

CANADA / JUDGMENT

Thiara v. Neuls

2021 BCSC 1319

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2021 BCSC 1319 Thiara v. Neuls

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thiara v. Neuls,

2021 BCSC 1319

Date: 20210707

Docket: M188489

Registry: New Westminster

Between:

Bhupinder Singh Thiara

Plaintiff

And

Matthew John Neuls and Satnam Singh Thiara

Defendants

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

Counsel for Plaintiff:

M.S. Randhawa

H. Randhawa

Counsel for Defendant:

S.M. Walker

A. Haynes

Place and Date of Trial:

New Westminster, B.C.

October 26-30,

November 2-5, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 7, 2021

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Introduction

- [1] The plaintiff seeks damages for personal injuries sustained in a motor vehicle accident in Vancouver on November 5, 2015 (the "Accident"). He was a front-seat passenger in a vehicle driven by his brother, Satnam Thiara, travelling northbound on Hemlock Street. The defendant, Mr. Neuls, was travelling westbound on Broadway and collided with the Thiara vehicle as it proceeded through the intersection of Broadway and Hemlock Street. The action against Satnam Thiara has been discontinued and liability has been admitted on behalf of Mr. Neuls.
- [2] The plaintiff, now 56 years of age, is a construction worker who performs physically demanding work. I accept that his injuries, including the pain in his neck and back, have negatively impacted his life and will impair his earning capacity going forward to some extent. The main issues are the extent of the plaintiff's injuries and the appropriate awards under the usual heads of damages.
- [3] The defendant admits the plaintiff suffered soft tissue injuries but disputes the severity of the injuries and the extent of the impact upon his earning capacity. The defendant also points to the plaintiff's pre-accident shoulder injury in May 2015, for which he had surgery a week after the Accident, which kept the plaintiff off work for a time after the Accident.
- [4] Overall, the plaintiff seeks \$125,000 for non-pecuniary damages, \$10,000 for past wage loss, \$10,000 for past loss of housekeeping capacity, \$420,000 for future loss of earning capacity, \$1,952.96 in special damages, \$126,087 for the cost of future care, as well as applicable interest and costs.
- [5] The defendant suggests more modest awards on the order of \$60,000 for non-pecuniary damages, \$6,200 for past wage loss, \$1,850 for future medications, \$1,409.50 for special damages and an award for loss of future earning capacity on the order of \$18,205.50, or \$15,000 after factoring in negative contingencies and the possibility of improvement.

Credibility

- [6] The defendant submits that the plaintiff tended to emphasize his Accident-related injuries and perceived limitations. He submits that the plaintiff was litigation-focussed and eager to cast his case in the most favourable light. Consequently, the defendant submits that his evidence lacked reliability.

- [7] Overall, I found the plaintiff to be generally credible. He testified in a forthright and careful manner. He was confused on one or two minor points but appeared earnest and forthright. He did not appear prone to exaggeration or hyperbole. His evidence was largely internally consistent. With some exceptions, his evidence was also externally consistent with the evidence from other sources I accept respecting the impact of the Accident upon his quality of life and work-related functionality. I reject the defendant's submission that the plaintiff was excessively litigation-focussed.
- [8] Certain aspects of the plaintiff's evidence warrant closer examination. For instance, the issue of the plaintiff's unrelated May 2015 fall and its impact upon damages claimed and his rehabilitation in 2016 warrants special attention. The absence of indications of lower back pain in the plaintiff's medical records during the 2016 to mid-2017 period is also noteworthy. I deal with these issues in more detail below.
- [9] The plaintiff's wife, Tirath Thiara, and his supervisor, Solon Vine, testified. I found both to be credible, though their credibility at trial was not significantly challenged.
- [10] I deal with the credibility and reliability of the experts' opinions in my assessment of their evidence below.

Background

- [11] The plaintiff was born on December 20, 1964, in Punjab, India. He achieved a Bachelor of Arts in India before immigrating to Canada in 1993. Once he arrived in Canada, he settled in the Lower Mainland. He married Mrs. Thiara in 1994. They have two children together.
- [12] The plaintiff appears to be a hard worker who has been employed variously over the years assembling furniture, driving taxis or long-haul trucks, and in construction. Between 2000 and 2008, he worked full-time as a taxi driver. Then, in 2009, he started working part-time in construction in addition to driving a taxi.
- [13] The plaintiff currently works for Turner Bros Construction Ltd. ("Turner Bros") in Langley doing drywall work. This work involves hanging drywall as well as taping, mudding, and sanding the walls. Scaffolding or lifts are used for high areas.

Pre-Accident Health of the Plaintiff

- [14] The plaintiff was working full-time at Turner Bros prior to the Accident. He had worked there since 2013.
- [15] In terms of complicating causative events, in 2013, the plaintiff developed pain in his right elbow. The injury did not affect his ability to work, and he recovered gradually over the course of three to four months.

- [16] In 2014, the plaintiff had pain in his right shoulder and elbow, and some light pain in his neck as well. That condition lasted for about six to seven months. The plaintiff attended physiotherapy but continued to work.
- [17] The more significant event is the plaintiff's fall at work from scaffolding on May 15, 2015. As a result, the plaintiff suffered a localized injury to his right shoulder. The pain resulting from the injury disrupted the plaintiff's sleep in the months prior to the Accident. He often slept for short periods of time and woke up due to pain in his right shoulder. I will address the plaintiff's shoulder injury in more detail in my causation analysis below.
- [18] Following his fall, the plaintiff worked reduced hours for the rest of May and June. His work records confirm that he was fully back to work by the July 4 to July 17 period for which he worked 84.35 hours.
- [19] In the three pay periods before the Accident, the plaintiff worked 94.85 hours from September 26 to October 9, 107.89 hours from October 10 to October 23, then 78.55 hours from October 24 to November 6, 2015.
- [20] The plaintiff was thus working full-time and regular hours at the time of the Accident on November 5, 2015. In addition, he was responsible for housekeeping activities at home such as lawn mowing, gardening, and pressure washing.

