).
- [192] Mr. Stevens' withdrew various amounts from his RRSP, as follows: 2015 - \$39,947; 2016 - \$59,973; 2017 - \$49,921; 2018 - \$60,269, for a total of \$210,110.
- [193] It appears that, initially, he obtained some benefits in 2015 from Bird Construction and he was then instructed to apply for disability benefits from Sun Life, which he obtained at some point. In 2015, he had nominal EI income; in 2016, the RRSP amount was his only income; in 2017, he had almost \$33,000 in CPP disability benefits; and in 2018, he turned 65 and his government benefits included a regular CPP payment and OAS of approximately \$14,800.
- [194] Mr. Stevens' claims that he would not have withdrawn monies from his RRSP but for his need for income arising from his inability to work and earn income. He therefore claims the amount of increase in his RRSP that would have otherwise accrued on those amounts at 3% per annum over the next ten years (to age 75). He calculates this at \$6,000 per year for almost ten years, equal to \$55,333.
- [195] I reject this claim. As the defence argues, this argument is entirely speculative. It is essentially based on an estimated growth percentage that is not advanced by any evidence, let alone expert evidence. It is simply based on an October 2015 retirement income planning report prepared for Mr. Stevens and his wife by a person at Envision Financial. The only reference in that report is a "Savings Assumption" that the "index rate" will be 3%, presumably meaning an estimate as to the anticipated growth in their investment portfolio.

[196] There are other more technical issues arising from the requirements of converting RRSPs to RIFs at age 71, rather than age 75. Finally, it is apparent that my award of lost income will be available to Mr. Stevens to replenish his RRSP, assuming that there is sufficient room to do so under the current income tax rules.

[197] I decline to award any amount for investment loss.

MITIGATION OF DAMAGES

[198] The final and most significant issue is whether Mr. Stevens has failed to mitigate his losses, whether they be in dealing with his injuries or the economic consequences of the Accidents. Both matters are related since the ongoing injuries as said by him have impacted his ability to work.

[199] The defence contends that Mr. Stevens did not take any or adequate steps to mitigate his losses by pursuing treatments that would have hastened his recovery. In addition, the defence contends that his financial losses, both past and future, were exacerbated by that slower recovery, leading to his failure to look for work more suited to his post-accident condition.

[200] 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. See also *Graham v. Rogers*, 2001 BCCA 432 at para. 35; leave to appeal refused, [2001] S.C.C.A. No. 467.

[201] Once the plaintiff has proven 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.

[202] A failure to mitigate is a defence to the amount of damages that the defendant is obligated to pay: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at para. 36.

[203] The onus falls on the defence to prove that Mr. Stevens could have mitigated some of his loss or injury. In *Chiu v. Chiu*, 2002 BCCA 618, the court stated:

[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.

- [204] More recently, in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 56, the Court described the mitigation test as a "subjective/objective test": firstly, whether the reasonable patient, having all the information in hand, ought to have undergone the recommended treatment; and secondly, the extent to which the plaintiff's damages would have been reduced or if there was some likelihood that the plaintiff would have received substantial benefit from it.
- [205] In *Gill v. Lai*, 2019 BCCA 103, the court recently discussed the test:
- [26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person in that plaintiff's circumstances would do. As stated above, where a trier of fact applies the correct test, this Court must defer to their determination on this question of fact.
- [206] Mr. Stevens did not return to work immediately after the First Accident, which is entirely understandable given his significant injuries.
- [207] He did, of course, obtain medical advice from Dr. Newton in early 2015. However, he did not go for massage therapy as recommended; instead, he opted for physiotherapy which he quickly dismissed as too painful. He did not seek further input from Dr. Newton as to ongoing therapies to improve his recovery, including continuing physiotherapy, or other or more active rehabilitation measures.
- [208] Mr. Stevens chose to essentially direct his own rehabilitation efforts, most notably having spinal adjustments through chiropractic treatments. His counsel argues that this was his preference given his previous chiropractic treatments. That said, he was well aware that these were only passive treatments and that they only provided temporary relief.
- [209] I accept that Mr. Stevens was aided to some extent in his thinking and passivity by the fact that Dr. Newton did not actively direct him to other treatments during their visits. Dr. Viggiani also did not recommend any other treatments, opting to continue to serve his very regular customer.
- [210] Despite his own assertions of a general lack of progress in his recovery in 2016, Mr. Stevens did not proactively seek input from Dr. Newton or any other medical practitioner as to whether there was a better program that would assist him.
- [211] I have readily concluded that Mr. Stevens had no inclination to push himself to do physical exercise that would have sped up his recovery. He was more than able to do so and knew full well that physical exertion was necessary to speed recovery. Instead, he took steps to limit his exertion, based on his own perceived ability to push himself beyond what he

wanted to do. As I stated above, I also conclude that to some degree, he has expressed more disability than was actually the case, in part due to his comfort and clear preference for staying at home on his hobby farm and taking things at his own pace.

