

CANADA / JUDGMENT

Szostakiwskyj v. Launay

2020 BCSC 653

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Supreme Court of British Columbia

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2020 BCSC 653 Szostakiwskyj v. Launay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Szostakiwskyj v. Launay,

2020 BCSC 653

Date: 20200430

Docket: M165088

Registry: Victoria

Between:

Julian Daniel Szostakiwskyj

Plaintiff

And

Bilton Neil Launay

Defendant

- and -

Docket: M165087

Registry: Victoria

Between:

Julian Daniel Szostakiwskyj

Plaintiff

And

Stuart Clinton Smith and Brendan Wyatt Smith

Defendants

Corrected Judgment: The front page of the judgment was corrected on May 4, 2020.

Before: The Honourable Marzari

Reasons for Judgment

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Place and Date of Trial:

Victoria, B.C.

February 20-28, 2020

Place and Date of Judgment:

Victoria, B.C.

April 30, 2020

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INTRODUCTION

- [1] The plaintiff, Mr. Szostakiwskyj, claims for damages arising from two motor vehicle accidents: the first occurring on April 29, 2015, (the "2015 Accident") and the second on March 4, 2016 (the "2016 Accident"). Both were rear-end collisions, and liability has been admitted in both. The 2015 Accident occurred in Victoria, BC and involved the defendant Brendan Smith, who was driving a vehicle owned by the defendant Stuart Smith. The 2016 Accident also occurred in Victoria and involved the defendant Bilton Launay. By consent in September 2017, this Court ordered that the actions relating to each accident be heard together.
- [2] The parties are agreed, and I find, that any injury or loss that Mr. Szostakiwskyj suffered from the 2015 Accident is divisible from the injuries he suffered in the 2016 Accident. The evidence led at trial and the arguments were focused almost exclusively on the 2016 Accident, and where I refer solely to "the accident" or "the defendant" it will be to that claim that I am referring.
- [3] Mr. Szostakiwskyj says, and the evidence establishes, that he did not suffer any significant injuries in the 2015 Accident, and he had fully recovered from the 2015 Accident well before the 2016 Accident. He did not miss any work as a result of the 2015 Accident and did not report the 2015 Accident to his doctor or seek any special treatment in respect of it. Mr. Szostakiwskyj does not seek a specific amount of damages in relation to this accident.

- [4] I would award Mr. Szostakiwskyj \$100 in nominal non-pecuniary damages in relation to the 2015 Accident on the basis that he did suffer a minor and temporary injury as a result.
- [5] On the other hand, Mr. Szostakiwskyj claims he was unable to return to work for a number of months as a result of the 2016 Accident, and that his pain has persisted since that accident and has affected his every aspect of his life. Although he did manage to work on and off for three years after the 2016 Accident, he had not worked for more than a year prior to trial.
- [6] Mr. Szostakiwskyj seeks non-pecuniary damages, past and future loss of earnings, special damages, and cost of future care for the 2016 Accident.

FACTS

- [7] I turn now to my factual findings relating to Mr. Szostakiwskyj's general circumstances before and after the 2016 Accident, and the accident itself, many of which are uncontroversial.
- [8] At the time of the 2016 Accident, Mr. Szostakiwskyj was 62 years old. He was 66 at the time of the trial.
- [9] Mr. Szostakiwskyj lives with his wife, who also gave evidence at this trial. They have lived their entire married life (approximately 40 years) on a near one-acre property in Langford, BC, bounded on three sides by a creek. Approximately one quarter of the property has been tamed into a garden, and the rest is "wild" and steep. Mr. Szostakiwskyj contributes significantly to all the household tasks, from cooking and cleaning, to yard work and house maintenance. Since the accident he continues to do so, though he is more limited in what he can do outdoors, and he takes longer with indoor tasks.
- [10] Their two children are now grown and no longer live at home, though they still frequently share meals and help with the property.
- [11] Mr. Szostakiwskyj has had a varied career. He was a contract welder off and on since the 1980s, working at times as an underwater diver/welder. In the mid-1980s to 1990s, he was in the wine business and taught a course at Camosun College. He owned and managed properties in the latter part of the 1990s, and he worked, for a time, doing contract enforcement work for the SPCA. He went back to welding in 2005, and since 2011, he has been a shipfitter for Seaspan at the Victoria Shipyards. Around that time, he was also certified as an acoustic tile applicator in the overhaul of submarines, and he has been called to do that work a number of times on major contracts at the shipyards.
- [12] Mr. Szostakiwskyj was a shop steward for the submarine work between 2011 and 2015. As a union member, Mr. Szostakiwskyj is called in to work on the basis of seniority, although his tile application specialty put him in high demand for submarine work, such as on the HMCS Chicoutimi (which was ongoing when he started in 2011 and completed in 2015) and, more recently, on the HMCS Corner Brook (which started in Fall 2016 and is ongoing). Shipfitting is a highly demanding, physical job requiring the lifting and moving of heavy parts and

materials. Tile application, in particular, requires both strength and holding awkward positions for up to 90 minutes at a time.