The Accident

- [21] On November 5, 2015, at 6:45 a.m., the plaintiff was a passenger in a van driven by his brother on his way to work from Surrey to downtown Vancouver. As their vehicle passed northbound on Hemlock Street through the intersection at Broadway, the defendant's vehicle, travelling westbound on Broadway, struck or t-boned the passenger side of their vehicle where the plaintiff was sitting.
- [22] The collision was a forceful one. The collision pushed the vehicle the plaintiff was riding in to the west, or the plaintiff's left-hand side. Inside the vehicle, the airbags deployed, hitting the plaintiff in the face and chest. The plaintiff was wearing a seatbelt, but the force of the collision pushed the plaintiff forward and to the left. His body then rebounded back, and he hit his head on the right and his body against the frame of the door.

Post-Accident Health of the Plaintiff

- [23] In the immediate aftermath of the Accident, the plaintiff experienced pain in his head, shoulders, and upper, middle and lower back. On the second or third day after the Accident, he developed pain radiating down his left side to his leg and foot.
- [24] The plaintiff also experienced sleep disturbances after the Accident, often waking up in the middle of the night due to pain.

- [25] The pain and soreness in the plaintiff's upper, middle and lower back have continued since the Accident despite treatment with physiotherapy and an exercise regimen. He rates the lower back pain as more intense (eight to nine out of ten) than the pain in his upper back (six to seven) or mid-back (five to six).
- [26] The pain in his left leg has also continued, as has the pain in his neck, with varying intensity between four and eight out of ten. He also experiences pain in his left foot three to four times per week.
- [27] The plaintiff's headaches have continued and can occur up to four times per week.
- [28] He is able to treat his pain and headaches with prescription and non-prescription medication, but such treatment is in the nature of symptom management rather than a cure.
- [29] Overall, the plaintiff continues to experience ongoing headaches, persistent neck and upper back pain, intermittent mid-back pain, more intense low back pain, pain in the left leg and left foot, and sleepiness.
- [30] In terms of treatment, the plaintiff has attended physiotherapy on the recommendation of his family physician from January through June 2016. He also attended one to two massage sessions. Upon his discharge from physiotherapy, the plaintiff received and practiced a home-based stretching program. He continued to do his exercises at home in subsequent years. He took prescription and non-prescription pain medication to reduce the severity of his symptoms.
- [31] As noted above, the plaintiff had shoulder surgery for a work-related fall a week after the Accident. His low back pain is not well-reflected in some of his medical records, particularly in 2016 and 2017. However, this could be partially the result of the plaintiff's right shoulder being his primary complaint for a time.
- [32] The plaintiff testified that his Accident-related injuries have impaired his enjoyment of life including his ability to play soccer, participate fully in social gatherings, go for long drives or trips on the weekend, and sit for long periods while watching movies.

Collateral Witnesses

- [33] The plaintiff's wife, Mrs. Thiara, testified. She observed several changes in the plaintiff's behaviour after the Accident. Immediately after the Accident until the end of 2016, she observed from time to time that he was experiencing pain. The plaintiff would take medication, and she observed him massaging his shoulder, side of his neck, back, and left leg.
- [34] In subsequent years, the plaintiff showed outward manifestations of the subjective pain he was experiencing. He would take medication, do his stretching exercises, or wake up at night. Mrs. Thiara also observed him take a bath or remain seated after work, then do his exercises, after which his pain-related behaviour would moderate.

- [35] Mrs. Thiara confirmed that after the Accident, the plaintiff's activity level around the home diminished and that he was less able to do housework, gardening, and pressure-washing. He also became less social, less active with the children, and did not play soccer anymore.
- [36] Mr. Vine is the plaintiff's supervisor at Turner Bros. He has worked there for 17 years. He works approximately 50% of the time with the plaintiff and is familiar with his work-related responsibilities and abilities.
- [37] After the plaintiff's return to work in the spring of 2016, Mr. Vine observed that the plaintiff would sometimes grimace with pain and touch his back or left leg. When sanding ceilings, the plaintiff would sometimes look like he was in a lot of pain and would ask to have his duties reassigned so that he would not have to look up as much. He observed the plaintiff take pain medication at lunch.
- [38] In subsequent years, Mr. Vine made similar observations of the plaintiff's pain-related behaviours. He described the plaintiff as "a real trooper" and "not a complainer," but he did observe the plaintiff to be in pain sometimes. He observed the plaintiff's habit of touching his back, leg or neck.
- [39] Mr. Vine noted that he has tried to accommodate the plaintiff at work sometimes by assigning physically demanding tasks to others, having co-workers assist, or allowing the plaintiff to leave work early or come in late if he had appointments.

The Medical Evidence

- [40] Dr. Cecil Hershler is a physiatrist who testified on behalf of the plaintiff. He examined the plaintiff on February 19, 2020 and his report was filed at trial.
- [41] Dr. Hershler opined that the plaintiff sustained permanent injury to his cervical and lumbar spine as a result of the Accident. In Dr. Hershler's view, the plaintiff has a permanent partial disability and would remain permanently symptomatic in his current fashion.
- [42] Dr. Hershler noted that the plaintiff had full shoulder movement. He noted no complicating functional limitations of the plaintiff's right shoulder due to his May 2015 fall.
- [43] Specifically, Dr. Hershler made the following observations:

Diagnosis:

The history and physical findings are consistent with the following:

1. Musculoligamentous (mainly in muscle structures) and discogenic injuries to the neck and upper back - This is evident by virtue of tender points on examination and is consistent with myofascial pain. This is the most likely reason for the pain Mr. Thiara experiences with work activities and is also the cause of his headaches (cervicogenic). There were no tender points on palpation of the muscles on the right side of the neck and over the right shoulder. He has regained full range of motion in both shoulders. The MRI has revealed tiny broad

posterior disc protrusion at C6/7 level.