- [212] There is no evidence that Mr. Stevens was incapable of working in the two years after the accident, beyond his bald assertions. He absolutely refused to make any effort to even try to return to work. There is little doubt that Mr. Stevens' skills as a carpenter would have been in high demand in 2015 and in the ensuing years.
- [213] Mr. Mendini was rebuffed in his suggestion that Mr. Stevens should investigate a potential job with Beedie Construction. The same goes for Mr. Maida who confirms that he asked Mr. Stevens to come back to work and was told by some unnamed person that he was not fit. Certainly, Mr. Stevens was not proactive in speaking to anyone at Bird Construction to see if he could return on some graduated program given his injuries and ongoing recovery.
- [214] By late 2016, Mr. Stevens knew that the walls were closing in on his ability to continue to decide for himself and self-declare that he was incapable of any employment such that he could stay at home on his hobby farm. As his own counsel expressed, he knew he was "in trouble" then and had to do something.
- [215] The functional capacity evaluation in November 2016 confirmed that Mr. Stevens had some work capacity. Again, somewhat enabling and confirmatory of Mr. Stevens' own perceptions, Mr. McNeil in his report declined to report on any further rehabilitation efforts or treatments that would be made to increase function.
- [216] In addition, Dr. Newton had noted significant progress over 2016 and was himself by that time recommending that Mr. Stevens return to carpentry work, not just any work. It was only at that time that Mr. Stevens saw fit to make his final decision to rule out carpentry and make some effort to find other employment.
- [217] In the face of these developments in late 2016, Mr. Stevens again did not pursue any active rehabilitation toward increasing his function, despite his own indication to Dr. Newton that he had reached a plateau of his symptoms. He simply carried on as before in his treatments, which included only his chosen chiropractic treatments and whatever physical exertion he decided he could do.
- [218] It was only when faced with the 2019 expert reports of Dr. Hirsch and Dr. Boyle that Mr. Stevens then conceded that he was prepared to undertake an active rehabilitation program, including kinesiology treatments.
- [219] I accept Dr. Boyle's comment that, if Mr. Stevens had undertaken a proper and early active rehabilitation program, it is entirely possible that Mr. Stevens would have made more progress in addressing his injuries and decreasing the severity of his symptoms and functionality than even he said he was experiencing. The potential benefits of kinesiology at this time, which Dr. Boyle indicated might be of benefit, are significantly and negatively impacted by the extremely long period of time since the Accidents and Mr. Stevens' failure

to do any such treatment over the last four-and-a-half years. He is now very de-conditioned as a result of his inactivity.

- [220] I also find that it was well before November 2016 when Mr. Stevens would and could have reasonably concluded that he was not fit for carpentry any more. From that time forward, he should have made efforts to find alternate employment.
- [221] Even when he decided that he had no choice but to seek out other employment, Mr. Stevens took a decidedly leisurely approach to the task.
- [222] Rather than seek out immediate employment, he enrolled in an extensive retraining course as a home inspector. No person told him that he was suitable for such a job, although I conclude that such an occupation is in keeping with Mr. Stevens' interests and abilities. No doubt other immediate jobs in the construction industry might also have been an option, such as working in a hardware store. It does not appear that these were even considered.
- [223] There was then a significant delay (almost two years) in getting certified to work in the home inspection field. During this time period, Mr. Stevens continued to refrain from any paid employment at all, including light work. There is no evidence that he could not have done both. I also accept that Mr. Stevens' overall mantra of proceeding at his own pace did not dictate any terrible urgency in completing his qualifications, given his activities and distractions on the hobby farm, practicing the violin and going to choir practice. Having said that, what is required is that Mr. Stevens act reasonably, not that he complete the qualifications as fast as could be humanly done.
- [224] Mr. Stevens' response to the mitigation argument centers on the idea that he followed whatever recommendations he received from medical experts, including Dr. Newton and Dr. Viggiani. This is largely true but not with respect to the massage therapy (which evolved into the physiotherapy sessions that were quickly abandoned).
- [225] The defence, however, argues that a consideration of the mitigation issues requires a more comprehensive analysis of Mr. Stevens' actions or rather, inactions.
- [226] The defence refers to *Rahimi v. Ma*, 2014 BCSC 710. There, Justice Voith noted at para. 35 that the usual argument surrounds whether the plaintiff has failed to undertake a recommended treatment program. The plaintiff had sought only little medical advice or assistance which gave rise to the defence arguing that she should have sought out such advice.
- [227] In *Rahimi*, the Court stated:
- [44] In *Ken Cooper-Stephenson*, *Personal Injury Damages in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at p. 862, the author states "Personal injury victims cannot sit back after the accident and allow their losses to accumulate. They must take all reasonable steps to avoid those losses".