- [13] Mr. Szostakiwskyj worked a base 40 hours per week, without a part-time option. Sometimes he would also work significant periods of overtime, but he would also be laid off intermittently when his particular skills were not required at the shipyard. Mr. Szostakiwskyj's work records indicates numerous layoffs in the years prior to the 2016 Accident for various lengths of time. They indicate some overtime as well.
- [14] Prior to the 2016 Accident, Mr. Szostakiwskyj had no pre-existing pain or chronic pain. He had recovered well and relatively quickly from the 2015 Accident, and had not missed any work as a result.
- [15] He did have type 2 diabetes, which I find was well-managed by diet and a relatively low dose of metformin. He had a "neurological event" in May 2013, which was diagnosed as a small stroke that resolved without medical intervention and resulted in him having to take medication for high blood pressure and for cholesterol. He also had some difficulty sleeping prior to the accidents for which he took prescribed medication from time to time.
- [16] The evidence also establishes that he had pre-existing but non-symptomatic osteoarthritis, a form of degenerative disc disease common at his age.
- [17] Generally, Mr. Szostakiwskyj showed a general reluctance to rely on prescription medication and a preference for treatment through diet and exercise. While he takes all the medications prescribed to him, he seeks to take the lowest doses his doctor will agree to, and he avoids opiate pain medications almost entirely.
- [18] Prior to the 2016 Accident, Mr. Szostakiwskyj had a well-established swimming routine, swimming almost daily at local community centres and in lakes in the summer months. He was seeking to join the masters swim club, which required that he be able to swim 1000 metres in 30 minutes, something he had achieved prior to the 2016 Accident.
- [19] The evidence of Mr. Szostakiwskyj's family and friends also establish that Mr. Szostakiwskyj was a vigorous, social, and "get it done" kind of person. He enjoyed cooking big meals and hosting parties. He was a problem solver, and he liked taking on new projects. In early 2016, just before the 2016 Accident, he decided to redo the interior of his sailboat and ripped out all the existing fittings.
- [20] Recreationally, Mr. Szostakiwskyj was an active swimmer, diver, sailor, and walker.

The Accidents

- [21] Both accidents were rear-end collisions that did little damage to Mr. Szostakiwskyj's vehicle.
- [22] After the 2015 Accident, Mr. Szostakiwskyj was able to quickly recover without any medical assistance (other than the assistance of his wife who is a nurse of many years) using heat packs and hot soaks.

- [23] Mr. Szostakiwskyj describes his experience of the 2016 Accident as a more violent one. Unlike the 2015 Accident, it came without warning, and Mr. Szostakiwskyj had a greater sensation of acceleration, as though the vehicle that hit him was accelerating rather than braking (though of course he did not observe this directly).
- [24] I find that Mr. Launay's evidence tends to support Mr. Szostakiwskyj's evidence that Mr. Launay was accelerating rather than braking when he hit Mr. Szostakiwskyj, albeit from an initially stopped position and without great speed.
- [25] Mr. Szostakiwskyj's back and neck pain was immediate, and when it did not resolve with heat and over the counter medication, he went to his family doctor.
- [26] The parties are agreed, and the evidence establishes, that as a result of the 2016 Accident, Mr. Szostakiwskyj sustained a grade 2 whiplash injury to his neck and back.
- [27] The evidence also establishes that he continues to have chronic pain, primarily on his left side and most significantly in his neck. He describes the pain in his back as intermittent but the pain in his neck as low level and constant, spiking to more intense pain with certain movements.

Post-2016 Accident Condition

- [28] Mr. Szostakiwskyj had completed work on the HMCS Chicoutimi and was not working at the time of the 2016 Accident as a result of the ordinary nature of his work. However, he says that he was unable to return to the shipyards for the frigate work that came in to the yards in April 2016.
- [29] Mr. Szostakiwskyj undertook fairly rigorous rehabilitation efforts in the first months after the 2016 Accident, feeling frustration and disappointment when his pain did not resolve.
- [30] He returned to work briefly in August 2016 for training on the HMCS Corner Brook restoration contract and then resumed work again in October 2016 when the work on the HMCS Corner Brook began in earnest.
- [31] Mr. Szostakiwskyj continued to work until June 2018, when he went on medical leave related to his back and neck pain. In December 2018, he began a gradual return to work, and he was working full-time by January 2019. He found his neck and back pain upon his return to work "tolerable."
- [32] He was still working in March 2019 when he sustained a workplace injury to his foot that required that he not work for a few months.
- [33] He did not return to work after March 2019, and he had not returned to work as of the date of trial in February 2020.

- [34] Although he has not returned to work, Mr. Szostakiwskyj has also not retired. He continues to pay his union dues. His pension became fully vested in the year before trial, but he still hopes to return to work. He has looked into retraining and challenging the exams for a less physical supervisory position, although there is no certainty that he would be able to secure such a job.

ISSUES

- [35] The primary issues before me are whether and to what extent Mr. Szostakiwskyj's claimed losses were caused by the 2016 Accident. More specifically, whether these injuries and limitations would have occurred in any event due to Mr. Szostakiwskyj's other pre-existing health related factors. I must also consider whether Mr. Szostakiwskyj has failed to mitigate his losses.
- [36] Once I have determined the extent of Mr. Szostakiwskyj's losses that are properly attributable to the 2016 Accident, I will turn to the question of quantum of non-pecuniary damages, past and future income loss, special damages, and cost of future care.

CAUSATION

- [37] Mr. Szostakiwskyj must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to his injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [38] 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.
- [39] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 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*.