2. Musculoligamentous injury to the thoracic spine - This is evident by virtue of tender points on examination and is consistent with myofascial pain.
3. Musculoligamentous and discogenic injury to the lumbar spine - Mr. Thiara does have a history of pain referring into the left leg, as well as numbness. The MRI has confirmed small midline focal disc protrusion posteriorly and associated annular tear at the L4/L5 level. This contacts and flattens the anterior thecal sac and makes slight contact with deformation or displacement of bilateral L5 nerve roots. At the L5/S1 level there is mild loss of disc height with a small diffuse disc bulge.

The recent MRI confirm a likely discogenic component to his spinal pain and the likelihood that certain movements of the spine cause compression or irritation of nerve roots, leading to pain, muscle tightness and difficulty with movements.

From a review of the MRI report, the most likely regions affected are C3/4 to C6/C7 and L4/5 to L5/S1. In addition, there is ongoing pain due to muscle tender points in the neck, upper back, mid-back and low back.

Although some of the MRI findings probably predated the accident of November 5, 2015, it is more likely than not that some of these changes were likely caused and/or worsened by the accident. In any event, they have been rendered symptomatic by the accident on November 5, 2015.

With respect to the cervical spine, it is more likely than not that the small midline focal disc protrusion posteriorly and associated annular tear at the L4/L5 level and the small diffuse disc bulge at L5/S1 level was caused by the accident on November 5, 2015.

Based on the history, physical examination, and review of documentation and imaging, it is my opinion that these injuries and symptoms were caused by the motor vehicle accident on November 5, 2015.

There is a history of separate work-related injury that predated the accident and that affected the right shoulder. In fact, Mr. Thiara had surgery to correct this problem on week after the subject accident. He appears, however, to have gradually regained full range of motion and strength about the right shoulder and the pain in this region has resolved. This injury is unrelated to the accident.

Prognosis:

Almost five years have now elapsed since the accident, but Mr. Thiara continues to experience ongoing pain in the neck, upper back, mid back as well as more persistent pain in the low back (especially with sitting) that refers into the left leg and is associated with numbness.

Based on the nature of his injury, history and physical examination, it is my opinion that he has sustained permanent injury to his cervical and lumbar spine. It is likely that he will remain permanently symptomatic in his current fashion.

He will continue to be limited in his vocation and avocational activities as a result of his ongoing physical symptomology. Mr. Thiara will continue to miss time from work due to his symptoms and he will likely have difficulty sustaining his current employment to retirement age of 65 or beyond as a result of his ongoing symptomology. He has a permanent partial disability.

[Emphasis added]

[44] Dr. Catherine Paramonoff testified on behalf of the defendant as an expert physiatrist. Dr. Paramonoff did not examine the plaintiff. The defendant retained her to critique Dr. Hershler's medical report.

[45] Dr. Paramonoff offered the following opinions:

- Dr. Hershler, in his IME, describes that imaging consisting of x-rays in the 2014 and 2011 revealed degenerative disc and degenerative bony changes at the cervical spine (neck) [i.e. prior to the subject MVA].
- An MRI of the spine on July 24, 2020 reported multi level degenerative changes at the cervical spine and at the lumbar spine.

- I will note that:

- o Degenerative changes take time to develop, and degenerative changes tend to progress over time.

- o An MRI is a more detailed imaging modality than an x-ray. As such, more details will be reported on an MRI compared to an x-ray.

- I respectfully disagree with Dr. Hershler's opinions regarding the July 2020 MRI findings:

- o Dr. Hershler provides his opinion -"Although some of the MRI findings in the spine probably predated the MVA, it is more likely than not that some of these changes were likely caused and/or worsened by the MVA".

- o Regarding Dr. Hershler's opinion with respect to the cervical spine-

- § "With respect to the cervical spine, it is more likely than not that the tiny broad posterior disc protrusion at C6/7 level was caused by the MVA"

- § My discussion-

- Degenerative changes at the neck were already present on 2011 and 2014 x-rays, including degenerative changes at the areas of the discs and areas where the spinal nerves exit the bony spinal column.

- The details reported on the MRI in 2020 describe the degenerative changes in more detail, and I also note that due to passage of time since the x-rays were done, the degenerative changes likely progressed since the x-rays were done.
- It is my opinion that the findings on the MRI more likely than not represent underlying degenerative changes (broad posterior disc protrusion), i.e. although it is a possibility that the subject MVA contributed to the disc protrusion, it is more likely that this represents underlying degenerative changes. (x-rays were carried out in 2011 and 2014; hence Mr. Thiara would have had some past symptoms which necessitated imaging of the neck).

o Regarding Dr. Hershler's opinion with respect to the lumbar spine (lower back)-

§ "With respect to the lumbar spine, it is more likely than not that the small midline focal disc protrusion and annular tear at the L4/5 level and the small diffuse disc bulge at the L5/S1 level was caused by the MVA."

§ As I have described above for the cervical spine, it is my opinion that such MRI findings more likely than not represent underlying degenerative changes.

- I concur with Dr. Hershler that the subject MVA can have rendered underlying degenerative changes at the spine to become symptomatic, further contributing to an ongoing pain presentation. I also concur with Dr. Hershler that the subject MVA can have resulted in musculoligamentous and myofascial injuries.
- Dr. Hershler notes that Mr. Thiara has continued to do "stretching exercises" [I assume this refers to a stretching program, and not an ongoing program muscle strengthening/ muscle balance/ conditioning], as Dr. Hershler makes recommendation for further instruction for an independent exercise program. I concur with ensuring a sufficient extent of an independent exercise program, as it is my opinion that musculoskeletal symptoms (as described in this clinical presentation) can be optimized (and hence functioning can improve) with ensuring optimal muscle strength/ muscle balance (and instead relying on passive treatments for temporary symptom management).