[45] In *Sevinski v. Vance*, 2010 BCSC 892, I said:

[68] Instead, the proper starting point is the obligation of an injured plaintiff to seek appropriate medical assistance. The failure to seek such assistance cannot and does not displace or diminish the plaintiff's obligation to mitigate his or her loss. Thus, in *Jamie Cassels and Elizabeth Adjin-Tettey, Remedies: The Law of Damages*, 2nd ed. (Toronto: Irwin Law, 2008) at 389, the authors state:

Plaintiffs who are tortiously injured have an obligation to take reasonable steps to mitigate their injuries and cannot collect damages for losses that could be avoided. Mitigation in the circumstances ordinarily requires the plaintiff to seek appropriate medical treatment...

[69] Similarly, in *S.M. Waddams, The Law of Damages*, looseleaf (Aurora, Ont: Thomson Reuters, 1991) at 15.260 the author states:

In personal injury cases, the plaintiff is obligated to submit to reasonable medical treatment and to seek and follow medical advice where appropriate.

[83] In summary, I find the plaintiff's failure to raise her difficulties at an early stage and/or on an ongoing basis with appropriate medical advisers, her failure to obtain guidance or advice on the treatment of those difficulties, and her failure to engage actively and diligently in a course of physical or rehabilitative treatment, together constitute a failure to mitigate her losses.

[228] In *Rahimi*, Voith J. stated at para. 51 that it was not enough to wait for medical practitioners to tell someone what to do or to unsuccessfully cast about for help. He continued that the plaintiff's activities lacked structure, consistency and focus even in the face of her significant deconditioning. He concluded that the plaintiff had a positive obligation not simply to follow whatever advice had been received, but to reasonably seek out assistance or guidance toward recovery:

[52] I do not say that Ms. Rahimi's failure to obtain further medical assistance, without more, gives rise to a failure on her part to mitigate losses. I do say that the obligation to mitigate, based on the authorities I have referred to, and the circumstances that exist in a given case, can extend beyond simply following the medical advice that a plaintiff is provided. It can extend, instead, to the positive obligation to reasonably seek assistance or guidance. In saying this, I recognize that the burden of proving that a plaintiff has failed to act reasonably rests, at all times, on the defendant.

Having found the plaintiff in *Rahimi* to have failed in her duty to mitigate, the Court reduced non-pecuniary damages by 20% (at para. 99).

[229] I similarly conclude that Mr. Stevens had a positive duty to seek appropriate medical assistance if, as he alleges, he had suffered ongoing pain and restrictions into 2016. He utterly failed in that respect, preferring to guide his own recovery which, when results did not emerge, did not provoke any further measures on his part.

[230] In all the circumstances, I conclude that a 10% reduction is appropriate to the non-pecuniary damage and past income loss awards.

CONCLUSION

[231] In conclusion, and based on these reasons, I find the following awards of damages to be appropriate for the injuries sustained by Mr. Stevens in the First and Second Accidents:

Non-pecuniary Damages (\$85,000 less 10%)

\$76,500

Past Wage Loss (\$250,000 less 10%)

\$225,000

Loss of Future Earning Capacity

\$175,000

Cost of Future Care

\$1,500

Special Damages

\$17,286.32

TOTAL

\$495,286.32

[232] Mr. Stevens is also entitled to pre-judgment interest at the prevailing rate with respect to the special damages and past income loss.

[233] Finally, counsel are at liberty to speak to the matter of costs if they are unable to agree.

"Fitzpatrick J."

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