- [40] The plaintiff must be placed in the position that he would have been in if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for the average person (also known as the "thin skull" rule). However, the defendant need not compensate

the plaintiff for any debilitating effects of a pre-existing condition which he would have experienced anyway (also known as the "crumbling skull" rule): Athey at paras. 32-35. The Supreme Court of Canada articulated the "crumbling skull" rule in Athey, at para. 35 as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[41] The "crumbling skull" factor may be addressed in a number of ways, including as a percentage reduction on damages awards, which reflects the likelihood that a pre-existing injury or condition would result in similar losses: see, for example, *Booth v. Gartner*, 2010 BCSC 471 and *Beardwood v. Sheppard*, 2016 BCSC 100.

Parties' Positions

[42] Mr. Szostakiwskyj says that the 2016 Accident caused a grade 2 whiplash injury that rendered his pre-existing osteoarthritis symptomatic. Prior to the 2016 Accident, with the exception of the back pain he had for a few months after the 2015 Accident, Mr. Szostakiwskyj had no history of back pain or physical limitations.

[43] He says that the whiplash injury caused both myofascial pain and also activated, exacerbated, or aggravated his underlying osteoarthritis in his neck and, to a lesser extent, in his lumbar spine. He says that this pain has now become chronic.

[44] The defendant says that while the 2016 Accident caused Mr. Szostakiwskyj some injury in the months after it, by the time he returned to work in the fall of 2016 he was largely recovered, at least with respect to his back pain. At the time of his return to work, he reported to his doctor that the low back pain was gone, and while he was still reporting some neck pain, he filled in a form for his employer saying he had no existing injuries. In addition, after returning to work, he suspended his physiotherapy and massage therapy treatments for a number of months.

- [45] The defendant says that to the extent that Mr. Szostakiwskyj had renewed or ongoing pain symptoms since his initial return to work, these can be attributed, at least in part, to Mr. Szostakiwskyj's underlying health conditions, which were likely to manifest at some point in any event. Specifically, the defendant relies on the evidence of Dr. Thompson, an expert in orthopaedic and spine surgery, who identifies other factors that may also have re-activated Mr. Szostakiwskyj's underlying osteoarthritic conditions after his return to work, including:
- a) Mr. Szostakiwskyj's pre-existing medical conditions that pre-dispose him to muscle pain, including type 2 diabetes, his weight, and his cholesterol medications; and
 - b) The nature of Mr. Szostakiwskyj's work, which is vigorous and involves sustaining awkward positions as well as overhead work, which may have independently triggered the onset of pain symptoms related to his pre-existing osteoarthritis in his neck and lumbar spine.
- [46] The defendant says there should be a 40% deduction in Mr. Szostakiwskyj's damage awards to account for the causal impact of these pre-existing factors.

Determination

- [47] It is uncontentioned that the 2016 Accident caused an injury to Mr. Szostakiwskyj that is responsible for his pain symptoms for at least the three to six-month period after the accident, and that he was experiencing ongoing chronic pain in his neck and intermittent pain in his back up to the time of trial.
- [48] The main difference between the parties and their experts is whether Mr. Szostakiwskyj would have experienced some amount of his ongoing pain and disability even without the 2016 Accident.
- [49] Mr. Szostakiwskyj's evidence was that after the 2016 Accident, he had persistent low back pain that, with a lot of rehabilitation, resolved to the point where he could return to work, but that still intermittently returns. However, his neck pain never fully resolved, and is easily triggered, sometimes to a debilitating level of pain. He is now at a point where he can no longer tolerate the pain that working as a shipfitter provokes, and it continues to affect every aspect of his life.
- [50] I found Mr. Szostakiwskyj to be a credible witness and a stoic individual, who tended to minimize his pain and disability. His evidence was affected by his relative unwillingness to admit to weakness or limitations, both as a result of the accident, but also as a result of other conditions that have affected him in the last 10 years.
- [51] The defendant relies on other evidence, including Mr. Szostakiwskyj's medical reports and forms, and Dr. Thompson's report, to argue that by the time of Mr. Szostakiwskyj's return to work in August 2016, his pain symptoms directly caused by the 2016 Accident had largely resolved.