[Emphasis added]

[46] In cross-examination, Dr. Paramonoff conceded that, leaving aside the question of whether the plaintiff's pain was musculoligamentous or discogenic, his pain was caused by the Accident.

[47] While both doctors recommended the plaintiff pursue an exercise program, Dr. Paramonoff disagreed with Dr. Hershler's recommendation of physiotherapy as a pain management tool. She opined that active treatment involving exercise is preferred instead of passive treatments for temporary symptom management.

- [48] The major point of disagreement between the two physiatrists is the emphasis each places on pre-existing degenerative changes in the plaintiff's neck, as revealed by his 2011 and 2014 x-rays. Dr. Paramonoff describes the discogenic component of the plaintiff's spinal pain revealed in the 2020 MRI as representing continued underlying degenerative changes, although she allows the possibility that the Accident contributed to his disc protrusion.
- [49] Dr. Hershler opines that "[a]lthough some of the MRI findings probably predated [the Accident], it is more likely than not that some of these changes were likely caused and/or worsened by [the Accident]. In any event, they have been rendered symptomatic by [the Accident]." On this point, Dr. Paramonoff agrees that the Accident could have rendered underlying degenerative changes at the spine to become symptomatic, further contributing to ongoing pain presentation. Hence, there is some common ground between the two experts on the issue of the Accident aggravating the plaintiff's pre-existing disc conditions.
- [50] The plaintiff's family doctor, Dr. Ravinder Sandhu, testified on his behalf. He was not qualified as an expert witness, and as such, his evidence was factual and limited to record-keeping and treatment.
- [51] Dr. Sandhu testified that his practice was a busy one and that he may not record all of the complaints made by a patient at each visit but instead focuses on the dominant issue. This would be the case where there was no change in the pain management plan.

The Functional Capacity Evaluation

- [52] Paul Pakulak was qualified as an expert in occupational therapy and functional capacity evaluations. He conducted a clinical interview and occupational simulation testing of the plaintiff on July 15, 2020.
- [53] I accept Mr. Pakulak's findings. He conducted so-called distraction tests to assist in determining the veracity of the results, and they were all negative. He also conducted tests to determine the plaintiff's effort level, and he had no concerns in that regard. The plaintiff's raw scores on the various tests declined over the course of the day, consistent with expectations based upon his reported symptomology and indicating the plaintiff did not have a good tolerance for working over longer periods of time.
- [54] Mr. Pakulak's report of his evaluation indicates in part as follows:

In my opinion Mr. Thiara demonstrated the functional strength capacity for medium strength tasks. He did demonstrate the strength sufficient for some load handling in the modified heavy range but did not demonstrate the capacity to sustain that level of load handling. He demonstrated specific body positional limitations related to prolonged and repetitive overhead work, prolonged neck flexion and prolonged and repetitive below waist level work. Given his response to testing (significant increases in reported pain levels during and after the assessment and a reduction in speed and capacity over the course of the assessment), I would anticipate that prolonged activity above a medium strength level or without provisions for the above limitations

will adversely impact his productivity.

With respect to work in general and based on the testing results overhead work, neck flexion and prolonged and repetitive below waist level work should be kept to an occasional basis. Overhead work should be kept to the entry level of the occasional range. Functional strength tasks should not exceed the medium level.

Thus, it is my opinion that his overall capacity to compete for work in an open job market has been reduced due to his ongoing physical limitations. That is, the overall number of jobs that he would be able to compete for is limited compared to prior to his MVA related injuries.

With respect to his work as a Drywaller/Framer, the physical demand of this work are described in the NOC under the category of Drywall Installers and Finishers (7284.2) and in the DOT under the category of Drywall Applicator (construction) (842.361-030). Given these descriptions, Mr. Thiara's reported job demands and my professional experience the work would be best described as requiring heavy to very heavy level strength, multiple limb coordination, other body positions, standing and walking, other sound discriminations, verbal interaction, colour discrimination and near and far vision. In my opinion he did not demonstrate the capacity to complete this work on a full time basis at a competitive or sustainable level. To his credit he has continued with this work on a full time basis although he does continue to miss shifts and continues to experience ongoing difficulties and limitations at work as well as related reduced activity levels outside of work. His ability to continue in this manner will depend largely on his ability to manage symptoms and his willingness to continue to work with increases in symptoms and reduced activity levels (quality of life). In short, he is not well suited for this work.

[Emphasis added]

[55] In cross-examination, Mr. Pakulak conceded that he assumed the plaintiff was truthful in responding to questions about his functionality. With respect to the plaintiff being not well-suited for drywall work even though he was continuing to work in that capacity, Mr. Pakulak stated that he understood the plaintiff was missing some time from work. He further opined that it was not so much a question of whether he can do the work, but what impact the work was having on him and whether it was the best thing for him given questions about competitiveness and sustainability.

[56] Mr. Pakulak allowed that it would be better for the plaintiff if he was only doing taping and finishing (as opposed to more demanding work such as hanging drywall overhead), but he noted that there was still a decline in productivity in the testing over time with respect to body positional work.

Overall Findings Respecting the Plaintiff's Medical Condition

[57] I do not accept that the plaintiff's current problems are merely the result of his pre-existing back and neck degenerative disease being aggravated by the Accident for a short time. In any event, that is not the opinion Dr. Paramonoff provided.