- [52] Dr. Thompson opines that Mr. Szostakiwskyj's accident related injuries were resolved after 6 months, and that his ongoing pain was likely caused as a result of pre-existing conditions that would have spontaneously become symptomatic as a result of other predictive factors.
- [53] This opinion relies significantly on Dr. Thompson's interpretation of the medical records of Dr. Urban, Mr. Szostakiwskyj's long-time family doctor, and the records of other treatment professionals, not all of which were in evidence. I find that Dr. Thompson has relied upon these records to infer facts that were not established in evidence before me. For example:
- a) Dr. Thompson erroneously assumed that Mr. Szostakiwskyj returned to recreational sailing in 2018 as a result of an ambiguous note in a physiotherapy record;
 - b) Dr. Thompson incorrectly assumed Mr. Szostakiwskyj was taking part in running events after the 2016 Accident based on another ambiguous note in Mr. Szostakiwskyj's medical records; and
 - c) Dr. Thompson inferred, from a record indicating that Mr. Thompson was prescribed Tramacet, that Mr. Szostakiwskyj was taking Tramacet daily over a long period, when in fact the evidence establishes that Mr. Szostakiwskyj did not take this medication more than a few times in the first month after the 2016 Accident.
- [54] The most problematic example of Dr. Thompson's reliance upon unsubstantiated assumptions, was his inference, based on the medical records he reviewed, that Mr. Szostakiwskyj had highly variable pain reports, particularly with respect to his neck pain. Dr. Thompson opined that this variability was inconsistent with an activation of his underlying osteoarthritis at the time of the 2016 Accident.
- [55] I find that this assumption was not made out in the evidence at trial, including both Mr. Szostakiwskyj's direct evidence, and the evidence of Dr. Urban, the source of the records relied upon by Dr. Thompson in this respect. I find that Mr. Szostakiwskyj's neck pain was consistently left-sided by the time it had localized within a few months of the 2016 Accident.
- [56] Both Dr. Thompson and Dr. Filbey (a physiatrist who prepared a report for Mr. Szostakiwskyj) accept that the presence of relatively consistent pain symptoms in Mr. Szostakiwskyj's neck would tend to indicate that the 2016 Accident activated or exacerbated his pre-existing osteoarthritis in this area. Dr. Filbey goes so far as to say that the 2016 Accident might even have made the underlying disc disease in Mr. Szostakiwskyj's neck worse, thereby explaining the tenacity of the pain in this area.
- [57] However, while Mr. Szostakiwskyj's back pain was also exacerbated by the 2016 Accident, Dr. Filbey opines that some of the pain Mr. Szostakiwskyj feels in his back is likely now related to his underlying osteoarthritis in that area.
- [58] I find that the underlying facts and assumptions in Dr. Filbey's opinion are supported by the evidence at trial regarding the timing, location, and consistency of Mr. Szostakiwskyj's pain symptoms.

- [59] I find that the 2016 Accident aggravated Mr. Thompson's underlying disc disease and that the 2016 Accident is an ongoing cause of Mr. Szostakiwskyj's chronic and persistent neck pain. I find that Mr. Szostakiwskyj has experienced relatively consistent neck pain since the 2016 Accident as a result of that accident, and that rather than get better, it has gotten more entrenched over time.
- [60] On the other hand, I find that Mr. Szostakiwskyj's accident-related back pain resolved to a significant extent, such that it is now intermittent. I find that once his lower back had been made symptomatic by the 2016 Accident, it was then more vulnerable to being made symptomatic by work and other activity. The intermittent nature of this pain over the last four years makes it less clear whether that pain is consistently related to the 2016 Accident or other stressors and factors, including a pre-existing vulnerability to experiencing lower back pain and the nature of his work. Overall, the 2016 Accident has played a lesser part in Mr. Szostakiwskyj's ongoing back pain, but it is not his primary injury or the cause of his current state of disability. I turn then to the cause of Mr. Szostakiwskyj's neck pain.
- [61] Mr. Szostakiwskyj's chronic neck pain is primarily responsible for his current limitations.
- [62] The main thrust of Dr. Thompson's evidence is that there are a number of predictive factors in Mr. Szostakiwskyj's medical history and lifestyle that provide an alternate explanation for Szostakiwskyj's chronic pain symptoms and current condition. These factors include his underlying disc disease, jarring work at his employment, physical work in maintaining his property, other aspects of his active lifestyle, and his greater risk of muscle pain related to his diabetes and other health factors. Dr. MacNicol also agreed that Mr. Szostakiwskyj's underlying degenerative disease might one day have been activated by the hard physical nature of his work.
- [63] Given the aspects of Dr. Thompson's opinion that I have rejected, what Dr. Thompson proposes is more theoretical than empirical. It lacks, in particular, a temporal connection to the cause of Mr. Szostakiwskyj's current neck pain.
- [64] However, while I reject Dr. Thompson's theory as a causal explanation of Mr. Szostakiwskyj's current neck pain, I accept that his opinion, together with that of Dr. MacNicol, raises a real possibility that Mr. Szostakiwskyj may have experienced similar neck pain in the future as a result of pre-existing factors and the nature of his work and activities. I find that the other potential causal factors for his neck pain had not played a causal role in his pain up to the date of trial, but they may in the future.
- [65] Taking all of the above into account, I would discount Mr. Szostakiwskyj's non-pecuniary, future loss of earning capacity, and cost of future care awards by 20% on the basis of the crumbling skull principle.