- [58] Further, where Dr. Hershler and Dr. Paramonoff disagree, I would prefer the evidence of Dr. Hershler because he had the opportunity to examine the plaintiff, I accept the reasonableness of his conclusions, and his findings are consistent with other evidence I accept in this case.
- [59] The defendant points to the lack of clinical records supporting indications of low back pain in visits to Dr. Sandhu from March 2016 through June 2017. The defendant submits that the plaintiff's low back pain ceased for the six months after the Accident, and that his low back pain had substantially recovered as a result. I do not accept that this is so.
- [60] In my view, the likely explanation for the lack of better documented low back pain in these intervening months following the Accident is the priority his treating physician gave to his recovery from right shoulder surgery and to his complaints of pain in other areas, which seem to have been more of a concern for the plaintiff at the time. I do accept that the plaintiff's low back pain was not his foremost concern in these intervening months, but I accept that his low back pain has given him more problems since.
- [61] Overall, I accept Dr. Hershler's opinion that the plaintiff suffered cervical and lumbar injuries in the Accident that are likely to remain permanently symptomatic. I accept his opinion that it is more likely than not that some of the plaintiff's pre-existing conditions have been rendered symptomatic by the Accident. I accept this opinion to be sound, well-considered, and consistent with other evidence I accept including the evidence from the plaintiff and the collateral witnesses.

Causation

- [62] The cause of the plaintiff's Accident-related injuries is complicated by his shoulder surgery, indications of pre-existing low back degenerative disc disease, and the lack of corroborating documentation of ongoing symptoms, particularly in 2016 and 2017.
- [63] As noted above, the plaintiff had shoulder surgery on November 12, 2015, seven days after the Accident.
- [64] The plaintiff's pain in his shoulder persisted for a matter of months. The plaintiff recommenced light duties at work in April of 2016 and gradually eased back into work over the next couple of months. His employment records indicate that he worked 29.22 hours from May 21 through June 3, and then worked 40 hours from June 4 through June 17, 2016. In the June 18 through July 1 period, he worked 87 hours and was essentially back to normal time.
- [65] The plaintiff reported having fully recovered from his shoulder surgery in 2016, but he nevertheless reported two instances of shoulder pain in 2017 and one in 2018. Nevertheless, in his comprehensive functional capacity evaluation discussed above, Mr. Pakulak found the plaintiff did not have ongoing functional limitations respecting his right shoulder.

- [66] Looking at the overall picture, I find that the plaintiff's May 15, 2015 fall and subsequent shoulder surgery do not detract from the Accident being the cause of his ongoing neck and back pain, headaches, and persistent sleep problems.
- [67] The defendant also disputes that the plaintiff's low back pain and left leg symptoms were caused by the Accident. In this regard, he points to the omission of reported low back pain in Dr. Sandhu's clinical records during the March 2016 to June 2017 period. He also points to the records of the plaintiff's physiotherapy, from which he was discharged in June of 2016, and Dr. Sandhu's March 25, 2017 CL19 report, which showed only complaints of residual upper back pain. In fact, Dr. Sandhu's CL 19 report checks off low back as a Grade II classification, but it is not explicitly written in the "list patient's current subjective complaints" section on the first page; only upper back is expressly written in that section.
- [68] As noted, I do not find the absence of certain specific symptoms such as low back pain from the plaintiff's medical records to be significant on the issue of causation. Dr. Sandhu indicated that he often recorded only the dominant purpose of the visit. Hence, the plaintiff's low back pain may well have been a secondary or additional complaint. I also accept the plaintiff's evidence that he reported his symptoms to his treatment providers. It is possible that Dr. Sandhu did not record all his symptoms, and I find it probable that his back pain was variable and that the localized area of pain in the back evolved over time with it being of relatively less concern at times.
- [69] With respect to any pre-existing symptoms, I find that other than his right shoulder injury, any prior symptoms the plaintiff had suffered had long been resolved by the time of the Accident. This would include the pain in his right elbow and his reports of symptoms in 2013-2014. As Dr. Hershler noted in cross-examination, the plaintiff's complaints in this respect were substantially not symptomatic at the time of the Accident.
- [70] I accept that this fact supports the trauma of the Accident rendering certain areas symptomatic or more symptomatic, while acknowledging that some changes in the plaintiff's spine could well have commenced prior to the Accident.

Non-Pecuniary Damages

- [71] The plaintiff has established entitlement to damages for non-pecuniary loss to compensate for his pain, suffering, loss of enjoyment of life, and loss of amenities.
- [72] In assessing the quantum of the plaintiff's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [Stapley].
- [73] The plaintiff has sustained physical injuries including past and ongoing headaches, ongoing pain in his neck, back, left leg and foot, and sleep disruption. These injuries have negatively impacted the quality of his life.

- [74] I find that the plaintiff's persistent and intermittent pain has and will limit him vocationally, socially, recreationally and domestically. His injuries have negatively affected his mood, activity levels, energy, and state of mind. At the same time, the plaintiff is not totally disabled, and he is able to carry on working to a degree. I do not accept his condition is as bleak as his counsel maintains.
- [75] The plaintiff seeks an award for non-pecuniary general damages of \$125,000. The plaintiff points to the following decisions as supporting his range (all awards indicated are unadjusted for inflation): *Majer v. Beaudry et al.*, 2002 BCSC 746 (\$95,000); *Slocombe v. Wowchuk*, 2009 BCSC 967 (\$125,000); *MacKenzie v. Rogalasky*, 2011 BCSC 54 (\$100,000); *Sekihara v. Gill*, 2013 BCSC 1387 (\$130,000); *Benson v. Day*, 2014 BCSC 2224 [Benson] (\$110,000); *Bellaisac v. Mara*, 2015 BCSC 1247 (\$140,000); *White v. Wiens*, 2015 BCSC 188 (\$100,000); *Arletto v. Kin*, 2016 BCSC 77 (\$110,000); *Slater v. Gorden*, 2017 BCSC 2265 (\$135,000); *Chawla v. Lambright*, 2017 BCSC 1884 (\$125,000); *Domijan v. Jeon*, 2018 BCSC 1988 [Domijan] (\$100,000).
- [76] Of the above authorities, *Domijan* involved a younger plaintiff with similar injuries. The *Benson* case has some similarities in that it involved a 57-year-old drywaller who suffered similar physical injuries but also suffered cognitive difficulties. General damages were reduced by 15 percent for failure to mitigate.
- [77] The defendant submits that \$60,000 is an appropriate award for non-pecuniary damages. In support of this submission, the defendant argues: a) the plaintiff did not have a well-established history of working full time in a labour intensive position prior to the Accident; b) he was already having pain and symptoms in 2013 and 2014 related to his position; c) the plaintiff is exaggerating his injuries and symptoms; d) the plaintiff's ongoing symptoms are relatively mild and are only worsened after long periods of work; and d) the plaintiff has not established any psychological complaints aside from some temporary driving anxiety.
- [78] I do not accept the defendant's submission that overall the plaintiff's symptoms are mild in nature. However, I do agree that at times the plaintiff copes well with his symptoms and that his back and neck pain is not always constant. I find it likely, however, that the plaintiff's ability to manage his symptoms will worsen with age, and I accept the medical opinion that his symptoms are chronic.
- [79] I have reviewed the various awards ordered in the cases cited by the parties. There is a large degree of variation in the injuries, their effects, the prospects for recovery, and the biographical details of the plaintiffs in the cases cited. Of note, the plaintiff here is older than those in many of the cases cited, and he had indications of pre-existing lower back degeneration prior to the Accident.

- [80] The defendant has not sought a reduction of the general damages award on the basis of a pre-existing injury or for failure to mitigate; however, the defendant asks me to consider the pre-accident health and lifestyle of the plaintiff. The defendant also invites me to consider the possibility of improvement through active rehabilitation treatment and the plaintiff's ability to successfully manage his pain-related symptoms.
- [81] Having regard to the principles in *Stapley*, I view a fair and reasonable award for non-pecuniary damages in this case to be \$110,000. This amount is inclusive of any lost capacity with respect to domestic chores.

Loss of Earning Capacity - Legal Principles

- [82] The central task in assessing damages for past and future loss of earning capacity is to place the plaintiff in the position they would have been in, but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. This assessment involves a consideration of hypothetical events, which need not be proven on a balance of probabilities. Instead, a hypothetical event will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34-46; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27 [*Athey*].
- [83] Depending on the facts of a case, loss of earning capacity may be assessed using either the earnings approach or the capital asset approach. The former approach will be more useful when the loss is more easily measurable, while the latter approach will be more useful when the loss is not measurable in a pecuniary way: *Perren v. Lalari*, 2010 BCCA 140 at paras. 12 and 32.
- [84] In *Hoy v. Williams*, 2014 BCSC 234 at paras. 157-58, Mr. Justice Kent summarized the different considerations of the two approaches:
- [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

- [85] The valuation of loss of earning capacity is a matter of assessment rather than a mathematical calculation. Under either approach, the court's ultimate goal is to determine what is fair and reasonable in the circumstances. Projections, calculations and formulas may help determine what is fair and reasonable, and the court should start the analysis by considering them where available: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

Past Wage Loss

- [86] The plaintiff has maintained calendars documenting hours and days missed since the Accident due to his Accident-related injuries. Those records show that the plaintiff missed 457.75 hours during the period May 1, 2016 to June 30, 2020. Based on the applicable average hourly rate of \$33.00 per hour, the plaintiff assesses his gross past income loss in the amount of \$15,105.75 (457.75 X \$33/hour) and net past income loss in the amount of \$12,084.60 (applying an effective tax rate of 20%).
- [87] The defendant accepts that the plaintiff missed work immediately following the Accident until November 12, 2015, when he underwent his right shoulder surgery. The defendant submits that a net wage loss figure of \$1,000 adequately compensates him for loss of income in 2015.
- [88] For 2016, the defendant submits no award is appropriate because the primary reason for any missed work would have been the plaintiff's recovery from his right shoulder surgery. He also submits that the plaintiff's evidence was vague as to whether he missed work due to his right shoulder as opposed to the Accident.
- [89] I accept that the plaintiff was still recovering from the lingering effects of his shoulder surgery up to the end of June of 2016, but I also accept that the plaintiff's Accident-related symptoms impacted his earning capacity to a degree in 2016 and in later years.
- [90] In the years 2017 onward, the defendant suggests modest net awards of \$1,500 for 2017, \$600 for 2018, \$2,400 in 2019, and \$700 in 2020. The defendant submits that an overall appropriate award for past wage loss is \$6,200.
- [91] Overall, I find that a fair and reasonable award for past wage loss, taking into account positive and negative contingencies, is a net award of \$9,000.