FAILURE TO MITIGATE

- [66] I must also consider whether any amounts should be deducted from Mr. Szostakiwskyj's damage awards on the basis of a failure to mitigate, and I have found that they should not be.
- [67] A plaintiff in a personal injury action has a duty to take reasonable steps to limit their loss. The defendant has the burden of proof on the issue of mitigation. This involves proving two elements: first, that the plaintiff acted unreasonably in not taking medically recommended steps, and second, that the plaintiff's loss would in fact have been eliminated or reduced had the step been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. 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 [Gilbert].
- [68] The defendant argues that Mr. Szostakiwskyj's damages should be reduced by 25% because Mr. Szostakiwskyj' suspended his professional rehabilitation therapies in late 2016 for a number of months after he returned to work.
- [69] The defendant acknowledges that Mr. Szostakiwskyj continued doing moderate exercise using resistance bands at home and continued to swim multiple times per week during this time, and that he returned to regular physiotherapy, massage therapy, and kinesiology in 2017 when his pain increased again. However, the defendant says that Mr. Szostakiwskyj's doctor never recommended that he cease these therapies at all, and that he was cautioned against doing so.
- [70] I have reviewed the evidence with respect to Mr. Szostakiwskyj's physiotherapy and massage, and while there is a gap in November and December 2016 when Mr. Szostakiwskyj first returned to work, Mr. Szostakiwskyj had returned to physiotherapy by early January 2017 and massage by February 2017.
- [71] I also accept Mr. Szostakiwskyj's evidence that he was exhausted by his return to work full time in October 2016 and had little energy to continue the same rehabilitation regime while working full time. Nevertheless, the evidence establishes what most personal injury defendants could only hope for: Mr. Szostakiwskyj continued an active rehabilitation and exercise program without incurring the costs of professional help, while mitigating his financial losses by working full-time throughout this period. He then returned to professional rehabilitation assistance within a few months when his independent regimen was insufficient. Furthermore, he did so without reducing his work income for more than a year. I am also satisfied that he did not act contrary to the advice of his doctor during this time.
- [72] I am satisfied that by choosing to work full-time rather than dedicate his energies toward his rehabilitative therapies at the end of 2016, Mr. Szostakiwskyj reduced his losses rather than increased them. To the extent that Mr. Szostakiwskyj compromised his enjoyment of life for that purpose, this was overall financially to the defendant's benefit.

[73] I find that the defendant has not proven a failure to mitigate on Mr. Szostakiwskyj's part.

NON-PECUNIARY DAMAGES

[74] 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 unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[75] 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 BCCA 54).

[76] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Parties' Positions

[77] Mr. Szostakiwskyj is seeking a non-pecuniary damages award of \$150,000.

[78] Mr. Szostakiwskyj says that the 2016 Accident caused injuries, including chronic pain in his neck and back, headaches, and low mood. He is anxious, fatigued, and grumpy. Where he used to have plenty of energy after work and on his days off to work on his property and host social gatherings, after the 2016 Accident, he was unable to do anything at all after work; he

was exhausted, short-tempered, and difficult to be around. He says his injuries are permanent and impact every aspect of his life. He has lost confidence in himself as the capable family man who was able to step in and "get it done." He cannot enjoy the many recreational activities he used to that gave him joy, such as sailing, diving, and hiking.

- [79] The plaintiff relies on a series of cases where chronic pain and mood disorders were diagnosed, including *Verjee v. Dunbrak*, 2019 BCSC 1696, *Mattson v. Spady*, 2019 BCSC 1144, and *Zwinge v. Neylan*, 2017 BCSC 1861.
- [80] The defendants submit that the impact of the accident on Mr. Szostakiwskyj's life is more consistent with non-pecuniary damages awards in the \$60,000 to \$80,000 range, before factoring in pre-existing conditions and an alleged (but unproven) failure to mitigate: See *Sangha v. Read*, 2019 BCSC 1761; *Abraha v. Suri*, 2019 BCSC 1855; *Bulatovic v. Siebert*, 2013 BCSC 240; *Courtney v. Hutchinson*, 2012 BCSC 188; and *Mandra v. Lu*, 2014 BCSC 2199.

Determination

- [81] I have reviewed the parties' proposed analogous cases, and I consider that the cases relied upon by the defendant in the \$60,000 to \$80,000 range are more analogous to Mr. Szostakiwskyj's situation.
- [82] Mr. Szostakiwskyj still swims multiple times a week and, with effort and diligence, has been able to match his 30 minute 1000 metre benchmark. He remains stronger than average, but he still feels the loss of his previous strength and abilities, and he now feels more vulnerable to re-injury.
- [83] Mr. Szostakiwskyj is still able to vacation (even performing volunteer work in Latin America since the accident), though he can no longer engage in sailing or diving. His sailboat is still gutted, and he has not been able to restore it. He is much slower on ambitious walks or hikes and now has difficulty keeping up with wife, but he still does them. His vacation and retirement plans have changed to less active ones.
- [84] The 2016 Accident has had an effect on his personality and enjoyment of life. His social activity has decreased, and he is prone to be shorter with his loved ones. Nevertheless, his relationships remain intact. He continues to contribute to the house and yard work, though it takes him longer and he now relies on the assistance of his adult children.
- [85] Overall, I find that Mr. Szostakiwskyj is a highly capable man who, up until the age of 62 and the 2016 Accident, was able to and did just about anything and everything required. At work, he competed with men much younger than himself; he carried his wife's luggage; he fixed his daughter's boat. As a result of the 2016 Accident, he is now less able to take care of everyone else and is more vulnerable to pain and injury. This has been a difficult adjustment, particularly when it is accompanied by a low level but permanent level of chronic pain that saps his strength and resilience and makes him less social and pleasant to spend time with.

- [86] Overall, I find that the 2016 Accident caused a significant and long-term diminishment in Mr. Szostakiwskyj's enjoyment of life, but not one that was debilitating to the same degree as in cases upon which he relies. Those cases involve much greater experiences of pain and physical limitation, loss of critical relationships and work connections, and a more serious psychiatric diagnosis.
- [87] I would award Mr. Szostakiwskyj \$65,000 in non-pecuniary damages. I would apply the 20% reduction to this award in relation to the contribution to and future potential cause of his pain and limitations related to his underlying disc disease, resulting in an award of \$52,000.

PAST WAGE LOSS

- [20] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; and *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [21] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, the plaintiff is entitled to recover damages for only his past net income loss. In exercising this discretion, I must keep in mind that the plaintiff is to be put back in the position he would have been in had the 2016 Accident not occurred: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 185-186 [Lines].
- [88] The plaintiff need not establish earnings loss on a balance of probabilities -- since what would have happened between the date of the accident and prior to the trial is essentially hypothetical, as are predictions regarding future losses. As stated 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.

- [22] A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; and *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

Parties' Positions

- [89] Mr. Szostakiwskyj claims a net amount of \$103,300 in lost wages resulting from three periods where he was unable to work as a result of the 2016 Accident:
- 2016: from the time he would have returned to work but for the accident in April 2016 to August 2016 when he first returned to work;
 - 2018: from June 2018 when he took a medical leave from work to December 2018 when he began a gradual return; and

- c) 2019 to 2020: from his last day of work in March 2019 to the date of trial at the end of February 2020.
- [90] Mr. Szostakiwskyj calculates his past wage losses on the basis of his hourly rate (which increased each year), multiplied by 40 hours per week for a total of 94 weeks. To this, he would subtract 25%, reflecting his agreed upon tax deduction, and add his employer's pension contribution of approximately six dollars for each hour he worked. Mr. Szostakiwskyj suggests that his vacation time would likely have cancelled out his overtime pay during this period.
- [91] While I am unable to follow Mr. Szostakiwskyj's calculations in this regard (they seem to result in a higher figure than claimed), I find that his stated claim is supported by the more detailed calculations of the defendant.
- [92] I find that the defendant's calculations more closely accord with the evidence regarding Mr. Szostakiwskyj's availability to work and ordinary work patterns. The defendant excludes from the calculations a number of weeks that the evidence establishes Mr. Szostakiwskyj would not have worked, for example because of his foot injury in March 2019. He calculates that Mr. Szostakiwskyj missed fewer weeks of work on that basis to the date of trial, but he includes additional allowances in Mr. Szostakiwskyj's hourly wage, including his pension benefit. As a result, his calculations of Mr. Szostakiwskyj's past wage loss is just over \$105,000 after 25% tax is deducted.

Determination

- [93] I find that Mr. Szostakiwskyj is entitled to \$105,000 in past wage losses, after tax. I would not apply any discount factor to this as I consider that Mr. Szostakiwskyj's limitations in the four years since the 2016 Accident were primarily due to the chronic pain that was caused directly by the accident.

DIMINISHMENT OF FUTURE EARNING CAPACITY

- [94] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time?
- [95] 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. Gola*y (1985), 26 B.C.L.R. (2d) 260 (C.A.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos]; and *Pett v. Pett*, 2009 BCCA 232. The plaintiff must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren].
- [96] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [97] Insofar as possible, a plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 32.
- [98] There are two possible approaches to assess loss of future earning capacity: the "earnings approach" and the "capital asset approach". Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: Perren at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset approach" is more appropriate: Perren at para. 12.
- [99] 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; Gilbert at para. 233.
- [100] 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 himself as a person capable of earning income in a competitive labour market: Brown; Gilbert at para. 233; and Morgan v. Galbraith, 2013 BCCA 305 at paras. 53 and 56 [Morgan].
- [101] Though the capital asset approach is not a "mathematical calculation", the court must still set out the factual basis of the award: Morgan at para. 56.
- [102] 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), 84 B.C.L.R. (3d) 158, 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

Parties' Positions

- [103] Mr. Szostakiwskyj seeks \$188,000 in future loss of earning capacity.
- [104] He seeks this compensation on the basis of the earnings approach, based on a retirement date for Mr. Szostakiwskyj of July 2022, at which point Mr. Szostakiwskyj will be 68 years old. He calculates this amount as 127 weeks from the commencement of trial to July 4, 2022 at his base hourly rate, less 16 weeks of vacation for a total of \$187,723.
- [105] The defendant says that the evidence establishes only that Mr. Szostakiwskyj had a commitment to completion of the work on the HMCS Corner Brook that he committed to prior to the 2016 Accident. While Mr. Szostakiwskyj believed that contract could go as long as 2022, the evidence at trial of Mr. Lampart, a steelworker and tile applicator and former co-worker of Mr. Szostakiwskyj, was that the HMCS Corner Brook work will likely be concluded the end of this year. The defendant therefore says that Mr. Szostakiwskyj, if it is accepted that he remains unable to work in his former role as a result of the 2016 Accident, would only be entitled to a future loss of earning capacity to November 1, 2020.
- [106] The defendant calculates that amount, without including overtime, to be just short of \$61,000. The defendant also acknowledges the evidence of Mr. Lampart that, in recent months, he has been working significant amounts of overtime and expects to do so until the HMCS Corner Brook is taken out of dry dock at the end of the year. While the defendant performs this calculation taking into account pre-trial and post-trial potential overtime, that figure can be broken down to allow for another approximately \$30,000 in overtime income for Mr. Szostakiwskyj post-trial. The defendant therefore acknowledges a potential future wage loss of \$91,000 (before income tax, which is not deducted from future earnings awards pursuant to *Kelly v. Kotz*, 2014 BCSC 1022).
- [107] The defendant says I must deduct an amount from that award to reflect the likelihood that Mr. Szostakiwskyj would have been unable to work in any event due to his pre-existing degenerative disc disease (which he argues should be 40%, but which I have set at 20%). To that amount, the defendant argues that there should be a further 10-20% reduction to account for the contingency that Mr. Szostakiwskyj may still return to work in the future.
- [108] The defendant notes that Mr. Szostakiwskyj testified that his foot injury, which forced him to stop working in March 2019, is now healed. Further, his neck and back symptoms are currently at similar levels to where they were when he was working prior to his foot injury. Mr. Szostakiwskyj continues to pay union dues and has spoken with Seaspan's disability manager as recently as the month of trial about returning to work or challenging the exams and seeking a supervisory position.