Future Loss of Earning Capacity

The Positions of the Parties

- [92] The plaintiff submits that the evidence establishes that he will continue to remain symptomatic and that it is more likely than not that his symptoms will be permanent. Indeed, Dr. Hershler opined that it is likely that the plaintiff would remain permanently symptomatic in his current fashion, that he would continue to miss time from work due to his symptoms, and that he will likely have difficulty sustaining his current employment to retirement age of 65 or beyond as a result of his ongoing symptomology.
- [93] The plaintiff's position is in part supported by the functional capacity evaluation performed by Mr. Pakulak discussed above. That evaluation supports the submission that the plaintiff will continue to struggle with working full-time at a sustainable level.
- [94] The plaintiff submits that, given his background, he will be restricted to lesser paying jobs in the range of minimum wage or slightly above.
- [95] Using a capital asset approach, the plaintiff submits that his injuries have diminished the value of his capital asset as the range of employment options available to him have narrowed as a result of his Accident-related injuries. He submits that he has been less capable of all types of employment, less marketable or attractive as an employee, and less valuable to himself as a person capable of earning income.
- [96] The plaintiff submits that an award representing five years of annualized earnings (\$386,440) for retiring five years early and a lesser award of \$37,000 to reflect annual losses of \$3,776.25 (for a total of \$423,424.59) is a fair and reasonable assessment of his future income loss and diminishment of earning capacity on a capital asset approach.
- [97] Using an earnings approach, the plaintiff submits that his inability to sustain work at Turner Bros should be quantified in the form of an annual loss of \$35,000. Based on that figure and applying economic multipliers, the plaintiff submits \$420,000 is an appropriate amount for future loss of income and diminishment of earning capacity.
- [98] The defendant submits that a much lesser award on the order of \$15,000 is appropriate for loss of future earnings. He arrives at that figure by taking the annual average of the plaintiff's gross earnings from missed work during 2017 to 2019, applying a future income loss multiplier and calculating the loss to the age of 70. This approach yields a figure of \$18,202.50, which the defendant submits should be reduced slightly for negative contingencies and the possibility of improvement.
- [99] In support of this submission, the defendant submits that there is no suggestion that the plaintiff's condition will worsen, only that his symptoms will remain as they are or possibly improve with the active rehabilitation treatment. The defendant also disputes the evidence that the plaintiff would have worked to the age of 70 in any event. Finally, the defendant asks me to consider the possibility of improvement in the plaintiff's symptoms with the treatment recommended by Dr. Hershler and the likelihood that once the litigation is over, the plaintiff will no longer be focused on his injuries.

Analysis of Future Loss of Earning Capacity

- [100] In examining the real and substantial possibilities for the plaintiff's earning capacity, I return to what is reliably known about the plaintiff.
- [101] The plaintiff is a drywaller by trade. I have no doubt that the work of taping and finishing drywall is physically demanding work that involves reaching, bending over, carrying or using a variety of tools, standing for long periods, and working in awkward positions.
- [102] I take into account the functional capacity evaluation from Mr. Pakulak that the plaintiff is not well-suited for his current employment based upon the physical demands of the job. I find that the plaintiff is likely to be impaired over the long-term in performing this work to some extent even if his employer provides reasonable accommodations in the form of removing or limiting his conduct of heavier lifting tasks and tasks such as ceiling work that would involve more demanding body positions. The plaintiff has established a real and substantial possibility of impairment of his earning capacity as a result of his Accident-related injuries.
- [103] The plaintiff has taken some time off work in the past due to his injuries, but the extent of the impact has been modest to date. I take this history into account in assessing the overall picture.
- [104] Nevertheless, Dr. Hershler opined that the plaintiff would likely have difficulty sustaining his current employment to retirement age as a result of his ongoing symptomology. The medical opinion is that the plaintiff is permanently partially disabled from his employment and that his Accident-related injuries are ongoing and chronic.
- [105] I accept the plaintiff's evidence that he had planned on working to age 70. However, given the physical demands of the plaintiff's job, and having regard to his advancing age and the medical evidence, the plaintiff's ability to perform his work will further diminish over time as a result of his Accident-related injuries. It will be very challenging for the plaintiff to continue working full-time to his projected age of retirement given the increasing toll that his injuries are likely to take on his ability to engage in physical work in the twilight years of his working career.
- [106] The plaintiff was involved in driving a taxi, a job that is less physically demanding. Nevertheless, I assess that given his difficulty in sitting for long periods in the same position (a difficulty he described having when watching movies), it appears that vocation will present challenges for the plaintiff as an alternate career. As well, the plaintiff was earning substantially less as a taxi driver than in his present capacity in construction.
- [107] While I would not be as pessimistic as the plaintiff's counsel urges, I find that in assessing the plaintiff's future earning capacity it is likely that the plaintiff will likely need to retire two years earlier than otherwise planned.

- [108] I regard the residual possible positive and negative contingencies that could impact the plaintiff's earning capacity in the future as being equal. I do not accept the defendant's submission that the plaintiff's past injuries would have negatively impacted his earning potential in any event. His shoulder aside, the plaintiff was asymptomatic at the time of the Accident and had shown resilience in his working career to date. As well, I would not discount the possibility of improvement of symptoms with an active rehabilitation program, but in my view that is a very remote possibility and one which may offer only temporary gains given Dr. Hershler's negative prognosis.
- [109] The plaintiff's approach is based on a loss of \$35,000 per year over his remaining 15-year working life (a present value of \$424,795). The defendant's approach is based upon a loss of \$1,500 per year and applying a contingency for premature death (\$18,205.50), though the defendant would reduce this amount for negative contingencies and the possibility of improvement.
- [110] I find that the plaintiff's approach is too generous while the defendant's approach is too conservative. The award I propose will recognize the real and substantial possibility of the plaintiff's earning capacity being impaired for the remaining years of his working life but would reflect reasonable expectations regarding the level of impairment of the plaintiff's future earning capacity.
- [111] Having regard to all the evidence including the increasing degrading effect of the plaintiff's injuries on his earning capacity as he advances in age, and the likelihood of his retiring early, I assess the impact of his Accident-related injuries on his earning capacity to be on the order of an average of \$15,000 - \$18,000 per year over the remaining 15 years of his working life from the trial date to retirement. Using the multipliers provided, the present value of \$15,000 per year loss of earnings over the next 15 years is \$182,055. The present value of an average \$18,000 per year reduction in earnings is \$218,466.
- [112] Alternatively, using the capital asset approach, I would make an award of \$200,000 in recognition of the plaintiff's impaired earning potential, the diminishment of his attractiveness as an employee and ability to take advantage of job opportunities, and the reduced value of the plaintiff as a person capable of earning income.
- [113] Overall, having regard to all the circumstances, I find that \$200,000 is a fair and reasonable award for the plaintiff's loss of future earning capacity.

Past Loss of Housekeeping Capacity

- [114] The plaintiff seeks compensation for past loss of housekeeping capacity in the amount of \$10,000 or \$2,500 per annum over four years. He points to the evidence of the plaintiff and his wife that since November 2015, other family members have taken over responsibility for heavy household chores including lawn mowing, pressure washing, and gardening.