- [109] Mr. Szostakiwskyj says no such deduction should apply, and the evidence of Seaspan's disability manager is that no supervisory positions are currently posted or available and that, even if one came available, there is no certainty that he would get the job.

Determination

- [110] I find that Mr. Szostakiwskyj likely would have continued to work at the shipyards as a shipfitter (including steel work and tile application) until the completion of the HMCS Corner Brook, but for the 2016 Accident. I accept his evidence that he committed to that work in early 2016 before the accident and that he would have seen that commitment through.
- [111] I consider that the likelihood that Mr. Szostakiwskyj would have continued to work as a shipfitter beyond the completion of the HMCS Corner Brook in the absence of the accident is fairly low. His pension has already vested, and his wife has retired.
- [112] I consider that it is at least as likely that Mr. Szostakiwskyj will challenge the supervisor exams and return to work in that capacity at some point in the future. I consider that this possibility balances out any potential award for loss of capacity to work beyond the completion of the HMCS Corner Brook.
- [113] I accept the defendant's calculations of Mr. Szostakiwskyj's likely income loss from trial to the completion of the HMCS Corner Brook. While the evidence of Mr. Lampart was not definite as to the time frame for completion, he did say that the tile work had to be completed before the end of the year so that the next submarine contract work could begin in dry dock. I find that Mr. Szostakiwskyj would have worked until the end of 2020.
- [114] The appropriateness of an award in the \$91,000 range is also supported by Mr. Lampart's evidence that he currently makes \$4,500-\$4,750 per two week pay period at the union rate applicable to Mr. Szostakiwskyj, including his overtime pay. In the 44 weeks, or 22 pay periods, between the completion of this trial and the end of 2020, and allowing for two to four weeks of vacation, Mr. Lampart could be expected to earn between \$90,000 and 100,000.
- [115] I would award Mr. Szostakiwskyj \$95,000 for this period on the earnings based approach. I would award him nothing for any potential earnings loss beyond 2020, as I consider that any such losses are no greater than the likelihood of him returning to work in 2020 or 2021 in a supervisory role.
- [116] I would apply the 20% reduction to this award in relation to the chances that his pre-existing disc disease may have been activated by another source and affected his ability to continue in his role as a shipfitter in the post-trial period. Applying the 20% reduction, the award would be \$76,000.

- [117] This award would ordinarily need to be adjusted to reflect its present value. Neither counsel has provided me with any evidence of how the award might be affected by such adjustments. However, I am entitled to use the multipliers provided at Appendix E of the Civil Jury Instructions: *MacGregor v. Bergen*, 2019 BCSC 315. I have factored in the prescribed discount rate of 1.5%, pursuant to s. 56(2)(a) of the Law and Equity Act, R.S.B.C. 1996, c. 253, and I have also considered its application to address the fact that the award is for slightly less than a full year.
- [118] Taking all of the above into account, I award Mr. Szostakiwskyj \$75,000 in damages for loss of future earning capacity.

COST OF FUTURE CARE

- [119] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-2016 Accident condition insofar 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 (S.C.) [Milina]; *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [31] 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* at 84; and *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [120] 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 the 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. However, if the evidence shows that previously rejected services will not be able to be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60 and 68-70.
- [121] 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* at para. 253.

[122] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21.

Parties' Positions

[123] Mr. Szostakiwskyj seeks to recover his anticipated costs for ongoing treatments and therapies, including ongoing massage treatments, physiotherapy, and kinesiology for the rest of his life. He also seeks compensation to assist with the costs of seasonal house cleaning, outdoor yard work and gardening, work on the house, and splitting and stacking wood to the age of 75. Mr. Szostakiwskyj will be 75 in nine years.

[124] He relies upon the report of Ms. Phillips, who is a physiotherapist, and who provides estimates of the costs of all of these services in her report.

[125] In her report, Ms. Phillips provides the following calculations in relation to services that are medically supported:

- a) Physiotherapy or acupuncture, 12 sessions per year at \$85.00 per session = \$1,020.00 annually;
- b) Kinesiology, four sessions per year, costing \$68.25 per session = \$273.00 annually; and
- c) Massage therapy, 12 sessions per year, costing \$105.00 per session = \$1,260.00 annually.

[126] In addition, Ms. Phillips recommends that Mr. Szostakiwskyj receive the following services:

- a) Seasonal cleaning, 20 hours annually, costing \$30.45 per hour = \$609.00 annually to age 75;
- b) Seasonal yard and garden upkeep, 30 hours annually, costing \$47.25 per hour = \$1,417.50 annually to age 75;
- c) House maintenance, costing \$1,000.00 annually to age 75; and
- d) Provision of labour to split and stack wood, costing \$800.00 annually to age 75.