- [115] The defendant denies that the plaintiff is functionally limited with respect to his housekeeping chores. Prior to the Accident, he gardened three to four hours per week, mowed the lawn twice per month, and pressure washed three to four times per year. Since the Accident, the plaintiff testified that his wife and sons assist with these activities though he still mows the lawn on occasion. He has not hired anyone to help and did not give evidence that he was likely to do so in the future.
- [116] It is also not clear to me how the plaintiff's injuries have or will prevent him from engaging in pressure washing or lighter gardening tasks if he has the ability to continue to moderately perform his drywalling work, albeit at a reduced level. I accept however that the plaintiff's ability to perform heavier gardening tasks and lawn care has been impaired by his Accident-related injuries.
- [117] A plaintiff whose ability to perform housekeeping services, including home maintenance, is diminished in part ought to be compensated for that loss: *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.); *Tombe et al. v. Stefulj*, 2002 BCSC 154 at para. 78. I have the discretion to award damages for loss of homemaking capacity either as part of the non-pecuniary loss or as a separate pecuniary head of damages: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.
- [118] In my view, the non-pecuniary damages award appropriately compensates the plaintiff for his past loss of housekeeping capacity. In this case, I am not inclined to make a separate award, but I would make some allowance for gardening and lawn care under the award for the cost of future care.

Special Damages

- [119] The plaintiff has tendered a schedule of receipts documenting his out-of-pocket expenses, which he assesses in the amount of \$1,952.96.
- [120] The defendant assesses special damages in the amount of \$1,409.50. That amount comprises reimbursement for physiotherapy, mileage, non-prescription medication and prescription medication.
- [121] Part of the disagreement relates to dual-purpose expenses in 2016 respecting physiotherapy and medication.
- [122] Overall, I assess special damages in the amount of \$1,700.

Cost of Future Care

- [123] The plaintiff seeks an award for the cost of future care in the amount of \$126,087. The defendant opposes all but a very modest award for future care.

- [124] The plaintiff's position is based on the cost of future care estimates provided by Mr. Pakulak. Having regard to medical recommendations, Mr. Pakulak estimated future care items related to rehabilitation and treatment would cost \$2,028 to \$2,210 plus GST for 26 exercise sessions with a trainer or kinesiologist, \$392.75 to \$523.75 annually for a fitness membership, \$1,950 to \$3,960 per year for physiotherapy, \$3,500 for a vocational consultant, and \$29.99 plus GST for a massage tool.
- [125] For medication, Mr. Pakulak's estimate is \$146 per year for Naproxen, \$35 per year for Tylenol #2, and an additional amount for Phlojel (\$138 for a 100-gram container).
- [126] Under this heading, the plaintiff also claims for the cost of yard work and home maintenance services.
- [127] The plaintiff submits that an award for the cost of future care should involve a global assessment, taking into account the plaintiff's current medical condition and care needs, his future potential care needs, the medical recommendations, and the plaintiff's life expectancy.
- [128] The defendant submits that no award is appropriate for physiotherapy or massage therapy, and the claim for a vocational consultant and compensation for housekeeping chores are not supported.
- [129] The defendant would allow compensation for an active rehabilitation training program and \$1,850 for analgesic medications.
- [130] The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence. For an award of future care, (1) there must be a medical justification for claims for the cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 84, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [131] The court must be satisfied only that the future care is medically justified as opposed to medically necessary. It is not necessary to have a medical opinion respecting each item claimed, but there should be some evidence that the expense claimed is directly related to the disability arising out of the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 74.
- [132] The standard of proof to establish a claim for the cost of future care is the same as for any future pecuniary loss: simple probability. The plaintiff must establish a real and substantial risk of pecuniary loss. It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur: *Athey* at para. 27.
- [133] Here, the plaintiff has established a reasonable medical justification for the cost of an active exercise program for six months (as recommended) and a gym membership for 10 years. I would also allow the plaintiff's claim for medication over a 10-year period.

- [134] In terms of physiotherapy, the plaintiff ceased physiotherapy in mid-2016. Dr. Hershler has recommended that he continue to take physiotherapy but did not specify a time frame. I would allow a modest amount for physiotherapy but as a pain management tool. Rather than ongoing physiotherapy, I would allow the equivalent of only one year of physiotherapy or \$2,955. This level of physiotherapy is consistent with the plaintiff using passive physiotherapy from time to time over the long term to manage his symptoms rather than using active physiotherapy as a method to further his rehabilitation.
- [135] As noted above, I would make a modest award for the heavier garden tasks (estimated at \$1,600 plus GST per year) and a good portion of the lawn mowing and edging (estimated to be \$630 to \$812 plus GST) that the plaintiff is unable to complete. I would award the plaintiff \$12,200 based roughly on a 50% reduction in the plaintiff's ability to perform these tasks over the next 10 years.
- [136] I would not allow an amount for a vocational consultant.
- [137] Together then, I would allow \$2,225 for the cost of an active rehabilitation program with a kinesiologist or trainer for six months, \$4,400 for an annual pass to a fitness facility for 10 years, \$31.50 for a massage tool, \$12,200 for lawn care and heavier garden work, \$2,955 for physiotherapy, and the cost of medications including Naproxen and Tylenol (\$3,270 over 10 years) but not Phlojel.
- [138] These amounts total \$25,081.50. I would award the plaintiff this amount for the cost of his future care.

Conclusion

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

Non-pecuniary damages:

\$110,000

Past wage loss:

\$9,000

Future loss of earning capacity:

\$200,000

Cost of future care:

\$25,081.50

Past loss of housekeeping capacity:

\$0

Special damages:

\$1,700

Total:

\$345,781.50

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

"Brundrett J."

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