[127] Mr. Szostakiwskyj argues that on the basis of this evidence, he has established an entitlement to \$34,438.50 for household services to the age of 75, and to another \$22,977.00 or \$48,507.00 for massage, physiotherapy, and kinesiology to the age of 75 or 85 respectively.

[128] Mr. Szostakiwskyj acknowledges that this award will need to be adjusted to address its present value and says that counsel can agree upon the required adjustments without the need for expert evidence on this point.

[129] The defendant argues that Ms. Phillips' cost of future care assessment was made on the basis of assumptions that are not supported in her report or in the evidence at trial.

[130] Nevertheless, the defendant accepts that some amount for cost of future care is supported by the evidence, and he accepts the rates that Ms. Phillips ascribes to those services and therapies, but not the total amounts.

- [131] With respect to the therapies recommended, the defendant relies on the recommendation of Dr. Filbey that the plaintiff reduce his "passive therapies," including massage and physiotherapy, to 12 sessions per year, which the defendant says is an appropriate number. The defendant agrees with the recommended four sessions per year of kinesiology.
- [132] With respect to the household services Ms. Phillips recommends, the defendant is prepared to agree to 10 hours of seasonal house cleaning assistance, 20 hours of outdoor work annually, \$500 per year for house maintenance, and \$400 to assist with splitting firewood.
- [133] To these costs, the defendant would have me apply a 40% reduction to account for the contingency that the plaintiff would have suffered neck and back symptoms preventing him from performing household tasks absent the accident, and a 10% reduction for his alleged failure to mitigate.
- [134] The defendant says that the total award for the costs of future care should be \$15,489.

Determination

- [135] I agree with the defendant with respect to the limitations posed by Ms. Phillips' report. Her opinions are neither clearly stated nor clearly supported. The report contains no facts or assumptions to substantiate the estimates of house and yard maintenance that Mr. Szostakiwskyj previously did or the extent of the diminishment in his ability to continue to do so. Finally, the report does not provide me with the calculations needed to extend the figures that are provided to the age of 75 or beyond based on actuarial factors such as Mr. Szostakiwskyj's life expectancy or the present value of such an award.
- [136] However, I do find on all of the evidence that Mr. Szostakiwskyj has had a reduction in his capacity to do the house and yard work that he previously did, and I am satisfied that there should be some compensation for that loss, not unlike a loss of housekeeping capacity award.
- [137] The evidence also establishes that Mr. Szostakiwskyj has benefited from the therapies he currently uses and that those should continue, though not to the same extent. The defendant has also accepted some of the figures relied upon in Ms. Phillips' report for this purpose.
- [138] Overall, I would award Mr. Szostakiwskyj \$1,275 per year to continue his choice of massage therapy, physiotherapy, or kinesiology for the next 10 years.
- [139] I would also award Mr. Szostakiwskyj \$2,000 per year for the next five years for the costs associated with house and yard work that he is unable to do as a result of his chronic pain or which he now performs more slowly. I have based this figure on the costs in Ms. Phillips' report, as accepted by the defendants.

[140] Both of these amounts are subject to a 20% reduction to reflect the contingency that Mr. Szostakiwskyj may have required similar services in this period as a result of his degenerative disc disease. They must also be reduced by the factors applicable to the present value of this award. I have used the multipliers provided at Appendix E of the Civil Jury Instructions for this purpose, using the discount rate of 2%, as prescribed by regulation pursuant to s. 56(2)(b) of the Law and Equity Act.

[141] I would therefore award Mr. Szostakiwskyj \$16,700 in costs of future care.

SPECIAL DAMAGES

[142] The parties admitted, by consent, a list of the costs Mr. Szostakiwskyj has incurred in relation to his rehabilitation care. This list includes costs for massage therapy, physiotherapy, and kinesiology. It also includes the cost of Mr. Szostakiwskyj's West Shore Parks and Recreation pass, which Mr. Szostakiwskyj testified he has always had as a benefit through work.

[143] Mr. Szostakiwskyj has agreed to remove the cost of that annual pass, as well as the cost of swimming goggles that are objected to by the defendant. He says, however, that the West Shore Parks and Recreation invoices for specific gym visits and kinesiology sessions should not be removed.

[144] I am satisfied that the charges shown at Tab 18 of the Document Agreement, other than the annual pass itself, were necessitated by the 2016 Accident. I would award Mr. Szostakiwskyj \$15,806 in special damages.

CONCLUSION AND COSTS

[145] In conclusion, Mr. Szostakiwskyj is entitled to \$264,606 in damages from the defendants as follows:

- a) Non-pecuniary Damages for 2015 Accident: \$100
- b) Non-pecuniary Damages for 2016 Accident: \$52,000
- c) Past Wage Loss: \$105,000
- d) Loss of Earning Capacity: \$75,000
- e) Cost of Future Care: \$16,700
- f) Special Damages: \$15,806

Total: \$264,606

[146] Mr. Szostakiwskyj is also entitled to his costs, subject to any offers or other matters that may require an adjustment to his costs entitlement. If the parties wish to address costs, they may make arrangements with the Registry in the next 30 days to make submissions before me for this purpose.

"Marzari J."

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